

2013

# Consent Steps

Resource consent conditions



## Resource Consent Conditions

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This guidance only includes changes to the RMA as a result of the Resource Management Amendment Act 2013 that are already in force. Part 3 of the Amendment Act will come into effect on 3 March 2015, which is 18 months from the date of Royal Assent (3 September 2013). For more information about the amendments please refer to the Ministry for the Environment's – Fact Sheets available from the [Ministry's website](#).

Sections 108, 127-133A and 220-221 of the Resource Management Act 1991 (RMA) deal with the inclusion, change, cancellation or review of resource consent conditions. Good resource consent conditions are fundamental to ensuring actual or potential adverse environmental effects of an activity are appropriately avoided, remedied or mitigated. It is critical that resource consent conditions are drafted carefully to ensure:

- they are within the law
- compliance with the conditions will result in any adverse effects being limited to the extent anticipated by the decision-maker
- the consent holder and other parties understand exactly what the requirements are, and
- if necessary, enforcement can be undertaken.

As a consequence, the drafting of resource consent conditions is extremely important. This guidance note provides information about the drafting of conditions, their implementation, their review, changes to, or cancellations of them.



## Guidance note

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## Conditions of consent

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Section 108 of the RMA allows councils to include conditions on resource consents. Conditions include standards, terms, restrictions or prohibitions specified in a consent following the written decision to grant the consent (s2 definition).

The scope of possible conditions of consent is very wide. For example, they may relate to:

- the design or appearance of structures
- landscaping
- hours of operation
- restrictions on the quality of a discharge
- restrictions on the amount of resource use
- monitoring and reporting
- the layout of a site.

Conditions may include the provision of:

- cash
- land
- works
- services
- a bond.

Specifying conditions of consent that are effective and enforceable is essential to the operation or development of an activity. Conditions also ensure any adverse effects on the environment are avoided, remedied or mitigated. Therefore getting the conditions right is essential.

### **Drafting consent conditions**

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There are a number of important legal principles and good practice guidelines to remember when drafting conditions. The critical considerations can be divided into high level legal principles and best practice guidelines.

#### Principles

There are six key principles that should be adhered to when developing consent conditions. Conditions must be:

1. Within a council's powers under the RMA
2. For a resource management purpose –
3. Certain – Consent conditions must be certain so the consent holder, the council and any layperson viewing the consent have no doubt about what is required by the conditions and the obligations the consent holder has. It is important conditions are drafted in plain English and can be readily interpreted and understood by council officers monitoring the consents and subsequent consent holders.
4. Relevant to the subject matter of the consent
5. Fair, reasonable and practical
6. Exclusively between the consent holder and the consent authority –Such conditions can be prefaced with a clause that clarifies their origin, for example, "As volunteered



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by the applicant ...". A consent can have a condition that imposes a restriction based on the exercise of another. For example, for some types of consents the following clause may be applicable "This consent shall not be exercised concurrently with consent ABC080001".

### Good practice guidelines

The following are good practice guidelines for drafting conditions of consent:

#### **Process and outcomes**

1. Communication on consent conditions should occur between the applicant and the reporting officer (or decision-maker) prior to the decision being finalised, even for relatively straightforward applications. This helps ensure there is no misunderstanding and reduces the likelihood of appeals or objections (ss120, 357 and 357A). Many councils adopt the approach of requesting the applicant's written endorsement of draft officer recommended conditions (for non-notified applications) before the decision is made. An applicant's agreement is not required and the council makes the decision on the conditions that need to be imposed. The applicant should be advised they have the right to object and/or appeal the final approved conditions.
2. Consent conditions should be prepared in liaison with other council staff, even for relatively straightforward applications. For example, compliance monitoring staff should be involved in the development of monitoring conditions as they can advise on their
3. Address whether all the significant adverse effects that may result from the exercise of the consent can be effectively managed by consent conditions. The relevant plan provisions are usually a good guide to the issues that need to be addressed and the effects that need to be managed by consent. The Assessment of Environmental Effects (AEE) and any submissions will need to be thoroughly assessed. In addition, checking issues identified in similar consent processes, brainstorming and consulting with colleagues may assist in identifying and/or resolving issues.
4. Ensure that each condition is effective and efficient from the perspective of the affected resource, the consent holder, and the community. Also, is the condition the most cost effective method to achieve the result sought?
5. As far as is possible, ensure there is no conflict between conditions imposed on a separate consent or with another statutory requirement, for example, the Building Act. If a conflict is possible, ensure it is clear what takes priority (eg, "The development shall be in accordance with the provisions of Management Plan ABC dated XYZ... except where another condition of this consent must be complied with").
6. Ensure no regard is given to any effects on a person who has given written approval (s104(3)(a)(ii)).
7. Limitations offered by an applicant at a resource consent hearing should also be incorporated as conditions.
8. Ensure there is a regular reassessment of standard and non-standard template conditions which are often imposed on consents. This should involve other council staff where appropriate, such as compliance/enforcement staff, to ensure that conditions can be effectively monitored and enforced where necessary.

#### **Content**



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1. Write conditions in plain English so they can be understood by a lay person.
  - a. Avoid archaic legal terms such as “pursuant to”, “herein”, “hereby”, etc.
  - b. Where possible, avoid using complex or potentially confusing words or terms such as “not with standing”. Try to minimise the use of technical jargon.
  - c. Keep sentences and paragraphs as short as possible.
  - d. Use numbered not bulleted lists.
  - e. Avoid double negatives.
  - f. Use the active tense with clear mandatory verbs: “shall” or “must”.
  - g. Be careful with punctuation. For example, the location of commas can completely change the meaning of a condition. Generally words in brackets can be ignored, so care is needed in their use.
2. All relevant and appropriate further information including plans approved should be specifically referenced in conditions. Any references to external specifications or methods must only refer to readily available technical publications that meet normal consent condition requirements (ie, the technical document or relevant part must be clearly written as a set of mandatory requirements). Ideally conditions should refer to specific plans and specifications, and have those documents physically attached to the consent. However, if the amount of technical information is too extensive or physically too big to attach to the consent document, then it should be labelled and physically filed with the consent and referred to in a consent condition. If cross references to plans and specifications are so extensive that some aspect of them may have been superseded by other more specific conditions, then compliance certainty should be provided by using a clause such as “The development shall be in accordance with ... except where another condition of this consent must be complied with”.
3. Conditions should not include reference to rules in plans because these may change during the duration of the consent.
4. Ensure all conditions are able to be achieved. They must be as certain as possible and compliance must physically and technically be able to be achieved. Some terms may need to be defined to ensure there is no doubt about what a condition requires.
5. Ensure there are no conditions that require the approval of another person, such as the council’s compliance manager, because such ‘secondary approvals’ are not lawful. Instead, either ensure that all requirements are resolved prior to the decision being made, or use a technical certification condition, such as requiring certification by a specifically qualified person that a detailed technical requirement such as a performance or design standard has been met. Such certification should generally be done by a qualified person acting for a consent holder.
6. Specify the qualification/experience required for undertaking a critical task such as writing a technical report, supervising critical investigations or monitoring, or for certification. The phrase ‘suitably qualified and experienced person’ should not be used. Instead specific requirements can be defined for example, “any reference to a ‘senior qualified person’ shall mean a person with a post-graduate degree in environmental science, chemistry, biology, geology,(including a Chartered Professional Engineer (CPEng)) or similar field; or sufficient technical experience that is at least equivalent; and at least five years professional experience involving environmental quality investigations”.
7. Where it is necessary to include a condition requiring a future management plan, the purpose of such a condition must only be to provide more information on how the consent holder will comply with other conditions of a resource consent. The outcome sought by a management plan should be specified. Before such a condition is used there should be a very high degree of confidence that compliance is achievable. A



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management plan should not be a substitute for clear performance or environmental standards.

8. Monitoring and reporting conditions must specify exactly what must be done, how, and by when. Critical information requirements will usually have the greatest level of specificity and assurance. Matters may include :
  - exact location details (GPS)
  - time of day
  - number of replicates
  - compositing of samples
  - chain of custody requirements
  - laboratory accreditation
  - detection/accuracy limits
  - sample bottle standards
  - methodology (for example, dissolved or total metal)
  - minimum training or qualification requirements for the person who is collecting the samples or undertaking the measurements
  - interpretation of results by a specifically qualified and experienced

It may be appropriate for a technical standard for monitoring methodology to be incorporated into a condition and be referenced or attached to the consent notice as appropriate. Amalgamating reporting requirements into a regular report (such as an annual report) can have significant benefits for both the consent holder and the council. Monitoring and reporting conditions can be critical when consent is granted for a short term because of concerns about the actual or potential adverse effects. The information from that monitoring can be essential to assess the extent of any such adverse effects.

Time frames should be specified for compliance with other conditions where appropriate. For example, "A noise survey in accordance with ANSXYZ is to be carried out at least 30 days prior to the commencement of any physical site works; Landscaping shall be carried out in accordance with attached Plan XYZ within six months of completion of ABC", etc. There must not be any 'gaps' in the sequence of requirements (eg, requiring monitoring to be undertaken at a specific time, the results to be interpreted by a specifically qualified person, and those results provided to the council after a specified time).

It is appropriate to refer to an appropriate council job title in a condition rather than just the council or the chief executive. For example, "The monitoring report specified in condition X shall be provided to the AB Council, Attention: Environmental Compliance Manager by 31 August each year." Contact details can be useful in an advice note to highlight who to contact if the consent holder has any queries. However, unless a consent is for a very short term, it is not generally appropriate to provide any more specific individual contact information because of staff and organisational changes that can occur over the long term.

Use advice notes if necessary to explain conditions or to highlight other important legal requirements.

Ensure that conditions requiring a consent holder to "use all practicable methods to..." are only used for minor issues and only where more certain conditions (for example, a requirement to implement specific procedures, technical standards or plans) are not reasonable or appropriate.



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A condition must not affect the consent holder's legal rights to apply for future resource consents or a change of conditions.

When specifying environmental quality standards, if possible, use a numerical (eg, less than 50 milligrams per litre total suspended solids), rather than a narrative standard (eg, no conspicuous suspended solids). Unless there is established case law on the meaning of a narrative standard, there would generally be significant potential for debate about exactly what is required by a narrative environmental quality standard.

If a condition refers to a third party, such as providing a copy of a report to a third party, ensure sufficient information is provided in the consent condition to ensure it provides certainty for the duration of the consent about the contact details.

Resource consent conditions from different councils or separate consents from the same council that relate to the same development should not be inconsistent with each other. Joint council hearings of consent applications enhance the ability to coordinate decisions and conditions. It is generally preferable for a specific effect to be controlled in detail by the most specific consent. For example, a district council may be satisfied that dust effects relating to a development will be comprehensively addressed via regional council discharge permit conditions and not place any conditions relating to dust on the district council land use consent. If there are conditions relating to the same issue on both council's consents they must not conflict with each other.

Sometimes one issue such as contaminated soil management may be addressed by both district council and regional council land use consents but for separate effects, for example, onsite human health and groundwater quality management. Operational protocols may also be needed between councils to ensure that compliance monitoring is not duplicated.

Where necessary, incorporate a glossary of definitions with the consent.

## Consent condition framework

It is useful to have a simple framework for consent conditions to appreciate what generic types of conditions should or could be included in a consent. One useful framework is as follows:

Consent condition category	Explanation
1. Description specification	Essential. Clarifies exactly what is authorised and where the activity is located, and includes reference to all relevant documents. May sometimes be combined with a simple restriction such as the amount of water able to be taken.
2. Restrictions/standards (Most common type of conditions)	Specifies the receiving environment or 'output' standard, (eg, noise standard, effluent quality standard, height of building, maximum abstraction amount, receiving water standard). May not be needed if another condition effectively specifies performance (eg, "...built in accordance with Plan XYZ").
(a) Performance or environmental standards	Most common type of condition (eg, hours of operation, works shall not occur within 20 metres of the property boundary).
(b) Simple/complex operational restrictions	Provides for a limitation to apply depending on the state of the receiving environment (eg, the abstraction shall cease when the flow in the river is less than X cubic metres per second).
(c) Trigger & response controls	
3. Pre-development assurance/certification	Refer to the table in the Certification examples section.
4. Post-development assurance/certification	Refer to the table in the Certification examples section.
5. Monitoring	Monitoring by consent holder to check whether the performance standard and/or other restrictions are being complied with. May be either or both receiving environment or performance monitoring. Important to specify methodology for sampling and analysis, qualifications of personnel involved and laboratory accreditation requirements.
6. Reporting	Need to ensure monitoring information is interpreted by a suitably qualified and experienced person and reported by a specified date. Reporting dates need to be specified.
7. Bond	Refer to the Bonds section.
8. Review	Usually appropriate. <u>See Review Conditions section.</u>
9. Duration and lapsing	Duration of consent and any non-default lapsing provision needs to be specified.

## Using standard conditions

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Standard conditions can be useful where a council processes a significant number of applications for a similar activity, with similar effects and environmental context. However, they should be used with caution as a starting point from which appropriate conditions for the individual consent can be drafted.

Standard conditions can:

- be efficient
- provide consistency and certainty for applicants
- be fair to each applicant.

However, there is a risk that standard conditions may be imposed without relevance to the specific circumstances and environmental effects the conditions are meant to avoid, remedy, or mitigate. Quite frequently a standard suite of conditions needs to be complemented by a range of consent-specific conditions.

The potential for significant cumulative adverse effects should also be carefully considered. In some circumstances where there are resource limitations, continuing to grant consents with the same conditions may not be appropriate, and specific conditions to address cumulative effects may be necessary. While consistency of conditions between similar consents in similar circumstances is generally appropriate, consistency must not be the overriding consideration.



## **Conditions relating to existing and future management plans and certification**

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Large-scale projects often require significant refinement of design and construction concepts once the consent for the development is granted. A challenge with such applications is to provide for flexibility in design and construction whilst appropriately managing and mitigating effects without using consent conditions that are ultra vires because of the potential discretion needed.

It has become relatively common in these situations to either provide for subsequent management plans or some technical matter to be approved by a council representative after consent has been granted. However, this type of condition is not lawful because it leaves a decision to a subjective discretion.

Instead of requiring management plans conditions must provide clear performance or environmental standards that are to be certified by an appropriately qualified and experienced person as being achieved. This approach is appropriate for both simple and complex applications, with requirements responding to the issues to be addressed varying from being relatively minimal, to stringent and complex for complex developments.

Critical actual or potential adverse effects need to be identified, appropriately avoided, remedied or mitigated with conditions before a decision to grant is made and not left to be addressed via a future management plan. Management plans should be limited to non-critical operational processes that lie behind a performance or operational standard. For example, a certified Noise Management Plan could be used to complement noise limits specified by other conditions.

A number of councils provide design guides or technical plans as examples that comply with specific plan requirements. These can be used to assist in preparing conditions linking to Existing management plans or requiring Future management plans to be prepared. This approach can have significant benefits by enhancing the certainty of the consent process and its efficiency and effectiveness. The availability of such 'standard solutions' can sometimes remove the need to develop individual plans and remove the need for certification processes.

### Existing management plans

Where an existing management plan is proposed as a consent condition, great care is needed to ensure there is clarity about exactly what aspects of that management plan should be included. Often environmental management plans include a range of measures, only some of which may be critical or relevant to a specific resource consent. In addition, management plans may incorporate both mandatory and optional procedures/processes.

It is preferable to include specific mandatory aspects of a management plan as consent conditions. Alternatively, if this is not feasible, the specific mandatory provisions can be referred to. If the plan is a public document, the document can be attached to the



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consent or the relevant provisions can be specifically referenced (for example, clauses X and Y of NZSABC, 2009). Certainty is essential both in terms of the level of adverse effects authorised and exactly what the conditions require of the consent holder.

If a detailed management plan is incorporated into a consent condition by reference, it may be appropriate to have a condition that makes it clear that if there is any inconsistency between the requirements of a management plan and another consent condition, that the consent condition has priority.

### Future management plans

A future management plan can be required by a condition of consent where the management plan provides detailed information on how the consent holder will comply with other conditions of the consent

An example management plan condition is:

The consent shall be exercised in accordance with a management plan prepared by the applicant. The management plan shall include, but is not limited to the following:

1. reporting and auditing;
2. complaints handling and reporting procedure;
3. all measures that will be undertaken to mitigate potential dust effects to achieve compliance with condition X of this consent; and
4. a copy of the management plan shall be provided to the AB Council, Attention: Environmental Compliance Manager by 30 November 20XY.

Management plans can be used to clarify how compliance will be achieved but they should not be relied upon as the sole mechanism to provide reassurance that a critical performance or environmental standard will be achieved.

Conditions requiring preparation of management plans cannot guarantee that such a management plan will contain the effective measures wanted. It simply requires that there has to be a management plan with specific procedures and measures. In addition, such a condition is based on an assumption that methods are readily available to enable compliance with the condition. If it is not clear that such methods are available, then such a condition without other complementary certification conditions would not be appropriate.

Below are additional general guidelines for preparing conditions requiring preparation of future management plans:

- Where potentially significant adverse effects are a concern it would be appropriate to require a certification sequence to provide assurances that the effects of a development stay within defined limits. For example, this can include the certification (to specific requirements) of a design prior to construction and certification of the 'as-built' system. The qualification required for the certifier



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needs to be specified (eg, chartered professional engineer, a person with at least a XYZ qualification in noise measurement).

- Monitoring and reporting conditions that complement certification conditions are usually essential to ensure the consent holder reports on compliance with critical performance or operational standards.
- Monitoring and reporting conditions can be linked to specific results to automatically allow for a reduction in monitoring and reporting if the results demonstrate the effects are within specified limits. Conversely, a specific feedback control and/or review provision can often be appropriate to ensure that if the environmental effects are not within a specified range then, either a change must occur (eg, take less water, discharge less effluent), and/or a review can be initiated.
- It may be appropriate, where the potential adverse effects of an error in design or application of a method could be particularly significant, to require details of the certifier's qualifications and technical experience to be submitted to the council in advance of certification. This allows the council to check the person's credentials against the qualification/experience requirements.
- The council may include a condition where it can nominate a certification expert or determine whether one nominated by the consent holder has the specified qualifications and experience. Time frames for such determinations must be specified to avoid unreasonable delay and failure by the council to respond within the time frame.
- The technical information used for certification can be required with the certification to provide a documented 'assurance chain'.
- Certification can be undertaken by a council officer or an agent. However, the qualification requirement must be specified and that person must meet that requirement. For many certification processes there can be a number of advantages in having certification undertaken by an independent person. For example, this can demonstrate independence to the consent holder and to other parties. Certification by a council officer or agent may involve taking on responsibilities that should be held by the consent holder.
- The greater the potential adverse affect on the environment of a proposal the greater the level of assurance needed about performance.



Example certification conditions

The table below provides an outline of the application of certification conditions on two types of consents, one with low potential adverse effects on the environment, and one with high potential adverse effects.

Consent condition category	Example condition (various types of consents)	Low potential adverse effects	High potential adverse effects	Comment
Performance or environmental standard	<p>The height of the building shall not exceed 8.3 metres above the surveyed natural ground level shown in attached Plan XYZ.</p> <p>The 99 percentile total suspended solids concentration discharged from the wastewater treatment system shall not exceed 100 milligrams per cubic metre.</p>	Y	Y	<p>Need to specify the standard that must not be breached.</p> <p>Consent may also have specific monitoring and reporting conditions.</p>
Plan design standard	The design of the Big New Bridge shall be in accordance with NZ Standard XYZ/ Council's Engineering Design Manual ABC dated 1 July 2009/Plan ABC09001 attached to this consent.	Y	Y	Needed to ensure in accordance with a specific industry accepted standard or specific plan that provides assurance about performance and durability for the duration of the consent.
Certification by a specifically qualified and experienced person	(a) At least one month prior to commencement of construction of the Big New Sewage Treatment Plant,		Y	Needed to provide assurance by a qualified expert that the final plans comply with the relevant standards.



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	<p>design plans shall be certified in writing by a Chartered Professional Engineer (CPEng) with at least five years experience in the design and construction of wastewater treatment systems, as being in accordance with NZ Standard XYZ/Council's Engineering Design Manual ABC dated 1 July 2009/ Plan ABC09001 attached to this consent, and consistent with the requirements of Condition X.</p> <p>(b) A copy of the certificate shall be submitted to the AB Council, Attention: Environmental Compliance Manager prior to commencement of the construction of the Big New Sewage Treatment Plant.</p>			<p>This is particularly critical if a specific structure and certified plans are not provided prior to the decision to grant consent.</p>
<p>Determination of the certifier's qualifications and experience (for proposals with particularly significant potential</p>	<p>(c) Information on the qualifications and experience of the nominated person shall be submitted to the AB Council, Attention: Environmental Compliance Manager and construction of</p>		<p>Y</p>	<p>For some particularly complex designs and/or potentially significant adverse effects, it may be prudent to ensure that certification must be carried out by an experienced</p>



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<p>adverse effects)</p>	<p>the Big New Sewage Treatment Plant shall not start until the Council determines, or it is deemed under Condition (Z)(d), that the nominated person has met the qualification and experience requirements.</p>			<p>expert and that the council have the ability to determine whether or not the nominated person does have the requisite qualifications and experience.</p>
	<p>(d) If the AB Council does not respond in writing within 10 working days of receipt of the submitted information regarding the qualifications and experience of the nominated person, the nominated person shall be deemed to have the required qualifications and experience.</p>			
<p>As-built certification</p>	<p>As-built plans shall be certified by a Chartered Professional Engineer (CPEng) as being in accordance with the design plans certified in accordance with Condition X and a copy of the as-built certification shall be submitted to the AB Council, Attention:</p>		<p>Y</p>	<p>For more significant developments as-built certification is appropriate to provide an assurance that the authorised system has been installed.</p>



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	Environmental Compliance Manager within 10 working days of completion of the works.			
Trigger response	If the level of water in groundwater monitoring bore ABC09002 drops below WXY metres above mean sea level, the abstraction of water shall reduce to Z cubic metres per day.		Y	Provides for resource use to occur provided specified environmental conditions exist. May be critical in situations where there is uncertainty about cumulative adverse effects.  Must be linked with detailed monitoring and reporting conditions.

**Conditions to prevent specific adverse effects and/or address uncertainty about adverse effects**

There can be situations where a decision to grant a consent application has been made and there is concern about preventing specific adverse effects and/or uncertainty about some adverse effects. In these situations a range of (potentially complementary) approaches can be used, for example:

- trigger and response conditions
- monitoring/investigating and reporting conditions
- review frequency and specificity

## Trigger and response conditions

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Where it is understood that the exercise of a consent could result in a specific adverse effect and the consequence of that effect would change the quality or state of the receiving environment, a 'trigger & response' condition can require a restriction on the exercise of that consent or a cessation of an activity when a specific situation occurs.

This is commonly done with some water permits to take water from surface water or groundwater where the amount that can be taken has to be reduced when, for example, the flow in a river drops below a specified flow or the groundwater drops below a specified level. Similarly, with some discharge permits to discharge contaminants to a river, the amount of the discharge must be reduced when the river drops below a specified flow.

Often the resource trigger points are specified in a plan but it is also common for these to be developed as part of a resource consent process. The level of information needed to determine an appropriate long-term trigger can be significant. In the absence of adequate detailed technical information, interim triggers can be established with further monitoring/investigations used to establish future triggers.

An example trigger/response condition: If the level of water in groundwater monitoring bore ABC09002 drops below WXY metres above mean sea level, the abstraction of water shall reduce to Z cubic metres per day.

The condition provides for resource use to occur provided specified environmental conditions exist. May be critical in situations where there is uncertainty about cumulative adverse effects. Such a condition must be linked with detailed monitoring and reporting conditions that record abstraction quantities and groundwater levels.

## Monitoring/investigating and reporting conditions

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The level of uncertainty about an adverse effect can usually be significantly reduced by a well designed monitoring or investigation programme. Such conditions can be combined with other conditions designed to address uncertainty, including a trigger and response condition (above) and a review condition (below). Monitoring conditions are particularly important if consent is granted for a short-term because of concerns about a specific adverse effect.

A monitoring/investigation condition can help ensure critical additional information is available as part of a further future process such as: (i) a new consent application, (ii) an application to change or (iii) a review conditions of a consent condition.

## Review conditions

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A review condition is an effective and efficient way of providing a council the flexibility to review the consent conditions to address specific significant adverse effects that might arise during the exercise of the consent.

An example of a broadly worded review condition is: The council may once per year, on any of the last five working days of either May or November, serve notice of its intention to review the conditions of this consent for the purpose of dealing with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage.

An example of a more specific review condition is: The council may once per year, on any of the last five working days of either May or November, serve notice of its intention to review the conditions of this consent for the purpose of:

- a) changing the frequency and location of monitoring specified in condition X,
- b) amending or adding conditions to address odour effects that may arise, and
- c) dealing with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage.

Section 128 specifies four broad grounds on which a council may review the conditions of consent, as follows:

1. The most common basis for review will either be where there is provision for review in a consent (s128 (1)(a)) or through the operation of a regional rule relating to water, coastal or discharge permits to enable the levels, flows, rates or standards set by a regional rule to be met (s128(1)(b)). Also, in the case of water, coastal or discharge permits, a review may take place when a relevant National Environmental Standard (NES) has been made under s43 (s128 (1)(ba)).
2. A review can be undertaken under s128(1)(a)(i) on the basis of any adverse effects arising in the future from the exercise of the consent. The review condition must specify the time(s) for review, the purpose of the review and what environmental effect the review relates to. A condition stating that the consent is subject to review 'at any time that the council considers appropriate' is inadequate and would not comply with the requirements of s128.
3. For any other purpose specified in the consent 128(1)(a)(iii).
4. If the information made available to the council by the applicant as part of the consent application contained inaccuracies which materially influenced the decision on the application and the effects of the consent make it necessary to apply more appropriate conditions (s128(c)).

## General principles

Consent holders have a legitimate requirement for a high level of certainty, so review conditions should only be used where the actual adverse effect in question or the degree of effect is uncertain, although the type of effect can be specified with some certainty. The review process cannot be used to materially alter the consent's nature. A review condition should not be a replacement for maximising the level of certainty about adverse effects during the consent process.

Before including a review condition the council needs to consider:

- Are there any uncertainties about adverse effects, particularly cumulative effects?
- Should more information be obtained prior to making a decision?
- Is there a specific issue that could be addressed through a 'trigger and response' condition?
- Should the consent application be refused because of unknown/uncertain effects that might arise?
- Should a short-term consent be granted?
- Whether there are any means available to the consent holder to address specific adverse effects, in the event that a review does need to be undertaken? There is no benefit in reviewing the conditions if there is no ability to mitigate the effects of concern.
- Whether possible mitigation measures would require the approval of a third party? For example, roading improvements which would require approval via a separate council process.

If conditions relating to the change of a regional plan are to be attached to a consent, that plan should have:

- rules relating to the matters in s128(1)(b); and
- include a statement that the rules affect the exercise of existing resource consents for activities that contravene the rule (refer to ss68(7) and 130(5)-(7)).

## Review frequency

A standard broadly worded review clause should provide a reasonable basis for initiating a review if some unforeseen adverse effects occurred. However, where certain adverse effects are anticipated as likely to occur, but there is some uncertainty about the degree of the adverse effect that may occur, it may be prudent to include a specific review purpose, such as to enable a specific adverse effect to be addressed, or to require some specific further investigation or monitoring.

Careful consideration needs to be given to the frequency and timing of a review. An appropriate balance needs to be achieved between a consent holder's need for certainty and the need for the council to be able respond to a specific environmental issue or event.

### What happens when a council decides to review a condition?

If a council decides to initiate a review of a condition then it must serve notice of the intended review on the consent holder (s129). This notice:

- shall state which condition(s) are being reviewed
- shall state the reasons for the review. It is critical that these reasons are based on a thorough and objective documented assessment of the relevant issues
- shall specify the information which the council took into account in making its decision to review the consent (unless the notice is given under s128(1)(a) or (ba) or (2)).
- invite the consent holder to propose new consent conditions within 20 working days of service of the notice. This is not compulsory, but it is best practice
- shall advise the consent holder of any charges payable under s36(1)(cb) and the estimated amount.

Under s128(2) a council must serve notice on a consent holder of its intention to review the conditions of a resource consent if an order is made under s339(5)(b). Orders under s339(5)(b) are made when a person is convicted of an offence against the RMA (s338) and the offence involves an act or omission that contravenes the consent.

### What is the process if a review proceeds?

The process for reviewing a condition is much the same as the process that applies to resource consent applications (ss96 to 102 apply) albeit that the actual consent holder takes the position of the 'applicant' and the notice for review is in effect the 'application'.

Sections 95 to 95F also apply to this process as if the review of the condition(s) was an application for a discretionary activity taking into account the effects of the change of conditions only. They can be considered on a notified/limited notified/non-notified basis. Remember it is only the conditions that are being reviewed not the consent itself or effects outside those associated with the review. This applies whether the notification is required by a plan or proposed plan or the review relates to a resource consent in respect of any status activity.

When reviewing the conditions of consent the council:

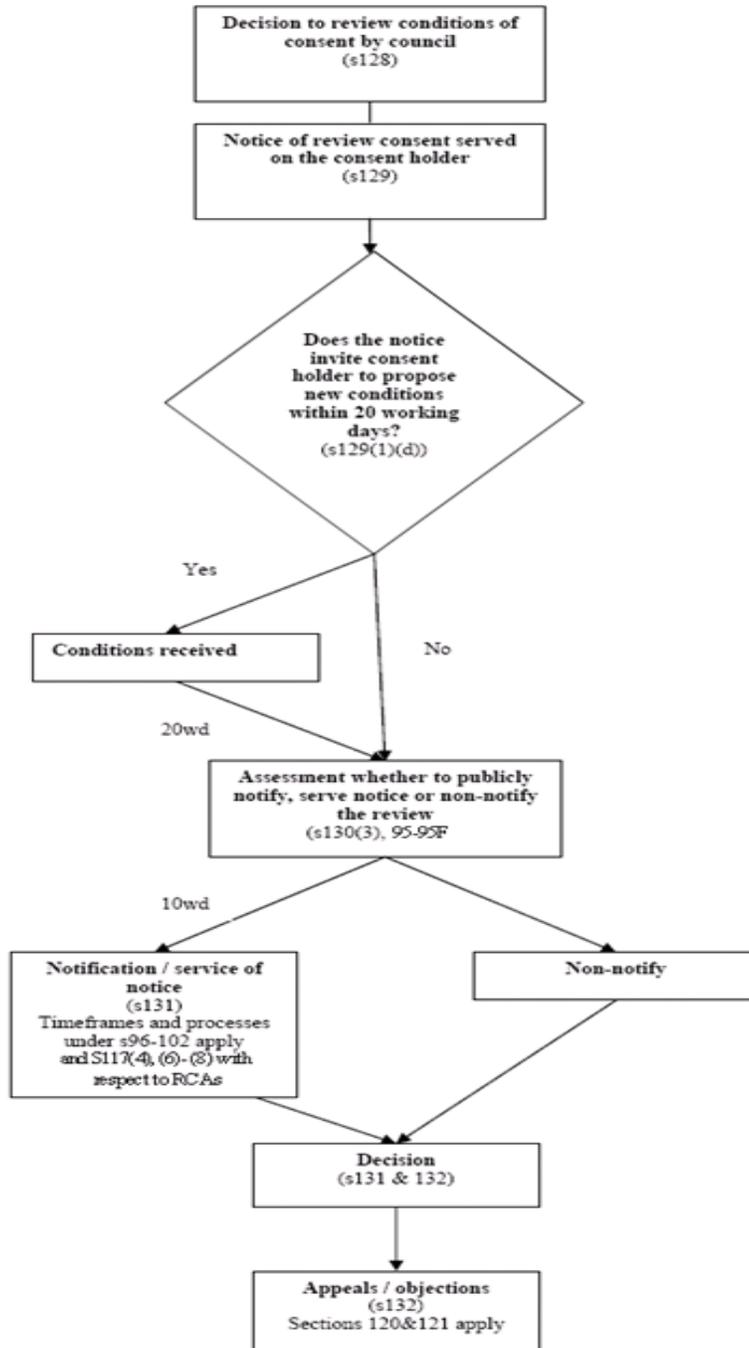
1. must have regard to the matters in s104 and whether the activity will continue to be viable after the condition is changed
2. must have regard to any reasons the Court provided for making an order requiring a review under s128(2)
3. may have regard to the manner in which the consent has been used.

The council must apply ss106 to 116 with respect to notifying the review, setting any new conditions, and making a decision. Sections 120 and 121 also apply in relation to the lodgement of any appeals against a review decision. The flowchart below shows the legal process that a review of a condition goes through.



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Flowchart of condition review process



Some councils use independent commissioners to make decisions on consent condition reviews to clearly separate the decision-maker from the decision to initiate the review. This is not a requirement but it is good practice.



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If a council reviews a resource consent under s128(1)(c) (which relates to reviewing consent conditions because of inaccurate information being supplied at the time the consent was originally applied for), and it is found the consent application contained inaccuracies that the council considers materially influenced the decision made, and significant adverse effects on the environment have occurred as a result of the exercise of the consent, then the council may cancel the consent (s132 (3)). If a council considers cancelling a consent under s132(3) or 132(4), ss128 to 131 and subsections (1) and (2) apply as if the cancellation were a change to the consent conditions.

### **Limiting the duration of consent**

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The basic consent duration provisions are specified in s123. The duration of consent is often used as a method to address uncertainty about adverse effects for consents other than land use or subdivision consents and coastal permits for reclamation (which have unlimited duration).

When a consent duration condition is being considered, regard should be given to:

- the intended duration of an activity or structure, and
- the sensitivity of a receiving environment over time.

A condition limiting the duration of a consent to a short-term period, may not be the best way to address uncertainty about an adverse effect. Assuming that there is no further information that would reduce the uncertainties and that they are not so significant that the consent application should be declined, a range of adaptive management, monitoring/reporting and review conditions may at times be more appropriate.

If a short-term consent condition is proposed it must be accompanied by monitoring and reporting conditions so as to avoid a repetition of the consent process with a replacement consent being applied for with incomplete information, which could lead to a series of short-term consents being granted.

A replacement consent application is not considered on exactly the same basis as a new application; the investment in a development involving an application for a replacement consent must be given specific regard under s104(2A). This raises a particular challenge when short-term consent applications are made for major long-term developments.

The wording of a consent duration condition should ensure that it is clear whether for example, the intent is for a consent to expire on a specific date or for the consent to have a specific duration. If a specific duration is intended then the following wording can be used: "The duration of this consent is X years from the date of commencement". This wording ensures that there is no ambiguity about the duration if there is an appeal and can be complemented by the council adding the actual dates to the consent document.

Alternatively a lapse date condition could be used as follows: "The lapsing date for the purposes of Section 125 of the Resource Management Act 1991 shall be XYZ".



**Examples of improved conditions**

The following table consists of examples from actual consents that have been granted by various councils, an explanation of the reason why the condition wording needs changing and suggestions how the wording could be improved to be consistent with good practice.

Original condition	Issue explanation	Better condition
<p>“The consent holder must submit a detailed set of engineering plans prepared in accordance with council’s Environmental Engineering Standards. The engineering plans are to be submitted to the Senior Environmental Engineering Officer for approval.”</p>	<ol style="list-style-type: none"> <li>1. Purports to give secondary approval or arbitration power to a council officer.</li> <li>2. Council’s engineering standards need to be more specific to provide certainty (ie, specific reference to a dated document).</li> </ol>	<p>Prior to works commencing the consent holder shall submit a certificate signed by a chartered professional engineer, CPEng, to the Senior Environmental Engineering Officer certifying that the engineering plans have been prepared in accordance with Council’s Environmental Engineering Standards version XYZ dated July 2008, attached to this consent.</p>
<p>“The development shall proceed in accordance with the plans and information submitted with the application, and entered into council records as RMAXYZ/1-5.”</p>	<p>Doesn’t specifically reference the plan and/or specification requirements, further information or amended plans submitted subsequent to the lodgement of the application. All relevant requirements should ideally be attached as part of the consent or if this is not practicable the relevant plans/specifications should be stamped and referenced via a condition.</p>	<p>The development shall proceed in accordance with the information submitted with the application on (date), the further information regarding ABC dated XYZ, and the amended plan entitled “Revised Site Plan (No. 1234/5 Rev B) dated ABC, except where another condition of this consent must be complied with. This information is entered into council records as RMAXYZ/1-5.</p>
<p>“The consent holder should not use machinery in flowing</p>	<p>“Should” is not mandatory: “must” or “shall” need to be used.</p>	<p>Machinery shall not be used in flowing water.</p>



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water.”	Specifying “consent holder” is generally not necessary.	
“The installation of the bore shall be carried out in accordance with the requirements of NZS AST/12 including any revisions of that standard.”	Incorrect New Zealand Standard reference and provides for uncertain future revisions (the correct New Zealand Standard was prepared primarily for use in the consent process).	The bore installation shall be undertaken in accordance with NZS 4411:2001 Environmental Standard for Drilling of Soil and Rock.
“The consent holder shall surrender resource consent XYZ as volunteered as part of the proposal.”	A ‘subsequent’ resource consent cannot normally affect the exercise of another existing consent. However, if volunteered, the condition may be enforceable. However, restrictions on a ‘subsequent’ consent can be linked to the exercise of another consent.	Consent ABC09013 shall not be exercised concurrently with consent ABC02342.
“The consent holder shall re-submit a parking plan to council for approval. The parking plan shall accord with the amended parking plan tabled at the hearing and shall indicate:...”	All these conditions involve a ‘secondary approval’ and are therefore not lawful. Even if an applicant proposes such a condition and the ‘Augier principle’ would allow it, it is not recommended. The plan content requirements should be resolved prior to the decision to grant consent or a certification process developed. See examples of <a href="#">certification</a> . May need to discriminate between those matters that must be specified in advance or certified and those matters such as detailed design issues which may not need to be controlled by consent conditions.	Provision for parking shall be undertaken in accordance with the attached Parking Plan 09/01v1.4, October 2008.  Vehicles and machinery shall not be operated in flowing water except when necessary to: maintain a water channel depth of at least 0.45 metres for allow fish passage; enable compliance with condition X; and to maintain the swimming hole known as “The Local Swimming Hole” approximately 100 metres downstream of the State Highway 99 bridge.
“A lighting plan shall be submitted to the council for approval.”		
“Prior to commencing works, the consent holder shall submit to council for review and approval a site management plan for the works.”		
“Vehicles or machinery used to extract gravel		



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<p>under this consent shall not be operated in or through running water, except when expressly permitted in writing by any authorised officer of the council.”</p>		<p>Within 15 working days of completion of the gravel extraction works, the river bed shall be restored in accordance with the attached “Post-gravel extraction works river bed restoration plan” reference XTY and dated XCVB.</p>
<p>“The consent holder shall prepare an Earthworks Design and Management Plan and submit this to the Council Environmental Services Group Manager for approval no later than 3 months prior to the commencement of earthworks on the site.”</p>		



## Change or cancellation of a condition

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Section 127 allows a consent holder to apply for a change or cancellation of a condition of consent other than a condition on the duration of the consent. In relation to subdivision consents, an application under s127 can only be made before the survey plan is deposited (s224). After the deposit of a survey plan, application must be made under s221 for any variation or cancellation of a consent notice.

For these types of applications, ss88 to 121 apply as if the application was an application for resource consent for a discretionary activity. As part of processing these types of applications, a council must, in determining if there are any adversely affected parties, consider every person who made a submission on the original application and may be affected by the change or cancellation. Under s127 only the change to the condition can be considered. It does not provide for the reconsideration of the entire consent.

Often there is a debate about whether an application to change a condition should be an application for a new consent. Case law indicates that each case should be considered on its merits and has highlighted that where an application involves materially different effects it is preferable to treat it as an application for a new consent.

## Minor corrections of resource consents

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Section 133A allows a council to issue an amended consent that corrects minor mistakes or defects in the consent (including the conditions) within 20 working days of the date that consent is granted. In addition, s13 of the Interpretation Act 1999 provides the power to correct errors outside the 15 working day time frame afforded by the RMA. Specifically "The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once".

## Advice notes

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It is common practice to place advice notes on consents. They provide a useful customer service, in that they can remind consent holders of other standards and requirements related to the consent and of obligations as a consequence of the consent. Advice notes are legally part of a consent.

Advice notes must be clearly labelled as advice notes to ensure they are not misinterpreted as consent conditions.

For example, advice notes could clarify:

- the need to obtain other consents and permits. For example, matters of relevance under the Building Act 2004
- any specific activities the consent is not issued for but may have been discussed during the processing of the consent
- the ability to object or appeal the decision



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- the charging provisions that may apply, including monitoring charges, administration charges and financial contributions
- the lapse period of the consent (where not altered by a specific consent condition)
- the need to comply with the [Resource Management \(Measurement and Reporting of Water Takes\) Regulations 2010](#)
- any other obligations the consent holder may have as a consequence of holding the consent.

Advice notes should not be worded as though they are conditions. For example, an advice note should not state that the consent holder “shall” or “must” do something. Instead use wording like, “A building consent will be required ...”

Where advice notes are consistently provided on consent decisions that are the same to all consent holders, it may be useful to have booklet or leaflets that provide more detailed information and simply refer to them in the advice notes. However, it would be prudent to maintain brief important advice notes on the consent document as a long-term reminder.

### **Monitoring and enforcing resource consent conditions**

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The process of drafting resource consent conditions should consider compliance monitoring and enforcement issues such as the practicability of compliance monitoring, certainty for all parties involved, enforcement issues, etc.

### **Financial contributions**

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Under s108(2)(a) of the RMA, financial contribution conditions can be imposed. Such conditions must be in accordance with the purposes specified in the plan and the level of contribution needs to be determined as set out in the plan. Note however that financial contributions policies in proposed plans (or proposed plan changes) do not have legal effect until a decision on submissions has been made and notified (s86B).

Financial contribution conditions either require a contribution of money or land, or can be a combination of the two (s108(9)). Financial contributions can assist with the costs of providing infrastructure for developments and providing for the recreational needs of the community. Funds can also be used to provide upgraded or additional servicing or to acquire or enhance land or assets for recreation and community purposes. Councils must specifically use these monies collected for the purposes they are intended.

Financial contributions can be taken to provide off site ‘offset’ mitigation, eg, where the adverse effects of replacing a bridge on a riverbed habitat cannot be avoided or satisfactorily mitigated, a financial contribution could be used to improve the riverbed habitat elsewhere as part of a wider riverbed restoration programme.

Financial contributions are not the same as development contributions. Development contributions are authorised under the Local Government Act 2002 through long term council community plans (LTCCP) or conditions of consent attached under s220. Such contributions are based on a new developments demand on council’s network



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infrastructure, which can include community infrastructure, open space and reserves. Great care is needed to ensure that a financial contribution is not imposed on a development for the same purpose as a development contribution.

Councils should ensure that the wording of any financial or development contribution condition is legally reviewed prior to it being included on a resource consent (unless it is a standard condition that has already been legally reviewed before). This will help ensure that the condition is legally robust. It can also be helpful to show the calculation of a financial or development contribution as an advice note so the consent holder can clearly see how the contribution was calculated.

### **Bonds**

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Section 108(2)(b) allows a consent condition to require a bond to be entered into with the council. Section 108A specifies that a bond may be required to ensure the performance of any one or more conditions of a resource consent and it may continue to be in force after the expiry of the consent to secure the ongoing performance of conditions relating to long-term effects. Bonds can be registered against the Title (Computer Register) of the land to which the activity relates to act as a covenant running with the land and binding subsequent owners (s109).

If a consent holder is for some reason unable to ensure compliance with a bond requirement, such as the liquidation of a consent holder company, then a financial bond is available for the council to use to undertake those specific works. A further example is that a bond may be required for landfill activities where the effects of the landfill may still occur after it is filled and rehabilitated (for example, because of leachate problems).

For subdivisions, s222 allows bonds to be entered into as part of grant of a completion certificate and deposit of the survey plan (s224) and in doing so a council may exercise all powers conferred under s108A. This effectively allows bonds to be applied following grant of subdivision consent.

It is critical that legal advice is obtained to assist in drafting a bond condition. An example bond condition:

At least two months prior to the installation of any part of the marine farm, the consent holder shall enter into an enforceable agreement and bond with the AB Council for a sum of \$1,000.00 per hectare granted to ensure compliance with conditions (X) and (Y). The bond is required under Section 108(2)(b) of the Resource Management Act 1991. To meet the bond requirement, either:

- a) The bond shall be guaranteed by a guarantor acceptable to the AB Council who shall be bound to pay for the carrying out of any works required to meet requirements of Conditions (X) and (Y) in the event of any default by the consent holder, or
- b) The consent holder shall provide the AB Council with such security as is acceptable to the AB Council for the performance of any works required to meet



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the requirements of Conditions (X) and (Y) in the event of any default by the consent holder.

The value of the bond should be based on the estimate cost of the works subject to the bond.

Bonds should not be used as a penalty for non-compliance. The purpose of a bond is to ensure that an event such as restoration occurs, not to solve compliance issues.

### Consent notices

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Where a condition of subdivision consent is required to be complied with on a continuing basis after the subdivision has been completed, a council can issue a consent notice (under s221) to be registered by the consent holder against any new Title (Computer Register). For example, the council may require that mitigating plantings remain on the subject land to protect the amenity values of adjoining land. The need to register a consent notice should form part of the condition.

For example, a consent notice condition could read as follows:

'The existing shelterbelt located in Area A shown on the survey plan shall be retained at a height no less than 3 metres. This condition shall be imposed by way of a consent notice registered against the Title for Lot 1 of the subdivision of Lot 2 DP 8889.'

### Covenants/encumbrances

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While consent notices are a type of covenant/encumbrance on a Title (Computer Register), there are many covenants/encumbrances that are not consent notices. Most covenants address issues between two private parties (eg, specific restrictions that a developer places on titles for a new housing development such as house designs, fencing).

An example is 'no complaints' covenants designed to address reverse sensitivity issues, where a developer agrees to a 'no complaints' covenant in return for an affected persons approval or withdrawal of a submission from an existing potentially affected person operating an established activity that has some adverse environmental effects such as noise or odour.

Once these types of covenants are registered on titles it is a complex legal process to change or remove them.

A council would generally not have any responsibility to enforce these types of covenants. Therefore, when considering resource consent conditions, effects addressed by these types of covenants may still need to be considered. For example, there may be a covenant on a title that addresses noise effects but a consent condition that establishes a noise restriction may still be appropriate for some development proposals.

## Side/civil agreements

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Side or civil agreements are private arrangements that individuals and applicants for consent sometimes enter into. They can, for example, involve payment in exchange for a specific limitation on a development, and/or payment in compensation for an adverse effect or some other agreement. If the side agreement means that an affected party agrees to sign an affected party approval form (s95E) then the council can disregard an effect on that party.

A council would not normally have any role in the supervision or enforcement of side agreements between parties. It is possible that a council itself may be a party to a side agreement. However, in this situation a council operational or land owner function may need to be separated from the role of the council as a consent authority.

In some situations a side agreement may result in an applicant agreeing to make a specific change to an application. It is a matter between the parties whether such a side agreement is discussed with the council and the change to an application made.

Councils need to be aware of the risk that a side agreement may result in an actual or potential adverse effect not being highlighted by an applicant or a potentially adversely affected person because of a side agreement that those parties have entered into. However, the effect will still occur. For example, a side agreement that involves payment to compensate for an adverse effect may not extend to subsequent owners of land that experience the adverse effect. Therefore, a reporting officer needs to appreciate that there may be adverse effects that need to be considered that a potentially adversely affected person may not identify.

Generally, a council should not have regard to a side agreement when processing consents and preparing conditions.

