



NZLS CLE Ltd
CONTINUING LEGAL EDUCATION
NEW ZEALAND LAW SOCIETY

HOW TO RUN A RESOURCE MANAGEMENT CASE

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Introduction

Purpose

- Assumes the seminar participants have a good general grounding in the law but with little experience in running a resource management case.
- *“In the conventional courts facts are facts; in the planning field opinions are facts”* – Tony Hearn QC



Overview

- A comparison of jurisdictions
- Opinion evidence
- Plan submissions and consent applications
- Local authorities and the Environment Court



Chapter 1 – The Initial Steps

- Introduction

- Presentation covers primarily representing applicant but also submitters
- Local Authority hearings strategically important
- Step-by-step guide



- Overview

- Understand client's objectives
- Understand details of what is proposed
- In order to do this, you will need to understand:
 - District/Regional Planning Documents
 - rules
 - objectives / policies
 - the environment



- District and Regional Plans (NB Unitary Plans)
 - Need to consider operative and proposed
 - If proposed – may or may not have legal effect
- Rules
 - Start with the rules
 - Permitted to prohibited
 - May need to adjust proposal
 - Bundling – can be across district and regional plan
 - Exception to bundling when no overlap in effects



- Objectives / Policies

- Can be useful if breach of rule, nevertheless meets objectives / policies
- May also dictate whether Plan Changes as opposed to resource consent is best option
- If Private Plan Change needed – always notified
- Also look for other provisions like explanations, reasons or other relevant aids to interpretation



- The Environment

- What is physically there
- Unimplemented resource consents – need to ask Council
- What the plan permits
- Visit the site so you understand



- Developing a Strategy

- Develop a strategy with client and expert
- Will include:
 - cost/resourcing
 - chances of success
 - process
 - modifications
 - staging
 - Notification / non-notification
- Avoid necessary consents and notification if possible



- Resourcing

- Understand resources of client
- Consider number of experts and be strategic



- Assessing Chances of Success
 - Cases involve balancing
 - Need to be practical and realistic
 - Manage client's expectations – especially if weaknesses



- Consenting Process

- Direct referral
- B O I
- Pros and cons of two stage process versus single stage process



- Role of lawyer versus other expert
 - Involve multidisciplinary teams of experts
 - Role of lawyer – advocate
 - Role of expert – objective / impartial expert
 - Planners should not become advocates
 - Lawyers role critical



- The Application

- Application needs to be prepared very carefully
- Prescribed forms
- Needs to reflect strategy
- Make sure it covers everything client needs to do
- Cannot get what you do not apply for!
- *Arapata Trust v Auckland Council*



- AEE

- Section 88 / Schedule 4 set out the contents
- Opportunity to show Council that any effects can be avoided, remedied or mitigated
- Should be comprehensive covering all matters



- Notification

- Non-notified
- Limited notification
- Public notification



- Consultation

- Section 36A – no duty
- But enormous benefit
- Consultation can lead to non notification
- Written approvals – invaluable
- Consult with Council processing officers
- Attend one or more pre-application meetings if need be



- Acting for Submitter

- Most of practices above apply
- Submission drafted with care / strategically
- Err on side of more information – as may be more influential
- Relief clear and reasonable
- In terms of District Plan submission cannot seek whole plan withdrawal



Chapter 2 – The Appearance

- The Hearing Itself

- Independent Commissioners increasingly common – all attend “Making Good Decisions Course”
- Public
- No unnecessary formalities and no cross examination
- Sensitive information can be protected
- Decision in writing
- Resource consent commences once appeal period expires
- Plan Changes become operative by resolution of the Council



- Local Differences

- Very across the Country – understand what is on offer
- Raise any concern through the Chair
- Watch issue of predetermination / bias at local level
- Do not interrupt other parties cases
- Do not antagonise panel
- Note ability to lodge late submissions



- Hearing Preparation

- Our real job starts once hearing is fixed and timetable set
- The more complex the more thought needs to go into presentation
- Discussions with Council staff
- Evidence, officers reports, application, AEE mostly pre-read
- So your role is to make sure everything is easily understood
- Ensure any new information such as section 92 responses, other third party reports, new proposed plan rules are included in your case



- Evidence

- Needs to be concise, structured and clear
- Your client is paying the costs of the hearing
- Repetition needs to be avoided and case needs to be concise and focussed
- Meet your team well in advance
- Discuss big picture
- Provide template to experts
- See Environmental Court 2014 Practice Note
- All drafts peer reviewed by other experts and lawyers



- Pre-circulation – Resource Consents

- Section 42A officers report now circulated 15 working days before the hearing
- All applicant briefs 10 working days before hearing
- All submitters expert evidence 5 working days before hearing
- In terms of preparation of evidence, avoid traversing areas of agreement with s 42A report
- Address matters that remain in contention
- Consider carefully amending conditions suggested by officers and submitters
- Address these matters in openings and get witnesses to address when called



- The Hearing

- Housekeeping always addressed at start so be there
- The opening follows for applicant
- Submitters follow after that
- Opening should:
 - clearly describe proposal – conditions (mark-up)
 - use diagrams, plans – need to plan in advance
 - summarise evidence
- Explain statutory framework – but not too much
- Identify and argue legal issues - concisely



- The Hearing continued....
 - Identify changes or concessions
 - Overall role is to persuade Commissioner – take into account their expertise



- Reply Submissions

- Applicants given right of reply at end of all submissions and evidence
- Not a chance to raise new issues – pre-circulation of evidence should mean there will not be any
- Respond to matter raised by submitters – produce mark-up of amended conditions/provisions
- Or you may need to get things back on track – away from irrelevant matters
- If you do not need one do not do it



Chapter 3 – The Work of the Environment Court

- Its constitution

- Section 247 RMA – Court of record
- Court consists of Environment Judges and Planning Commissioners

- Its function

- Circuit court
- Criminal prosecutions carried out in the District Court
- Possibility for a Land and Environment Court with a wider jurisdiction



- Its structure and processes
 - “Orderly and expeditious discharge” of its business under the direction of the Principal Environment Judge
- Environment Judges
 - Can have up to 10 full-time Judges (currently 9)
- Environment Commissioners
 - Presently 10 full-time and 5 Deputy/part-time
 - “persons possessing a mix of knowledge in matters coming before the Court”



- Locations

- Registries in Auckland, Wellington & Christchurch

- Approachability & Efficiency

- The Court has extremely wide powers of procedure (s 269 RMA)
- Less formality and legalism than in other courts
- Degree of fairness for the many self-represented litigants



- The Environment Court Practice Note

- Significantly re-written and published at the end of 2014
- Not a set of inflexible rules, but is a guide to the practice of the Court

- Parties in the cases

- A person or body that made an application to a council or sought a plan change that did not like the council's decision
- Council is automatically a party
- Submitters before the council, or have a relevant interest greater than the general public



- Case Management by the Judges
 - Strongly embraced in the New Zealand Environment Court
 - Results in prompt and efficient resolution of cases, and cost efficiency
- Judicial Conferences
 - Usually conducted by telephone at an appointed time, or in a courtroom
 - Designed to keep proceedings moving fairly and efficiently
 - May resemble an interlocutory hearing, but less formal



- The Role of Expert Witnesses

- The Court has high expectations concerning the quality of work by expert witnesses
- Independent, objective and entirely professional
- Overriding duty to assist the Court impartially, free from direction from their client
- Facilitated conferencing with the purpose of reaching professional agreements where possible



- Recent Innovations in the Environment Court

- Electronic innovations

- iPads
- Interactive use of the Court's website

- Appeals on:

- Policy Statements

- Plans

- Consent Applications

- Enforcement Proceedings

- Alternative hearing models



Chapter 4 – The Filing of an Appeal

- General Appeals

- Decisions of councils on:
 - Resource consent applications
 - Proposed plans
 - Proposed policy statements
- Can be appealed to the Environment Court

- Local differences

- Local Government (Auckland Transitional Provisions) Amendment Act 2013 (the LGATPA)
- Environment Canterbury (Transitional Governance Arrangements) Act 2016
- Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014



- Status to appeal

- Section 120 RMA determines whether a party has status to appeal
- Applicant, consent holder or any person, who made a submission on the original application at Council level
- May appeal against the *whole* or *any part* of the decision
- Must file the appeal within the statutory timeframe or apply for a waiver



- Receiving Instructions

- Assessing the client's proposal

- How the proposal is likely to be decided by the Environment Court

- Understanding the facts

- Necessary to quickly familiarise yourself with the facts, bearing in mind the 15 working day limit for lodging an appeal

- Checklist for obtaining instructions

- Once the facts are clearly understood, it is then necessary to have a sound understanding of the law relating to the facts



- Principles of Law

- Status of activity
- Statutory instruments
 - Proposed and operative versions of **district** and **regional plans** (including coastal plans) and regional policy statements
 - Any superior instruments such as national policy statements and national environmental standards
- Hierarchy of statutory instruments
- Implementation of Part 2
- Effects of the proposal



- Assessing chances of success

- Two key considerations:

- The cost of a full hearing before the Environment Court
- Possibility of an award of costs being made following an unsuccessful appeal



- Drafting the Notice of Appeal

- Must be in the prescribed form
- State the reasons for appeal, the relief sought and any matters required by regulations
- Form 16 – date the decision was received, whether the appellant is a trade competitor and the land or resource affected
- Form 7 – appeal proposed policy statement or plan



- Grounds for appeal

- *“All parties to proceedings before the Court are required to demonstrate what their concerns are and cannot simply come before the Court and effectively contribute nothing to the problems that have been identified”.*
- The matters cannot be general in nature
- Limitation will apply when the recent RMA amendments come into force on 19 October 2017



- Justiciable Relief

- Need for clarity of expression is essential
- Relief sought must be capable of being decided by legal principles

- Filing the Appeal

- Covering letter
- Signed original and one copy of the notice of appeal
- Confirm that a copy of the appeal has been or will be sent to the relevant parties



- Annexures
 - Must be supplied with the appeal document
- Service of the Appeal
 - “Serve” defined in sections 352 – 353 RMA
 - Consent appeals: served to every person who was a party to the council process
 - Within 5 working days after appeal lodgement



- Section 274 Parties

- Parties who are not appellants may have representation at the proceedings
 - Minister
 - Local authority (if not the respondent)
 - The Attorney-General (representing a relevant area of public interest)
 - A person having an interest in the proceedings that is greater than the interest that the general public has
 - A person who made a submission about the subject matter of the proceedings
- Subject to exceptions relating to trade competition
- Timeframe – 15 working days



- Waivers and Directions

- Section 281 RMA – Court has wide powers to grant waivers and make directions
- Two commonly sought waivers:
 - Waiver of the 15 working day time requirement by which to file an appeal or serve an appeal
 - Waiver of the requirement to serve annexures on all parties
 - (Addressed in the Practice Note)

- Other Council Decisions that can be appealed

- Section 357A(1)(f) and (g) – rights of objection
- Section 358 appeal, same filing formalities as under s 120



Chapter 5 – Mediation & Conferencing

- Introduction
- Mediation
- Expert Witness Conferencing



The Role of the Lawyer in Mediation

- The Practice Note
- The Do's and Don'ts
 - The right process?
 - Prepare thoroughly
 - Comprehensive instructions
 - Consider alternatives
 - Authority to settle
 - Record the agreement



Procedural Conventions

- Amending the proposal
- Provide notice – prepare the other parties for your position
- Mediation etiquette
- Experts at mediation



Conferencing

- The Practice Note
- Understand the evidence/expert advice
- Prepare the client
- Benefits for the overall case



Benefiting the expert

- Obligations
- Know the background
- Prepare notes
- Not there to negotiate/mediate
- Record differences of opinion and reasons
- Make sure the agreement is accurate

Supporting the expert



Chapter 6 – A Hearing in the Environment Court

- Hearing de novo
 - The Court hears and decides cases on the merits from the beginning
 - The Court must have regard to the Council decision that is the subject of the appeal
- Order of Case Presentation



- Exchange of Evidence and Rebuttal Evidence

- The Court requires copies of a witness's statement of evidence to be provided by the party calling the witness to all other parties, and the Court, prior to the hearing
- Sequential exchange timetable

- Additional Evidence

- Distinction must be drawn between an attempt to introduce new evidence, and what can properly be called rebuttal evidence



- Exhibits/Planning Documents/ Authorities

- Must be produced through expert evidence and appended to relevant expert statements
- Exceptions for the likes of large photographs
- Casebook limited to those cases that are to be specifically drawn to the Court's attention

- Move to an Electronic Court

- Trialled the use of electronic versions of statements of evidence, exhibits and case authorities



- Opening Submissions

- Very important
- Submitting to a court of and engaging three persons
- Use tools to ensure the lay-members of the court follow your legal arguments

- *What is good practice in relation to an opening submission?*

- Outline background circumstances
- Identify the issues
- Nature of evidence to be called
- State the principles of law
- When citing authorities, remember fact situations are rarely identical



- Presentation of Evidence

- Evidence is pre-read no longer read out in court
- Ensure there is a suitable number of copies of the evidence available at the start of the hearing
- The Court requires 4 copies, one each for the three members and one for the file
- Extra copies for journalists in smaller centres and original parties in the Council hearing but have not become formal parties to the appeal



- Cross-Examination of Experts
 - The common knowledge rule
 - The field of expertise rule
 - The ultimate issue rule
 - The basis rule



- How do you Cross-Examine Expert Witnesses?

- No universal answer
- Can you detect a flaw in the reasoning process?
- Guidelines in the seminar book
- Lead the Court to appreciate that there is a problem between the witnesses
- Remember the expert may have appeared before the Court many times for the Court to have decided whether the expert is a credible witness



- Closing Address

- Closing on **legal issues** rather than on the facts
- Comment on matters which have arisen out of the opposing counsel's submissions
- Considerations:
 - Is a closing address necessary?
 - Take note whether the Court members are being helped by your submissions and ask yourself whether they look bored
 - Don't persist with an argument you have clearly lost
 - Consider any conditions that your client may agree to and do not hesitate to advance the idea of further conditions that had not been contemplated by the local authority



- Costs

- No scale of costs in the Environment Court
- Governed by s 285 RMA
- The Court has a broad discretion to order any party to pay to any other party the costs and expenses (including expert witness expenses) that it considers reasonable (exception in direct referral cases)
- Case Law establishes the Environment Court’s “comfort zone” in respect of quantum is 25-33% of the actual reasonable costs incurred by a party



Questions

