



THE DECISION-MAKER

DECEMBER 2008

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

To everyone who has been involved with the Making Good Decisions Programme this year, we wish you a Merry Christmas and a Happy New Year.

Welcome to the sixth edition of **The Decision-maker**, the Ministry for the Environment's newsletter for certified RMA decision-makers. This newsletter provides guidance on issues you face as a decision-maker, tells you about future training opportunities and shares the perspectives of others actively involved in making decisions. **The Decision-maker** refers you to relevant case law and invites your feedback on thought-provoking issues.

THE MAKING GOOD DECISIONS ADVISORY BOARD

The Making Good Decisions Advisory Board was established in 2003 to provide on-going input and advice on the development and implementation of the Making Good Decisions Programme. The Board also champions the programme, provides input and advice on any feedback, concerns and issues raised about the programme, provides feedback on the development of new course material and helps to address any complaints. The Board meets up to three times a year.

There have been some recent changes to the composition of the Board. Founding members Alan Watson, Sarah Dawson and Professor Jenny Dixon have stepped down and Bob Nixon and Peter Frawley (who was on the Board at its inception) have joined. The Board and the Ministry for the Environment would like to acknowledge the enormous energy that Alan, Sarah and Jenny have put into making the programme the success that it is. Current Board members are: Mark Farnsworth (Northland Regional Council), Peter Frawley (Tauranga City Council), Adrian Ramage (Porirua City Council), Fiona Illingsworth (Department of Internal Affairs), Irene Clarke (Local Government New Zealand), Paul Rogers (Anthony Harper Lawyers) and Bob Nixon (Planit Associates). You can contact any of the Board members with any feedback, concerns or issues that you have regarding the programme. The Ministry for the Environment hosts Board meetings and is represented by Craig Mallett (Manager RMA Implementation) and Sarah Myhill (Senior Adviser).

DEVELOPMENT OF NEW COMPLEMENTARY TRAINING COURSES

Following feedback on programme content, we are developing three new CPD courses to complement the programme: One course will focus on strengthening participants' skills in considering Māori perspectives in RMA decision-making. We are working with the Society of Local Government Managers on a second course that will provide a one-day introduction to the RMA for those with limited exposure to the RMA but who are seeking certification. The third course will cover plan and policy statement decision-making. We will update you as these courses are developed.

PLAGIARISM RISK

Unfortunately, there have been two recent instances of plagiarism in submitted course assignments. Under no circumstances is any copying or collaborating allowed in completing assignments. Your assignment must be your own work. You must not ask any other person to assist in writing your assignment. The consequence of plagiarism is an unequivocal fail with no opportunity for resubmission.

However, you are still encouraged to discuss the broader concepts and issues that are covered in the programme with your colleagues and to seek support from your tutor in completing your assignment.

ASSESSING RESTRICTED DISCRETIONARY ACTIVITIES

The High Court decision, *Auckland City Council v The John Woolley Trust and S J Christmas, HC, CIV-2004-404-3787*.

This case addressed how applications for restricted discretionary activities should be assessed by decision-makers. The case is particularly relevant to how RMA Part 2 (purpose and principles) is applied when assessing these types of applications.

The Court found that Part 2 is applied differently depending on whether a consent authority grants or refuses an application for a restricted discretionary activity: When deciding to grant consent, the decision-makers **can take Part 2 matters into account**. However, when refusing consent, the decision-makers can only take into account those matters **to which the exercise of discretion is restricted**. The High Court also found that Part 2 matters **cannot** be relied upon when imposing consent conditions for such applications, beyond those matters to which the exercise of discretion is restricted.

ASSESSING CUMULATIVE EFFECTS

Environment Court decision on *Motorimu Wind Farm Ltd v Palmerston North City Council (W067/08)*:

This case deals with an appeal to the Council decision to only grant consent to 75 out of 127 turbines in a new wind farm. The potential adverse landscape and amenity effects (particularly cumulative effects) of the additional turbines were a key factor in this decision. In response to a submission by the Council, that the RMA lacks capacity to deal with cumulative effects, the Court stated: *“It appears to us that the problem is not with the RMA which specifically incorporates cumulative effects into the bundle of effects described in s3. Rather the problem is a factual and evidential one of identifying and assessing those cumulative effects. That exercise can be particularly difficult when dealing with issues such as landscape effects which can be subject to a wide range of conflicting and subjective opinions, or when assessing the significance of incremental changes.”*

OPPORTUNITIES FOR FURTHER, SPECIALISED TRAINING

The Centre for Continuing Education is again offering a series of short, elective specialist courses in 2009 for local decision-makers and others, under the banner *Putting the RMA into Practice*. These courses complement the training offered under the Programme. Relevant courses, including locations, times and presenters, are:

Writing Good Decisions

Presented by Greg Hill

- Christchurch – March
- Auckland – Early July
- Wellington – Early November

Second-Generation RMA Plans

Presented by Jan Crawford

- Auckland – March/April
- Wellington – March/April

Effective Leadership

Offered as in-house training to councils

For more information and to register interest, please contact Anne Cave at the Centre for Continuing Education on (09) 373-7599 x89541, email a.cave@auckland.ac.nz. Dates and venues will be scheduled shortly, please refer to the website www.cce.auckland.ac.nz/rmainpractice.

QUESTIONS AND ANSWERS

Each issue of the Decision Maker includes a question and answer section based on matters raised at recent recertification workshops. Please bear in mind that the responses are not Ministry policy, but represent the collective wisdom of participants, and generally accord with principles of best practice.

Q: As an appointed commissioner, how far in advance can I start getting information on the application to determine for myself the key issues and if more particular information is required? Do I need to rely on the experience of the staff officer to assess the information and issue appropriate s92 requests?

A: There is no reason that you could not obtain information about an application from as early as when the application is lodged, or more realistically, from when you are appointed. However, it is best practice for you to obtain all relevant information at the one time, when you are then best able to make an informed judgement as to whether you have all the necessary information to be able to identify both the key issues and whether additional information is required. This would be when the council officer's report is distributed before the hearing. That report will provide an assessment of the application and identify key issues. When reviewing the report you should note any areas where you consider further information is needed. These areas can then be raised and addressed when you are testing evidence through the hearing. Where necessary, you can request further information and adjourn the hearing if there are still information gaps.

Q. What is the correct procedure if someone challenges the validity or legality of evidence that another party has provided?

A. It is reasonably common for one party to challenge the evidence of another party. As a decision-maker, you need to ensure you understand why the evidence is being challenged and what the issue of contention is. Using questioning techniques should assist you to determine these areas of difference or contention. Ultimately, you need to assess the weight that is given to the evidence that has been presented by all parties at the hearing. Page 146 in Module 8 provides guidance on what factors to consider when determining what weight to give.

Q. What do I do if I determine that what is allowed to occur as-of-right on the site ('the permitted baseline test') is having (or would have) an adverse effect on the environment?

A. You will occasionally come across applications that highlight problems with the planning document against which the application is being assessed, such as in this instance where what is permitted by the plan is having, or may result in, adverse effects. You may also identify other problems, such as drafting errors or weak or inconsistent policies. In these situations, it would be best practice at the completion of the hearing to provide feedback on the identified problems to those within the council responsible for district or regional plan drafting. Remember that when you come across these sorts of problems, the application itself needs to be assessed on its merits and on the plan provisions as they stand, and should not be assessed on the basis of what you consider the plan should contain.

Q. How do I decide what weight to give a proposed plan change compared to existing plan provisions, when I am considering an application that requires consents under both?

A. The weight to be given to a plan change compared to an existing plan depends on a number of different factors, being

- (1) the type of plan change
- (2) the stage that the plan change is at and the decisions (if any) that have been made to date
- (3) possible injustice
- (4) the extent to which the proposed plan change may implement a coherent pattern of objectives and policies in a plan or other associated council initiatives such as other plans or strategies.

There is a difference between council-initiated or adopted plan changes that generally must be considered and take effect as soon as they are notified, and private plan changes that do not take effect until such time as the decision is publicly notified and/or any appeals are settled. However the council has discretion under s20 for council-initiated plan changes to defer a rule from taking effect until a plan becomes operative. When dealing with an application that is subject to multiple plan changes, you should itemise the implications of each plan change on the proposal, determine how they may relate to each other, and then weigh out the impacts on each change and the overall application. You need to identify whether one plan change may be more advanced than the other, and therefore how much weight should be given to one versus the other – particularly if they may be in part contradictory to each other. This should already have been addressed in the council officer's report.

RE-CERTIFICATION

Does your certificate expire on 30 June 2009 or 31 December 2009? Do you want to maintain your certification?

There will be recertification courses in early 2009. If your certificate expires 30 June or 31 December 2009 you will need to attend the courses in the first half of the year, as recertification courses will not be offered in the second half of 2009. The University of Auckland's Centre for Continuing Education aims to contact all decision-makers whose certificates are coming up for expiry. If your contact details have changed, please let the Centre know.

Two options are available:

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| OPTION A (Panel Members) | Re-certification for those who plan to continue as members of hearings panels. This course is at a difficulty level similar to the original training. It is for decision-makers who primarily act as hearings panel members, rather than as the chair of hearing panels. Courses for Panel Members will be held in Christchurch on 13 March, in Auckland on 26 March and in Wellington on 31 March. |
| OPTION B (Chairs) | Re-certification for those who chair hearings, or who would like to develop skills as chairs. This course is more advanced. The assignments are significantly more demanding, and there are no opportunities for resubmission. Courses for Chairs will be held in Christchurch on 6 April, in Wellington on 20 April and in Auckland on 24 April. |

Please note that the re-certification round will only be open to those whose certificates expire on 30 June 2009 or 31 December 2009.

If you are successful you will be issued with a new certificate that is valid for a further **five** years. If you obtain re-certification under Option B your certificate will include a 'chairing endorsement'. **You aren't legally required to have a 'chairing endorsement' to chair hearings, but the course will help you develop or maintain the skills you need to perform this role effectively.**

For more information, call Libby Passau at the Centre on (09) 373-7599 x88532, email l.passau@auckland.ac.nz or visit the Centre's website at www.cce.auckland.ac.nz/rma

DO YOU KNOW ANYONE SEEKING CERTIFICATION?

A limited number of certification workshops will be held in Auckland, Wellington and Christchurch in the second half of 2009. For more information, call Libby at the Centre (see above for contact details).

MORE INFORMATION

To enrol for training and certification under the Programme: Libby Passau, Centre for Continuing Education, Auckland University, phone (09) 373 7599 x88532 or email l.passau@auckland.ac.nz

For general enquiries about the Programme: Sarah Myhill, phone 0800 762 4636 or email sarah.myhill@mfe.govt.nz

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