

SUPPLEMENTARY PAPER – RMA REFORM

Wednesday, 21 January 2009

Subject:	Further information requests/provisions
Purpose:	To provide a summary of potential options for reducing costs and delays in resource consent processing associated with requests for further information
Recommendation:	<ol style="list-style-type: none"> 1. No limit should apply to the number of times a council can issue requests for further information. Upon receipt of further information or the applicant informing the council that they are not going to provide information, the statutory 'clock' should start again and cannot subsequently be stopped (i.e. additional further information requests will not stop the clock). 2. Simplification of sections 92, 92A and 92B, with the preferred option is for processing to continue and decision-makers be required to consider the adequacy of information provided in making their decision. This would involve removing the current specific rights of appeal and objection in section 92A and 92B 3. Applications should lapse where further information has not been provided 12 months from the date of the original request.

Background

4. Efficient processing of resource consents can be hampered by poor quality applications and excessive further information requirements.
5. There is a responsibility on applicants to provide sufficient information about their proposal and on Councils to avoid making excessive and unreasonable requests for further information.
6. Sections 92, 92A and 92B enable councils to request further information or request the commissioning of reports to provide further information on the effects of proposals on the environment.
7. There were substantial changes made to the further information provisions in the 2005 amendments, including adding timeframes by which applicants were required to respond and providing specific pathways for applications to be declined on the basis of insufficient information, as well as providing the applicant with rights of appeal and objection in relation to further information requests.
8. While aspects of these 2005 provisions have reduced delays (such as the introductions of a timeframe), other parts of the provisions have not worked to reduce delays (for example the specific appeals and objection rights introduce further delays, and many applicants choose to supply information in order to continue processing, regardless of whether they think the request it is reasonable).

Comment

9. Further information requests can be a symptom of bad practice by local authorities, either through not checking adequacy of applications up front, or to delay the processing of the application.
10. Multiple requests for further information is also a particular issue that can frustrate applicants.¹ The burden of proof should be on the local authority to show that the

¹ And further information request are quite common. Preliminary figures form the 2007/2008 RMA suggests further information requests are made on 40% of applications The number of multiple requests is unknown

FOR DISCUSSION ONLY – NOT GOVERNMENT POLICY

information requested is relevant, necessary and material to the particular application, not on the applicant to show that it isn't.

11. There is potential to clarify the frequency and timing of further information requests, which will increase the certainty for applicants. This should be supported by a review of section 92A to make it easier for consent authorities to decline applications with insufficient information. In particular, there is a need to clarify the declining of an application under section 92A(3) due to insufficient information and the role of the Environment Court in this process. The current wording can result in the Environment Court making a first level decision on an application; a position the Court has expressed some discomfort about².
12. Collectively section 92, 92(A) and 92(B) provide a level of complexity that could be simplified to provide greater certainty and a smoother process for consent staff and applicants.

Alternatives

13. Options include:
 - a. Limit ability of councils to request further information
 - b. Review section 92A
 - c. Lapsing of Application
14. The option to limit the ability of councils to request further information would involve limiting the amount of times a council can request further information. This may be limited to once before the application is notified and once after it is notified, or once only for any application.
15. However, there would need to be some flexibility in this option for the council to assess whether the information provided by the applicant has sufficiently fulfilled the original request. If inadequate, the council could commission a report to fill the information gap or decline the application if clearly inadequate. There would also need to be some flexibility to request more information if the original request provided significant new information or issues (such as a 5 day timeframe to identify and request this).
16. This option could also make the scope of further information requests clearer. For example, section 92(1) could state further information "that is necessary to determine the environmental effects of the application" rather than "information relating to the applications" as currently exists. This would help to exclude the ability to extend time by requesting information on minor/irrelevant matters (e.g. plans at a different scale).
17. An alternative to this is to constrain requests for further information to decisions on notification only. If there is insufficient information to make a decision on the merits, and applicant and decision maker can not agree on whether the information is necessary, then the decision is to decline the application on the basis of inadequate information and then current provisions come into play.
18. The second option - to review s92A (which provide applicants who receive a further information request with options as to how they may respond and sets timeframes to respond within) - would fix a procedural lacuna which has arisen from the provisions in section 92A(3). The lacuna is that where an applicant refuses to provide information, then a local authority then goes on to consider the application without notifying it and subsequently declines. If the applicant appeals to the Environment Court, the current wording effectively requires the court to make a decision on whether or not the application should have been declined.
19. One option for addressing this issue with section 92A is that if the applicant refused to provide further information, the application would default to being notified. However,

² Refer *PN Industrial and Residential Developments Ltd v Palmerston North City Council* [2007] W073/07 where Judge Dwyer expressed the view that declining an application under s92A(3) without having determined section 93/94 was an unsatisfactory system that required urgent remedy.

FOR DISCUSSION ONLY – NOT GOVERNMENT POLICY

this could be a waste of effort when clearly deficient applications are required to be notified prior to declining. This option could potentially result in affected (or unaffected) parties making submissions based inadequate information in an application, and wasting council resources on a deficient application that was inevitably going to be declined

20. A more feasible option for applicants to challenge the declining of consent based on insufficient information is through an objection under section 357, with a further right of appeal to the Court under section 358. This would allow the substantive decision on information requirements to be reconsidered. This would alleviate the need for the Environment Court to be involved in the majority of cases, unless any decision on objection is appealed to the Court under section 358.
21. Where there is an appeal, the Court would make a determination on whether the council had sufficient information to make a decision and return it to the council for the substantive decision. The Court would simply note whether the information was sufficient when referring it back to the council, and possibly make directions on whether or not it should be notified.
22. The third option is for applications to lapse if any request for further information remains outstanding for more than 12 months. This puts the onus on the applicant to that application should lapse unless an objection or appeal is extant or unless the council approves otherwise.

Preferred options

23. No limit should apply to the number of times a council can issue requests for further information (i.e. remain the same in accordance with current legislation). However, upon either receipt of further information or the applicant informing the council that they are not going to provide information, the statutory 'clock' should start again and cannot subsequently be stopped (i.e. additional further information requests will not stop the clock).
24. This essentially gives councils one opportunity to stop the clock, and will encourage councils to ensure that all matters requiring further information are dealt with in one request. This provides more certainty to applicants, and provides incentives for the councils to reduce the occurrence of multiple further information requests.
25. Simplification of sections 92, 92A and 92B, in particular the process if an application refuses to provide information is desirable to ensure the Court is not in a position of having to make a first-level decision on an application. The preferred option is for processing to continue and decision-makers be required to consider the adequacy of information provided in making their decision. This would involve removing the current specific rights of appeal and objection in section 92A and 92B, however there would remain the appeal and objection rights in section 120 and 357 on the substantive decision. The benefit of this option is that the processing is not held up until the resolution of appeals in relation to the further information aspect.
26. Applications should lapse where further information has not been provided 12 months from the date of the original request. This put the onus on applicants to respond to further information requests, be it to supply the information or refuse to supply it.