

Restricted Discretionary Activities Are they really?



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In this article Michael Garbett analyses the case law dealing with restricted discretionary activities, discussing the current approach of the Environment Court to such consents and explains how this approach can complicate the consent process.

A “restricted discretionary activity” is a type of resource consent where a Council’s District Plan limits the range of relevant issues that can be considered. An example is where a resource consent may be required for a house near to a property boundary, but the only relevant issue is the degree to which the neighbour is shaded.

In the Environment Court there have been decisions which have determined that restricted discretionary activities can be refused or have conditions imposed only if those matters are identified in the District Plan.

There is a second recent line of cases which have determined that restricted discretionary activities need to be assessed under section 104 of the Resource Management Act 1991 (RMA) and are subject to a further assessment under Part 2 of the RMA. This recent line of cases allows a significantly wider range of relevant matters to be assessed than what the District Plan may have envisaged.

This tends to undermine the purpose of a restricted discretionary activity. By doing so, this increases the range of relevant matters that need to be taken into account, the complexity of the issues to be considered and the cost of hearings for restricted discretionary activities.

The Traditional View

Based on an Environment Court decision in 1999, *Auckland City Council v Auckland Regional Council A28/99*, the traditional view concerning restricted discretionary activities was that resource consents could be refused or conditions imposed, based only on the matters which the District Plan describes as relevant.

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The Environment Court in 1999 described the position as follows in *Auckland City Council v Auckland Regional Council [1999] NZRMA 167* at paragraph 94:

“We do not accept that this general provision was intended to add the broad matters stated in Part 2 to the matters expressly specified in a District Plan as relevant considerations for deciding applications for restricted discretionary activities. That would deprive restricted discretionary activities of their distinctive quality.”

The point is: where a District Plan identifies relevant matters, the court when assessing a resource consent application, could consider only those matters. This had the effect of simplifying hearings for resource consent applications.

Current Position of Environment Court

In two recent decisions, *Stephenson v Auckland City Council A169/2005* and *The John Woolley Trust v Auckland City Council A049/2007*, the Environment Court determined that:

- a restricted discretionary activity simply restricts the number of relevant matters contained in the District Plan to which the consent authority can have regard; and
- all the matters set out in section 104 RMA remain relevant; and
- section 104 RMA is subject to Part 2, which sets out the purpose of the Act, which is also relevant and needs to be assessed.

The consequence of this interpretation is that even though the District Plan might limit the range of relevant matters, any submitter can challenge a resource consent on the basis that it is inconsistent with the wide ranging and subjective matters contained in Part 2 RMA. This creates greater uncertainty and complexity in resource consent hearings.

The arguments in favour of the Court’s current approach are:

- Section 104 begins: When considering an application for a resource consent ... It is clear both from its position at the beginning of the “Decisions” part of the Act and the wording of section 104 itself, that every resource consent application is to be considered under section 104. This is important because it is section 104 which requires consideration of:
 - the application for resource consent (104(1));
 - any submissions (104(1));
 - actual and potential effects on the environment (104(1)(a));
 - any relevant provisions of national policy statement, regional plan and the District Plan (104(1)(b)).
- There are other machinery provisions in section 104 that must apply to all resource consents, including those for a restricted discretionary activity.

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Examples include:

- the permitted baseline now in section 104(2);
- disregarding trade competition (104(3)(a.));
- disregarding effects on those who have given written approval to an application (104(3)(b.)).
- This is all subject to Part 2 of the Act (ie the purpose, sections 6, 7 and 8) being relevant.
- Section 104C is headed **Particular restrictions** for restricted discretionary activities (emphasis added). This signals that there are other general provisions which apply.
- Section 104C(a). says that a consent authority “must consider only those matters specified in the plan or proposed plan to which it has restricted the exercise of its discretion”. This subsection ensures that when the decision maker considers the District Plan (as required by section 104(1)(b.)), only the relevant matters specified in the plan are considered. It does not exclude consideration of other relevant sections in the Act.
- Accordingly restricted discretionary activities (and all resource consents) are processed under section 104 and thereby subject to Part 2 of the Act.

High Court Authority

Recently, this position was argued in the High Court in *Blueskin Projects Ltd v Dunedin City Council* (CIV-2007-412-669).

“The parties in this case argued for and against the proposition that when considering a restricted discretionary activity the Court could have regard to Part 2.”

The High Court upheld the decision of the Environment Court on jurisdictional grounds and did not go on to determine the substantive arguments raised. The High Court did not therefore make a ruling on this issue, but did offer the following comment Paragraph 44:

In a case where it is no longer relevant to the decision I prefer not to venture in any definitive way upon the section 104C/section 104(1) issue. I admit that the scheme seemed to me to contemplate that section 104C was a self contained provision that was a qualification of, and limitation on, section 104(1).

This seems to suggest that the High Court may be inclined to adopt a different view to the current position of the Environment Court.

Conclusion

The wording of the RMA leaves open the arguments for and against the diverging Environment Court decisions. The recent comment from the High Court seems to suggest that there remains room to argue whether or not the current approach of the Environment Court towards the statutory scheme is incorrect.

Based on the law as it currently stands a consent authority is free to assess restricted discretionary consents under section 104 and Part 2 RMA. This tends to enable arguments on almost any environmental issues despite the intent of many district plans to restrict the scope of relevant issues.

The fact that the Environment Court has issued conflicting decisions on this issue highlights an issue of uncertainty in the RMA. It is not entirely clear whether Parliament intended restricted discretionary activities to be assessed under Part 2. This is an issue that could easily be clarified by legislative change. Section 104C should state whether or not it is subject to section 104 and Part 2 RMA.

Summary

The Environment Court (and other consent authorities) are frequently required to consider applications for restricted discretionary activities. Many District Plans restrict consideration to only the standard that is breached by a proposal, such as maximum height.

When making this assessment, the consent authorities have approached the matter on the basis that they can take into account only relevant matters that arise from the District Plan itself.

Recently, there has been a line of cases which suggests that the various consent authorities should, in addition, assess the application against the matters that arise from Part 2 of the RMA.

“To give more certainty to applicants and the various consent authorities, this issue should be resolved by legislation.”

Since this article was accepted for publication, High Court decision may have given some clarification. The effect of this decision will be dealt with in a subsequent issue of Connect.

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Following this article being sent for publishing the High Court has issued its decision in *Auckland City Council v The John Woolley Trust* (CIV 2004-404-3787). This decision confirms the current Environment Court approach discussed in this article with one important qualification. The High Court has decided that a restricted discretionary activity is assessed under Part 2, but Part 2 can only be relied on to grant consent, not to refuse consent or impose conditions. This is a difficult distinction to make in practice, especially when determining what is, and is not relevant to a particular decision. This distinction will be discussed in a follow-up article by Michael Garbett.