

VALUATION OF RESOURCE CONSENTS

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INTRODUCTION

The Resource Management Act was enacted in 1991 and for the past seven years we have observed the implementation of this controversial legislation. It has made some dramatic changes to the way in which we use, view and administer the allocation and use of natural resources. Yet in other ways its full implementation has been painfully slow with many of the transitional provisions still operational as Regional and District Councils struggle towards operative plans which have been constructed under this Act. (as opposed to transitional plans converted from District Schemes. In the Selwyn DC the first attempt was scrapped in August 1997 and they are making a fresh start on a new Proposed District Plan)

There have been some significant changes to the RMA since 1991, especially by the Amendment Act in 1993 which changed the definitions of the “activities” in Section 2 and substantially changed sections 104 and 105 relating to the decisions on resource consents.

The Planning Tribunal, renamed the Environment Court from 1996, has heard and given substantive decisions in over 1600 appeals and references. This volume of litigation has provided vital clarification on the meaning of many terms in the RMA and the administrative procedures which need to be adopted, in the whole process of achieving sustainable management of our natural and physical resources.

The evolution of the act and its applications continues with more changes likely, especially in relation to the “standing” of persons wishing to make submissions re resource consents.

The Objectives of this paper are to:

1. Review the valuation methods of land with resource consents, land without consents (but with the possibility of) and consent valuation.
2. Review the legislation and rules framework within which we value resource consents, highlighting the RMA changes and incorporating the relevant cases since 1991.
3. The tradability/transferability of resource consents.
4. Discuss and signpost likely changes to the RMA

1. REVIEW OF THE VALUATION METHODS

The valuation of land with consents attached usually does not pose any major problems for valuers. Where the consent has the net affect of enhancing the utility or income stream from the property then that net affect can be incorporated into the value with the traditional valuation approaches. This is made easier where the consents have attached to private land and the land use has become established or the subdivision is well advanced. (Permits which allow the use of public resources (air, sea, water) are far less straight forward as they have termination dates, review provisions, restrictions and are specifically defined as not real or personal property.)

For income producing property this means calculating a net income stream with the benefits of the consent included and assessing a capitalisation or yield rate incorporating the risks, including the sustainability of the net income and sustainability of the consent.

For the sales approach the presence of the consent may change the sales set which is the most comparable. The best sales will be those with the same land use and consents. Next best are those with the use permitted by the plan not requiring consents. Land sales with the potential to obtain similar consents are also useful in any sales analysis, especially when there is a high chance and minimal cost, in obtaining a similar consent.

The cost approach also can be applied with its rationale that “no person will pay more for a land component (in this case a resource consent) than the cost to them to replicate that land component with the same function or utility”. This should be based on the current rules in the plan and the current administration of the plan (at the time of the valuation).

For example land with a resource consent granted some time ago, and where the use has since become permitted by changes to the plan, that consent will now be worthless. The value associated with the use has been transferred from the consent component (an improvement) into the land component by the change in the plan. Note that the reverse applies where the consent becomes harder (more expensive) to obtain and in this case the value of the land component declines and the added value of the consent rises, with the total value still remaining much the same. This is a straight forward assessment of the Market Value but splitting the value between the vacant land (or Land Value) and the improvements becomes a little more complex.

The work done on or for the benefit of the land by way of expenditure of labour or capital, as per the Valuation of Land Act definition will be an improvement. This improvement component will be the replication cost to the owner of obtaining the consent. The McKee v VG case provides some guidance as to the procedure for the valuation. This is to essentially remove the actual consent attached to the land and view the land with the prospect of obtaining a similar consent. That is, the potential is an inherent part of the land itself which includes the chance of obtaining the consent. The confirmation of that potential is the cost of getting the consent which will form part of the improvements.

This concept introduces the value of land with potential which can only be realised with the granting of consent(s). This type of land poses much more of a difficulty for the valuer to determine the market value. The difficulty related to the Resource Management issues is the need to make an assessment of the chance of getting the consent(s) needed and estimating the costs associated with the consent application including complying with any conditions. This means that the valuer is required to make the following assessments:-

1. The type of activity the proposed use will be (discretionary, non-complying)
2. The information required to be lodged with the consent (including costs)
3. The administrative process of dealing with the consent (notified, non-notified)
4. Identify the effected persons who will be directly contacted
5. The number of likely objections and the nature of those objections
6. The matters which are considered by the Council in making the decision
7. The decision including the nature of the consent and any conditions imposed
8. The appeal process against decisions made

It is for these reasons the valuer must be familiar with the objectives, policies and the rules of the relevant plan(s) along with the following parts of the RMA

Part	I	Definitions
Part	II	Purpose and Principles
Part	III	Duties and Restrictions
Part	VI	Resource Consents
Part	X	Subdivision and Reclamations

2. THE RMA FRAMEWORK AND RELEVANT CHANGES SINCE 1991

ACTIVITIES

The section 2 definitions of the act are critical in the interpretation of the subsequent content. The definitions of Controlled, Discretionary and Non-Complying activities are pivotal to the resource consent process. All three of these definitions were changed by the 1993 amendment.

In the original act “Controlled activity “ meant an activity-

- (a) Which a plan specifies as a controlled activity;
- and
- (b) Which is allowed only if a resource consent is obtained in respect of that activity:

Now “Controlled activity “ means an activity which-

- (a) Is provided for, as a controlled activity, by a rule in a plan or proposed plan; and
- (b) Complies with standards and terms specified in a plan or proposed plan for such activities; and
- (c) Is assessed according to matters the consent authority has reserved control over in the plan or proposed plan; and
- (d) Is allowed only if a resource consent is obtained in respect of that activity:

In the original act “Discretionary activity “ meant an activity which a plan specifies as being allowed only if a resource consent is obtained in respect of the activity from a consent authority, which must exercise its discretion to grant the consent in accordance with criteria specified in the plan and this act:

Now “Discretionary activity “ means an activity-

- (a) Which is provided for, as a discretionary activity, by a rule in a plan or proposed plan; and
- (b) Which is allowed only if a resource consents obtained in respect of that activity: and
- (c) Which may have standards and terms specified in a plan or proposed plan; and
- (d) In respect of which the consent authority may restrict the exercise of its discretion to those matters specified in a plan or proposed plan for that activity.

In the original act “Non-complying activity “ meant an activity which contravenes a plan but is not a prohibited activity:

Now “ Non-complying activity” means an activity (not being a prohibited activity)which-

- (a) Contravenes a rule in a plan or proposed plan; and
- (b) Is allowed only if a resource consent is obtained in respect of that activity:

These remedial changes are not significant in themselves but in conjunction with the changes to sec 104 and 105, significantly change the whole resource consent process. Note the definitions of permitted and prohibited activities remain the same.

Part V of the RMA (Standards, Policy, and Plans) empowers the local authorities to make rules in a plan and specifies the administrative processes to formulate a plan including the content. A valuer must therefore be familiar with the rules in the relevant plan(s) to determine not only the category of the activity but other issues such as notification/ non notification, conditions etc. As regards the consent process the valuer should also familiar with the objectives and policies in the plan and the efficiency of the local authority in the administration of their own plan.

CONSENTS

Part IV (Resource Consents) begins with the definitions of the five types of resource consents in Section 87 :-

Land use consent	(contravene S 9 & 13)
Subdivision consent	(“ “ S 11)
Coastal permit	(contravene S 12,14 &15)
Water permit	(contravene S 14)
Discharge permit	(contravene S 15)

Section 88 sets out the requirements on making application for a resource consent. This includes a description of the activity, the actual and potential effects on the environment and the way in which any adverse effects may be mitigated. This section now includes a significant amendment which relates to controlled and discretionary activities which effectively (in conjunction with S 104 and 105) creates two types of discretionary activities. Subsection (5) refers to a discretionary activity over which the local authority has restricted the exercise of its discretion. The assessment of effects is limited to those matters over which the LA has expressly retained control or the right to exercise its discretion.

NOTIFICATION

The notification or non notification of resource consents is outlined in Sec 93 & 94 and will significantly affect the cost (and time)of obtaining a resource consent. Section 93 presumes that all applications must be notified unless they fall within the exceptions in Sec 94. This has been an area of recent debate and while just 8% of all consents in the 1995/96 year were notified, there are already signals that changes to notifications may be made in the near future. The Environment Ministry has commissioned a report from a planning expert Owen McShane on this very issue (NBR 20/02/98). Sec 93 specifies applicants must serve notice of the application to a range of agencies where appropriate, but must include; the person(s) who, are likely to be directly affected by the application (adjacent owners and occupiers); public notification and a sign on or adjacent to the site.

In the case of the adversely affected persons, the LA has complete discretion to decide who is included in this group. Adversely affected has been generally identified as meaning persons with an interest which differentiates them from the public generally. The Environment Court has made it clear there is no right of appeal from a decision under Sec 94, only a right of judicial review in the High Court.

Applications not requiring notification (sec 94) can be divide into 3 categories

1. Controlled activities where written approval has been obtained from the adversely affected persons, or if the plan expressly permits consideration without written approval.
2. Discretionary activities where the LA has restricted the exercise of its discretion (“restricted discretionary activities”) can be non notified if the plan expressly permits consideration without written approval.
3. Discretionary and non-complying where, the effect on the environment is minor and written approval from the adversely affected persons. Note that the definition of the word *minor* has been the subject of some dispute. The Environment Court and the High Court agree that a minor effect is one which is less than major but more than minute or slight, comparatively small in size or importance.

The administrative procedures including time limits, submissions and hearings follow in Sec 95 to 103. The obligation to hold a hearing is based on the need by, the consent authority, a submitter or the applicant themselves requesting to be heard. It is in no way linked or dependant on the requirement for notification. Whether there is a hearing or not will add to the costs of the consent including time delays and the valuer may be required to predict the likelihood of a hearing being requested and the assessment of the costs.

A summary of the time limits for consents are

public notice within	10 working days
submissions close after	20 working days
Council hearing within	25 working days

Council decision within	15 working days of hearing
	20 working days if non-notified, no hearing
	20 working days from submission close, no hearing
	15 working days of hearing

MATTERS TO BE CONSIDERED

The matters to be considered and the decision on applications are critical and comprise the two sections 104 and 105. While they are not large sections in themselves, a large number of the Environment Court decisions result from these two sections and for valuation purposes a good clear understanding of them is essential. Both these sections were the subject of amendments in 1993 which have brought significant changes. One of the cases which highlighted the need for change was the Batchelor v Tauranga D.C. case and one of the issues in this case involved the “primacy” of part II (Purpose and Principles) of the RMA. In the original Act Sec 104 did not clearly specify the importance of part II and in the Batchelor case some rules in the plan were given priority over the purpose and principles in part II of the RMA. The amended Sec 104 now begins with “Subject to Part II, when considering an application ...”. The thrust of the other amendments to Sec 104 directs attention on effects and to effects on the environment where previously this was not so well specified.

The key elements of Sec 104 Matters to be considered are
Subject to Part II, when considering an application for a resource consent the consent authority shall have regard to:

- actual and potential effects on the environment
- any relevant regulation or policy statement (national or regional)
- any relevant objectives, policies, rules of a plan or proposed plan (regional or district)
- any relevant water conservation order, designations, heritage orders
- any other matters the consent authority considers relevant

- management strategy or plan for a consent re bed of lake or river adjoining crown land

- where discharge(or coastal) the nature of discharge, the sensitivity of the receiving environment to adverse effects, applicants reasons for proposed choice, alternative methods of discharge.

- where coastal any relevant policy by Crown and regional coastal plan

- where written approval has been obtained, or a submission in support has been received, the consent authority shall not have regard to any actual or potential effect on that person. No grounds to refuse if an adverse effect on that person.

- no regard to trade competition

Notes

1. The issue of primacy of Part II was confirmed after the 1993 amendment by Reith v Ashburton DC (the first case post the 93 Amdmt) and Gardner v Tasman DC. “Subject to” means that the purpose and principles of the Act are an over riding guide when construing the consent provisions in the Act
2. As regards effects the words “on the environment” indicate that the physical effects of the activity, not its precedent effects, are now of prime importance. (Gardner case)
3. The effects includes potential adverse effects of activities associated with a proposal for a resource consent. Aquamarine Ltd v Southland RC (effects relating to the passage of vessels and discharges from such vessels)

4. Cumulative effects on the integrity of the plan can be considered if there is some pressure to establish activities in an area not designed to cope, where the granting would cause a proliferation of similar consents. Destruction of physical resources, people and communities by unnecessary loading on services may be considered. (Gardner case)

5. For non complying activities if the activity infringes not only a rule but also the objectives and policies of a plan then it is likely to impair the integrity of that plan. (and not be granted)

6. Where written approval from affected persons has been obtained by financial consideration in return for that written approval, that is not to be considered. In the case of BP Oil New Zealand Ltd v Palmerston North CC the Planning Tribunal observed that one consent was effectively paid for but this is open to a developer in terms of the Act because a person who considers he may be adversely affected can effectively be compensated for that fear. The Tribunal sated in this case “ even if true it is of no concern to the Tribunal under the RMA. (The Independent 4th March 98 ran an article on the payments made to affected parties for the Britomart development totaling \$9.6m)

DECISIONS ON RESOURCE CONSENTS

Sec 105 Decisions on applications gives the consent authority the powers to grant a consent.

For controlled activities the consent authority shall grant the consent but may impose conditions (sec 108) in respect of those matters over which it has reserved control. Sec 104 matters only apply to the conditions.

For discretionary activities the consent authority may grant or refuse the consent and if granted may impose conditions. Where the consent authority has restricted the exercise of its discretion in the plan, the refusal or the conditions imposed is restricted to those matters it has specified in the plan. Sec 104 matters only apply to the restrictions that have been specified in the plan.

For the remaining activities (unrestricted discretionary or non complying) a consent may be granted or refused and if granted may impose conditions.

No consent may be granted for a prohibited activity

The consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that:-

The adverse effects on the environment will be minor; or

The application is for an activity which will not be contrary to the objectives and policies of the relevant plan or proposed plan.

Notes

1. The introduction of “restricted discretionary activities” has in essence created two separate categories of discretionary activities. Those where the consent authority has limited its discretion to particular matters and those where it has not limited its discretion, in the plan. The difference between controlled and discretionary activities is that the consent authority does not have to grant the consent for a discretionary activity but can exercise its discretion; either restricted to matters in the plan or unrestricted (but still subject to the RMA).

2. The word *minor* is less than major, more than minute or slight. Whether effects are minor is to be determined after having regard to any mitigation by imposing conditions.

3. For non-complying activities meeting one of the two alternative conditions does not justify the granting of the consent. It just enables the consent authority to consider the proposal and it still retains an overall discretion as to whether to grant or refuse the consent.

4. The term *contrary* does not mean strict adherence to the plan but a non-complying activity which is actually opposed in nature to the objectives and policies of the plan is unlikely to be granted.

5. The decision making is now more focused on the effects of the activity and less emphasis is now on the zone or whether or not it was mentioned in the zone.

Section 106. A subdivision consent is not to be granted where the consent authority considers that the land or any structure is or is likely to be subject to damage by erosion, falling debris, subsidence, slippage, or inundation. This applies to any subsequent use likely to accelerate, worsen, or result in material damage to that land, other land, or structure unless the situation can be avoided, remedied or mitigated by rules in the plan, resource consent conditions or other works.

Section 107 restricts the granting of certain discharge permits or coastal permits to discharge. No discharges into water or onto land which may result in the discharge entering water. This section has been amended to include dumping into a coastal marine area from any ship, aircraft, or offshore installation. Water quality in terms of scums, suspended materials, colour and odour must not change and the water must remain suitable for consumption by farm animals and there be no significant effects on aquatic life.

CONDITIONS OF CONSENTS

Section 108 empowers the consent authority to impose any conditions it considers appropriate on the grant of resource consents. These conditions can include financial contributions, bonds, services or works, covenants, and supply of information. Financial contribution is defined as money, land including esplanade reserve or any combination of land or money. While the courts will not interfere with conditions if they are prima facie within the jurisdiction of the consenting authority there have been numerous decisions on consent involving conditions. The financial contribution must be fair and reasonable (Woolridge Estates) and that recouping the cost of public utility services from owners as they subdivide their land was consistent with the RMA. (Nicoll Management Ltd v Manukau CC) The conditions must be relevant and relate to the purpose of the RMA and the type of consent in question. The condition should not have the effect of frustrating the consent. If compliance with the condition would involve infringement of the legal rights of third parties the condition should not be imposed unless they agree. Note that conditions of consents especially those involving discharges can have reviews.

There are further conditions for subdivision consents contained in section 220. These are conditions on which a subdivision consent is granted and may include:-

- the requirement for esplanade reserves and strips which apply to subdivided land under 4 hectares - - amalgamation of land of the subdividing owner (LA must check practicality with DLR)
- a condition as bulk, height, location foundations
- provisions for protecting land including any not part of the subdivision against subsidence, slipping erosion or inundation arising or likely to arise as a result of the subdivision.
- filling, compaction, earthworks
- the granting of easements

Other relevant issues relating to the valuation of consents

Section 122 states that a resource consent is neither real nor personal property. Unless otherwise stated, on death may pass to the successors of the holder, on bankruptcy vest in the Official Assignee, and the

holder may grant a charge over a consent. There are specific limitations on coastal permits and a coastal permit does not confer ownership however in some circumstances a coastal permit may give exclusive occupation rights.

Section 123 sets the duration of consents. Subdivision and land use consents and consents for reclamation are unlimited in time unless otherwise specified. Other consent can be granted for up to 35 years but if no time is specified, are granted for 5 years.

3. TRADABILITY /TRANSFERABILITY OF RESOURCE CONSENTS

TRANSFERS OF CONSENTS

The transfer of consent is dealt with in the RMA in sections 134 to 137. Land use consents and subdivision attach to land unless otherwise stated. This does not apply to land use consents which contravene section 13 (beds of lakes and rivers) but are treated as personal and may be transferred. The transfer has no effect until written notice is given to the consent authority.

The holder of a coastal permit may transfer their interest to any other person but may not transfer that interest to another site unless the consent allows. Written notice is required for the transfer to have effect.

Water permits for the damming or diverting of water may be transferred to any owner or occupier of the site in respect of the permit but not to any other person or from site to site. Water permits for other than damming or diverting may be transferred to any other owner of the site. The act also allows for the transfer to a person on another site if both sites are in the same catchment or aquifer, and the transfer is expressly allowed by a regional plan or has been approved by the consent authority. There are specified procedures as to the notification including the consideration of the transfer as though it were an application for a consent.

Discharge permits may only be transferred to an owner or occupier of the site to which the permit applies and is not transferable from site to site. Written notice must be given to the consent authority.

TRADABILITY OF CONSENTS

While there are numerous opportunities within the RMA to create tradeable economic instruments, to date there has been little action. None of this type of approach to resource allocation and environmental management has found its way into notified plans, yet. Note also that Sec 26 h Functions of the Minister refers to “the consideration and investigation of the use of economic instruments (including charges, levies, and other fiscal measures, and incentives) to achieve the purposes of the Act”. Despite no progress so far, there are some good advantages in creating tradeable instruments. It would reduce the amount of centralised decision making and place the resource use decisions into a market setting. Permit trading would be instigated by the allocation of entitlements allowing rights to use the resource up to a certain overall limit. The holder of an entitlement can then trade in that resource use along with other resources. One of the major advantages lies in the incentives for efficiency. Misuse of the entitlement would cause a decline in value hence a personal loss for the holder. There is also the incentive to improve or enhance the entitlement through efficiency or technology as any gains will accrue back to the holder or if the need is reduced can be sold in whole or in part. When the instruments are traded a price becomes established which provides information on the value of the

resource, the opportunity cost, and the marginal value of the resource units. This allows resource users to adjust their behaviour in respect of resource allocation by examining the cost in relation to the benefits. For resource users it could lead to a much quicker and some times cheaper access to that resource.

Economic tradeable instruments are however not without problems. Much needs to be known about the extent and capability of the resource to be able to make the initial allocation. The fisheries management quota system may have yielded improved efficiency, but has been plagued by public concerns over the sustainability of the total allowable catch. An entire framework must be created within which the trading can take place with all the legal and information systems needed to support the market. The community would need to be involved in the set up process to ensure the outcomes were environmentally acceptable, especially in the discharge and pollution allocations. For example discharges may need to be restricted to certain site(s) to ensure that one section of the community is not adversely effected in relation to others.

The challenge is to provide a good framework for economic instruments that allows for both public participation and considerations of social justice concerns in policy making, while enabling the efficiency gains of the market approach. It seems a little inconsistent in today's deregulated economy to have tradeable economic instruments in some areas such as the fishing quota system, and to have proposals such as the privatisation of the maintenance of our roads currently before us, and not to be making progress towards some economic tradeable instruments in the natural resource allocation and environmental protection issues. There is no reason why water permits could not be tradeable within the same catchment now, and there appears few obstacles to trading in land use and subdivision consents other than the development of the appropriate framework.

4. LIKELY FURTHER CHANGES

I will limit my opinions to just two broad areas :-

1. There is considerable pressure by developers to speed up and simplify the resource consent process. This has been recognised in the commissioning of a report from Owen McShane by the Minister. There is also a significant incidence of applicants effectively buying the consent of effected persons by direct financial consideration. There is pressure on the consent authorities not to notify consent applications and to incorporate the non notification of consents into the plan, rather than rely on the public notification process at the time of the application. While the RMA has as one its themes the strong public involvement in the policy and decision making process, it appears that with only 8% of all consents publicly notified in 1995/6, this is already not being reflected in the resource consent process. The assumption in Section 93 that all applications will be notified unless they fall into the exemption criteria of Section 94 may no longer be relevant. There have also been complaints of "professional objectors" who lodge objections and request a hearing on applications which have been publicly notified, who then begin negotiating to withdraw their objection in exchange for a financial sum. There are also some cases where environmental groups have had costs awarded against them for challenging consent approvals.

I suggest there will be further changes to the RMA in the areas of notification of consent applications and it is possible that an objector may be required to prove some status in relation to the consent before they can lodge a valid objection. In non notified consents the determination of who are the effected persons will become much more important. While consent authorities have an almost unchallengeable right to decide on the effected persons they may prefer (or be required) to contract this decision out to a third party who would inspect the site. The current practice for most councils is to make the decision from the office based on plans.

2. The benefits of tradeable economic instruments are compelling and given the current economic environment and the "free market" emphasis of successive governments, it is in my opinion only a matter of time until the appropriate frameworks are developed. These framework issues are many and include establishing sufficiently competitive markets, devising institutional structures that minimise

transaction costs, and defining and determining with accuracy the resource which is the subject of the instrument. None of these can be done quickly but there are some resources which are well suited and these are likely to be the first to be given a market structure; water permits in the same catchment. It is the responsibility of valuers (and other professionals) to become conversant with the economic theory and legal nature of economic instruments as it is only a matter of time before we are called upon to play our role in that market place.

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