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Committee Policy, Finance and Strategy
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Outcomes of the 2005 Consent Review

1. Purpose

To report on the key outcomes of the Consents Review and to seek a decision from the Committee in relation to the use and payment of Iwi commissioners, the ongoing relevance of the 'commissioners list', and the process for the appointment of commissioners.

2. Significance of the decision

The matters for decision in this report do not trigger the significance policy of the Council or otherwise trigger section 76(3)(b) of the Local Government Act 2002.

3. Background

In February 2004, Council requested a review of some of our consent processing practices and procedures.

The Review was initiated for two key reasons. First, the Council was criticised in an Environment Court decision (the *Barton*¹ decision, December 2003) around our use of an Iwi Commissioner, and the associated cost implications to the applicant, in a case that seemingly had no implications for Maori. Secondly, there was also some political discomfort that resource consents were costing applicants too much, and that some aspects of the process were not as efficient as they might be.

The Review incorporated staff involved in the consent process from both the Wairarapa and Wellington offices, and the Council Secretariat. The outcomes of this Review were to have been finalised some time ago. However, part way through the process, the Government announced a review of the Resource Management Act (RMA), focussing on ways to improve the quality of decisions and processes. It was recognised that the RMA review could result

¹ Barton Wellington Regional Council EC.W81/03

in changes that would impact on the way in which we process consents, and, therefore, also on a substantive part of the Consents Review itself.

The RMA amendment programme has now gone through a public consultation and parliamentary process with the resulting *Resource Management Amendment Act 2005* being passed under urgency by Parliament on 3 August 2005. Most of the provisions contained in the amendments came into effect on 10 August 2005.

The completion of the RMA amendment process has now given us the certainty to allow the Consent Review to be completed, and to be reported back to this Committee.

4. Comment

A copy of the Consents Review will be made available in the Councillors lounge.

In developing the scope of the Consents Review, it was recognised that our consent processing and compliance monitoring practice and procedures are set down, and well established, in our operational manuals, namely:

- Consent procedures manual
- Compliance monitoring procedures manual
- Incident response and investigation manual

These manuals rule our everyday work. They are continually updated and refined to ensure we are consistent with best practice and meet all legislative requirements. It was not the intention of the Review to look at these processes; rather, the Consents Review was focussed on providing a thorough assessment of practices and procedures specifically related to the notified consent process. On this basis, the review team assessed the notified consent process on a step-by-step basis, assessing our legal requirements and our current practices, and recommending changes where required.

In reporting back to this Committee, we have broken down the outcomes of the consent review into two fundamental areas. The first of these areas relates to practices and processes around the way in which we manage the consent process. These are the 'day-to-day' practices of how we work, and rely on Management decision and discretion to ensure that they are efficient and effective. The second area is in relation to broader matters of governance regarding Iwi appointees and the use and appointment of commissioners. We require direction from this Committee in relation to these matters of governance. These issues are discussed in more detail below.

‘Management’ issues

When addressing each component of the notified consent process, the following issues were addressed up to the stage where a consent hearing is held:

- Provision of pre-application advice;
- Assessment of applications;
- Advertising applications;
- Making the decision to notify or not; and
- Consideration of submissions.

The Review concluded that there is no need to change current practices on the basis that they continue to provide a high level of customer service, they are efficient and statutorily correct, and that they result in fair and reasonable costs to the applicant. However, some refinements to these processes are required as a result of the 2005 RMA Amendment, such as those around s92 requests for further information. These will be incorporated into our already existing manuals.

In relation to charging for council officer attendance at a hearing, minor changes resulted. While we typically have two officers attending a hearing (one is the person who has written the officer’s report, and the other a ‘buddy’ or ‘decision writer’), it was agreed that the applicant should only pay for the time of one of these officers. This conclusion was reached on the basis that the second officer is only there because of the Council’s wish to provide a transparent and efficient process, and it is not absolutely necessary for that officer to write the decision. For instance, Councillors could prepare the decisions themselves. Charges for only one officer will reduce the cost to the applicant.

In relation to issues following a formal hearing, the matters below were considered:

- The preparation of the decision;
- Distribution of the decision;
- Processes where no formal hearing is required due to reaching a negotiated outcome; and
- Charging and invoicing.

No changes to current practices in relation to any of these issues resulted from the Review.

‘Governance’ Issues

A number of recommendations, broadly surrounding the formal hearing process, have been made as an outcome of the Review. These relate predominantly to issues surrounding representation and remuneration, and impact on either formal delegation decisions or remuneration considerations. Areas in which we seek direction from this Committee are detailed more fully below.

Use of Iwi ‘Commissioners’

Greater Wellington has for some time promoted power sharing with local Iwi by providing a mechanism for them to be part of the decision making process for notified consents. In March 2002, the Council agreed to an action plan to strengthen its relationship with tangata whenua, with section 3.6 of this plan stating that “*the Council will continue to use Maori commissioners on resource management hearing committees where this is appropriate*”. This formally confirmed the Council’s ongoing commitment to the principles of power sharing.

However, the Review found that using the terminology Iwi commissioners has caused a degree of confusion in relation to both the purpose of their role, and in regard to their remuneration when compared to independent Commissioners. The Review recommends that they be called ‘Iwi appointees’ to alleviate some of this confusion.

For ease of reference, we refer to Iwi appointees for the rest of this report. We also note that in practice, we have already begun to use the terminology Iwi appointees. This is in part due to issues surrounding remuneration (discussed further on the following page), and in part due to the delay in the recommendations of the Review being formally reported as a result of the 2005 RMA Amendment process.

Unlike independent commissioners whom we appoint from time to time, Iwi appointees are *principally* appointed to reflect the desire to promote power sharing. This is certainly not to say that Iwi appointees do not bring their own particular areas of expertise to hearing proceedings. However, the primary reason to use an Iwi appointee is not to address a lack of technical expertise (other than cultural), as is specifically the case when independent commissioners are appointed.

We have always attempted to include an Iwi appointee on all hearing panels. However, in practice, this has not always been possible as in some instances we simply have not been able to find an available Iwi appointee, either through unavailability or conflict of interest. For instance, in Wellington in the last financial year, Iwi appointees sat on 6 of the 11 formal consent hearings held. However, this not necessarily problematic, as the Council resolution of March 2002 clearly provided for a hearing committee **not** to include an Iwi appointee through the wording referring to appointments only “*where this is appropriate*”.

There is, however, a broader question of whether or not there are enough Iwi appointees available for use on Council hearings. Currently there are five Iwi appointees with delegated authority to sit on a hearings panel. These Iwi appointees have been recommended by Ara Tahi and given delegated authority by Council to hear and decide on consent applications.

Given issues we are experiencing in relation to finding available Iwi appointees, it may be appropriate at this stage for the Committee to recommend to Ara Tahi that further nominations be sought.

Cost associated with the use of Iwi appointees

As noted, our 'default' position is to look to use an Iwi appointee for all consent hearings, unless there is a potential conflict of interest or where one is not available. As the inclusion of an Iwi appointee is a result of Council's desire for power sharing with Iwi, and given the ramifications of the 'Barton' decision, the Review recommends that Council pays for all costs associated with the use of Iwi appointees on a hearing panel, rather than the applicant.

In practice, we have been tending to absorb the cost of Iwi appointees, as per the Review's recommendation. This is because we considered the findings of the Barton decision exposed the Council to a high degree of risk if we continued to pass these costs onto the applicant.

Remuneration of Iwi appointees

The payment of Iwi appointees has been an area of inconsistency and uncertainty over the last few years.

Due to the historical confusion surrounding the use of Iwi 'commissioners', payment has been typically made up to the level paid to independent commissioners, which is up to \$120 per hour.

However, this is considered to be inconsistent with Council policy given that Council has supported the use of Iwi appointees principally to promote power sharing within the region, rather than to provide for specific technical expertise. There is certainly no legal requirement to include Iwi appointees on a hearing panel. Similarities can be seen in cases where appointed members to the Environment Committee, or Rural Services and Wairarapa Committee, sit on a hearing panel. In these instances, appointed members sit on a hearing panel by virtue of being appointed to a Council committee, not because of their technical expertise. However, appointed members are paid at the same rate as Councillors.

The Review recommends that Iwi appointees be paid at the same rate and on the same terms as Councillors and appointed members, that is, at a rate of \$60 per hour or part thereof. This would ensure consistency in payment between Councillors, appointed members and Iwi appointees, and would recognise the differences between these hearing panel members and independent commissioners.

Commissioners list

From time to time, we require the use of independent commissioners to make decisions on behalf of the Council. While our first preference is to always use Councillors, commissioners are appointed where:

- A real or perceived conflict of interest exists;
- Specific technical knowledge is required; or
- Where the Council itself is the applicant or has made a submission on an application to be heard jointly with a Territorial Authority.

Commissioners must first be given delegated authority to act on behalf of the Council, and then must be appointed to specific hearings. This is a two stage process that requires the involvement of a Committee to delegate authority to commissioners to act on behalf of the Council, and then the Committee Chairperson to appoint the commissioner to sit on a particular hearing panel.

In an attempt to streamline the appointment of commissioners, and to increase our pool of commissioners, the Wellington office established a 'commissioners list' which was approved by Council in 2002. This list includes about 30 people who satisfied a set of selection criteria before being given delegated authority to act as commissioners. This list was due to be reviewed in July 2005. In the Wairarapa, a commissioners list was established in 1998 which has not been reviewed since and only has about five people on it.

In practice, the Commissioners list has been of limited value. There are two separate lists, and despite having over 35 people altogether, we tend to consistently use the same people when we need commissioners. Given the limited number of times we actually have applications that need to be heard by Commissioners (only about 10-15 % of all notified applications), it is unlikely that we would need to delve more deeply into the existing commissioners list to find suitable people to act for us. Furthermore, where we do need specialist expertise, we have often had to look outside the existing list to obtain these skills. This then requires an individual delegation, which negates any benefits in terms of ease of appointment which the list was meant to provide. In some cases, we have even had to call an extraordinary Committee meeting to delegate authority to Commissioners.

On the basis of the issues raised above, the Review recommends the commissioners list be discontinued rather than reviewed. Those currently on the list would be advised of this decision, and we could simply retain their information and details for future reference if required

Appointment of commissioners

In the absence of a 'commissioners list', the Review further recommends that the appointment of commissioners to an individual hearing be decided on a case-by-case basis, and that the Chairperson of the Environment Committee

and the Rural Services and Wairarapa Committee have the delegated authority to both:

- Appoint appropriately qualified people to act as a commissioner on behalf of the council (a delegation currently held by the Environment Committee and Rural Services and Wairarapa Committee as a whole); and
- Appoint those already with the delegated authority to act as a commissioner to a particular resource consent hearing (a delegation already currently held by the Chairpersons of the Committees).

The benefits of the approach outlined above would mean that the appointments process is efficient and streamlined. The recommended approach also eliminates the unnecessary administrative burden of maintaining a redundant commissioners list.

Summary

In summary, the 2005 Consents Review provided useful validation of the majority of the management systems and procedures currently already in place in relation to how we deal with the notified consent process.

The 2005 RMA Amendment Act has resulted in a number of procedural changes that will need to be reflected in our procedures manuals, but have not resulted in a significant change to the way in which we manage the resource consent process.

There are some governance issues in relation to the use and remuneration of Iwi appointees that have been highlighted as a result of the Review. Also highlighted has been the need to reassess how we use and appoint commissioners. These issues are the subject of the recommendations below.

5. Communication

No further communication is necessary.

6. Recommendations

That the Committee recommends that Council:

1. ***Receives*** the report.
2. ***Agrees*** to use the terminology *Iwi appointees* rather than *Iwi Commissioners*.
3. ***Requests*** Ara Tahi to make further recommendations for Iwi appointees.
4. ***Agrees*** that the Council should cover all costs associated with Iwi appointees sitting on resource consent hearing panels.
5. ***Agrees*** that Iwi appointees will be paid \$60.00 per hour (or part thereof) when sitting on resource consent hearing panels.

6. *Agrees that the use of the commissioners lists be discontinued rather than reviewed, and that commissioners to be used on resource consent hearing panels be appointed on a case-by-case basis.*
7. *Agrees to delegate to the Chairpersons of both the Environment Committee and the Rural Services and Wairarapa Committee the ability to appoint appropriately qualified people to act as a commissioner on behalf of the Council.*

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