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FUTURE NAPIER COMMITTEE

Open Attachments Under Separate Cover

Meeting Date: Thursday 22 October 2020

Time: Following the Sustainable Napier Committee

Venue: Large Exhibition Hall
War Memorial
Marine Parade
Napier

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Executive Summary

Napier City Council (NCC) has engaged Strategy Planning (MWT) Limited to review the process for the appointment of Hearing Commissioner's to hear and determine resource consent applications. The purpose of this review is to assess the current practice against best practice and to recommend any necessary changes to ensure a robust process is in place that is not contrary to the relevant provisions of the Resource Management Act (RMA) and eliminates any undue risk.

The review has considered key reference material and NCC's existing practice and the practice of several other local authorities. The review has also considered the views of the Hearings Committee Chairperson, NCC's Director City Strategy and Team Leader Planning and Compliance and has drawn from the authors 20 years of experience in the resource management and planning profession. The review has found a key step to be missing with the appointment of Hearing Commissioners and has recommended a revised process to ensure that due consideration of best practice guidance criteria is undertaken and documented when appointing Hearing Commissioners.

Having completed the review it is recommended that amendments be made to the Hearings Committee Terms of Reference to include specific guidance criteria when considering the appointment of Hearing Commissioner's, and the development of a specific process whereby the recommendation by the Planning Team is documented alongside the decision being made by the Hearing Committee.

Review Methodology

The methodology followed in undertaking this review is as follows:

1. Discussion with key representatives of NCC involved with the appointment of Hearing Commissioners.
2. A review of Council's delegations and policies related to the use of Commissioners for resource consent hearings.
3. Reviewing the MfE Making Good Decisions manual and the Quality Planning website to consider the most up to date guidance material and best practice.
4. Drawing on the authors own experience as an Independent Commissioner and as an officer of Council recommending the appointment of Hearing Commissioners.
5. Reporting back draft findings to Council officers.
6. Confirmation of final report.

Processes not included as part of the Review

This review process has not included and therefore should not be used for the following processes:

- The setting of delegations and/or the appointment of Hearing Commissioners for the development of policy or undertaking District Plan reviews.
- The setting of delegations and/or development of a process for the consideration of Tenders or any other procurement processes.

Relevant Reference Material

The following reference material has been considered as part of this review:

- NCC's Planning Team non-financial RMA delegations.
- NCC's Local Governance Statement 2019-2020 which sets out the "*Guide for the Community on Council processes*" and includes the current Terms of Reference (TOR) for the NCC Hearings Committee
- Ministry for the Environment's Making Good Decisions Programme and Manual.
- The Quality Planning Website Manual titled "*Plan Components and Consent Support – The Use of Commissioners 2017*." A copy of this document is provided in **Annex A** to this report.
- Relevant sections of the RMA.

Background

NCC has a set of regulatory functions that include the processing of resource consent applications, some of which are notified or limited notified and require being heard by Hearing Commissioners. At present there is no NCC set or defined criteria/policy to support the appointment of Hearing Commissioners. Essentially a conversation is had between the Hearing Committee Chairperson and the Director City Strategy to discuss the merits of the consent application and the preferred makeup of the Hearing Panel.

This review has therefore been commissioned to consider whether current practice is in line with best practice, thereby ensuring all decisions to appoint Hearing Commissioners are transparent and robust. Specifically, there is a desire to:

- Set a clearly understood and transparent process for who the decision sits with when appointing Hearing Commissioners.
- Ensure the process is robust and of sound legal standing.
- Update the Hearings Committee ToR to reflect any change in process as a result of this review.
- Strike a balance with using Councillors as Hearing Commissioners to grow their capability and share in local decision making, while retaining the use of Independent Commissioners where warranted.
- Establish a set of criteria to be considered for every appointment that guides officers' recommendation and the final decision.

Role of a Commissioner

Commissioners are delegated responsibility for carrying out statutory decision-making duties on a Council's behalf or as an independent adviser to the Council in the making of those statutory decisions. It is vital that Commissioners provide sound advice and /or make sound decisions without any conflicts of interest that could open the path for challenges.¹ Further guidance is provided in page 2 of the Quality Planning Website Manual, however in summary:

- 1) Commissioners may be generally classified as:
 - internal Commissioners – who are appointed from within a council
 - independent Commissioners – who are not a member of the Council i.e. appointed

¹ The Quality Planning Website Manual titled "*Plan Components and Consent Support – The Use of Commissioners 2017*", Pg 1

from outside the elected members or staff of a Council.

- 2) Commissioners are typically used for one or more of the following:
 - making decisions on proposed policy statements, proposed plans, variations or plan changes (other than approval)
 - making decisions on resource consent applications and recommendations on notices of requirement
 - making decisions on the notification or non-notification of resource consents
 - making decisions in regard to the service of an application
 - making decisions on plan changes or variations and on submissions to plan changes (other than declaring a plan change operative)
 - reviewing resource consent conditions
 - providing advice on technical or procedural matters in assisting councils to make decisions on particular applications.
- 3) Commissioners cannot:
 - approve a proposed policy statement or plan; or
 - delegate any powers or functions delegated to them.

These powers are given to a Council only.

Statutory Considerations

There are a number of sections in the RMA relevant to this review. These sections are set out below with some commentary provided as to their intent and relationship with the appointment of Hearing Commissioners:

Section 34A - Delegation of powers and functions to employees and other persons

- (1) A local authority may delegate to an employee, or hearings commissioner appointed by the local authority (who may or may not be a member of the local authority), any functions, powers, or duties under this Act except the following:
 - (a) the approval of a proposed policy statement or plan under clause 17 of Schedule 1;
 - (b) this power of delegation.
- (1A) If a local authority is considering appointing 1 or more hearings commissioners to exercise a delegated power to conduct a hearing under Part 1 or 5 of Schedule 1,—
 - (a) the local authority must consult tangata whenua through relevant iwi authorities on whether it is appropriate to appoint a commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū; and
 - (b) if the local authority considers it appropriate, it must appoint at least 1 commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū, in consultation with relevant iwi authorities.
- (2) A local authority may delegate to any other person any functions, powers, or duties under this Act except the following:
 - (a) the powers in subsection (1)(a) and (b);
 - (b) the decision on an application for a resource consent;
 - (c) the making of a recommendation on a requirement for a designation.
- (3) [Repealed]
- (4) Section 34(7), (8), (9), and (10) applies to a delegation under this section.

- (5) Subsection (1) or subsection (2) does not prevent a local authority delegating to any person the power to do anything before a final decision on a matter referred to in those subsections

Section 34A sets out that a local authority can delegate its functions and powers to a Hearing Commissioner. Section 34A(2) clearly prohibits a local authority from delegating the powers listed in subsection 2 (a)-(c) to any other person. Essentially this makes it clear that the delegation of powers under this Act, including those relating to the hearing and determination of a resource consent, are limited to staff or a Hearings Commissioner.

Section 398 - Persons who may be given hearing authority

- (1) This section applies when a local authority wants to apply any of sections 33, 34, and section 34A to give authority to 1 person or a group of persons to conduct a hearing on—
- (a) an application for a resource consent; or
 - (b) a notice of requirement given under section 168 or section 189; or
 - (c) a request under clause 21(1) of Schedule 1 for a change to be made to a plan; or
 - (d) a review of a resource consent; or
 - (e) an application to change or cancel a condition of a resource consent; or
 - (f) a proposed policy statement or plan that is notified under clause 5 of Schedule 1 or given limited notification under clause 5A of that schedule; or
 - (g) any matter under section 357C.
- (2) If the local authority wants to give authority to 1 person, it may do so only if the person is accredited.
- (3) If the local authority wants to give authority to a group of persons that has a chairperson, it may do so only if—
- (a) all persons in the group, including the chairperson, are accredited; or
 - (b) the chairperson is accredited and there are exceptional circumstances that do not provide the time or opportunity to ensure that all persons in the group are accredited.
- (4) If the local authority wants to give authority to a group of persons that does not have a chairperson, it may do so only if—
- (a) all the persons in the group are accredited; or
 - (b) over half of all the persons in the group are accredited and there are exceptional circumstances that do not provide the time or opportunity to ensure that all persons in the group are accredited.

The intention of this section is clear in that all decision makers must be accredited to hear and consider applications unless exceptional circumstances exist. As such, the desire to have greater Councillor representation hearing and determining consent applications will require those Councillors to complete the accreditation requirements. Further guidance is provided in the Quality Planning Website Manual titled "Plan Components and Consent Support – The Use of Commissioners 2017", Pgs 11-13.

Section 100A - Hearing by commissioner if requested by applicant or submitter

- (1) This section applies in relation to an application for a resource consent if—
- (a) the application is notified; and
 - (b) in accordance with section 100 a hearing of the application is to be held.
- (2) The applicant, or a person who makes a submission on the application, may request in writing that a local authority delegate its functions, powers, and duties required to hear and decide the application in accordance with subsection (4).
- (3) The request must be made no later than 5 working days after the closing date for submissions on the application.

- (4) *If the local authority receives a request under subsection (2), it must delegate, under section 34A(1), its functions, powers, and duties required to hear and decide the application to 1 or more hearings commissioners who are not members of the local authority.*

Section 100A of the RMA makes a distinction between elected members and non-elected members, setting out that elected members of the council cannot be independent Commissioners. Section 100A(4) requires councils to delegate its functions, duties and powers to hear and decide on an application to one or more Hearing Commissioners who are not members of the council when requested by an applicant, submitter or both. The intent is that this would be an exclusive delegation to independent Commissioners only (i.e. not a mixed panel also containing elected members or staff of council).²

Further guidance on the appointment of Commissioners when requested by an applicant is provided in the Quality Planning Website Manual titled *“Plan Components and Consent Support – The Use of Commissioners 2017, Pg 5-6.*

Current Appointment Process

The Hearings Committee is currently made up of five elected members with a Chairperson and deputy Chairperson. There is no maximum number of members and there is a minimum of three members for a Quorum and the meeting frequency is as required. As set out in the ToR, their role is:

“To conduct fair and effective Hearings and make determinations on a range of the Council's quasi-judicial functions under legislation (and other matters as referred to the Committee). In practice, some matters are referred to Commissioners appointed under the Resource Management Act.”

With respect to resource consents, the Terms of Reference clearly sets out that the Committee is required to hear and determine notified resource consent applications and any challenges to conditions of consents. A copy of the ToR is provided in **Annex B** to this report.

Having discussed the current practice of appointing Hearings Commissioners it was found that a general discussion takes place between the Director City Strategy and the Hearings Chairperson, considering all matters such as scale and complexity of the consent application, necessary expertise required (such as traffic, cultural), and any perceived risks such as conflicts of interest. Following this discussion, the Director City Strategy typically makes the decision. If the decision is that the application is to be heard by Councillors, the Hearings Committee Chairperson, in consultation with the Hearings Committee members will make the decision on who will sit on the Hearing Panel.

In recent times Independent Commissioners have mostly been used due to large scale and complex applications, and due to the request for Independent Commissioners by applicants under section 100A of the RMA. While the request for Independent Commissioners essentially takes the decision making process out of the Council's hands (specifically whether a Councillor is able to be appointed), there appears to be little opportunity to improve the capability of Councillors as decision makers unless they are afforded more opportunities due in part to the small number of hearings (typically 1-2 per year), their lack of experience and cost implications.

² The Quality Planning Website Manual titled *“Plan Components and Consent Support – The Use of Commissioners 2017, Pg 2.*

Cost Implications

When using Commissioners to hear applications, these costs are passed onto the applicant. Often Independent Commissioners who are appointed sit alone as they are experienced enough to conduct a hearing themselves. Through using only one Commissioner, only one set of costs are passed onto the applicant. However, the hourly rate of an Independent Commissioner is typically higher than a Councillors.

Where a council employs Independent Commissioners, determining who is responsible for the costs depends on the circumstances of the Commissioner's appointment. Where a Council decides to use Independent Commissioner(s), then the costs are passed onto the applicant in the standard way under s36, albeit potentially up to a maximum hourly rate if specified in a Council's fees and charges schedule. However if Independent Commissioners are requested under s100A, then the following applies (s36(1)(aa)):

- If the applicant makes the request (regardless of whether a submitter also makes a request) the applicant is responsible for all the costs of the hearing and decision.

Should a Council wish to grow the capability of their Councillors as Commissioners, you would typically sit an inexperienced Councillor with one or more experienced Commissioners so as to grow their capability as decision makers while ensuring the process is robust with less risk of judicial challenge or appeal. Taking this approach thereby can incur additional cost to the applicant through using two or three Commissioners, which may not be easily justified.

When a submitter makes a request for an Independent Commissioner then the submitter(s) who have made the request and the applicant are responsible for portions of the costs of the hearing and decision. The applicant must pay for the costs of the hearing and decision as if the request for independent commissioners had not been made (i.e. the council was hearing and deciding the application in the normal way). The submitter(s) pays for any additional costs consequent of the appointment of the independent commissioner. These additional costs are split in equal shares if there is more than one submitter who makes the request for a commissioner. It is fair to say that this example would be rare as a submitter(s) typically would not be wanting to occur additional costs for a situation that they are likely opposed too. However, for completeness this scenario is covered by the Act and generally supports the users pays nature of the of resource consent process. Again, it highlights that there is a process whereby a 3rd party can effectively take the process out of the hands of Councillor Commissioners. Further guidance on when a submitter makes a request for an independent Commissioner is provided in the Quality Planning Website Manual on page 17.

Essentially there are cost implications of either using Independent Commissioners or a panel comprised solely of Councillors. These factors should be weighed up firstly by the Planning Team making the recommendation to appoint Commissioners, and then by the decision maker. A consistent approach, and one that strikes a balance is to sit a Councillor with an Independent Commissioner. When doing so the Councillors costs could be absorbed by the Council as a professional development opportunity.

Best Practice

Having reviewed the reference material and the practice of several other local authorities, it is accepted practice for Councillors to decide who among them will be appointed Commissioner roles. In the interests of good practice, decisions should be guided by the following principles (whether or not they form part of a Council policy or set of guidelines):

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- Elected members or Councillors should have training and experience as chairs or hearing panel members or both and be able to demonstrate fulfilling the accreditation requirements of the RMA by holding a current certificate under the Making Good Decisions programme.
- Councillors nominated to be appointed as Commissioners should have no actual or perceived conflict of interest (refer to Guidance for members of local authorities about the local authorities (Members' Interests) Act 1968).
- Where Councillors or other elected members are regularly called upon to act as Commissioners, they need to be made fully aware of the potential workload involved and be available as required.
- Any appointment of Commissioners and delegation of functions made under s34A of the RMA should be formally recorded as a resolution of the Council. This appointment may be recorded on documentation related to a hearing (such as correspondence and order papers) to ensure that no confusion exists in regard to the authority of those persons to act as Commissioners.
- For the sake of transparency and consistency, Councils should have a clear policy or set of guidelines on the use of independent Commissioners which clearly states what circumstances are considered to warrant the use of a Commissioner, what powers are to be delegated, and what steps are to be followed in the appointment of a Commissioner. Such a policy or set of guidelines may form part of a Council's delegations manual or policy, or may constitute a separate policy.
- Councils should have a list of suitable persons from which they can appoint Commissioners as back-up for occasions when Commissioners who may otherwise have been appointed are not available.
- The skills and experience of Independent Commissioners employed should match the nature, scale and technical complexity of the issues on which a decision is being made.

With respect to the appointment of Independent Commissioners, one or more Independent Commissioners should conduct a hearing when one or more of the following applies:

- The Council is the applicant.
- The organisation (applicant) is one in which the Council has a significant and/or pecuniary interest.
- The project (application) is one in which the Council has a significant and/or pecuniary interest.
- A valid request has been made under the Resource Management Act 1991 for a Commissioner to hear and determine the matter.
- In the view of either the Council or the Chairperson or Deputy Chairperson of the Hearings Committee, the subject of the hearing is highly political and elected members' objectivity in hearing or determining the matter would be compromised due to previous political and community debate.
- In the view of either the Council or the Chairperson or Deputy Chairperson of the Hearings Committee, the highly complex and technical nature of the issues to be addressed in the hearing requires specific expertise (care is needed in this regard, as technical issues should always be discussed at the hearing in a manner that is understandable to the layperson.)
- In the view of either the Council or the Chairperson or Deputy Chairperson of the Hearings Committee, the Hearings Committee has insufficient resources and/or time to hear the matter in a timely manner.

In the interest of transparency, best practice would ensure that these principles or guidelines form part of the decision-making process, so that it is clear (and clearly recorded), that they were considered

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when making the decision. This provides a level of robustness and demonstrates that the Hearings Committee has taken responsibility and ownership of the decision and has clearly followed the adopted practice.

Supporting this process would be the consideration of these same principles and guidelines by the Council officers in making their recommendation. A simple process would be one where the officers have a template they complete with the principles and guidance criteria listed, and an area to make any comments. This could then be appended to a cover letter addressed to the Chairperson of the Hearings Committee setting out their recommendation with supported reasons.

Review Findings

Below is a bulleted summary of the review findings:

- The RMA makes it clear that the power to hear and determine resource consent applications may be delegated to staff or to Hearing Commissioners provided they are accredited to do so (by holding a current Making Good Decisions Accreditation certificate).
- NCC has a ToR setting out that the Hearings Committee is responsible for appointing and delegating powers to Hearings Commissioners to hear and determine resource consent applications.
- There is no clearly documented process or guidance criteria, either within the Hearings Committee ToR, or with Council Officers standard practice, setting out when Independent Commissioners will be appointed.
- There is no clear recorded decision on the appointment of Commissioners, whether independent or internal. The appointment of Independent Commissioners has typically been done by Council officers with no clearly recorded decision or reasons.
- There is a desire by the Hearings Committee Chairperson and Senior Planning staff to have a clearly defined process setting out where the decision to appoint Commissioners falls to protect the integrity of the process, protect the Council from unnecessary risk, and to respect their different roles and responsibilities.
- A clear process needs to be developed whereby the Planning Team makes a formal recommendation to the Hearings Committee Chairperson as to who should hear and determine a resource consent application including documenting the reasons why. This could be as simple as a discussion between the Planning Manager, processing officer and the Hearings Committee Chairperson, followed by a letter which seeks a decision to appoint a one or more Commissioners and documenting the reasons why.

Having considered these findings, the recommended approach is recorded below:

Recommended Approach

- 1) The decision to appoint Hearing Commissioners, whether Independent or Councillors, to hear and determine a resource consent should sit with the Hearings Committee.
- 2) Following the Planning Team's consideration of a resource consent application that requires a hearing (typically between the processing officer and their Manager) a discussion between the Director City Strategy and the Hearings Committee Chairperson should be held which will be used to form the basis of the recommendation to The Hearings Committee.
- 3) The Council develop guidance criteria, based on best practice, setting out when it is appropriate to appoint Hearing Commissioners, including when Independent Commissioners should be used to hear and determine consent applications. The guidance criteria should be

based on the relevant reference material, including the Making Good Decisions Manual and the Quality Planning Website. I have included as **Annex C** to this report recommended guidance criteria based on this reference material.

- 4) The Hearings Committee ToR should be amended to include the guidance criteria and that any decision made by the Hearings Committee to appoint Commissioners be done so having considered those criteria with reference to those criteria recorded in the decision. An alternative would be to have this guidance criteria separate, however in my view that creates an unnecessary risk whereby the committee could choose to not consider that criteria or it was unintentionally overlooked.
- 5) Councils should have a list of suitable persons from which they can appoint Commissioners as back-up for occasions when Commissioners who may otherwise have been appointed are not available.
- 6) Consideration should be given to the approach of having a mixed Hearings Panel consisting of an experienced Independent Commissioner sitting with a Councillor (Commissioner) where the opportunity presents itself. This should be done irrespective of costs with preference being for the Councillors time being absorbed by Council.
- 7) All decisions made by appointed Hearing Commissioners should be made by those Hearings Commissioners. Council staff (other than the Reporting Officer) may be used to assist in the writing but the decision must be that of the decision makers.
- 8) Although Commissioners should generally write their own decision reports, there may be a professional development opportunity for Council staff/accredited Councillor Commissioners to assist in this respect. This could be considered on a case by case basis or under a set policy/guideline.

Annex A

Quality Planning Guidance - The Use of Commissioners 2017



Annex B

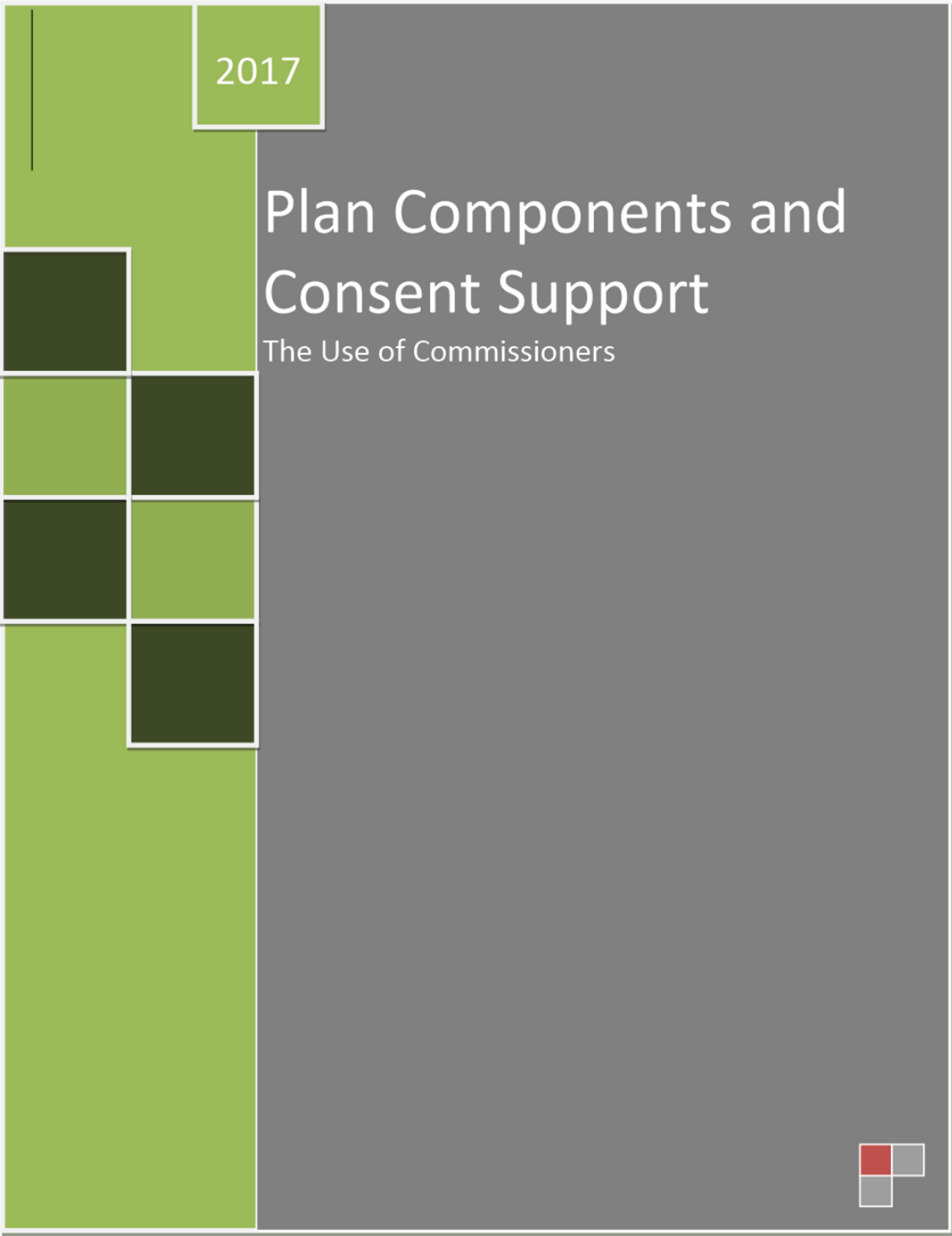
NCC Current Hearings Committee Terms of Reference



Annex C

Guidance Criteria for Delegations to and Assignment of Commissioners







The use of Commissioners

This guidance has been updated to include changes to the RMA as a result of the Resource Legislation Amendment Act 2017 (RLAA17). The final part of the RLAA17 came into effect on 18 October 2017. For more information about the amendments refer to the RLAA17 - Fact Sheets and technical guidance available on the [Ministry's website](#).

Commissioners are delegated responsibility for carrying out statutory decision-making duties on a council's behalf or they as an independent adviser to the council in the making of those statutory decisions. It is vital that commissioners provide sound advice and /or make sound decisions without any conflicts of interest that could open the path for challenges. This guidance note aims to provide best practice guidance to assist councils in appointing commissioners and developing a clear policy for using commissioners as part of the resource consent, plan making, plan change and notice of requirement processes.

This guidance note provides an:

- introduction into the role of a commissioner
- overview of the use of independent commissioners and councillor commissioners
- outline of the skills required of commissioners.

Click on the graphic below to learn more about the use of Commissioners.

Guidance note

What is a Commissioner

Guidance on the Use of Independent Commissioners

Using Councillors as Commissioners

How Many Commissioners

The Skills a Commissioner Requires

The Costs of Commissioners



What is a Commissioner?

A commissioner is a person appointed by a council to carry out statutory decision-making duties on the council's behalf, or to serve as an independent adviser to the council in the making of those statutory decisions.

Commissioners may be generally classified as:

- internal commissioners – who are appointed from within a council
- independent commissioners – who are not a member of the council i.e. appointed from outside the elected members or staff of a council.

Section 100A and s 357AB(2) of the RMA makes a distinction between elected members and non-elected members, setting out that elected members of the council cannot be independent commissioners.

Section 100A(4) requires councils to delegate its functions, duties and powers to hear and decide on an application to one or more hearing commissioners who are not members of the council when requested by an applicant, submitter or both. The intent is that this would be an exclusive delegation to independent commissioners only (i.e. not a mixed panel also containing elected members or staff of council).

Internal commissioners may either be appointed to act alone, or with other commissioners or elected members of the council (councillors and community board members).

A council can appoint anyone to be an independent commissioner, but typically those appointed will have relevant skills and experience for the issue being decided (such as in planning, law, surveying, engineering or science). They may also be former councillors who are appointed for their chairing or hearing experience and expertise.

What decisions can a commissioner make?

Section 34A of the Resource Management Act 1991 (RMA) specifies the functions and powers that can be delegated to council employees or other persons such as commissioners. This section leaves the potential powers of commissioners open, referring instead to those powers and functions not able to be delegated.

Commissioners cannot:

- approve a proposed policy statement or plan; or
- delegate any powers or functions delegated to them.

These powers are given to a council only.

Commissioners can be delegated powers in respect of:

- making decisions on proposed policy statements, proposed plans, variations or plan changes (other than approval)
- making decisions on resource consent applications and recommendations on notices of requirement
- making decisions on the notification or non-notification of resource consents
- making decisions in regard to the service of an application



THE RMA QUALITY PLANNING RESOURCE

- making decisions on plan changes or variations and on submissions to plan changes (other than declaring a plan change operative)
- reviewing resource consent conditions
- providing advice on technical or procedural matters in assisting councils to make decisions on particular applications.

Commissioners are able to have any of the powers delegated to them that are delegated to council staff. The following list outlines which delegations can be held by council staff.

RMA	Summary of function delegated
Section 10	Power to determine that existing use rights apply to a proposal
Section 36AAA	Require additional charges
Section 36AAB(1)	Remission of charges on application
Section 36AA	Discount on an administrative charge
Section 37	Power to waive or extend time periods
Section 38	Authorisation of enforcement officers
Section 87CA	Decisions in respect of direct referral
Section 88	Power to determine on initial receipt of an application, the adequacy of an application and whether or not it should be accepted for further processing as a complete and valid application
Section 91	Deferral of application pending additional applications
Section 92	Request further information
Section 95A	Power to determine whether to publicly notify an application for resource consent.
Section 95B	Power to determine whether to limited notify an application.
Section 95C	Notification of consent application after request for further information or report.



THE RMA QUALITY PLANNING RESOURCE

Section 95D	Power to decide if adverse effects are more than minor
Section 95E	Power to decide who is an affected person
Section 95E(3)(b)	Power to decide the circumstances when it will be unreasonable to seek written approval of affected persons
Section 98	To provide applicants for resource consents with a list of submissions received
Section 99	Power to initiate pre-hearing meetings
Section 100	Power to determine that a formal hearing is not needed
Section 101	Power to fix hearing dates
Section 102	Power to make a decision to establish a joint hearing provided that prior consultation takes place with the chairperson
Section 103	Power to decide and arrange the holding of combined hearings where two or more applications are made to the council
Section 104 Section 105 Section 107 Section 108	To make decisions on applications for resource consents, including determining consent conditions.
Section 109	Power to decide whether any work the subject of a bond or covenant is completed satisfactorily
Section 113 Section 114	To serve on parties copies of decisions on applications for resource consents and arrange public notification of such decisions where appropriate
Section 125	Power to extend the period in which a resource consent lapses
Section 126	Power to cancel un-exercised consents
Section 127 (1)	Power to change or cancel a consent condition



THE RMA QUALITY PLANNING RESOURCE

Section 127 (3)	Power to decide the circumstances when it will be unreasonable to seek written approval of other persons to the variation or cancellation of conditions
Section 128-132	Power to review consent conditions
Section 139	Power to issue certificates of compliance
Section 221	Power to issue a consent notice
Section 222	Power to issue a completion certificate

Guidance on the Use of Independent Commissioners**Circumstances when an independent commissioner must be used**Decisions on notified resource consents

Section 100A allows an applicant, and/or a submitter to a notified resource consent application, to request that the council appoints at least one independent commissioner to hear and decide on the application. This also applies to notified notices of requirement for a designation and heritage orders, but excludes applications for restricted coastal activities.

The request for an independent commissioner must be made in writing any time up to five working days after submissions close.

If such a request is received, then the council must delegate its functions, powers and duties to hear and decide the application to one or more independent commissioners. The council has the discretion to decide on the number of commissioners appointed. This will largely depend on the complexity of the application and the required expertise.

Councils also have the discretion to decide on who they employ as an independent commissioner, provided they meet the accreditation requirements of s39B of the RMA and are not a member (elected representative or staff) of the council. The intent of s100A is that the council delegation would be exclusive to independent commissioners.

Parties who request a commissioner have no right of objection to another party's request for a commissioner or to the council's choice of commissioner.

Objections to decision of council officer on resource consent

Section 357AB allows an applicant who is objecting to a decision by a council officer on a resource consent application (or applications under s127, s128 or s221) to request that their objection be heard by an independent commissioner.

The objection, along with the request for an independent commissioner must be made in writing, no later than 15 working days after the decision on the application is issued. If such a request is received, then the council must delegate its functions, powers and duties to consider and decide on the objection to one or more commissioners appointed



THE RMA QUALITY PLANNING RESOURCE

(who are not members of the council, and must be accredited (under s39B) unless there are special circumstances).

It should be noted that s357CA enables commissioners to call for further information or commission a report on any matter raised in the objection if that will help them make a decision on the objection.

Costs of using an independent commissioner falls on the person making the objection (the applicant).

Other circumstances where an independent commissioner may be used

The decision to use internal commissioners or independent commissioners (or a combination) will often involve the following considerations:

- perceived or actual conflicts of interest or perceptions of bias
- the need for specialist expertise not available within a council in cases where issues surrounding an application are complex or of a highly technical nature
- whether the application has substantive implications for the policy of a council such that elected representative input may be considered necessary or desirable
- the likely expense of using independent commissioners compared to the scale of the issue (particularly where an independent commissioner would have to be brought in from outside the district or region)
- the availability of independent commissioners at the time a hearing is required
- the willingness of elected members to delegate decision-making powers and functions to independent commissioners, when not already requested by the applicant and/or submitter(s) under s100A.

While consideration must be given to all these factors, it is generally accepted to be good practice to use independent commissioners in place of internal commissioners when:

- the council, or an individual elected representative, may otherwise be perceived to have an actual or perceived conflict of interest (refer to [Guidance for members of local authorities about the local authorities \(Members' Interests\) Act 1968](#))
- determining objections under s357 relating to council charges
- matters are outside the technical knowledge or experience of elected members or the council's own staff
- one or more committee members may have, or may be perceived to have, a closed mind on the proposal (such as when publicly stating opinions on the merits of a proposal in the media or at public meetings before it is heard)
- combined or joint hearings under s102 where a neutral chairperson or adviser is considered desirable.

Some councils also employ independent commissioners to make decisions on applications that are politically contentious. This removes the political pressures that may otherwise be placed on councillors at key times (such as in the lead-up to election).

Independent commissioners may also be employed to:

- assist council in carrying out their duties during times when councillors are not available due to conflicting meeting times, or heavy workloads (such as during annual plan hearings)



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- to assist councils following local body elections, when there has been a considerable turnover of councillors, and hearing committees are perhaps lacking in skills and expertise, or cannot otherwise field a sufficient proportion of accredited hearing panel members hear applications, plan changes or carry out other functions of councillors immediately after local authority elections when committees who may normally hear resource consent applications and plan changes have yet to be appointed
- to cover lengthy hearings which councillors would be unable to attend on a continuous basis due to business, financial, family or other limitations.

Use of Māori commissioners

Plan or Policy Statement Hearings (Standard Planning Process – Part 1 Schedule 1)

Section 34A(1A) requires councils when appointing commissioners to conduct hearings under Schedule 1, to consult iwi authorities about whether it is appropriate to appoint a commissioner who understands tikanga Māori and the perspectives of local iwi or hapū. If the council considers it appropriate, it must appoint at least one commissioner who understands these matters, in consultation with the relevant iwi authorities.

Plan or Policy Statement (Collaborative Planning Process)

At least one member of a collaborative group must be appointed by iwi authorities to represent the views of tangata whenua (Schedule 1, Clause 40(1)). At least one member of a review panel must have understanding of tikanga Māori and the perspectives of tangata whenua, and be appointed after consultation with iwi authorities (Schedule 1, clause 64(5)).

Plan or Policy Statement Hearings (Streamlined Planning Process)

If the Minister directs a hearing, the relevant planning process requirements under clause 77(5)(c) may apply, which include requirements for hearing panels which mirror those set out in Section 34A(1A) (see above re: Standard Planning Process). Regard must be had to any Mana Whakahono a Rohe (iwi participation arrangement) or iwi participation legislation, or treaty settlement obligation, and any process must be consistent with these obligations.

Resource consent applications

Where formal relationships and mechanisms between local authorities and iwi, or between the Crown and iwi, confer particular resource management functions and responsibilities on iwi, these must be adhered to. For example, Mana Whakahono a Rohe – iwi participation arrangements, memoranda of understanding, co-management agreements.

There may be circumstances when Māori commissioners should be used, such as for applications involving:

- any water based issue (i.e. involving rivers, lakes, wetlands, groundwater, estuaries, harbours and coasts) such as:
 - wastewater discharges to waterbodies
 - taking of water
 - inter-catchment water diversions
 - large scale construction in waterways and the coastal marine area
 - landfill developments



- use of geothermal resources
- developments near taiāpure and mātaītai
- developments that may impact on iconic waterbodies (e.g. Taupō-nui-a-Tia (Lake Taupo), Waikato River, Whanganui River and Te Waihora (Lake Ellesmere))
- proposals that are likely to affect marae, papakāinga, kōhanga reo, kura kaupapa Māori or other Māori institutions.
- proposals that may affect urupā (burial grounds), wāhi tapu (sacred sites), wāhi tupuna (ancestral sites) that are documented and/or known only to Māori (sometimes known as 'silent files'),
- any use or development that may affect mahinga kai, (culturally significant resources used in medicine, weaving, carving, art, ornamentation or other customary usages)
- activities or issues likely to affect Māori ownership or management of resources including Māori land, reserves, statutory acknowledgments, mataitai and taiāpure.
- development in the vicinity of iconic natural features such as maunga and awa.
- proposals associated with specific activities or issues that are identified in iwi management plans.
- proposals based on Māori values, customary usages, practices and beliefs, for example:
 - facilities associated with marae-based education and training in Māori language, arts and culture.
 - wānanga (e.g. Te Wānanga o Aotearoa, Te Wānanga o Raukawa, Te Whare Wānanga o Awanuiarangi)
 - use of land/sites and activities on the surface of water associated with the expression of Māori culture, such as:
 - performing arts (e.g. kapa haka)
 - sports events (e.g. waka ama)
 - festivals, exhibitions and celebrations (e.g. Te Hui Ahurei a Tuhoe, Parihaka Peace Festival, Paihia Matariki Festival)
 - tourism developments for example:
 - restored/model Māori villages
 - Te Wairoa buried village, Whakarewarewa thermal village, Tamaki Māori Village, Mitai Māori Village.
 - Māori art and craft centres
 - New Zealand Arts and Crafts Institute, art galleries
 - operations or venues offering Māori cultural experiences
 - Te Puia heritage park, Whakarewarewa geothermal valley, Whanganui River waka tours, marae-based tourism
- special reserves for culturally significant resources, for example:
 - tōtara trees - carving, construction, medicinal



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- kahikatea (white pine) – construction
- kōwhai tree - medicinal, construction
- harakeke (flax) - textiles, construction, medicinal
- tī kōuka (cabbage tree) - textiles, medicinal
- pīngao (sand sedge) - textiles, ornamentation
- remnant karaka groves – food
- hīnau trees – food
- kawakawa (pepper tree) – medicinal
- kōkōwai (red orche) - ornamentation, construction
- mānuka (tea tree) - tools, construction, medicinal
- pounamu (greenstone) - tools, ornaments
- raupō (bulrush) - construction, textiles
- tūhua (argillite) – tools
- matā (obsidian) – tools
- tītī (sooty shearwater or mutton bird) – food
- kererū (wood pigeon) – food
- tuna (freshwater eel) – food
- korokoro (lamprey) – food
- tohorā (whales) - tools, food, ornamentation

Note: Pounamu resources are owned and controlled by Ngāi Tahu.

- Proposals in communities that have a high Māori population and that identify strongly with Māori cultural and spiritual values e.g. papakainga and marae-based communities, and other special communities and locations) including:
 - Rātana (Rātana Church-based township)
 - Ruatahuna (Ngāi Tūhoe/Ringatū)
 - Parihaka (Whiti & Tohu movement)
 - Ngāruawāhia (Kīngitanga)
 - Whakarewarewa (traditional & natural heritage)
 - Waitangi (Treat of Waitangi)
- Proposals likely to be of significant interest to, and attract submissions from, Māori.

Good practice in the use of independent commissioners

- For the sake of transparency and consistency, councils should have a clear policy or set of guidelines on the use of independent commissioners which clearly states what circumstances are considered to warrant the use of a commissioner, what powers are to be delegated, and what steps are to be followed in the appointment of a commissioner. Such a policy or set of guidelines may form part of a council's delegations manual or policy, or may constitute a separate policy.



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- Councils should have a list of suitable persons from which they can appoint commissioners as back-up for occasions when commissioners who may otherwise have been appointed are not available.
- The skills and experience of independent commissioners employed should match the nature, scale and technical complexity of the issues on which a decision is being made.
- The Ministry for the Environment maintains a [list of independent commissioners](#) and councillors (including their fields of expertise and areas of practice) who have achieved certification under the [Making Good Decisions programme](#).
- A check of the past experience of candidates for independent commissioner work can be used to ensure that they have the capability to undertake the task for which they are being considered.
- Ensure the accreditation requirements of the RMA are taken into account.
- Where independent commissioner(s) are appointed for a hearing, the appointing council should confirm the appointment in writing. Such documentation should specify the powers being delegated, whether the independent commissioner(s) will be sitting alone or as part of a panel (and if part of a panel, their role on it) and details of the anticipated time, date and location of the hearing.
- Where a particular commissioner is being used by a council for the first time, the council may outline the style and detail to be contained in the written decision report, and may supplement any such outline with an example that demonstrates the style desired.
- Ensure that all material which a commissioner will need to make a decision on, is given to the commissioner as far ahead of the hearing (or the task they are to perform) as is possible. Such information should include a copy of the application, the council officer's report, and the plan(s) under which a decision on the application will be made. It is also helpful to provide an indexed copy of any submissions made to the application, and a clear map of the site to which the application relates.
- Where possible, a room separate from where the hearing is to be held, should be made available to commissioners for use in breaks during the hearing. This allows deliberation, avoids unnecessary distractions for the commissioner(s), and removes the ability of a party to try and approach or influence the commissioner(s) during or after the hearing.
- Check with the commissioner(s) if a site visit before or after the hearing is preferred, and if they want staff to assist them in pointing out the relevant features/issues on the site. (Note: some councils ensure that the person accompanying the commissioner is not the reporting officer; this eliminates any possible perception that the reporting officer may take the opportunity to influence the commissioner into favouring the council's recommendations).

Appointing independent commissioners: standing orders, codes of conduct and delegated authority

Elected members or independents appointed as commissioners are not subject to standing orders or other formal committee procedures (because they are not a committee of the council). In any event, the hearing should be conducted without undue formality. From the point of view of applicants or submitters, there should be very little difference between hearings conducted by commissioners and those held by councillors.



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Once the council has settled on the appointment of a commissioner, panel of commissioners or committee, it must ensure that sufficient delegations are given to these people to undertake the hearing and make decisions or recommendations. Appointment and delegation usually occur at the same time, but they are separate steps, and should both be documented.

Councils should ensure that the appointment and delegation of commissioners clearly sets out:

- the identity of the commissioners
- the identity of the chair, or whether the commissioners may elect a chair
- that the commissioners have the power, under s34A of the RMA, to both hear and make decisions on the relevant application and/or submissions or, where relevant, to hear and make recommendations
- whether the commissioners can continue to hear and make a decision if one or more of the commissioners is unable to continue with the hearing
- where necessary, that commissioners may make decisions in relation to preliminary consent processes, such as extensions of time limits, decisions on pre-hearing meetings, etc (in many cases these will not be relevant, as these steps will occur before the appointment of the commissioners)
- that the commissioners have been delegated the powers to exercise any additional power or function under ss41 to 42A of the RMA
- whether the commissioners are expected to deliberate in public or in private.

In delegating its procedural powers at the hearing, the council may wish to consider whether decisions on procedure should be delegated to the chair alone, rather than collectively to the panel of commissioners. Especially where an experienced chair has been appointed, it may be administratively convenient to leave decisions on hearing procedure entirely to the chair; this will also enable the other panel members to focus on the merits of the application.

Independent commissioners are not technically operating under a council's code of conduct. However, they should bear in mind that they represent the public face of the council in undertaking its RMA function. Commissioners must also be aware that they may only act in accordance with the terms of their delegation. Councils should ensure they clearly set out any procedural expectations for hearings conducted by commissioners at the time the commissioners are appointed.

Fulfilling the accreditation requirements of the RMA

There are accreditation requirements that apply when a council gives authority (including under s34A) to one person or a group of persons to conduct a hearing on:

- an application for a resource consent that is notified
- a notice of requirement given under s168 or s189
- a request under clause 21(1) of Schedule 1 for a change to be made to a plan (private plan change).

These accreditation requirements are set out in s39B. In the circumstances referred to above, the council must ensure that:

- a person is accredited (if it gives authority to one person)



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- everyone in the group, including the chairperson, are accredited; unless there are exceptional circumstances that don't provide the time or opportunity to ensure that everyone is accredited but the chairperson must be accredited (if it gives authority to a group of persons that has a chairperson)
- everyone in the group is accredited; unless there are exceptional circumstances that don't provide the time and opportunity to ensure that everyone is accredited, in which case over half of all the persons must be accredited (if it wants to give authority to a group of persons that doesn't have a chairperson).

The Minister has approved the successful completion of the Making Good Decisions programme, as a qualification for accreditation. The Minister announced his decision by way of a notice in the [New Zealand Gazette](#) in accordance with s39A. All alternate, temporary, current, retired and former judges of the Environment Court, High Court, Court of Appeal and Supreme Court are to be treated as having completed the programme. Automatic accreditation is also given to Environment Commissioners and Deputy Environment Commissioners, with five years or more experience in that capacity. To retain accreditation once retired from the Environment Commissioner role, recertification is required within three years of ceasing service and every five years thereafter, in line with recertification requirements for all other certificate holders.

Councils need to ensure that:

- the people they wish to appoint as sole commissioners or chairpersons hold a current certificate under the Making Good Decisions programme
- independent commissioners they wish to appoint as panel members hold a current certificate
- panels onto which they wish to appoint such people have the necessary majority of members who hold a current certificate.

From 12 September 2014 all members of hearing panels must be accredited under the Making Good Decision programme unless there are exceptional circumstances. This requirement was introduced by Section 14 of the Resource Management Amendment Bill (No 2) 2011. The section also introduced an extension to the range of hearings for which accreditation is required. Accreditation will also be required for hearings on:

- reviews of resource consents
- applications to change or cancel resource consent conditions
- proposed policy statements and plans
- any hearing of an objection under section 357C of the RMA

Additional points for councils who regularly use independent commissioners

- Where a council has many hearings that require the use of an independent commissioner over the course of a year, a pool of commissioners should be used; and the people appointed to hearings should be rotated to avoid perceptions of favouritism, or compromised commissioner independence.



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- Any pool or register of commissioners should have sufficient variety of knowledge and experience to cover the typical range of hearing topics which a council may be expected to encounter during the course of a year.
- Any policy or guidelines used to guide a council in the employment of commissioners should allow for circumstances where none of the registered individuals are available, or a particular body of knowledge and experience is required but not available from those on the register.

The Ministry maintains a [list of independent commissioners](#) and others (including their fields of expertise and areas of practice) who have achieved certification under the Making Good Decisions programme

Use of Councillors as Internal Commissioners

A council may appoint elected members or community board members, from within that council or from another council, to be internal commissioners. Appointing councillors as internal commissioners may be useful where a resource consent application requires a joint hearing (where councils combine to hear an application), or where a consent hearing is likely to span a local authority election and continuity of service on the hearing panel is required.

However, if an independent commissioner is requested under section 100A or 357AB, the council must appoint at least one commissioner who is not a member (councillor or staff) of the council. The intent of s100A is that the council delegation would be exclusive to independent commissioners.

Best practice in appointing councillors as internal commissioners:

Councillors will usually decide who among them will be appointed to internal commissioner roles. In the interests of good practice they should be guided by the following principles (whether or not they form part of a council policy or set of guidelines):

- elected members or councillors should have training and experience as chairs or hearing panel members or both, and be able to demonstrate fulfilling the accreditation requirements of the RMA by holding a current certificate under the Making Good Decisions programme
- councillors nominated to be appointed as internal commissioners should have no actual or perceived conflict of interest (refer to [Guidance for members of local authorities about the local authorities \(Members' Interests\) Act 1968](#)).
- where councillors or other elected members are regularly called upon to act as internal commissioners, they need to be made fully aware of the potential workload involved and be available as required.
- any appointment of internal commissioners and delegation of functions made under s34A of the RMA should be formally recorded as a resolution of the council. This appointment may be recorded on documentation related to a hearing (such as correspondence and order papers) to ensure that no confusion exists in regard to the authority of those persons to act as commissioners.



How Many Commissioners Should be Used?

There are no legal or statutory requirements as to how many commissioners should make decisions (other than the requirement to appoint at least one independent commissioner if requested under section 100A or 357AB). Principles contained in case law, common practice, and overseas examples do, however, provide some guidance.

The number of commissioners should match the scale of the decision that needs to be made, its complexity, and the experience and expertise of the commissioners. Any policies and guidelines drafted to guide councils in using commissioners should reflect this principle.

- Single-issue decisions of low complexity will generally require only one commissioner.
- Complex decisions, for example applications dealing with technical arguments on many different issues, may require two or more commissioners. One commissioner will often be employed to take into account the overall considerations of the application and guide the conduct of proceedings; the other(s) may consider the more detailed technical evidence according to their knowledge and experience. There should be sufficient expertise in the panel to ensure full understanding of the relevant evidence and information presented.
- Applications and plan changes with large numbers of submissions may warrant the use of more than one commissioner: the issues covered by submitters may be varied and require a range and depth of technical knowledge which no single commissioner can be expected to have.

Some councils use an odd number of commissioners in hearings to avoid 'stalemate' situations. With an even number of commissioners, councils may want to identify which commissioner's view will prevail or have a casting vote (usually the chairperson or principal commissioner) in the appointment/delegation of powers to commissioners. For most hearings, no more than three commissioners should be needed.

The Skills a Commissioner Requires

All commissioners should have a set of core competencies and skills that enable them to understand the application or issue before them, conduct hearings in an appropriate manner, and make sound decisions.

Core competencies include:

- correctly identifying the nature of issues arising during a hearing in terms of the RMA and relevant planning documents
- recognising common decision-making biases and applying cognitive strategies to minimise their impact
- demonstrating impartiality and integrity
- systematically and appropriately testing and questioning the evidence and decisions of others
- demonstrating commitment to appropriately and fairly assessing and weighing evidence



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- making balanced contributions during deliberation and obtaining and clarifying relevant views from other panel members to increase the total knowledge available
- using appropriate decision-making tools
- formulating a reasoned decision independently of others.

Commissioners should have the following expertise:

- a good knowledge of the RMA, and the decision-making and hearings procedures contained within it
- knowledge of functions and processes under the Local Government Act and the Local Government Official Information and Meetings Act 1987
- the ability to listen effectively, distilling the key arguments and facts from the information presented
- an awareness and understanding of the principles of natural justice and a sense of fair play
- the ability to maintain objective neutrality (not jump to conclusions or predetermine an outcome)
- a general understanding of the principles of the Treaty of Waitangi, their relevance in legislation, and whether and how they may be applicable to the decision(s) to be made.

Other skills or qualities may be required to meet the circumstances where general knowledge and skills alone will not suffice. These other qualities or skills could include:

- recognised specialist qualifications, expertise and/or experience in a particular field (such as resource management law, planning, surveying, engineering, ecology, architecture, urban design or science)
- understanding of Māori language, tikanga, history and cultural values (such as in cases where Māori heritage, tāonga, or ancestral relationships could be affected). On occasion an appreciation of potential conflicting or competing interests between local hapū or iwi may also be required.
- an understanding of other cultures, in cases where issues in relation to those cultures have been raised.

A commissioner who chairs a hearing, or sits alone, can be expected to have the following additional competencies:

- jointly considering and applying RMA, relevant legislation and planning documents to a wide variety of complex contexts
- demonstrating awareness of the powers of a panel and chair and being able to apply these powers flexibly, ethically, fairly and appropriately
- chairing hearings confidently, dealing appropriately with complex and unexpected issues, plus effectively leading and managing other panel members
- effectively leading and managing processes leading up to the hearing
- effectively leading and managing the post-hearing processes
- demonstrating a commitment to managing and developing the performance of panel members and continuous self-improvement.

Chairs with this set of competencies can be expected to:



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- conduct the hearing in a way that enables all parties who wish to be heard a fair hearing without time wastage or undue coverage of irrelevant or inappropriate issues and evidence
- manage conflict and unacceptable behaviours associated with unreasonable challenges
- communicate succinctly and accurately (orally and in written form), explaining the reasoning for any decisions made, including decisions regarding the relevance (or otherwise) of evidence being presented
- fully understand the processes involved in drafting decisions and be able to write decisions without assistance.

Some councils make staff available to assist commissioners in the interpretation of their plans. Where an adviser drawn from council staff is not available – or not wanted – it is important that the commissioner is familiar with both the content and structure of those planning documents, and can interpret them accurately.

All the skills referred to above are covered by the Making Good Decisions programme.

The Making Good Decisions training, assessment and certification programme for RMA decision-makers

The Making Good Decisions programme helps councillors, community board members, and independent commissioners make better decisions under the RMA. It provides RMA decision-makers with the skills they need to run fair and effective resource consent, plan change and designation hearings, and to make informed decisions.

The programme was developed by the Ministry for the Environment and Local Government New Zealand, in consultation with stakeholders and professional bodies, including the New Zealand Planning Institute.

It is delivered by the Opus Environment Training Centre, which employs an experienced team of presenters, facilitators and tutors. For more information on the structure and content of the programme, go to the [Opus Environment Training Centre website](#).

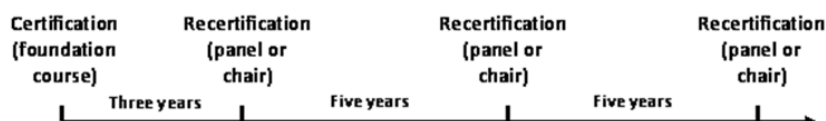
Successful participants are issued with a certificate that is valid for three years, confirming they have successfully achieved the programme's competencies and are competent decision-makers.

There is a re-certification process for those who wish to have their certificates recertified on expiry. Anyone who initially passes the course is required to undertake re-certification three years from their initial certification and every five years after that.

There are two options for re-certification:

1. Training for those who want to continue as hearings panel members
2. Training for those who are experienced chairs, or are aspiring chairs.

The diagram below outlines the re-certification requirements:



Successful completion of the programme is recognised as a qualification for fulfilling the accreditation requirements of the RMA.



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Certification brings with it both opportunities and obligations. Certificate holders are obliged to attend update seminars, and have their understanding re-assessed, should they wish to have their certificates reissued on expiry. See the [Making Good Decisions area on the Ministry for the Environment's website](#) for more information on the impact of the programme and for lists of certificate holders.

The Costs of commissioners

Where a council employs independent commissioners, determining who is responsible for the costs depends on the circumstances of the commissioner's appointment.

Where a council decides to use independent commissioner(s), then the costs are passed onto the applicant in the standard way under s36.

However if independent commissioners are requested under s100A then the following applies (s36(1)):

- If the applicant makes the request (regardless of whether a submitter also makes a request) the applicant is responsible for all the costs of the hearing and decision.
- If submitter(s) make the request (and the applicant does not), then the submitter(s) who have made the request and the applicant are responsible for portions of the costs of the hearing and decision. The applicant must pay for the costs of the hearing and decision as if the request for independent commissioners had not been made (i.e. the council was hearing and deciding the application in the normal way). The submitter(s) pays for any additional costs consequent of the appointment of the independent commissioner. These additional costs are split in equal shares if there is more than one submitter who makes the request for a commissioner.

If an independent commissioner is requested under s357AB (objection to a decision of a council officer on a resource consent application), the objector/applicant is responsible for all costs relating to the consideration and decision on the objection (s 36(1)(af)).

All charges are to be set as fixed charges under section 36(1).

Councils cannot take a deposit or security to ensure the costs of independent commissioners requested by submitters are met. Councils need to recover costs from submitters through their usual debt recovery means. Therefore it is important for councils to sort out their financial systems and make their charging regime clear to submitters before confirming the use of independent commissioners.

Councils also have the discretion to waive additional fees and charges where independent commissioners are requested. If they choose not to waive fees or charges, and the hearing has already gone ahead with independent commissioners, then the submitters should be treated like any other debtor.







HEARINGS

Chairperson

Deputy Mayor Annette Brosnan

Note that an Independent Commissioner may be appointed by the Committee to Chair Hearings in relation to the District Plan

Deputy Chairperson

Councillor Graeme Taylor

Membership

Her Worship the Mayor Kirsten Wise

Councillor Tania Wright

Councillor Apiata Tapine

Quorum

3

Meeting frequency

As required

Officer in Charge

Director City Strategy and Director Infrastructure Services

Role

To conduct fair and effective Hearings and make determinations on a range of the Council's quasi-judicial functions under legislation (and other matters as referred to the Committee).

In practice, some matters are referred to Commissioners appointed under the Resource Management Act.

Delegations

The Hearings Committee is granted responsibility and full delegated authority of the Council to make final decisions of Council in line with its mandate and in accordance with legislative requirements. The Committee may decide to refer a matter to Council accompanied by recommendations where it deems the significance of the decision or its implications warrant it.

The Hearings Committee will hear and make determination on statutory and or regulatory matters under relevant legislation unless otherwise delegated by statute or Council, including (but without limitation):

- District Plan
 - Hear and make determination on submissions and objections to the Napier City District Plan Review and any changes or variations proposed to that Plan.
 - The Committee may decide to refer the matter to Council accompanied by recommendations, in a situation where:
 - the District Plan will be significantly altered as a result of submissions,
 - any decision on the District Plan will have a significant impact outside the District Plan on other Council policies, particularly rating levels or fees and charges, and
 - the Council will need to consider making a variation or change to the District Plan.



- Tenders
 - Consider and decide tenders for the supply of goods and services to the Council, where tenders exceed the Chief Executive's delegated authority.
- Resource consents
 - Hear and determine notified resource consents applications and any challenges to conditions of consents.
- Challenges to decisions made under delegated authority where legislation allows
- Objections under the Dog Control Act
- Matters regarding drainage and works on private land under the Local Government Act 2002.

Note. Work must be identified in a Long Term Plan [LTP] (or an Annual Plan [AP] update to the LTP) in order to be considered for progress at any given time.

Typically the Hearings Committee will consider tenders for works included in the LTP or an AP that are above the financial delegation to the Chief Executive.

However, there may be instances where a tender may be brought to the Committee for consideration even when the monetary value is within the existing CE delegation.

For example, this would take place where specifically requested by resolution of Council or where the work relates to a bespoke project of significant interest to Council.

**GUIDANCE CRITERIA FOR DELEGATIONS TO AND ASSIGNMENT OF COMMISSIONERS (To be inserted into the ToR)**

Each member of the Hearings Committee that is responsible for Resource Management Act 1991 matters shall, if that member is accredited under this Act, be deemed for the purposes of this delegation to be a Hearings Commissioner.

Assignment of Commissioners

Commissioners shall be assigned as follows:

1. The Chairperson of the Hearing Committee (in liaison with the Director City Strategy, or her/his nominee,) has the responsibility for assigning one or more Hearings Commissioners appointed by the Council to carry out the function of processing, hearing and determining any matter, or to exercise the functions, powers and duties of the Council under the Resource Management Act 1991 in accordance with section 34A of this Act.
2. The assignment shall be made having considered the recommendation by the Director City Strategy having considered the criteria set out in General Criteria for Appointment of a Hearings Commissioner below.
3. Having considered the recommendation by the Director City Strategy, the decision shall be formally recorded in writing.
4. Notwithstanding the above, no member of the Hearings Committee may be assigned to consider a matter as a Hearings Commissioner unless in conjunction with at least one commissioner who is not a Committee member. This sub-clause applies only where one or more Hearings Commissioners is to be assigned to consider any matter in accordance with the General Criteria for Appointment of a Hearings Commissioner specified below.

General Criteria for Appointment of a Hearings Commissioner

One or more Hearings Commissioners shall be assigned to consider any matter or to exercise the functions, powers and duties of the Council under the Resource Management Act 1991 in accordance with section 34A of this Act, when one or more of the following applies:

- a) The Council is the applicant.
- b) The organisation (applicant) is one in which the Council has a significant and/or pecuniary interest.
- c) The project (application) is one in which the Council has a significant and/or pecuniary interest.
- d) A valid request has been made under the Resource Management Act 1991 for a Commissioner to hear and determine the matter.



- e) In the view of either the Council or the Chairperson or Deputy Chairperson of the Hearings Committee the subject of the hearing is highly political and elected members' objectivity in hearing or determining the matter would be compromised due to previous political and community debate.
- f) In the view of either the Council or the Chairperson or Deputy Chairperson of the Hearings Committee, the highly complex and technical nature of the issues to be addressed in the hearing requires specific expertise. (Care is needed in this regard, as technical issues should always be discussed at the hearing in a manner that is understandable to the layperson.)
- g) In the view of either the Council or the Chairperson or Deputy Chairperson of the Hearings Committee, the Hearings Committee has insufficient resources and/or time to hear the matter in a timely manner.