

Report No:	RCN11-11-01
File No:	
Date:	26 October 2011
Decision Required	

REPORT SUMMARY

Report to: Mayor and Councillors
Meeting Date: 3 November 2011
Report Author: Dennis Bush-King, Acting Chief Executive
Subject: **Conflict of Interest Protocol**

EXECUTIVE SUMMARY

This report seeks to update the 1993 Conflict of Interest Protocol established to manage those situations where Council is both regulator and applicant.

RECOMMENDATION/S

That the Council agrees with the draft resolution

DRAFT RESOLUTION

THAT the Council receives the Conflict of Interest Protocol Report RCN11-11-01 and adopts the Conflict of Interest Protocol attached as Appendix 2 to Report RCN11-11-01.

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1. Purpose

- 1.1 This report seeks to update the 1993 Conflict of Interest Protocol established to manage those situations where Council is both regulator and applicant.

2. Background

- 2.1 From time to time the Council has to apply to itself for a range of statutory approvals or has potentially differing interests in the way in which decisions might be made on plan rules and other applications. We have had in place since 1993 a protocol designed to assist in managing any potential conflicts (copy attached as Appendix 1). In practice, the 1993 Protocol has been limited in its application and the opportunity was taken earlier in the year to update it following discussion amongst staff.
- 2.2 The Protocol has been updated and is presented for Council endorsement. The text identifies the relevant legal obligations, establishes some principles to guide decision-making, and identifies some standard operating procedures to manage and conflicts arising.

3. Financial/Budgetary Considerations

- 3.1 Nil

4. Options

- 4.1 The Council could decide not to update the Protocol and instead rely on the 1993 version to the extent that it is relevant or otherwise staff judgement but it is considered appropriate that the protocol be endorsed to provide appropriate guidance to staff where required.

5. Significance

- 5.1 This is not a significant decision according to the Council's Significance Policy.

6. Recommendation/s

- 6.1 That the Council agrees with the draft resolution and the proposed Protocol subject to any clarification or amendment.

7. Timeline/Next Steps

- 7.1 The protocol, once agreed, will form part of the Administration Policies in place for staff direction.

8. Draft Resolution

THAT the Council receives the Conflict of Interest Protocol Report RCN11-11-01 and adopts the Conflict of Interest Protocol attached as Appendix 2 to Report RCN11-11-01.

Dennis Bush-King
Acting Chief Executive

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Appendices:

Appendix 1: 1993 Conflict of Interest Protocol

Appendix 1: 2011 Conflict of Interest Protocol

**TASMAN DISTRICT COUNCIL
CONFLICT OF INTEREST PROTOCOL
November 2011**

Purpose

The purpose of this protocol is to state the legal and governance principles and standard operating procedures for making decisions by Council under regulatory legislation that affect other interests of Council.

Background

Under Section 39 of the Local Government Act 2002 (LGA), local authorities are required to ensure that:

- the governance structures and processes of Council are effective, open, and transparent; and
- so far as is practicable, responsibility and processes for decision-making in relation to regulatory responsibilities is separated from responsibility and processes for decision-making for non-regulatory responsibilities.

The Chief Executive under section 42 of the LGA is likewise responsible to ensure that the management structure reflects and reinforces the separation of regulatory responsibilities and decision-making processes as far as is practicable, and that it is capable of delivering adequate advice to the local authority to facilitate the explicit resolution of conflicting objectives.

The LGA gives Council the power to provide infrastructural and community services. Other statutes such as the Reserves Act, Soil Conservation and Rivers Control Act and the Biosecurity Act also empower the Council to undertake other service functions that may at times require separate resource management or other regulatory approvals. The Resource Management Act and the Building Act are the two principal statutes that generate the potential for conflict, or the perception of some conflict of interest with Council's regulatory responsibilities.

The Resource Management Act also enables Council to establish regulatory policies and rules that define the need for consent for activities, including activities undertaken by Council.

The Council has a committee and departmental structure that provides for a degree of separation of regulatory and non-regulatory functions. Decisions that may involve a potential conflict of interest are also covered by the Council's Code of Conduct, a Staff Conflict of Interest Policy, and practices that should respect the rules of natural justice.¹ Separation is also achieved through Council's asset management system keeping consent records (as part of their

¹ Including the *audi alteram partem* rule – this requires Council to act fairly and without bias.

asset management system) which are separate from the regulatory consent information system.

To ensure transparency and proper accountability, Council has in place a protocol, the basis of which serves to direct how Council will be treated when it is subject to rule-making policy in plans, or requires regulatory approvals. The need for such a protocol is reflected in Policy 13.10 of the Tasman Regional Policy Statement.²

Scope of Potential Conflict

Table 1 identifies a range of actual instances where conflicts of interest might occur or be perceived.

Table 1: Instances of Potential Conflict of Interest

- Where Council is involved in policy and plan development affecting its interests as a service provider
- Where Council is applicant for building consent
- Where Council is applicant for resource consent
 - notified application
 - non-notified application
- Where Council trading activities are applicants or submitters on applications
- Where Council trading or service activity issues a requirement to designate under the Resource Management Act
- Enforcement matters where Council service or trading activities breach statutory duties
- Monitoring of Council's own consents
- Where Council interests require a Sale of Liquor licence

Situations where Council has a land holding interest or may in some other way be considered to be affected by any third party application, are not automatically considered to give rise to a conflict of interest that requires any separation in process. If one section of Council gives consent as an affected party because of a land holding interest, that does not mean consent to undertake an activity will be forthcoming, as other considerations may apply.

² The current Council resolution CN93/6/17 has proven to be of limited value and guidance.

However where adverse comment on a planning policy or an application, is forthcoming, the Council has the opportunity to resolve any impact on its various interests through the decision-making process. Provided any concerns from Council departments are transparently recognised in the process (and made available through either staff reports or delegated decisions), this is seen as being within the scheme of the legislation where Council is to “play a broad role” in promoting the general well-being of communities. It also achieves the integration necessary to ensure “prudent stewardship and efficient and effective use of its resources in the interests of the district”.³

Where differing opinions as to outcome between sections of Council might exist, these should be resolved through discussion between appropriately informed staff, with escalation to a higher level of delegated authority if required, or if necessary, contestable advice to Council as the decision-maker (particularly where expert advice or professional ethics mean reconciling diverse views is not easy). Management advice can be sought where differences cannot be resolved at staff level. All staff involved will need to be properly informed and apply judicial discipline. The safeguard supporting this approach is that there are remedies available through appeal or judicial review processes if third parties consider a decision is unreasonably skewed in favour of particular Council interests (whatever their origin).

Where Council is applicant or consent holder there are some countervailing matters to consider. It would not be fair to treat Council more or less restrictively than other applicants when processing applications. There is also likely to be a tension between maintaining process integrity and ensuring overall cost to ratepayers is kept proportionate and reasonable.

As an applicant the Council can represent a public interest (eg service activities such as water supply, wastewater supply, stopbank construction, provision of roading). At times it also operates in a commercial mode, sometimes in competition with other commercial or trade operators (eg land development, forestry, and gravel extraction). In the interests of fairness and process neutrality, it is not considered these different roles require a different assessment process.

As a matter of best practice when Council is applicant, staff should ascertain what process approvals will be required and do so in sufficient time to properly understand the process implications. Where resource information or expertise resides within the Environment & Planning Department (EPD), and where it is considered this information or expertise should be accessed by Council as applicant, Management will need to decide on how this will occur, as some level of independence from the regulatory assessment will be required.

Procedurally, the public have difficulty in distinguishing the Council’s various roles. They see the Council as “The Council”. Use of Commissioners is still making a Council decision that has to be defended and enforced as a Council

³ See section 14 Local Government Act 2002

decision. Whoever makes the decision on behalf of Council, the decision made must be appropriately informed and be the result of applying judicial discipline.

Principles

It can be assumed that in the main there will be no conflict, no substantive disagreement between staff or committees on what is best for the Council, and more importantly the ratepayer it represents. The main issue to consider is not the avoidance of conflict, but rather what is the best process for implementing Council's service delivery and regulatory functions, and if necessary, resolving any conflicts between them.

Any process in place must be consistent dealing with both where unanimity or difference may exist. As such any process should apply the same process logic to similar circumstances.

The arrangements must be open and fair - there may be situations where confidentiality is required but in the main Council's decision-making process for both responsibilities should be transparent. Justice should be done and be seen to be done.

The process should be cost-effective. Ideally Council should not incur additional costs when implementing both service delivery and regulatory functions. This may however occur where third parties challenge an application made by a Council department – there will likely be additional costs for both the service delivery and regulatory arm of Council to engage independent Commissioners and consultants to report on the application.⁴

The process should be flexible. We should have a responsive and adaptive process for dealing with the wide ranging functions and the concerns which the Council represents. There may at times be conflicts between the above principles. The Council needs a process to decide on its position in a particular case - it should do this however by recognising that both its service delivery and regulatory functions are of equal importance.

Standard Operating Procedures

Taking into account the issues, the following serves to guide staff in dealing with applications from Council departments.

1 Where Council is involved in policy and plan development

Council EPD staff will liaise with key staff in all other departments at the earliest stage, to ensure collaboration as appropriate with investigations and policy

⁴ And because of this prospect, there is nothing inherently wrong in the Council having two legal advisers (and it is not without precedent - viz. Southland County v Southland County (1981) 8NZTPA61). However it may look silly and be costly so for this reason every effort should be made for legal counsel to represent both Council perspectives (and there is legal precedent to support this c.f. s 33A, Trustee Act 1956).

assessment documentation that may lead to a Plan amendment with any implications for services and other functions of Council. Any conflicting implications from draft policy are to be assessed with all key staff involved, and the recommendations to Council must account for the position reached. Remaining unresolved conflicts at staff level are to be reported to managers who will decide whether to arbitrate or pass up to the relevant committee as contested advice. Where committees are left with an unresolved set of different recommendations from staff, then the Council will decide its position.

Following notification of any plan change, if it is considered a submission is required to change or clarify any aspect of the plan change, staff will liaise in the preparation of any Council submission. If necessary the matter can be referred to a higher level of delegated authority for resolution. The Environment and Planning Manager (or Chief executive) has delegated authority to lodge a Council submission against a plan change.

2 Where Council is applicant for building consent

Applications will be processed by building control staff in the normal manner.

3 Where Council is applicant for resource consent

3(a) Decisions on Notification/Non-notification

Normally EPD staff will make the decision on whether a Council-sponsored consent application requires notification or not. A Commissioner can be engaged to perform this function if considered necessary in the circumstances.

3(b) Notified application

Applications will be prepared by or on behalf of relevant Council department. If no EPD staff involved in preparing the application, the application will be assessed for completeness and notified as normal. If a hearing is required, Independent Commissioner(s) will be used. If EPD staff have been involved in preparing the application, consideration will be given to also engaging independent consultant advice to service the hearing panel but at the very least different staff will be involved in the processing function.

3(c) Non-notified application

Applications will be processed by staff as with any other application. If EPD staff have been involved in preparing the application, consideration will be given to also engaging independent consultant advice to advise the decision maker but at the very least different staff will be involved in the processing function.

4 Where Council trading activities, including CCOs are applicants or submitters on applications

Applications will be processed by staff as with any other application except that if a hearing is involved and Council will gain some pecuniary advantage, independent commissioner(s) will be used.

5 Where Council trading or service activity issues a requirement to designate under the RMA

Applications will usually be processed by staff. The RMA provides that the Council makes decisions on its own notices of requirement, and Council has financial responsibility for the public work proposed by a service department. Therefore it is considered appropriate that the Council hear first hand any evidence from submitters and advisers representing the variety of Council interests.

6 Enforcement matters where Council service or trading activities breach statutory duties

Treat no differently from other similar situations. The expectation is that Council will be compliant with consent conditions etc and if not, the response to that non compliance will be entirely consistent with Council's agreed enforcement policies until such time as full compliance is achieved. If legal action ensues, the offending department will have to secure legal advice/representation from other than Council's solicitor.

7 Monitoring Council Consents

Treat no differently from other similar consents in applying prescribed monitoring procedures and practices including performance reporting.

8 Where Council interests require a Sale of Liquor Licence

Treat no differently from other similar consents.