

## REGULATORY AND PLANNING COMMITTEE 13. 3. 2012

### 4. DIRECT REFERRAL OF APPLICATIONS TO THE ENVIRONMENT COURT

<b>General Manager responsible:</b>	General Manager Regulation and Democracy Services, DDI 941-8462
<b>Officer responsible:</b>	Resource Consents & Building Policy Manager
<b>Author:</b>	John Gibson, Planning Administration Manager and Maurice Dale, Consultant Senior Planner

#### PURPOSE OF REPORT

1. The purpose of this report is to inform the Council of the process under the Resource Management Act 1991 (as amended by the Resource Management Amendment Act 2009), that provides for certain applications to be directly referred to the Environment Court for a decision. The report also seeks input as to internal communication practices and the criteria that Officer's have developed to assist in determining whether such individual applications should be referred to the Environment Court or should instead be first determined by the Council as per usual practice. The criteria that have been developed are for use by Council Planning Officers in making recommendations to the Council Hearings Panel or alternatively Commissioners who currently have delegated decision making powers to determine whether an application should be referred to the Environment Court. The criteria are also for use by the Panel and Commissioners to assist them making decisions.
2. This is an updated version of the report presented to the Committee at its 6 May 2010 meeting. As a result of questions and directions from the Committee at that meeting, the report was held over to enable Officer's to consider the matters raised and respond to them. The matters that arose and that are addressed in this updated report include:
  - Whether there is any starting presumption when the consent authority is exercising the discretion to refer an application directly to the Environment Court if requested to do so by the applicant; and
  - If the consent authority agrees to refer an application to the Environment Court, whether the Council is able to be a party to the proceeding with a differing view on the merits of the application than that recommended in a consent authority report that is distributed prior to the applicant commencing the Environment Court proceedings.
  - Inclusion of further guidance in the proposed referral criteria in regards to whether a hearing would otherwise be necessary in deciding whether to directly refer an application; and
  - Addition of a recommendation to amend the delegations register such that the reference to a Hearings Panel considering a request for direct referral, instead be to a Sub-Committee made up of those Councillors who are accredited; and
  - Amendment of recommendations so as to direct Officers to implement processes to ensure that relevant Councillors, Community Board Members, Regulatory and Planning Committee, submitters, and potential submitters are advised only of the outcome of requests for direct referral and not when requests are received.
3. The representation of this report to the Committee has been delayed for sometime due to more urgent matters being brought before the Committee following the September 2010 and subsequent earthquakes. The opportunity has been taken since the previous meeting to update the information in this report to recognise more recent knowledge of direct referral matters.

#### EXECUTIVE SUMMARY

##### Direct referral process

4. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 came into effect on the 1 of October 2009. It introduced a number of changes to the Resource Management Act 1991 with the aim of simplifying and streamlining the planning processes under the Act. Part of the streamlining provisions included the ability for applicants for notified resource consent applications, and applications for notices of requirement for designations and heritage orders, to request to have their applications considered by the Environment Court without first having to proceed through the Council hearing process. This ability to refer applications directly to the Environment Court, does however not apply to private plan change requests.

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5. The intent of the provisions enabling direct referral of applications is to reduce duplication of process, costs and time delays as a result of applications going through a Council hearing process and then being heard again in the Environment Court. Thus, direct referral of an application enables all interested parties to debate the merits of the application before the Court without the usual time delays and costs associated with first proceeding through a Council hearing process.
6. **Attachment 1** contains a flow diagram of the direct referral process. To initiate direct referral of a notified application, an applicant must first apply in writing to the Council for the application to be referred under section 87D (notified resource consents) or 198B (notices of requirement). The request may be made on the day that the application is lodged up until 5 working days after which submissions on the application have closed. If the Council receives a request before it has determined whether to notify an application, it must defer its decision on whether to directly refer the application until a decision on notification has been made. If the Council determines that the application will not be notified, it must return the request.
7. Under sections 87E(5) or 198C(4) of the Act, if the Council determines to notify the application, it must make a decision as whether to directly refer the application within 15 working days after the date of the decision on notification. The Act specifies that no submitter has a right to be heard by the Council on a request for direct referral.
8. If the Council declines the request for direct referral, it must give the applicant its reasons in writing. The applicant then may object the decision to the Council under section 357/357A of the Act. Under section 358(1), there is no further right of appeal beyond this to the Environment Court for a direct referral request relating to a resource consent application, but there is for a notice of requirement. Appeals to the High Court on points of law are however also possible.
9. Under the Council delegations amended in October 2009, a decision on direct referral sits with either a Hearings Panel or Commissioner. At its 6 May 2010 meeting, the Committee outlined its preference that a Sub-Committee rather than a Hearings Panel make the decision on direct referral. The Committee considered that appointment of a Subcommittee with a smaller number of members compared to the Hearings Panel would promote consistency in Council decision making on direct referral matters. Furthermore, the Committee considered that this Sub-Committee should be made up of those Councillors who are accredited to hear and consider RMA matters. A recommendation amending the delegations accordingly is added to this report.
10. Where the Council agrees to the request, the application is directly referred to the Environment Court who make a decision on the application. Where it does not agree (and any objection is unsuccessful), the application continues to be processed by the Council as per normal processes under the Act.
11. Notices of requirement for designations and heritage orders by Councils (as opposed to by requiring authorities) may also be subject to direct referral to the Environment Court. The process however differs in reflection that there is no request per-se for referral and that the decision on direct referral is therefore essentially an internal one for the Council.

### **Direct Referrals since the 2009 Amendment Act**

12. Since the enactment of the Resource Management Amendment Act 2009, there have been ten applications accepted by Councils for referral to the Environment Court, and only one in Christchurch City. The status of these applications is as follows:
  - 3 completed.
  - 1 decision of Environment Court pending.
  - 1 on hold.
  - 5 filed with the Court but yet to proceed to hearing.
13. Typically the applications to which direct referral requests have been made and accepted have been large scale notified resource consents. They have included a supermarket proposal in Rodney District (now Auckland Council), a sewerage scheme in Hawkes Bay Region, the establishment of a quarry in Selwyn District, and a proposed Meridian wind farm in Hurunui District.

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14. In Christchurch City, a single direct referral request has been received relating to the proposed expansion of the Lyttelton Port Company coal yard by way of reclamation. The Lyttelton Port Company (LPC) proposal was subject to applications made jointly to both the Christchurch City Council and Environment Canterbury in 2009. Following the close of public submissions on those applications, LPC applied to both Councils seeking that the applications be referred to the Environment Court for a decision thereby bypassing the Council hearing stage of the process. The reasons stipulated for LPC requesting direct referral included in summary:
  - The port's strategic infrastructural and economic importance;
  - Need for process certainty for project planning purposes;
  - Likelihood of appeal to the Environment Court;
  - Many of the issues raised in submissions related to global environment issues which were unlikely to be resolved through mediation;
  - The technical nature of the evidence would be best determined by the Court from the outset;
  - The Court process would assist in focussing the cases of submitters and encourage the pooling of submitter resources;
  - Direct referral would be a more efficient decision making process overall.
15. Direct referral of the LPC applications was accepted by both Christchurch City and Environment Canterbury under their respective delegations. The Christchurch City Council decision was made by a Commissioner due to the Council's partial ownership of the port company. A decision was required to be made in advance of the criteria and process recommended in this report being developed and reported through the Committee.
16. Arrangements for hearing of the LPC applications were being made by the Environment Court at the time of the 4 September 2010 earthquake. Following the earthquake, LPC sought and obtained an adjournment of proceedings. The applications have remained on hold since this time.
17. The subsequent 22 February 2011 earthquake had a severe impact on port facilities, affecting port operations. In order to provide additional space for port operations while existing facilities are repaired, LPC sought an Order in Council through the Canterbury Earthquake Recovery Authority (CERA) to enable the reclamation covered by its applications for the coal yard expansion to proceed. That Order in Council was subsequently gazetted and came into effect on the 27 May 2011. Reclamation utilising demolition rubble has commenced.
18. The Order in Council however specifically does not provide for the use of the reclaimed land for the handling or storage of coal. Accordingly LPC's resource consent applications remain current insofar that they continue to seek that the reclaimed land be used for coal handling and storage. The applications currently remain on hold before the Court. A pre-hearing conference is set for the 4 April at which time LPC must inform the Court whether it wishes to continue with the applications.

### Criteria for considering a direct referral request

19. There is currently a lack of guidance for Councils as to what basis they should make a decision on the request for direct referral. Neither the Act nor the Ministry for the Environment presently provide guidance as to how Councils should exercise their decision making power. Indeed the Ministry has advised that they do not intend to produce any such guidance or criteria for making direct referral decisions therefore leaving it up to individual Councils to set their own. The absence of such criteria makes it difficult for Councils to determine what are appropriate grounds to accept or reject a direct referral request and ensure that individual decisions on direct referral are made on a consistent basis.
20. To date Environment Canterbury is the only Council in the country known to have produced any internal guidance to assist in exercising its discretion on direct referral requests. The ECAN criteria have also been used by Selwyn District Council and Hawkes Bay Regional Council in determining direct referral requests. The ECAN criteria were also looked at by Christchurch City Council Officers in reviewing the LPC direct referral request and making a recommendation to the Commissioner for direct referral of the LPC proposal to the Environment Court.

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21. While there is no statutory requirement to establish criteria, it is considered desirable that criteria are adopted for considering any future requests for direct referral of an application by Council Officers, and the making of decisions by the Hearings Panel and Commissioners. Adopting such criteria will provide consistency in decision making and ensure that decisions to refer or not refer are based on sound reasoning. This is important so that any decision that is challenged is defensible. Accordingly not adopting criteria is not considered to be an appropriate response to enable proper consideration of direct referral requests.
22. At its 6 May 2010 meeting, the Committee sought advice from Officers as to whether there is any starting presumption when the Council is exercising the discretion to refer an application directly to the Environment Court if requested to do so by the applicant. In other words does the streamlining intent of the amended Act mean that there is a presumption for the Council to agree to a direct referral request? Advice obtained from the Council Legal Services Unit attached as **Attachment 2** concludes that the identification of appropriate matters to take into account and weighting of those matters when the Council makes its decision whether to directly refer, is to be ascertained in light of the purpose of simplifying and streamlining the process by excluding the first instance consent authority hearing from that process.
23. As a result, the advice considers that whilst there is no starting presumption to the Council's exercise of discretion, the objective of simplifying and streamlining the consent process must be given particular weight in the consideration of whether to agree to direct referral. That weight has been incorporated in the proposed referral criteria attached to this report and many of the suggested matters for consideration are about whether the process will be simplified and streamlined by the direct referral.
24. Accordingly, when the Council exercises the discretion on whether to agree to the request for direct referral, there is no starting presumption; however,
  - (a) The decision must be focussed on factors that arise from the intent and purpose of the discretion, being to enable the resource consent process to be simplified and streamlined; and
  - (b) The decision must further the purpose of the Act.
25. The advice from the Legal Services Unit has been peer reviewed by Simpson Grierson and they agree that there is no presumption that the Council agree to direct referral. The advice of both the Legal Services Unit and Simpson Grierson remains current as of March 2012.
26. The criteria that are recommended to be adopted for considering direct referral requests to Christchurch City Council are attached as **Attachment 3**. The criteria largely mirror those devised by Environment Canterbury but have been adapted for Christchurch City Council purposes.
27. The criteria are self explanatory and separated into four sections. The first section addresses whether referral of an application is necessary. The second section addresses whether referral will support the enabling intent of the Act. The third section addresses the cost and timeliness of the process. Finally the fourth section addresses technical assessment of applications. It is not intended that the criteria be binding on the reporting officer or decision makers but are merely to assist them in making recommendations and decisions. The criteria are framed in such a way so as to not unduly constrain decision makers and maintain sufficient discretion to determine whether to directly refer an application based on the individual circumstances of the application being considered. There may also be other unique factors that individual applications present and the criteria need to be flexible so as to enable such unique factors to be taken into account.
28. The first criteria under "Necessity for Referral" has been updated following the Committee's 6 May 2010 meeting to provide more explanation around the circumstances as to whether a hearing would otherwise be necessary.

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29. It is expected that over time that the criteria will further evolve as more direct referral requests are considered nationwide. It is also expected that in time a body of case law will develop on direct referral matters which may assist in refining the appropriate matters that Council should consider in determining direct referral requests.

#### Communication of direct referral requests

30. Aside from the recommended criteria for making direct referral decisions, it is apparent that internal processes are required in order to ensure appropriate communication of requests for direct referral to Councillors, Community Boards, as well as potential submitters on a resource consent or notice of requirement. The Act contains no requirement or guidance for such lines of communication. It is however considered desirable that elected members for the ward, the relevant community board, and submitters or potential submitters are advised when a request for direct referral has been granted. Such communication is considered important so that they are fully informed of the implications of a direct referral decision for their involvement in the consent process.
31. As per the Committee's directions at its 6 May 2010 meeting, any requirement to advise Councillors, Community Boards, submitters, and potential submitters that a direct referral request has been received has been removed. This was in reflection that communicating receipt of a direct referral request may give submitters the false expectation of a right to be heard on a direct referral decision. In this respect, the Act specifies that submitters have no rights to be heard by the Council in considering a direct referral request.
32. It is therefore recommended that the relevant Councillors, Community Board Members, and submitters and potential submitters be advised only of the outcome of that request. It is also recommended that the outcome of requests be reported through the Regulatory and Planning Committee as part of the Planning Administration Managers monthly report.

#### The Council role at the Environment Court

33. Finally, at its 6 May 2010 meeting, the Committee sought advice from Officers as to the Council's role once a direct referral request has been granted. Specifically the Committee sought advice that if the Council agrees to refer an application to the Environment Court, whether another part of the Council is able to be a party to the proceeding with a differing view on the merits of the application than that recommended in a consent authority report that is distributed prior to the applicant commencing Environment Court proceedings.
34. Under the Act, once the Council has agreed to direct referral, the "consent authority" must provide a report on the application. This report is distributed to the applicant and any submitter prior to any Environment Court proceedings commencing and covers the matters contained in section 87F(4) of the Act. The purpose of the report is to ensure that the Court is given the context of the application in terms of the relevant planning instruments and local environmental issues by the Council, which is best placed to provide a comprehensive 'birds eye view' of those matters. Furthermore since the Council will potentially enforce any conditions of consent, it's important that the Council has a say in how they are drafted. Essentially the report would take a similar form to a section 42A report prepared for a Council hearing.
35. The reporting Council Officer would also be required to appear in Court to give expert evidence which may be subject to cross examination from other parties and questioning from the Court as per normal Environment Court hearing process. Caselaw has established that the council is a party to the proceedings and must be represented at the hearing (*Progressive Enterprises Ltd v Rodney DC* [2010] NZEnvC 221).
36. Given that responsibility for the report in respect of an application that has been directly referred rests with the "consent authority", it would be expected to contain the position of the entire Council as the consent authority including any differing positions as to the merits of the application within the Council. Given the provision in the Act that the report is one of the "consent authority", the advice from the Legal Services Unit is that the Council cannot therefore take a dual role in the Environment Court where for example a Council unit with a different position makes a submission and appear to present their position in Court. Any differing views within the Council may only be captured in the report.

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37. The review of the Council legal advice by Simpson Grierson agrees that it would be inappropriate for the Council having a dual role at any hearing, although they consider there would be no legal barrier to this – i.e. another part of the Council is legally able to make a submission and appear to present their position in Court. Simpson Grierson advise that the Courts have reinforced that the Council is a single entity and there is the potential for criticism of the Council due to it taking an inconsistent or even contradictory position in relation to a proposal.
38. Accordingly it is generally considered that any differing views as to the merits of an application are more properly addressed in the consent authority report as opposed to different parts of the Council making submissions and becoming parties to the proceedings. Indeed this is currently the approach taken with typical resource consents processed within the Council which are not subject to direct referral. In those cases, where another unit of the Council adopts a different position and raises them with the reporting Officer, that position is considered and addressed in the report in making a recommendation to the Hearings Panel or Resource Management Officer Sub-Committee making the decision. As such the only difference with an application that had been directly referred is that the Environment Court would be the decision maker.
39. As with typical resource consent reports, it would also need to be made clear in the report for an application that has been directly referred where differing views are being presented and whom within Council has raised them. This enables the Court to determine what weight should be placed on the views presented and avoids any sense that the Council is not being entirely transparent, or is leveraging off its position as consent authority to pursue another non-objective agenda (e.g. as a trade competitor). Ultimately it would be up to the Court as the decision making body to make a decision on all the merits of the differing positions reported and presented.
40. In practice the responsibility for preparing the report would appropriately rest with Officers who have the appropriate expertise and experience to address the matters required to be covered in the report. Ultimately it is up to each Council to decide at what level the content of the report should be approved. However it is also considered appropriate that the report be approved at an Officer level, as is currently the case with section 42A reports for Council hearings. In this regard it is noted that it is referred to in the Act as a “report” (not a “submission”) which connotes a professional/dispassionate statutory assessment of the application. Officers with the relevant expertise and experience are generally best placed to conduct such a statutory assessment.
41. It is not considered appropriate for the approval of the report content to sit with elected members as part of a Hearings Panel or Sub-Committee. If for example finalising the content of the report were to sit with a Hearings Panel or Subcommittee, there would be a need for that panel to essentially hold a hearing to debate the merits of the application to reach a decision as to the final content of the report. There is a clear intention in the Act, that the streamlining provisions of the Act exist to reduce duplication of process, costs and time delays as a result of applications going through a Council hearing process and then being heard again in the Environment Court. Accordingly it is considered that having the delegation rest with a Hearings Panel or Subcommittee would also run contrary to the streamlining intent of the direct referral process.
42. Reports on applications that have been directly referred are also required to meet statutory timeframes for their preparation and it would be highly unlikely if not impossible for a report to be able to be drafted, considered, and approved within the 20 working day timeframe following the close of submissions on an application (noting that any Panel or Subcommittee decision would also need to be reported through Council).

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43. Practical and jurisdictional difficulties in the context of a Court hearing could also eventuate where a Panel or Sub-Committee had finalised the content of the report. It is important to note that the Officer appearing in Court must be able to present their professional opinion and may be examined on that opinion. Accordingly it is important that the report ultimately reflects their professional opinion and not anyone else's. For example, during the course of a Court hearing it is common for the presiding Judge and Commissioners to seek the expert opinion of Officers in respect of resolving a relevant issue. The Court may also direct experts from the parties present to confer to discuss an issue with a view to narrowing or reaching agreement. Also depending on the nature of the evidence presented by other parties, the Officer needs to be open to considering that evidence and if necessary amend the position adopted in their report.
44. Where for example the report has been finalised by a Panel or Sub-Committee, Officers could therefore be constrained in responding, reaching agreement, or amending their position by the scope of the position adopted and approved by the Panel or Sub-Committee, frustrating the Court decision making process. Officers appearing as expert witnesses before the Court also have a duty to impartially assist the Court under the Environment Court Expert Witness Code of Conduct. Accordingly Officers appearing as experts before the Court who did not have full authority to respond, reach agreement, and be open to amending their position on issues could be in breach of this Code. This would also undermine the experts (and Council) credibility before the Court, as well as attracting criticism.
45. Given all of the above, it is recommended that the final content of the report should be delegated down to senior Officer level rather than rest with a Hearings Panel or Subcommittee. Having elected members involved in any aspect of the reports confirmation would not be appropriate process. As discussed above, delegating down to Officer level does not mean that the Council cannot take differing views on the merits of an application. As is currently the case with Officer reports to a Council hearing, the report to the Environment Court may address differing views within the Council. It is the role of the Court (as it is for the Hearings Panel with applications that have not been referred) to then consider those alternative views and reach a decision.
46. It is considered that the delegation as to the final content of the consent authority report rest with the Resource Management Manager and Planning Administration Manager. These roles provide the necessary oversight to ensure that the final content of the report considers all relevant issues including any differing points expressed by other Council units. As outlined in the advice from the Legal Services Unit, the delegation should however be made on the proviso that any report prepared states that it is report of the views of the Officers or consultants as individuals, and is not an expression of the views of a hearing panel or Council – i.e. similar to the preamble of Officer reports prepared under section 42A of the RMA.
47. As noted in the legal advice, the Ministry for the Environment is considering further changes to the direct referral provisions clarifying their intent. This work is likely to further resolve how the overall process will work. This may have the effect of requiring future changes to the Council's processes in considering applications for direct referral.

#### FINANCIAL IMPLICATIONS

48. There are no direct financial considerations.

#### Do the Recommendations of this Report Align with 2009-19 LTCCP budgets?

49. There are no LTCCP budgetary implications.

#### LEGAL CONSIDERATIONS

50. The adoption of the recommended criteria and process for finalising the consent authority report does not conflict with the statutory requirements of the Resource Management Act 1991 as amended by the Resource Management (Simplifying and Streamlining) Amendment Bill 2009.

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51. Environment Court and High Court case law may develop over time in respect to the direct referral provisions. The Council's internal process and direct referral criteria may therefore occasionally need to be revised and updated to reflect that guidance and case law.

#### **Have you considered the legal implications of the issue under consideration?**

52. Yes. The recommended criteria will support decision making related to the powers of direct referral in the Resource Management Act.

#### **ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS**

53. Page 156 of the 2009-2019 LTCCP – Level of Service under Democracy and Governance.

#### **Do the recommendations of this report support a level of service or project in the 2009-19 LTCCP?**

54. Yes. Supports the level of service that Council and Community Board decisions comply with statutory requirements.

#### **ALIGNMENT WITH STRATEGIES**

55. Not applicable.

#### **Do the recommendations align with the Council's strategies?**

56. Not applicable.

#### **CONSULTATION FULFILMENT**

57. Not applicable.

#### **STAFF RECOMMENDATION**

It is recommended that the Regulatory and Planning Committee recommend to the Council that it:

- (a) Adopt the criteria in Attachment 3 for use by Officers, the Hearings Panel, and Commissioners in respect to making decisions on requests for applications to be directly referred to the Environment Court.
- (b) Direct Officers to implement processes to ensure that relevant Councillors, Community Board Members, and the Regulatory and Planning Committee are advised of the outcome of requests for direct referral.
- (c) Direct Officers to implement processes to ensure that submitters or potential submitters are advised of the outcome of requests for direct referral, and the implications for their involvement in the process.
- (d) Amend the delegations register by deleting delegations (yn), (yp), and (ys) relating to the Hearings Panel's powers relating to direct referral of applications to the Environment Court and instead create a new Subcommittee to be known as the "Direct Referral Subcommittee" made up those Councillors who are accredited to hear and consider Resource Management Act 1991 matters. The specific delegation to be included is as follows:



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**Direct Referral Subcommittee**

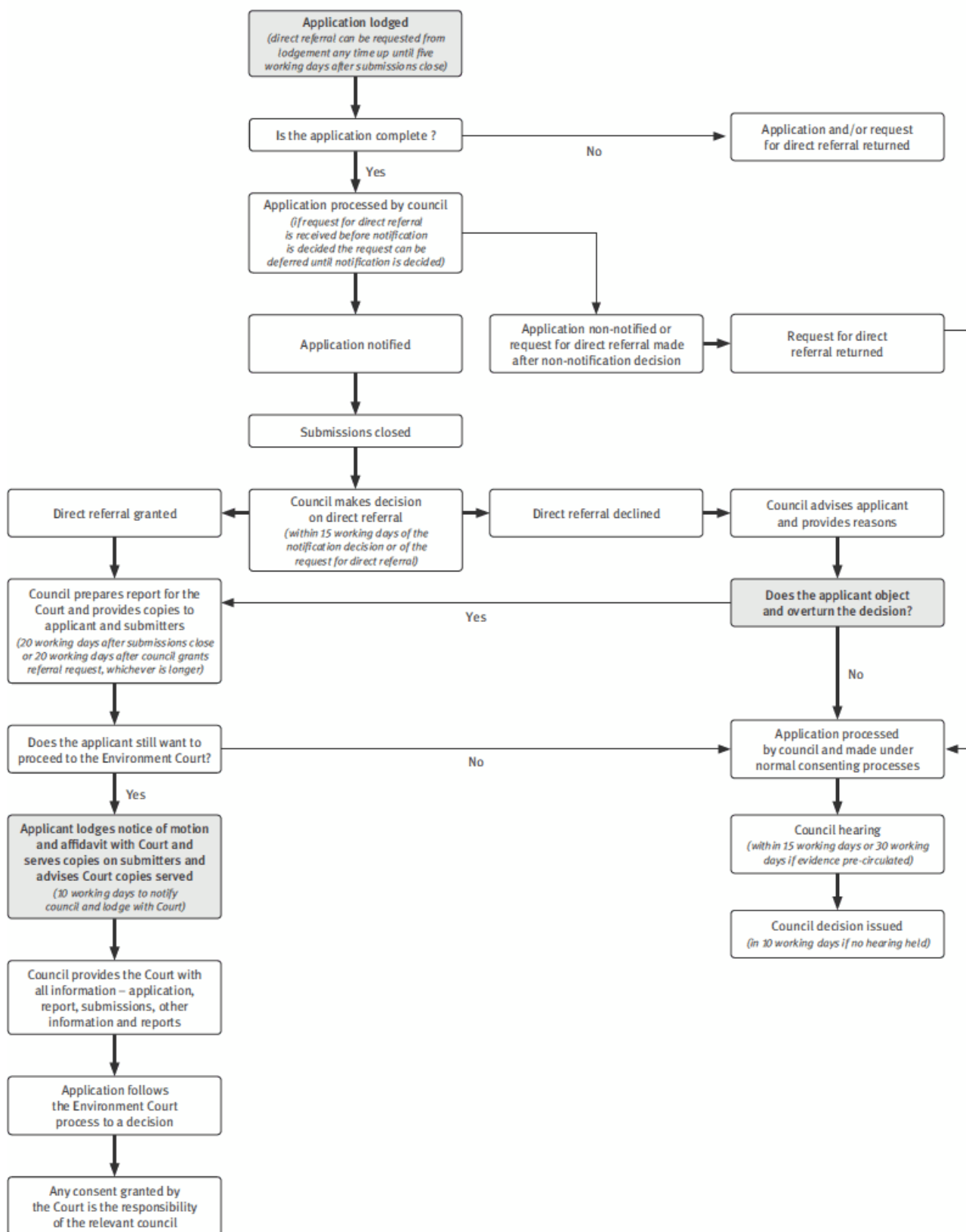
**Terms of Reference/Quorum**

1. To consider and make decisions on requests for resource management applications to be directly referred to the Environment Court.
2. The quorum of the Subcommittee shall be three and shall comprise those elected members that are accredited to hear and decide on Resource Management Act 1991 matters.

**Delegations**

- (i) To determine whether a notified resource consent application or an application to change or cancel a condition of a resource consent that has been notified, should be directly referred to the Environment Court at the request of an applicant, under section 87E of the Resource Management Act 1991.
  - (ii) To decide whether a notice of requirement for a heritage order should be directly referred to the Environment Court at the request of a requiring authority or a heritage protection authority under sections 198C of the Resource Management Act 1991.
- (e) Amend the delegations register by adding the following delegation under Resource Management Manager and Planning Administration Manager:
- (i) To approve the content of a consent authority report on an application that has been directly referred to the Environment Court under sections 87F and 198D of the Resource Management Act 1991.

### DIRECT REFERRAL PROCESS FOR RESOURCE CONSENTS



# Christchurch City Council

## Legal Services Unit

### LEGAL OPINION

**For the exclusive use of Council Officers only**  
**Not for public distribution without the approval of the**  
**Legal Services Manager**

**Date:** 24 MAY 2010

**From:** BRENT PIZZEY (Solicitor, Legal Services)

**To:** MAURICE DALE (Senior Planner, District Planning Team A)

PETER MITCHELL (General Manager, Regulation and Democracy Services)

#### **Legal Questions on Report on Direct Referral to the Environment Court**

##### **The Issues**

1. On 6<sup>th</sup> May 2010, officers reported to the Regulatory and Planning Committee on the process for direct referral of resource consent applications, changes to resource consents, and Notices of Requirement for designations, to the Environment Court.
2. The Committee asked two questions which require legal advice:
  - (a) Whether there is any starting presumption when the consent authority is exercising the discretion to refer an application directly to the Environment Court if requested to do so by the applicant; and
  - (b) If the consent authority refers an application to the Environment Court, whether the Council is able to take a dual role in the proceeding with a differing view on the merits of the application than that recommended in a consent authority report that is distributed prior to the applicant commencing the Environment Court proceedings.

##### **Summary of Opinion**

3. When the consent authority exercises the discretion on whether to agree to the request for direct referral, there is no starting presumption; however,
  - (a) Weight must be placed on the intent and purpose of the discretion (to enable the resource consent process to be simplified and streamlined), and
  - (b) The decision must further the purpose of the Act.

4. The report that the Council distributes to the applicant and the parties prior to the applicant lodging the proceedings in the Environment Court will be a report by the “consent authority”. The Council cannot be a separate party to the proceedings.
5. There are no existing delegations by the Council as consent authority for approval of that report.

### **Background on the Direct Referral Process**

6. Direct referral by the Council of applications to the Environment Court is a process introduced to the Resource Management Act 1991 by the amendments that were operative from 1<sup>st</sup> October 2009. On 6<sup>th</sup> May 2010 officers reported to the Regulatory and Planning Committee on the process for direct referral to the Environment Court. That report rightly noted that as the process is new, there is as yet no certainty on how it will operate. It may be the subject of further amendments to the RMA, and will be the subject of developing caselaw, best practice guides for practitioners and amendment to the Environment Court Practice Note.
7. A focus of the 6<sup>th</sup> May report was on the scope of, and exercise of, the discretion by the Council on whether to refer a notified resource consent application to the Environment Court. As the Act does not specify criteria that apply to the exercise of the discretion, the report recommended guidelines on the matters to be taken into account by the consent authority in exercising that discretion. The purpose of the guidelines is to assist consistency in the factors taken into account on each request for direct referral.
8. The issues addressed by this legal opinion were raised in the Committee’s discussion of that report.
9. As summarised in the 6<sup>th</sup> May 2010 report, the applicant’s request for direct referral can be made at any time from the date of lodging the application, until five working days after the close of submissions (section 87D RMA). If the request for direct referral is made before the date of notification of the application, the Council’s decision on direct referral must be made within 15 working days of the Council’s decision to notify the application. That may require the decision on direct referral before the submissions have closed.
10. The consent authority must prepare a report on the application within the longer of the following periods:
  - (a) the period that ends 20 working days after the date on which the period for submissions on the application closes:
  - (b) the period that ends 20 working days after the date on which the authority decides to grant the request.
11. That report must address all the matters in sections 104 to 112 of the Act for the decision making on resource consent applications to the extent that they are relevant to the application, and suggest conditions that the consent authority considers should be imposed if the Environment Court grants the application. As soon as is reasonably practicable after the report is prepared, the consent authority must provide a copy to—
  - (a) the applicant; and
  - (b) every person who made a submission on the application.

12. The Act requires specific steps by the consent authority if the applicant starts the Environment Court proceeding after the Council's direct referral decision. The consent authority must provide the Court with all necessary information, and copies of the report referred to above.
13. The Environment Court is yet to issue a Practice Note saying how it is going to manage these proceedings. Discussions are underway between the Court, the Ministry of the Environment, and councils involved in applications that have been referred to the Environment Court. In the meantime, the process will be at the discretion of the presiding judge. Current indications from the Environment Court are that:
  - (a) The Court will use Court process rather than consent authority process for hearings. This includes: encouraging parties to enter mediation before going to hearing; caucusing of expert witnesses; pre-hearing exchange of briefs of expert evidence; cross-examination of witnesses.
  - (b) The Court will require Council officers or consultants who prepared the reports to present them as evidence and be available for questions from the Court, and cross-examination. The officers are likely to be permitted by the Court to expand, extend and amend the content of the officer reports when they are giving evidence, so as to address matters raised in other evidence.
  - (c) The Court will expect legal counsel for the Council to support officers who will be presenting evidence and subject to cross-examination. That role for the Council's lawyer would necessarily include submissions, and testing the evidence of other witnesses through cross-examination.
  - (d) The Court may appoint a "friend of the Court", being a resource management professional, possibly a lawyer, to assist lay submitters in the process.

#### **The Law: Exercising the Discretion for Direct Referral**

14. The new sections of the RMA on direct referral appear under the subheading of "*Streamlining decision-making on resource consents*". Section 87E is as follows:

##### **Consent authority's decision on request**

- (1) If the consent authority determines under section [88\(3\)](#) that the application is incomplete, it must return the request with the application without making a decision on the request. Section [88\(4\)](#) and [\(5\)](#) apply to the application.
- (2) If the consent authority receives the request after it has determined that the application will not be notified, it must return the request.
- (3) If the consent authority receives the request before it has determined whether the application will be notified, it must defer its decision on the request until after it has decided whether to notify the application and then apply either subsection [\(4\)](#) or [\(5\)](#).
- (4) If the consent authority decides not to notify the application, it must return the request.
- (5) If the consent authority decides to notify the application, it must give the applicant its decision on the request within 15 working days after the date of the decision on notification.
- (6) In any other case, the consent authority must give the applicant its decision on the request within 15 working days after receiving the request.

- (7) No submitter has a right to be heard by the consent authority on a request.
  - (8) If the consent authority returns or declines the request, it must give the applicant its reasons, in writing or electronically, at the same time as it gives the applicant its decision.
  - (9) If the consent authority declines the request under subsection (5) or (6) the applicant may object to the consent authority under section [357A\(1\)\(e\).](#)]
15. The Act does not specify the criteria that the consent authority must apply when considering the request. There is no express presumption on whether the request ought to be granted. On its face, there is no explicit guide to how the discretion will be exercised.
  16. Despite the apparent lack of fetters on the exercise of the discretion, there are general legal principles which must apply when the consent authority is exercising that discretion. These guide the consent authority on the matters that can and cannot be considered in exercising the discretion, and on the weight to be given to possible factors in that decision.
  17. There is no such thing as an unfettered discretion. Discretion must be exercised reasonably. It must be exercised for a proper purpose. It must take into account relevant matters and exclude consideration of irrelevant matters.
  18. Every discretionary power is circumscribed by the purpose of the statute. Exercise of the discretion on whether to refer an application to the Environment Court must be in furtherance of the sustainable management of natural and physical resources. Moreover, the heading of this part of the RMA specifies its purpose, being “Streamlining decision-making on resource consents”. That statutory purpose must also inform the exercise of the discretion.
  19. Rules of statutory interpretation apply to identification of appropriate matters to take into account when exercising the discretion, and weighting of considerations. *The Interpretation Act 1999* provides:
    5. Ascertaining meaning of legislation
      - (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
      - (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
      - (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.
  20. Identification of appropriate matters to take into account and weighting of those matters when the consent authority exercises the discretion to directly refer applications to the Environment Court is to be ascertained in light of the purpose of simplifying and streamlining the resource consent process by excluding the first instance consent authority hearing from that process.
  21. As a result, whilst there is no starting presumption to the Council's exercise of discretion, the objective of simplifying and streamlining the consent process must be given particular weight on the consideration of the relevant factors. That weight has been incorporated in the proposed guidelines attached to the 6<sup>th</sup> may report. Many of the suggested matters for consideration are directly about whether the process will be simplified and streamlined by the direct referral.

22. Accordingly, when the consent authority exercises the discretion on whether to agree to the request for direct referral, there is no starting presumption; however,
- (a) The decision must be focussed on factors that arise from the intent and purpose of the discretion, being to enable the resource consent process to be simplified and streamlined, and
  - (b) The decision must further the purpose of the Act.

### **The Law: Dual Roles for Council on an Application Referred to the Environment Court**

23. The question of whether the Council could have dual, roles taking differing positions, in the Environment Court is here answered by describing the Council role in the Environment Court prescribed by the 2009 RMA amendments.

24. The 6<sup>th</sup> May 2010 report summarises the role of the consent authority following its decision to refer a resource consent application to the Environment Court. The consent authority must provide a report to the Environment Court:

#### 87F. Consent authority's subsequent processing

- (1) If the consent authority does not grant the applicant's request under [section 87D](#), the consent authority must continue to process the application.
  - (2) If the consent authority grants the applicant's request under [section 87D](#), the consent authority must continue to process the application and must comply with subsections (3) to (5).
  - (3) The consent authority must prepare a report on the application within the longer of the following periods:
    - (a) the period that ends 20 working days after the date on which the period for submissions on the application closes;
    - (b) the period that ends 20 working days after the date on which the authority decides to grant the request.
  - (4) In the report, the consent authority may—
    - (a) address issues that are set out in [sections 104 to 112](#) to the extent that they are relevant to the application; and
    - (b) suggest conditions that it considers should be imposed if the Environment Court grants the application.
  - (5) As soon as is reasonably practicable after the report is prepared, the consent authority must provide a copy to—
    - (a) the applicant; and
    - (b) every person who made a submission on the application.
25. The report writer is the “consent authority”. “Consent authority” is defined in the Resource Management Act 1991 as “*means a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act*”. “Territorial authority” is defined as meaning a Council listed in the Part 2 of Schedule 2 of the Local Government Act 2002. As a result, the “consent authority” writing the report following the Council’s decision to grant direct referral is the Christchurch City Council.

26. That provision in the RMA requiring the “consent authority” to prepare the report on the application differs from the provision for reports on applications prior to local authority hearings. Section 42A of the RMA provides
- Reports to local authority
- (1) At any reasonable time before a hearing or, if no hearing is to be held, before the decision is made, a local authority may require an officer of a local authority (as local authority is defined in [section 42\(6\)\(b\)](#)), or may commission a consultant or any other person employed for the purpose, to prepare a report on information provided on any matter described in [section 39\(1\)](#) by the applicant or any person who made a submission.
27. The provision for a report in the direct referral process is a mandatory requirement in which the responsibility rests with the consent authority itself, rather than the responsibility resting with officers.
28. As the Christchurch City Council will be the entity preparing the report, rather than an officer of consultant, the Christchurch City Council cannot take a dual role in the Environment Court proceedings in which the report is presented.
29. The Council now needs to resolve its delegations for the Council preparation of that report. The work needed for completion of that report may include assessment of the application and submissions, expert input from officers and consultants, assessment of the application under sections 104-112 of the RMA, and a recommendation on conditions if consent is granted. That must all occur within the statutory timeframe of 20 working days after submissions close, or after the Council grants the direct referral request, whichever is the longer.
30. Following receipt of a copy of that report, the applicant will decide whether to start the proceedings in the Environment Court, or to continue the Council hearing process.
31. The Environment Court has firmly signalled that if the proceedings are to be in the Court, the consent authority must produce its report writers to give evidence in Court. As noted above, the Court is likely to allow officers to expand and amend assessments from those on the report, and possibly adduce further evidence. Court procedures will apply. Officers giving evidence are likely to be subject to cross-examination by submitters and counsel for submitters, and to questioning by the Court. As the officers’ evidence will be subject to testing in that way, so should the evidence of the applicant and submitters. It will be necessary for the consent authority to have legal counsel appearing to make submissions, support and assist the officers giving evidence, and test other evidence.
32. The scheme of these changes to the RMA is intended to streamline the process by enabling an application to be referred directly to the Environment Court, whilst also enabling the Court to have the benefit of a report from the consent authority in which the application and the submissions may be assessed under sections 104-112 of the Act. It is notable that the consent authority must prepare the report, but that it has discretion over whether, and the degree to which, it embarks addressing issues arising under sections 104-112 of the Act, or suggests conditions. The report may not contain that detailed assessment.



33. The appropriate delegation for preparation of this report is to Council officers. The delegation should be made on the proviso that any report prepared under section 87F(3) states that it is report of the views of the officers or consultants as individuals, and is not an expression of the views of a hearing panel or Council – ie, similar to the preamble of officer reports prepared under section 42A of the RMA. There would be no benefit to the Council, community or Court if the Council attempted to use that report process as an avenue for expression of the views of the Council. The purpose of these changes to the RMA is to remove that step. Expression of a Council view in the report would carry little weight, as the view would have been formed without the benefit of hearing evidence.

## **Conclusion**

34. This report has responded to two legal matters raised by the Regulatory and Planning Committee at the 6<sup>th</sup> May 2010 meeting regarding direct referral of applications to the Environment Court. The advice given is that:
- (a) Whilst there is no starting presumption when considering a request for direct referral, weight must be placed on the objective of simplifying and streamlining the application process. The proposed guidelines for decision makers attached to the 6<sup>th</sup> May report do concentrate on factors relevant to the degree to which the direct referral would simplify and streamline the process; and
  - (b) The Council cannot be a party to the directly referred application in the Environment Court proceeding other than as the consent authority presenting its report on the application. It cannot take a dual differing position.
35. The Ministry for the Environment is considering further changes to the direct referral provisions to assist clarifying the basis of the direct referral decision. The Principal Environment Court Judge has had meetings with Ministry officials, with a view to the production of a Court Practice Note to direct parties on appropriate process in the Court. In the meantime, each Presiding Judge may have her or his own requirements for how the directly referred application will be managed.

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## Christchurch City Council Direct Referral Criteria

These criteria are to be used by Council staff in assessing a request from an applicant for a notified resource consent, notice of requirement, or heritage protection order, for that application to be directly referred to the Environment Court for a decision.

The criteria are non-statutory criteria and are therefore not binding on the Subcommittee or Commissioner in making a decision. They however provide a useful basis to consider such requests so as to ensure that decisions are made on a consistent basis and based on sound and defensible reasoning.

The starting point for considering a direct referral request should be neutral. There is however a clear intention in the Resource Management (Simplifying and Streamlining) Amendment Act 2009, to enable applications to be directly referred to the Court so as to reduce duplication of process, costs, and time delays as a result of applications going through a Council hearing process and then being heard again by the Environment Court. This overall intent should be kept in mind when considering a direct referral request.

There is no particular weight to be given to each criteria in making a decision and meeting or failure to meet one criteria is not necessarily determinative on whether the application should be referred or not.

Criteria	Guide Notes
<b>1. Necessity for Referral</b>	
Consider if a hearing would otherwise be necessary. If no, then there may be little merit in direct referral.	Are there or are there likely to be any submitters, and therefore will a hearing be necessary? Note that a hearing is not required where there are no submitters (unless otherwise requested by an applicant).
Consider whether there are alternative decision making bodies that could better determine the application. If there are, then those options should be investigated.	Is this a matter of national significance that could be referred to the Environmental Protection Authority? Should the Council request that the application be called in?
Consider whether if in the normal course of events the decision will likely result in an Environment Court appeal or other Court action. If no, then there may be little merit in direct referral.	Are the likely matters of appeal substantive, or will they be matters of a minor nature that will most likely be resolved through mediation? Would a pre-hearing meeting provide a more efficient and cost effective alternative?
<b>2. Providing an Enabling Process</b>	
Consider the reasons the applicant has provided in making the application to go to the Environment Court. Are these reasonable resource management grounds for referral?	What reasons has the applicant supplied with their application? Are these valid?
Consider how the decision will affect other applications in process. If other applications in process will be adversely affected by not referring an application, then there may be merit in allowing referral.	Will matters of processing priority or resource allocation priority be affected? (e.g. Will refusing to directly refer an application result in process delays preventing other later applications for the same resource from being heard and determined without unreasonable delay?)
Consider the effect on submitters and/or affected parties.	Will direct referral benefit submitters through their sharing of resources and/or focusing the matters they are submitting on to relevant resource management matters? Will submitters be unduly deterred by the cost and formality of a Court process and therefore put the quality of the consent decision in jeopardy?

<b>Criteria</b>	<b>Guide Notes</b>
Consider the effects on other Consent Authorities.	What effect will there be on any other consent authority involved in this proposed activity or project? (e.g. will making a decision for or against direct referral be inconsistent with the decision of a another Council jointly processing consents for this activity or project?)
<b>3. Cost &amp; Timeliness</b>	
Consider whether the overall cost will be more or less than the normal process	Will there be a cost advantage or disadvantage for the applicant? Will there be a cost advantage or disadvantage for any other party?
Consider the timeframe effects	Will the Environment Court be a faster or slower option than a Council hearing and possible appeal? Will the Court process delay or speed up decision making on other consent applications for the same resource in terms of processing priority?
Consider the implications on available resource within the Council	Will the referral free up Council resources or require greater resource? (e.g. reporting officers, technical officers, administration officers, hearings panels, commissioners.
Consider the available funding to support the Council's costs in carrying out their duties at the Environment Court.	Is funding available to cover the costs of acting as a witness at the Court? Has the applicant offered to pay for any additional costs that will be incurred by the Council?
<b>4. Technical Resolution</b>	
Consider whether there is a matter that will be best determined through cross examination and presentation of sworn evidence.	Will the Environment Court assist the resolution of matters of a technical nature? Will a decision by the Environment Court likely provide precedence that will assist decision making for other applications/future applications?
<b>5. Any Other Relevant Matter</b>	