

3. DIRECT REFERRAL OF APPLICATIONS TO THE ENVIRONMENT COURT



General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
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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 staff has 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 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.

EXECUTIVE SUMMARY

2. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 came into effect on 1 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.
3. 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.
4. 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 five 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.
5. 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.
6. 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.
7. 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.

8. Notices of requirement for designations and heritage orders by Council's (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.
9. Since the enactment of the Resource Management Amendment Act 2009, there have been just three requests nationwide for applications to be referred to the Environment Court. These all relate to notified resource consents and include a supermarket proposal in Rodney District, a sewerage scheme in Hawkes Bay Region, and finally one in Christchurch City for the proposed expansion of the Lyttelton Port Company coal yard by way of reclamation.
10. The Lyttelton Port Company (LPC) proposal has been subject to applications made jointly to both the Christchurch City Council and Environment Canterbury. 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.
11. Direct referral of the LPC applications has been 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 Councils partial ownership of the port company. A decision was required to be made in advance of the criteria recommended in this report being developed and reported through the Committee, in order to meet statutory timeframes for making a decision.
12. In respect of all three direct referral applications nationwide, there has been a lack of guidance for the respective Councils as to what basis they should make a decision on the request for direct referral. Neither the Act or the Ministry for the Environment presently provide guidance as to how Council's 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.
13. To date Environment Canterbury (ECAN) is the only Council in the country that has produced any internal guidance to assist in exercising its discretion on direct referral requests. The ECAN criteria were also used by the Hawkes Bay Regional Council in determining the one direct referral request they have considered. 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.
14. 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.
15. The criteria that are recommended to be adopted for considering direct referral requests to Christchurch City Council are attached as **Attachment 1**. The criteria largely mirror those devised by Environment Canterbury but have been adapted for Christchurch City Council purposes.

16. 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.
17. 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 the Council should consider in determining direct referral requests.
18. 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, however it is considered desirable that elected members for the ward or community board are advised where a request for direct referral has been received. It is also considered desirable that submitters or potential submitters are advised when a request for direct referral has been received. Subsequent communication to elected members and submitters or potential submitters should also advise whether the request has been granted. While submitters have no rights to be heard by the Council in considering a direct referral request, such communication is considered important so that they are fully informed of the implications of a direct referral request for their involvement in the consent process.
19. It is therefore recommended that the relevant Councillors, Community Board Members, and submitters and potential submitters be advised when a request is received and the outcome of that request. It is also recommended that such requests and the outcome of those requests be reported through the Regulatory and Planning Committee as part of the Planning Administration Managers monthly report.

FINANCIAL IMPLICATIONS

20. There are no direct financial considerations.

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

21. There are no LTCCP budgetary implications.

LEGAL CONSIDERATIONS

22. The adoption of these criteria 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.
23. Potentially Environment Court and High Court case law may develop over time in respect to the direct referral provisions. Should this occur, the Council direct referral criteria may occasionally need to be revised and updated to reflect that case law.

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

24. 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

25. 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?

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

ALIGNMENT WITH STRATEGIES

27. Not applicable.

Do the recommendations align with the Council's strategies?

28. Not applicable.

CONSULTATION FULFILMENT

29. Not applicable.

STAFF RECOMMENDATION

That the Council :

- (a) Adopt the criteria in Attachment 1 for use by Officer's, the Hearings Panel, and Commissions in respect to making decisions on requests for applications to be directly referral 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 when an application for direct referral is received, and the outcome of that request.
- (c) Direct Officers to implement processes to ensure that submitters or potential submitters are advised when an application for direct referral is received, the outcome of that request, and the implications for their involvement in the process.

COMMITTEE RECOMMENDATION

The Committee recommends that this report lie on the table until the June Regulatory and Planning Committee meeting.