

BY KRISTEN MAYNARD ENVIRONMENTAL ANALYST, MARUWHENUA, MINISTRY FOR THE ENVIRONMENT

KANOHI KI TE KANOHI¹ — CONSULTING WITH MAORI

RESOURCE MANAGEMENT
ACT REQUIRES DECISION
MAKERS AND RESOURCE
CONSENT APPLICANTS TO
CONSULT TANGATA
WHENUA IN ANY
ENVIRONMENTAL MATTER
THAT MAY AFFECT THEM.

INTRODUCTION

Consultation with tangata whenua has become a requirement of the work local government and (to a more limited extent) resource consent applicants must undertake.

The judiciary has outlined when and how to consult with tangata whenua. Although providing guidance to the consultation process, in practice, anecdotal evidence suggests that in some cases the consultation taking place has been ineffective. Ensuring that effective consultation has taken place will assist both local government and resource consent applicants in achieving their purposes, and in establishing amicable relationships with the tangata whenua in their areas.

It is therefore the intention of this paper to provide some answers to the most commonly asked questions relating to consultation with tangata whenua.

BACKGROUND

Traditionally, Maori have developed and practiced a similar concept to what is now commonly known as sustainable management. The special relationship Maori have with the land and its resources is reflected in Maori culture and history, and has now been recognised in legislation. Maori adopted practices, such as tapu and rahui, protect the well-being of the people and also the essence and integrity of the land. Consequently, many Maori have challenged the ill treatment of the land and its natural resources and, in part, inspired others to reflect on the way these resources are being managed.

Throughout the Resource Management Law Reform process, Maori involvement was seen as a necessary component of constructing a new and improved resource management system. Extensive Maori involvement in the development of the *Resource Management Act 1991* ("the Act") resulted from not only the Crown's recognition of its Treaty obligations, but also by the increased recognition that Maori, through their affinity to the land and their knowledge, tikanga and values, could contribute to sustainable management of

natural and physical resources. As a result, government officials consulted with Maori throughout the country to determine ways within which to reflect and promote Maori environmental values and practices. This prompted the incorporation of provisions within the Act that would enhance the role and participation of Maori within this new environmental system.²

WHY CONSULT?

The Act explicitly recognises and provides for the inclusion and implementation of Maori values, interests, and environmental practices. Part II places an obligation on all persons exercising functions and powers under the Act to:

- Recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga (section 6(e));
- Have particular regard to kaitiakitanga (section 7(a)); and
- Take into account the principles of the Treaty of Waitangi (section 8).

Integral to the adequate implementation of the Act, and implicit by these sections, is the requirement for local government to consult with tangata whenua. Clause 3(1)(d) of the First Schedule to the Act, places an express obligation on local authorities to consult with tangata whenua. During the preparation of a proposed policy statement or plan, the local authority concerned is required to consult with "the tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga".³

Further, when making an application for a resource consent, section 88(4)(b) requires that applicants include "an assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated". Section 88(6)(b) stipulates that such an assessment "shall be prepared in accordance with the Fourth Schedule". One of the matters that should be included in an assessment of effects on the environment is "an identification of those persons interested in or affected by the proposal, the consultation undertaken, and any



Kanohi ki te kanohi – face to face.

response to the views of those consulted".⁴ If the applicant is aware that the tangata whenua may be interested in, or affected by, their proposal, they would be wise to consult, otherwise a consent authority may require further information explaining the consultation process used by the applicant.⁵ This of course could lead to unnecessary delays in the processing of the application.

WHAT IS CONSULTATION?

The courts have identified certain elements which describe the nature of consultation. This includes:

- Listening to what others have to say and considering responses;
- Allowing sufficient time and making a genuine effort;
- Providing enough information to the party being consulted to enable the consultee to be adequately informed so as to be able to make intelligent and useful responses; and
- The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a working plan already in mind.

*"The subject matter of the consultation is a statement of a proposal not yet finally decided upon and is an intermediate situation involving meaningful discussion. The party obliged to consult holds meetings, provides relevant information and further information on request, and waits until those being consulted have had a say before making a decision."*⁶

Consultation does not mean that the parties involved must come to a consensus. However, if consultation is to be meaningful, any decision made pertaining to the information gathered, should be openly discussed with tangata whenua.

WHO CONSULTS?

Local government

Clause 3(1)(d) of the First Schedule of the Act places an express obligation on local government to consult with tangata whenua in the preparation of policy statements and plans. Further, case law has offered guidance as to who should consult with regard to resource consent applications. Important points to note, include that:

- Council officers acting in a non-judicial capacity may have a duty to consult with tangata whenua in relation to resource consent applications;
- Consent authorities acting in their "quasi-judicial" capacity should not undertake consultation; and

- Meeting the obligations of section 8 and the Treaty principle of consultation is not a duty of the applicant but the responsibility of council officers of the local authority.⁷

Further, section 94 of the Act lists applications for resource consents which do not require notification if certain conditions are met. One such condition stipulated is that "written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the consent..."⁸ It is important therefore, that consent authorities ensure before making a decision not to notify an application, that Maori interests have been fully considered.

"...It is perfectly obvious that the Council in deciding that the application should not be notified must have had the question of Maori interests in mind and have reached the conclusion that there are no known Maori land features to taonga which required consultation..."⁹

Resource consent applicants

Clause 1(h) of the Fourth Schedule of the Act requires an applicant to identify those persons interested in, or affected by, the proposal. Primarily, the courts emphasised that the statutory and Treaty obligation to consult was that of the consent authority as the local governmental agency, rather than the applicant.¹⁰ However, at the same time, case law was also suggesting that a consent authority may require an applicant to supply further information, which may include Maori issues, if the information supplied was not regarded as being sufficient, for the consent authority to make an informed decision.¹¹ This would appear to suggest that although there is no specific statutory duty on the applicant to consult, it would be wise for them to consult. This would ensure that there were no delays in the processing of their application.

*"...We also commend the idea that an applicant for a resource consent should consult with those who may be affected or interested, including tribal authorities where they are known..."*¹²

Further, recent cases have recognised that it would be good practice for applicants to consult with tangata whenua where their proposals may affect the matters referred to in sections 6(e) or 7(a).¹³

In summary, although there is no express statutory obligation imposed on resource consent applicants to consult with tangata whenua, it is considered good practice for applicants to consult in certain circumstances. Failure to provide adequate information with respect to the

Maori interest in the consent application, could result in delays and requests by the consent authority for further information.

WHEN SHOULD CONSULTATION TAKE PLACE?

In general, most of the case law stipulating when consultation must take place is based on the resource consent application process, rather than the content of plans and policy statements.

*"Two differing trends have emerged from the decisions of the High Court and the Planning Tribunal, in relation to resource consent applications. One line appears to support the contention that consent authorities should consult with tangata whenua prior to the consent authority's determination of a resource consent application, and another line of cases suggests a consent authority, which is not a Minister of the Crown, is not under a duty to consult with any party before proceeding to determine a resource consent application."*¹⁴

The law remains unsettled on this point. However, case law has also suggested that at the very least, consent authorities should ensure that they are fully informed as to all the necessary facts before coming to a decision on a resource consent application. Consultation with tangata whenua may need to be undertaken by "independent" advisers to the consent authority prior to determining a resource consent application. This would ensure that the consent authority was fully informed when making a decision. A similar approach may also be necessary prior to determining whether or not to notify a resource consent application.

Further, a common sense approach would suggest that tangata whenua should be consulted as early in the process as possible. This would ensure that Maori have time to consider the information, consult with members of their iwi/hapu groups, and identify the issues relevant to their area. Discussions with tangata whenua would then ensue on a more informed proactive basis, rather than a reactive one.

WHO SHOULD BE CONSULTED?

The issue of "who" are the most appropriate tangata whenua representatives to consult, is one that arises time and time again. It is an issue that local government, resource consent applicants, and the judiciary are constantly grappling with.

The Maori Land Court can determine issues of representation pursuant to section 30 of the *Te Ture Whenua Maori Act 1993*, but has expressed reluctance in doing so. The Planning Tribunal (Environment Court) has also expressed reluctance in determining tangata whenua status.

"...this Tribunal would avoid, if possible, making any finding about the status of a particular tribal authority, or about the scope of whanau rights as tangata whenua, or about which hapu might have traditional or customary interests in a particular area..."¹⁵

Further, the Environment Court has stated that it is not for the consent authority to decide "who" are the tangata whenua within an area.¹⁶

Simple solutions to this question are therefore scarce, and in many cases impact upon the effectiveness of the consultation taking place. It is important however, that local authorities are familiar with the iwi/hapu groups within its areas and their representative bodies. Knowledge of the location of marae within an area is also important. The Maori Land Court has suggested that in determining representative matters an inquiry as to tangata whenua today, should include:

- An assessment of the historic circumstances of those seeking representation;
- Ensuring that all iwi/hapu interests within that rohe¹⁷ are capable of being addressed by those claiming representative status;
- A consideration of the dynamic nature of, and changes in, iwi/hapu social structures; and
- Focusing on the marae of a rohe, rather than existing Maori land titles.¹⁸

There will often be more than one tangata whenua group in a particular area, and in certain situations all groups may need to be consulted. The nature of the activity will also determine in many circumstances who would be the most appropriate persons to consult. As such, identifying those persons most appropriate, will need to be determined on a case by case basis.

HOW SHOULD CONSULTATION PROCEED?

It is important to remember, when consulting, that most iwi/hapu groups do not have technical expertise in resource management matters and would need to be informed of a proposal in depth, and as early as possible. Further, a number of Maori are concerned that they are often expected to incur the costs of the consultation process themselves, although it is their expert opinion that is being sought. In some instances, iwi

organisations have reacted to insufficient funding by establishing processes and/or consultancies which enable them to charge local authorities and applicants for providing the information sought. These processes, have, however become a concern in some regions, where the processes in place are inefficient and/or perceived by local authorities and applicants as purchasing iwi/hapu support.

These issues, compounded with the numerous demands on iwi/hapu time and resources (for example, responding to large numbers of resource consent applications), impact substantially upon the ability of iwi/hapu to respond effectively to consultation requests. A lack of fundamental resources for iwi/hapu to participate in resource management processes, needs to be acknowledged and addressed by local authorities. Ensuring that funding is available for consultation purposes, and that an agreed and transparent process is in place, would encourage increased participation of iwi/hapu in consultation processes.

Further, anecdotal evidence suggests that insufficient responsiveness by local authorities to iwi/hapu concerns voiced during the consultation process, and a lack of feedback post-consultation, often leads to suspicion and breakdowns in relationships. Inadequate levels of cultural awareness and empathy are also factors perceived by iwi/hapu as affecting the responsiveness of local authorities to their concerns. It would assist relations and future consultation if local authorities provided feedback to iwi/hapu (post-consultation) and explained the reasons why particular concerns voiced by Maori, may not have been addressed. Mutually beneficial arrangements (for example, secondments between iwi organisations and councils) may also assist local authorities in developing a basic understanding of cultural issues and increase Maori knowledge on resource management processes.

Consultation should be pursued with an open mind and with honest intent. Most iwi/hapu groups prefer to be consulted "kanohi ki te kanohi" (face to face). Therefore, direct communication with iwi/hapu groups within an environment they feel comfortable (for example a marae), will assist the consultation process.

CONCLUSIONS

The obligations in the *Resource Management Act* to recognise and provide for Maori values, interests and practices, direct decision makers

and resource consent applicants to include tangata whenua in any environmental issue that may affect them. This requirement to consult has also been strongly established in case law. As such, in relation to decision-making and assessments of environmental effects, Maori have been accorded a status quite distinct from the general public. Building effective relationships with tangata whenua will assist in the consultation process.

In summary, effective consultation with tangata whenua involves:

- Informing iwi and hapu of ideas and issues as early in the process as possible;
- Knowing which iwi and hapu are resident and which group(s) may be affected by a proposal;
- Providing sufficient resourcing;
- Being flexible and respectful of cultural differences;
- Providing feedback post-consultation;
- Being honest and open minded;
- Directly consulting with tangata whenua in a manner and forum they feel comfortable with; and
- Building ongoing working relationships with the tangata whenua.

FOOTNOTES

1. "Face to face".
2. K Maynard; *Requirements of Iwi Consultation under the Resource Management Act*. A presentation to the NZ Planning Institute, Bay of Plenty Branch, 19 July 1996, (unpublished paper).
3. Ibid.
4. Clause 1(h) of the Fourth Schedule of the Act.
5. See section 92(2)(a)(ii) of the Act.
6. *Wellington International Airport Ltd v Air NZ (1991)* 1 NZLR 671.
7. *Whakarewarewa Village Charitable Trust v Rotorua District Council (1994)* W 61/94.
8. See section 94 of the Act.
9. *Di Andre Estates Ltd v Rodney District Council (W 187/96)*.
10. *Quarantine Waste (NZ), Waste Resources Ltd (1994)*, NZRMA 529.
11. *Ngatiwai Trust Board v Whangarei District Council (1994)*, NZRMA 269.
12. *Luxton v Bay of Plenty RC (A 49/94)*.
13. See *Pathia & Districts Citizens Assn v Northland Regional Council & Anor (A 77/95)*.
14. Ministry for the Environment (1995), *Case Law on Consultation - Working paper 3*.
15. *Luxton v Bay of Plenty RC (A 49/94)*.
16. *Pathia & Districts Citizens Assn v Northland RC and Anor (A 77/95)*.
17. "Area".
18. In the matter of an application by the Tararua District Council (138 Napier MB85, 1/Oct/94).

BY ALI MEMON AND BRENDAN GLEESON UNIVERSITY OF OTAGO

BICULTURALISM & PLANNING FOR COMMUNITY CARE FACILITIES

THE SITING OF
COMMUNITY CARE
FACILITIES IS CAUSING
INCREASING CONFLICT.
THE ISSUE OF
BICULTURALISM HAS THE
POTENTIAL TO INCREASE
SUCH CONFLICTS.

INTRODUCTION

In a previous issue of *Planning Quarterly*, we examined the recent policy concerns in the provision of community care facilities and their implications for planning under the *Resource Management Act 1991*. In this article, we focus on the particular implications of New Zealand as a bicultural society for provision of community care homes and their regulation, by local government planning.¹

MAORI HEALTH CARE

While Maori and Pakeha have comparable overall rates of mental illness, the last 30 years have seen first admission rates to psychiatric services for Maori increase considerably, while Pakeha rates have remained stable (Te Puni Kokiri/Ministry of Maori Affairs, 1993). Maori are more unwell at first admission to psychiatric services, they are more likely to be institutionalised and they are 40% more likely to be readmitted than Pakeha. (Indeed, Pakeha re-admission rates are declining significantly.) Maori make up half the population of prisons and forensic units and may, following present trends, make up half the numbers of psychiatric hospitals in 10 years (see also National Working Party, 1996). The fastest growing area of hospital admission is the readmission of Maori, with serious psychotic illness also exacerbated by a higher use of drugs.

The reasons for the discrepancy between Maori and Pakeha mental health trends lie deep in the social, cultural, political and economic structures of New Zealand. It has been argued that these trends reflect the systematic erosion of ethnic identity.

Issues such as cultural alienation, poverty, unemployment and hardship; the breakdown of cultural traditions with the shift from rural to urban living; and the failure of the education system for Maori, have not been taken into account in designing appropriate mental health services for Maori (Te Puni Kokiri, 1993:6).

As with many other institutions in New Zealand, the charge has been laid that the mental health system embodies deeply racist practices (OECD, 1994). The administering of more severe

treatment for Maori and possible misdiagnosis of Maori patients due to preconceptions and cultural misinterpretation, are amongst the criticised practices. It has been argued that, once outside of the hospital, society is more hostile to Maori with mental illness (Patten, 1992). These trends are disturbingly similar to the patterns observed for African-Americans in the USA and black people in the UK (Te Puni Kokiri, 1993).

PLANNING IMPLICATIONS

The creation of normalised environments has always been a key focus of the community care movement (Perske & Perske, 1980). Care homes have tended to follow the nuclear family model of a small (four to six bedroom) house in the suburbs – well maintained, subdued and indistinguishable from neighbouring houses. It is this model of care home that planners are most probably familiar with and doubtless have attempted to address as a land use category through district plans.

This type of care, however, presupposes that the “nice house in the suburbs” is the preferred, appropriate and “normal” living environment for people who are service dependent. This assumption, however, is coming under increasing critical scrutiny from certain service providers who argue for a more flexible approach to community care which recognises the cultural diversity of contemporary New Zealand, and, in particular, the needs of Maori.

Many planners may need to broaden their appreciation of the potential for cultural diversity in the creation of community care environments. This broadened understanding should encourage greater flexibility in the conception of care homes as a land use category than is presently the case.

In order to address the problems in Maori mental health outlined above, Maori service providers emphasise the importance of establishing community services which are run under Maori kaupapa². The lack of culturally appropriate care is a feature of the present system and has, undoubtedly, contributed to its failure in meeting the needs of Maori (National Working Party, 1996). Without community and institutional services where Maori feel safe and

supported, early detection of mental health problems is difficult. Moreover, such conditions may encourage treatment which is inappropriate (Burns, et al, 1994).

A recent Ministry of Health-commissioned study (McClellan & Warren, 1996) confirmed that there is presently a severe lack of residential accommodation services which address Maori mental health needs in culturally appropriate ways. This deficiency, however, is slowly being addressed, following the central government's 1994 undertaking to increase the amount of community care accommodation which is dedicated to meeting Maori needs (Ministry of Health, 1994). In early 1995, for example, a whanau (family) hostel received planning approval in Dunedin. Future residents of the whanau hostel have requested that the facility be culturally mixed but run under Maori kaupapa. In Christchurch, service providers, in conjunction with local Maori and the local public health agency, Health Link South, are working on a proposal for "culturally safe and sensitive" homes. Similar developments are occurring in other parts of the country (Ernst & Young, 1996).

We argue that the cultural context of Maori health needs necessitates a wider definition of community care in planning practice. While it would be wrong to suggest there is one form of Maori community care, there are some aspects of homes run under Maori kaupapa which challenge orthodox ideas concerning the nature of such facilities. Such "unorthodoxies" include the sharing of bedrooms and the "provision of spaces where families are permitted to sleep together". Due to the more severe needs of many Maori with mental illness, there may also have to be increased supervision.

Current community care philosophy recommends that residential and day services are locationally separated. Planners have enshrined this separation by developing strictly distinguished land use categories for residential and day service facilities. However, including a Maori perspective in caring, challenges this dichotomy between the home and the site of day services.

This implies a lot more interaction between the care facility and the broader community than is usually envisaged by mainstream service providers. Some Maori service providers challenge the notion that care facilities must not exceed the "effects" threshold of the "normal" residential dwelling. From this perspective, the generation of significant effects may indicate a successful, integrated facility, rather than one

which simply conforms to surrounding residential amenity norms. The emphasis, for such providers, is on providing an open, integrated facility, rather than on protecting established community notions of what activities are acceptable in a residential land use.

The introduction of a Maori perspective and approach in the mental health system is a crucial response to the chronic situation of Maori mental health. Moreover, it could be argued that such cultural sensitivity to the specific needs of New Zealand's indigenous peoples is one of the Crown's obligations to Maori under the Treaty of Waitangi. One of the ways that these dual objectives can be met is through the establishment of community care homes managed by Maori and run under Maori kaupapa. Such homes will likely challenge the now accepted image of the community care residence as a small-sized, unobtrusive facility which excludes day services.

Council planners need to recognise that while this form of community care home may increase the impacts on a neighbourhood in terms of traffic movement and size of the home, such facilities are crucial in addressing the legitimate socio-cultural needs of Maori. Flexible and culturally sensitive approaches by planners to the classification of community care homes will assist Maori in addressing their own mental health needs, in appropriate and effective ways. To ignore the need for such flexibility may be to frustrate the attempts of service providers to address the Maori mental health crisis. In the long term, inflexible land use planning policies may lead to negative social and environmental impacts on council jurisdictions, in the form of homelessness, crime and drug abuse, involving people unable to access culturally appropriate mental health services.

CONCLUSION

Conflict over the location of community care facilities can be expected to increase in many New Zealand cities as a consequence of deinstitutionalisation in the health sector. There is no doubt that New Zealand's increasingly complex social make-up, and the issue of biculturalism in particular, will increase the potential for such conflicts. It is therefore important, as we have argued, to consider the implications of the *Resource Management Act 1991*, in the context of such socio-cultural considerations, in order for such disputes to be better anticipated and managed by planners and community care agencies.

ENDNOTES

1. This paper is based on research conducted during 1994 on the siting of community care facilities in New Zealand urban communities. Data for this study, undertaken during 1994, was derived from a number of complementary sources: (i) a telephone survey of the 20 largest urban councils on planning issues relating to community care homes (18 responses were elicited); (ii) an extended investigation of planning for community care in three, case study city councils (Christchurch, Dunedin and Waitakere), drawing upon both qualitative interviews with staff and analysis of policy documentation; and (iii) a series of qualitative interviews with personnel in several community care agencies in the three, case study settings.

The authors wish to acknowledge the cooperation of local authorities – especially Dunedin and Christchurch City Councils – and community care agencies, in the research which this paper reports. This study was funded by the University of Otago.

2. "Kaupapa" is the Maori term for the policies, guidelines and rules relating to the operation of an organisation.

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