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THE PRE-HEARING MEETING

A PATHWAY TO NEGOTIATION OR MEDIATION?

The tight timeframes which have been imposed on the processing of consent applications under the Resource Management Act 1991 have served to improve efficiency of administration. However, they have also contributed to the backlog of Environment Court cases which are currently getting so much publicity.

Creative solutions to environmental disputes require the active management of cases from their inception. Planners have the most significant role to play in this active management. They are in a better position than any other profession to look beyond the constraints of timeframes and other legal obstacles and consider how best dispute resolution can be achieved.

The introduction of s.99 of the Act indicated the government at the time had some foresight that alternative dispute resolution had a role. It is unfortunate that the timeframe requirements have served to undermine that intention and that local authorities have focused their annual plan performance measures (and thus their management) on timeframes at the expense of high quality outcomes. Thus, opportunities to resolve environmental disputes are missed.

CURRENT USE OF PRE-HEARING MEETINGS

Pre-hearing meetings were used in only 18% of all notified resource applications during the 1999/00 year. Regional councils pursue this technique more actively (for 33% of cases). Territorial local authorities currently have a track record of only 12% use.

Apart from the workload and timeframe constraints, the infrequent use of pre-hearing meetings seems to be due to a degree of scepticism. The planners who are managing the cases often think that the parties are so intransigent that a pre-hearing meeting would serve no purpose.

They anticipate that the case will proceed to a hearing before the Council and maybe on to the Environment Court no matter what efforts they make.

THE RISKS OF A PRE-HEARING MEETING

There is a risk that a pre-hearing meeting can harden positions, particularly if parties choose to posture. If entrenched behaviour is unmodified through the atmosphere created by the facilitator, then there is a potential for the participants see no other course but to oppose each others positions.

Laying the foundation for problem-solving is among the important range of skills for the facilitator to bring to the meeting.

UNREALISED POTENTIAL FOR PRE-HEARING MEETINGS

Having now taken part in pre-hearing meetings and subsequently facilitated negotiations in several of these seemingly intransigent cases (where more than 50 submitters were involved), I am now convinced that the initial pre-hearing meeting can serve to trigger the opportunity for at least some of the issues to be resolved. I have seen environmentally satisfactory settlements result and some of these settlements have lead to the withdrawal of opposing submissions.

It is timely to recognise the potential for pre-hearing meetings to be used more effectively in creative resolution of environmental disputes. The first pre-hearing meeting, with often 30 participants or more, requires the skills of a confident and practised neutral facilitator who is accustomed to dealing with multi-party environmental disputes. The objectives for that initial meeting are only likely to be the clarification of the proposal and an opportunity for the participants to meet face-to-face with the prospect of narrowing down the issues.

From that initial pre-hearing meeting, it is useful for the local authority to offer the services of the pre-hearing facilitator or other mediator for the purpose of assisting the parties to reach an agreement. At this second stage, the mediator would need to emphasise three matters which distinguish this type of mediation from any commercial/civil mediation :

1. Limited Confidentiality

While negotiations before and after the pre-hearing meeting may well be confidential, it is likely to be inappropriate for a meeting called by a public authority to be confidential. There are times when the media may be present. It would be difficult to exclude the media even though their presence may distort proceedings. Participants are likely to choose to comment publicly if given a chance. Should it not be such a high profile case, the facilitator can take the opportunity to emphasise that exploration of possible options can be without prejudice and need not be drawn to the attention of the hearings committee. S.99 is phrased to the effect that the outcome may be reported. The discussion leading to the outcome or even the minutes of the meeting are not required to be produced at the hearing.

2. Limited decision-making process

The participants do not have the power to make the decision. They can only influence it. They might make arrangements for mitigating the adverse effects of a proposal that they can agree to but which the local authority would not be able to influence.

Examples include purchase of property and lease of land for landscape screening.

The powers of the participants to reach an agreement which can influence the local authority decision are more likely to be in the nature of having the design of the proposal changed or the type and extent of mitigating conditions.

3. Public Interest

The local authority must still consider its obligations to other parties who may not be represented at the pre-hearing meeting. There may well have been standards set through the community participation in the preparation of the district or regional plan which need to be taken into account.

The hearing, like a court, acts as a standard for future community behaviour and a precedent for the resolution of subsequent disputes of a similar nature. Mediation should not be used where society requires an authoritative decision on a matter of wide community interest, for setting policy priorities, or for allocating public resources.

The local authority is later put in a position to enforce the conditions of the consent. It cannot enforce consent clauses which do not align with the public interest or are in side agreements dealing with matters outside the RMA.

POTENTIAL AGREEMENTS

A reduction in the disputed issues is frequently the result of participants having the first chance to both understand the proposal thoroughly and to meet face-to-face. This might not result in a formal agreement but it can serve to better focus the hearing.

If discussions continue, the opportunity for a more formal agreement arises. Agreements can range from significant design changes to consent conditions. If they result in off-site environmental mitigations, compensation or reimbursement for expenses, this does not negate the purpose of the RMA. The Act has its limitations as a pathway in finding comprehensive solutions to environmental problems. Agreements reached through alternative dispute resolution are a means of overcoming those limitations, in some cases.

ROLE OF REPORTING PLANNERS

The reporting planner's role can be to initiate and participate in a pre-hearing meeting. The reporting planner is not in a good position to facilitate the initial meeting because the planner will be evaluating the proposal and recommending a decision. If they try to facilitate pre-hearing meetings themselves, they are likely to undermine their own participation in the meeting. At a pre-hearing meeting their role includes:

- ensuring that public interest matters are taken into account: for example the noise standards which have been agreed through the district plan ought not to be overridden by private agreement
- listening for and suggesting opportunities for mitigations
- recognising what type of independent reviews or evidence might be useful for the hearing and in solving problems

ROLE OF DECISION-MAKERS

If the application proceeds to a hearing, the hearings panel do not have to take agreements into account. Undoubtedly, however, the outcome of any pre-hearing meeting will be taken into account in decision-making. This was anticipated under s.99 in providing for the outcome of the pre-hearing meeting to be circulated to all parties before the hearing and to be part of the information which the consent authority shall have regard to in its consideration of the application.

CONCLUSION

There are positive steps which planners can take to improve the opportunities for resolving environmental disputes at an early stage in the process. Among these are:

1. Build pre-hearing meetings into timeframe planning for both consents and plan changes
2. Appoint facilitators who are independent
3. Consider follow-up meetings
4. Gain cooperation of applicant to delay hearings when progress is underway
5. Formulate internal Council policy on how and when pre-hearing meetings will be conducted
6. Set annual plan objectives which recognise that dispute resolution is an outcome which the local authority seeks

Government should consider providing more incentives for pre-hearing meetings by making it clear than timeframes can be waived for that purpose. In the meantime, s.37 can be used for waiving timeframes when prospects of resolution are closer.

It is time for planners to lift their sights to manage cases more actively. Such management is likely to attain a higher level of community agreement and reduce the level of dissatisfaction with the processes now so frequently expressed.

Planners do need to be assertive both within and outside of local authorities to ensure best practice techniques are used for dispute resolution. Active management through pre-hearing meetings is a key area for improvement.

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