

Mayor and Councillors
COUNCIL

15 OCTOBER 2015

Meeting Status: **Public**

Purpose of Report: For Decision

PDP HEARINGS PANEL - APPOINTMENT OF ELECTED COMMISSIONERS AND MANAGEMENT OF POTENTIAL CONFLICT OF INTEREST

PURPOSE OF REPORT

- 1 The purpose of this report is to seek approval to appoint two elected commissioners to the Proposed District Plan (PDP) hearings panel, to alert Council to a potential conflict of interest issue, and recommend an approach to resolve this.

BACKGROUND

- 2 At its meeting of 11 December 2014, the Council considered an officers' report on the appointment of elected and iwi commissioners (SP-14-1314) and resolved as follows:

"That, in addition to an independent chair and an independent commissioner, the Council confirms that the Proposed District Plan hearings panel will include an iwi commissioner and two elected commissioners.

That the Council requests staff to develop a short list of potential iwi commissioners for the Proposed District Plan hearings panel, obtain registrations of interest, and make a recommendation for Council approval.

That the Council defers the appointment of the two elected commissioners to the Proposed District Plan hearings panel until a minimum of 3 months before the commencement of the hearings."

- 3 At that 11 December meeting, the Council also resolved to appoint Alistair Aburn as independent chair, and David McMahon as independent commissioner to the hearings panel.
- 4 The PDP Hearings are currently scheduled to commence in February 2016, with a direction setting meeting where the commissioners can give instructions about the order and structure of the hearings. The substantive hearing of submissions is scheduled to begin in April 2016.
- 5 This report seeks approval for the appointment of two elected commissioners. It also identifies a potential conflict of interest issue involving the Chair, and proposes a solution for managing this. To complete the formation of the

hearings panel, an iwi commissioner also needs to be appointed and this is covered in a separate report to the Council.

- 6 It is estimated that the total number of hearing days for the PDP will be between 50 and 90 days. This does not include hearing preparation time or deliberation / decision writing time. The number of hearing days may be less depending on the extent to which submissions can be resolved through agreed positions reached at prehearing meetings.

ISSUES AND OPTIONS

Appointment of elected commissioners

- 7 Councillors who hold RMA accreditation were invited by the Mayor to register their interest in being a PDP hearings commissioner. The following three Councillors have registered their interest:

- Cr Diane Ammundsen
- Cr Mike Cardiff
- Cr Jackie Elliot

- 8 As requested, the Councillors provided the following information:

- 'Making good decisions' certificate of accreditation
- Conflict of interest declaration

This information is contained in **Attachment 1**

- 9 The Council has previously resolved that the hearings panel should have two elected commissioners. This means that two of the candidates should be appointed to the hearing panel.
- 10 The process for the hearings will be long, and involve elected commissioners for a substantial amount of time from February 2016 until such time as decisions are finalised in late 2016. It is anticipated that the commitment will require between 8 and 12 days per month from the commencement of the substantive hearings in April through to conclusion for hearings (intended to be completed by October), plus planning, meetings, consideration, and decisions.
- 11 Commissioners may only make decisions on matters that they have heard. While it is possible to have different commissioners hear different aspects of the plan, it is not ideal and both adds complexity to the process and presents risks of inconsistent or even irreconcilable decisions. It is preferable therefore to maintain the same panel as far as possible, and commissioners would therefore need to be available for the full hearing period. In order to ensure a robust process, exceptions will need to be made to deal with any conflicts of interest that may arise.
- 12 The process also provides for pre-hearings meetings to try to resolve some issues prior to formal hearings. Within this process there is an opportunity for other experienced accredited councillors to assist over the next 2-3 months. If the Council supports this approach it is recommended that the Council delegates the appointment of accredited councillors for specific pre-hearing meetings to the Mayor, Deputy Mayor and the Chair of the Regulatory Management Committee.

Chair conflict of interest

- 13 Mr Aburn has recently formally declared that he has a potential conflict of interest given his previous role as an expert planning witness for Paraparaumu Airport Ltd in 2008/2009. He has offered to exclude himself from any involvement in any proposed District Plan hearings or decisions relating Chapter 6 of the Plan which includes the Airport Zone provisions, and the Paraparaumu District Centre Zone provisions.
- 14 Mr Aburn's previous involvement with the then Paraparaumu Airport Ltd has been previously declared in his Conflict of Interest statement. At the time of appointment, this previous involvement was not seen as being so significant as to disqualify him from appointment to the independent chair role. However, Mr Aburn's potential conflict of interest was recently raised by an elected member. As a result officers considered the issue further and discussed the matter with Mr Aburn. In response Mr Aburn wrote to Council advising of his potential conflict of interest and proposed a solution for dealing with the conflict. Council obtained legal advice from Simpson Grierson on the matter as well. In order to prevent this from creating issues with the proposed District Plan processes, it is appropriate to consider how to manage this now.

Options

- 15 There are a range of options available to council to manage this issue. Council could:
- Seek agreement from affected parties that Mr Aburn's involvement does not present a real and unmanageable conflict of interest
 - Manage the potential conflict of interest by accepting Mr Aburn's offer to remove himself from those parts of proceedings (chapter 6) where it could be perceived he has a conflict of interest.
 - Remove any perception of conflict of interest by removing Mr Aburn and appointing a new Chair
- 16 Approaches to dealing with conflicts of interest need to be commensurate with the significance of the conflict declared. In this case, Mr Aburn's involvement was as an expert planning witness for Paraparaumu Airport Ltd, and ceased at the end of the case. He has no ongoing involvement or any pecuniary interest with the airport company (now Kapiti Coast Airport Holdings Ltd). At the time Mr Aburn agreed to comply with the Environment Court code of conduct for Expert Witnesses. Under that code his over-riding duty was to assist the Court (or Panel) impartially. The conflicts are therefore only that he could be perceived to hold a particular view, which could be considered remote and manageable as he is one of five accredited commissioners.
- 17 Chapter 6 does constitute a reasonable proportion of the plan. It covers the urban working zones, including the Centres Zones, the Civic and Community Zone, the Industrial / Service Zone and the Airport Zone.
- 18 It is a chapter with approximately 10% of submission points, and at this point just under half of these are currently considered resolvable through the engagement processes, prior to hearings.
- 19 Staff have sought legal advice on the matter. This advice together with Mr Aburn's response on the issue is attached at **Attachment 2**.

- 20 Removing Mr Aburn would mean starting the process for appointment of a chair again. This is an unreasonably severe solution to manage a perception rather than a real conflict; and to adopt this approach may create a difficult precedent for Council in the future, whereby any perception will be enough to unseat appointments. The reality is that it would be very difficult to identify a candidate suitable for appointment as Chair who has the required qualifications and experience who does not have some conflict or potential conflict of interest.
- 21 Managing the conflict by ensuring that the submitters have an opportunity to comment or challenge any party prior to commencement of the hearing is good practice and should be undertaken in any case. This is planned to occur in February 2016.
- 22 In this circumstance, the conflict of interest has been raised prior to formal commencement of hearings. This creates the opportunity to accept Mr Aburn's proposal to withdraw from Chapter 6 before hearings commence. These measures are deemed to be at the lower level of significance of measures recommended in the Office of the Auditor-General's advice on managing conflicts of interest.
- 23 While it is reasonable therefore to question whether it remains appropriate in proceeding with the current chair it is the view of staff that the broader skill set Mr Aburn brings to the process as a whole is more important than the fact that one chapter of the plan will be dealt with by a panel that has an alternative chair.
- 24 The Council's legal advisers also conclude that Mr Aburn standing aside from hearing Chapter 6 matters is an appropriate way on managing the potential conflict. The advice notes that it would be appropriate to consider whether there are links between Chapter 6 and other chapters (in particular objectives and definitions). Officers have considered this and do not consider there are any issues given the high level nature of the objectives in particular.
- 25 Should Council decide to accept the proposed measures to manage any perception of Mr Aburn's conflict of interest, staff will consult the Panel (once fully constituted) to seek their view on the panel composition to hear Chapter 6 matters. Staff will then report back to Council in December on any further steps required, including the appointment of an alternative chair.
- 26 Given the length of term of the proceedings, and the risk that some absence may occur due to illness or some other event, staff will also discuss this matter with the Panel of Commissioners, and provide advice back to Council in December.

Policy considerations

- 27 No policy considerations have been identified for this appointment process.

Legal considerations

- 28 The Resource Management Act now requires all commissioners, whether elected or independent, to be accredited commissioners. All of the candidates fill this criteria. Mr Aburn has declared a potential conflict of interest. All others have confirmed in writing that they are not aware of any actual, potential or perceived conflicts of interest. Mr Aburn has indicated he would seek to put in place procedures to ensure that conflicts are appropriately managed once all commissioners are appointed and hearings commence.

Financial considerations

- 29 As noted above, it is estimated that the total number of hearing days for the PDP will be between 50 and 90 days. The number of hearing days may be less depending on the extent to which submissions can be resolved through agreed positions reached at prehearing meetings. Elected members remuneration for Plan hearings is currently set by the Higher Salaries Commission at \$150 per day (plus GST).
- 30 The budget forecast for the completion of the PDP allows for these hearing costs. The hearings are currently scheduled to open in February 2016 for a direction setting session and with actual hearings commencing in April 2016.

Tāngata whenua considerations

- 31 No particular issues for iwi have been identified with the appointment of elected commissioners. The key Tāngata Whenua consideration is the appointment of an iwi commissioner which is addressed in a separate report.

SIGNIFICANCE AND ENGAGEMENT

- 32 The Council's Significance and Engagement policy does not cover any engagement process that may be required under the Resource Management Act 1991. However submitters will be advised through the PDP update newsletter, and a press release, of any appointments to the hearings panel.

RECOMMENDATIONS

- 33 That the Council appoint the following councillors to the Proposed District Plan hearings as elected commissioners:
- Cr
 - Cr
- 34 That Council accept Mr Aburn's proposal to withdraw from the hearing of Chapter 6 matters as an appropriate response to managing his conflict of interest
- 35 That Council note that staff will report back to the Council in December on the composition of the Hearings Panel to hear Chapter 6 matters
- 36 That the appointment of accredited councillors to assist with pre-hearing meetings be delegated to the Mayor, Deputy Mayor and Chair of the Regulatory Management Committee.

| Report prepared by | Approved for submission | Approved for submission |
|-----------------------------|---|---|
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ATTACHMENTS

1. Documentation from candidates
2. Legal opinion and response from Mr Aburn