

Resolving appeals on Private Plan Change 78 to the Kaipara District Plan

Meeting: Kaipara District Council
Date of meeting: 28 July, 2021
Reporting officer: Michael Day, Strategy, Policy and Governance Manager

Purpose | Ngā whāinga

To seek a decision from Council on the delegations to resolve Environment Court appeals on Private Plan Change 78 (Mangawhai Estuary Estates) to the Kaipara District Plan.

Executive summary | Whakarāpopototanga

Two appeals have been received on Council's decision on Private Plan Change 78 (Mangawhai Estuary Estates). The Environment Court issued a direction on 25 June 2021, requesting all parties to advise the Court (and one another) by 21 July 2021, as to whether or not they are agreeable to Court-assisted mediation¹.

Currently, Kaipara District Council does not have any delegations (to staff or otherwise) to resolve appeals under Clause 14 of Schedule 1, Resource Management Act 1991 (RMA). That means that full council would need to make all decisions relating to resolving appeals (including negotiating consent documents following mediation).

This paper recommends that a panel of Council (consisting of three Elected Members) be delegated the authority to resolve appeals on Private Plan Change 78 (Mangawhai Estuary Estates) and that Council delegate staff to attend Court-assisted mediation on behalf of Kaipara District Council and to represent Council's position during mediation. This is the most efficient option.

Recommendation | Ngā tūtohunga

That the Kaipara District Council:

- a) Delegates the authority to resolve appeals on Private Plan Change 78 (Mangawhai Estuary Estates) to **[insert three elected members names]**.
- b) Delegates staff to attend Court-assisted mediation on behalf of Kaipara District Council and to represent Council's position during mediation with the parties.

Context | Horopaki

Private Plan Change 78 (Mangawhai Estuary Estates) was approved by Council on 28 April 2021. The appeal period of 30 working days, closed on 23 June 2021 and two appeals were received.

The Environment Court issued a direction on 25 June 2021, requesting all parties to advise the Court (and one another) by 21 July 2021, as to whether or not they are agreeable to Court-assisted mediation. Council responded to the parties on 13 July 2021 that we are agreeable to mediation, following direction provided at the July Council briefing.

The next step is for Council to decide who has the relevant delegations to resolve appeals on the Plan Change.

¹ Council advised the Court and parties on 13 July 2021 that it agrees to mediation

Discussion | Ngā kōrerorero

The Environment Court 'strongly encourages' parties to undertake court-assisted mediation to try and settle disputes out of court. Any matter not resolved via mediation or by negotiation will proceed to a hearing.

Resolving appeals - process

Mediation is a process whereby (hopefully) parties can develop and agree upon constructive, achievable and mutually acceptable solutions. Even if mediation does not result in agreement, the process of isolating issues and agreeing undisputed facts can be helpful if an appeal proceeds to a hearing.

It is proposed that Council's position at mediation will be led by the Strategy, Policy and Governance Manager, who will be supported by legal counsel and a planning/technical team. It is 'common practice' for Council's position at Environment Court mediation to be led by a senior staff member with a specific resource management qualification and extensive resource management experience.

This approach is advantageous because at this stage of the plan development process, matters tend to become highly technical and it is considered appropriate that someone with significant resource management mediation experience as well as Environment Court experience should represent Council's position during mediation and negotiations.

Whilst there is no prohibition on Elected Members attending mediation and representing Councils position, this approach is not recommended by staff. As mentioned above, mediation involves complex planning and technical matters and is normally left to the Council's lawyer, planners and other technical specialists. Everything that occurs within mediation is also confidential and cannot be discussed with the general public or parties not involved in mediation.

Procedurally, what will happen next is the Environment Court will appoint an Environment Commissioner to lead the court-assisted mediation. The Environment Court will also set down the mediation date(s). Prior to mediation, the Court may direct the appellants to provide the parties with a draft 'tracked changes' version of the Plan Change, which clearly demonstrates what changes (to the Plan Change) their relief is seeking. This is common as it provides clarity on the matters of dispute and allows parties to focus discussions on resolving areas of dispute.

Staff will review this information and provide an initial recommendation to whomever has delegation to resolve appeals (outlined in options 1 – 3 below). An initial 'council' position will be formed before mediation and staff will attend mediation on this basis. Assuming staff do not have delegation to settle appeal points, if any agreement is reached via mediation, this will be recorded and staff will prepare a memo to those with delegated authority for resolving appeals. The Court (and parties) expect quick and efficient responses from Council at the appeals stage.

It is noted that all discussions that take place in mediation are completely confidential (and are subject to mediation privilege). In Environment Court mediations, no formal records are kept. However, when parties reach an agreed position during mediation and any subsequent negotiations, a consent order will be produced (and issued by the Environment Court) and forms part of the public record. Additionally, what goes on in the mediation process cannot influence or be referred to in other Court proceedings – if the process is not successful, anything discussed or offered during mediation can't be raised when the dispute goes to Court.

Delegations to resolve appeals

Council now needs to decide how it will represent its position and make decisions through the appeals negotiation and mediation process. Staff initially considered an option of delegation to the General Manager, Engagement and Transformation and the Mayor to resolve appeals that were generally aligned with the Council decision. However, after further analysis of the two appeals, staff have discounted this option as the vast majority of appeal points are not generally aligned with the Council decision (on the Private Plan Change). Staff have therefore identified the following options for consideration:

Options

Option 1: Delegation to a panel of Council, consisting of three Elected Members, to resolve appeals on PPC 78.

Option 2: Staff delegated the ability to resolve all appeals.

Option 3: No delegations (full council consideration)

The advantages and disadvantages of each option are described below:

Option	Advantages	Disadvantages
1 – Delegation to three Elected Members to resolve appeals on PPC 78	<ul style="list-style-type: none"> Reasonably nimble decision-making process for resolving appeals, including the ability for staff to potentially email/call the three Elected Members during mediation to confer agreed points. Resolving appeals through mediation can move swiftly and having this ability delegated to three Elected Members is considered the most efficient and effective way forward. Provides the ability for decision makers to efficiently confer with one another to ensure appropriate decisions are made. Aligns with Environment Court expectations on quick/efficient decision making. Reasonably administratively efficient (would not need to set up extra-ordinary Council meetings). 	<ul style="list-style-type: none"> None apparent.
2 – Staff delegated the ability to resolve all appeals	<ul style="list-style-type: none"> The most nimble and agile option, potentially allowing for the quickest resolution of appeal points Aligns with Environment Court expectations on quick/efficient decision making Is administratively efficient as staff would not need to continually brief Elected Members. 	<ul style="list-style-type: none"> May be a perceived risk of 'blurring the line' between governance and operations No governance oversight of mediation agreements.
3 – No delegations (full council consideration of appeals resolution)	<ul style="list-style-type: none"> Allows full council to be involved in resolving appeals and no Elected Member feels left out of the process. Allows for a broad understanding of community interests to be considered. 	<ul style="list-style-type: none"> Administratively in-efficient for the full council to be involved and would slow down the mediation process. This option would require staff to regularly 'update' full council (outside of public meetings because of the requirement to maintain legal professional privilege) regarding the positions of appellants and to get 'direction' around possible settlement parameters. Staff would then need to update full council again at the conclusion of each round of mediation with

		<p>regards to amended positions of parties. This is logistically and administratively in-efficient.</p> <ul style="list-style-type: none"> ▪ Does not align with Environment Court expectations around quick/efficient decision making ▪ Additional administrative burden for staff and elected members to coordinate/attend extra-ordinary publicly excluded Council meetings.
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The recommended option is **option 1**. All three options assume that Council delegate staff the ability to attend Court-assisted mediation on behalf of Kaipara District Council and to represent Council's position during mediation with the parties.

Policy and planning implications

The plan change will replace Chapter 16 of the Operative Kaipara District Plan once the appeals process has been finalised.

Financial implications

There will be a financial cost for Council to defend its decision on this Private Plan Change. This will mainly be through engaging legal and planning/specialist support.

Significance and engagement | Hirahira me ngā whakapāpā

The decisions or matters of this report are considered to have a low degree of significance in accordance with Council's Significance and Engagement Policy. No feedback is required, and the public will be informed of Council's decision via the agenda and minutes publication of this meeting, on the website and through other channels if appropriate.

Next steps | E whaiake nei

Court-assisted mediation will be facilitated by one of the Environment Commissioners. The date of mediation will be set according to the Commissioner's availability, not that of the participants.

Notice of at least 15 working days will be provided and the mediation will take place at a venue neutral to the parties. The Court is likely to offer the parties several days of mediation in an attempt to resolve the matter outside of Court.

Depending on the decisions reached regarding delegations, staff will continue to represent Council's position and liaise with those with delegated authority for resolving appeals.

If mediation proves unsuccessful then appeals will be case-managed towards an Environment Court hearing. Elected Members will not be involved in this stage of the process.