

## **Straight Thinking – By Owen McShane**

### **Councillors or Commissioners? That is the question.**

The column “Tips for New Mayors” has been well received and is in strong demand. Some new Mayors and Councillors are already working to implement the recommendations.

Certainly, many Councillors are being much more careful about the delegation of their powers to staff – as well they might be.

This Tip-Sheet has generated requests for information about another hot issue facing new Councils. Should applications for resource consents be heard by elected Councillors or by independent Commissioners?

I first addressed this question in my report to Simon Upton, as Minister for the Environment, back in 1996. My conclusion then was that applicants should have the choice. If they are not happy with the Committee of Councillors they should be able to ask for a Commissioner, and vice versa. Competition is always a useful discipline.

However, times have moved on, and while my general conclusion remains the same, there are now many more matters to be considered.

### **The Separation of Powers.**

Our democratic tradition is based on the separation of powers – we have a Parliament to write the laws, an independent Judiciary to interpret and enforce the laws, and an independent Executive to execute the laws.

We would never consider having MPs sitting on a High Court bench – those who write the laws should not enforce them.

Consequently, given that Councillors prepare their District or Regional Plans, which are sets of regulations derived from the RMA, those Councillors should not decide on applications. Interpreting and enforcing the Plans should be left to independent Commissioners. Of course the RMA provides for appeals to the Environment Court and the regular Courts, where the constitutional convention applies.

Few councils oppose the use of Commissioners where there is a clear conflict of interest, as when councils hear their own applications for activities on their own land.

However, proposals that all applications be heard by Commissioners (as has been suggested for Auckland City) generate a barrage of protest, claiming the democratic rights of the people will be eroded.

Such claims ignore the fact that one of the key ingredients of democracy is the separation of powers, and, in particular, the isolation of judicial power from populist pressures.

### **The Separations are Not Pure.**

However, in Parliamentary democracies the separation of powers is not clear-cut. The Cabinet is selected from the Parliament – unlike in the US where the President appoints the Executive. Few complain about this.

Similarly, most Councils have reached a compromise “separation of powers” which seems to be widely accepted.

These Councils appoint a Hearings Committee which hears submissions on Proposed Plans and Private Plan Changes, and then makes the decisions on such Plans.

However, those Councils also appoint a separate Judicial Committee, with totally different Councillors, which hears submissions on applications and makes the decisions on applications.

The different names reflect a significant difference in governance. Democratic participation is central to the process of preparing Plans for the local District or Region. The Hearings Committee is where the many voices of the many communities and pressure groups are genuinely “heard”, and democratic decisions are made.

However, the Judicial Committee acts in a quasi-judicial capacity. Its job is to make decisions in accordance with the regulations of the planning documents. Petitions, street parades, the burning of effigies, and other expressions of popular opinion should be given no weight for the same reasons we would not expect a High Court Judge to be impressed by petitions collected in the street, or in a supermarket. We expect the Judges to make their decisions based on the evidence and the law.

In reality, Councillors, facing an imminent election, may find it difficult to make decisions which, although legally correct, are immensely unpopular with large blocks of their electorates. Also, most members of the public, (not having been taught any civics at school) are unaware of such constitutional niceties and are convinced that the Judicial Committee should heed the voice of the people – because “that’s democracy”.

Councillors who sit on the Judicial Committee should never discuss applications with an affected citizen for the same reason we cannot ring up and harangue Judges hearing a case in Court.

If there is only a single Councillor in a ward, the people in that ward are thereby effectively “disenfranchise” when it comes to RMA applications. Consequently, the unexpected outcome of the plea for “democracy” can actually be a loss of democratic access for many.

The citizens of that ward would be better represented if their Councillor remained outside the Committee and made submissions to the Committee on their behalf. Unhappily many Councillors seem to believe, or have been persuaded, that they cannot make submissions to Council’s own Committees.

They should make sure the “right to appear” is built into their Council’s Standing Orders.

One solution is to have a rotating panel of members so that Councillors do not hear applications relating to their own ward. This would avoid the conflict of interest and remove the temptation to pretend to be “judicial” while actually having one’s ear glued closely to the electoral ground.

The ward councillor would then always be available to represent “the people’s voice”.

### **The Lack of Continuity**

Councillors are subject to the three year election cycle, and after an election the Judicial Committee can suddenly be manned by people with no experience and no training, but who have to make important decisions from day one. A couple of years can go by before they gain the confidence to overturn recommendations from “the experts”. By then a huge amount of damage can be done.

Commissioners provide continuity. A previous councillor, who may have accumulated many years experience, and been qualified through the MfE “*Making Good Decisions*” programme, could well be appointed as a Commissioner to serve alongside new Councillors.

Unfortunately, many new Councillors are hungry for meeting fees to supplement their income.

### **Are Commissioners really Independent?**

Many practitioners have fears about the “independence” of Commissioners. Council staff control most decisions and they may well appoint Commissioners sympathetic to their own

agendas. One solution would be for central government to appoint a panel of properly trained and qualified Commissioners.

People frequently presume that such specialist Commissioners would be much more expensive than a committee of Councillors.

Not necessarily so. Many Judicial Committees have Council's legal advisors sitting in attendance charging more per hour than any Commissioner. Properly trained Commissioners would make their presence unnecessary.

For major applications the appropriate Commissioner could well be a barrister being groomed for a seat on the Environment Court. They would certainly ensure their decisions were robust and unlikely to be overturned.

**There is a Range of Choices.**

I am not sure there is one size fits all. I would prefer experienced Councillors over many of the young graduates from our Planning Schools who are hell bent on ramming "Smart Growth" down our throats with no regard for the contents of the actual Plan, and I would have grave reservations about compulsory Commissioners if such staff controlled their appointment.

In the end my bias is towards a central panel of commissioners, but who can be supplemented by Councillors who are not representing the ward of the application.

Maybe Councils should offer their citizens a range of structures for the Judicial Committee with the final choice left to the applicant, with the different charges laid out for the applicant to consider.

However, there will be little progress with the debate about "Councillors or Commissioners" until the public are better informed about the constitutional difference between a Hearings Committee dealing with plans, and a Judicial Committee dealing with applications.

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