THOMSON WILSON LAW
BARRISTERS + SOLICITORS

Partners
Graeme Mathias, LLB (Hons)
Grant Currie, LLB
Arthur Fairley, LLB (Hons)
Michael Badham, LLB, BA
Vaughan Syers, LLB
Peter Magee, LLB
Associates
Wayne Coutts, NZILE
Rupert Wakeman, LLB, BA
Sarah Shaw, LLB, BSocSc, PGDipREP
Anna Patterson, LLB (Hons), BA (Hons)
Consultants
Kim Thomas, LLB
Nicola Grant, LLB (Hons), BA

12 March 2015

Whangarei District Council
Private Bag 9023
Whangarei 0148

Email: david.badham@wdc.govt.nz

Attention: David Badham

re: Plan Change 94B Papakainga - Iwi Authorities

Your refer to your letter dated 10 February 2015. In response to your specific questions:

1(a) – *should the Plan include a reiteration of the s33 requirements, either in the Papakainga rules (option 1) or in an Appendix (option 2)?* ***No***

The writer has discussed this with Mr Mathias, and in our view there is no real advantage and some significant disadvantages to doing so. Section 33 is very prescriptive as to the process that must be followed in order to initiate a transfer of powers – notice to the Minister, use of the SCP, and satisfaction as to the desirability of the arrangements. In our view the mechanics of an application process under s33 (bearing in mind that the process applies to more than just iwi authorities) are best left out of the District Plan.

You could either remain silent on procedure, or prepare a Council policy/guidance document on the s33 procedure. This would ensure that if any changes are made to s33 in future you do not need to update the District Plan, and you would retain flexibility to amend your policy as required (although given the prescriptive nature of s33, there is little flexibility available).

1(b) – *is s33(4)(c)(iii) "technical or special capability or expertise" referring to exercising the relevant RMA functions?* ***Yes***

We agree with your assessment – the technical capability / expertise needs to be interpreted in light of the specific "functions, powers or duties" proposed to be transferred. Here you would be dealing with a transfer of powers under Part 6 of the RMA to consider and determine an application for resource consent for a controlled activity papakainga development. You would need to be satisfied that the particular iwi authority had the expertise to undertake that work in Council's stead.

If the transfer of powers took place, would a Council/ consultant planner, engineer etc still process and report on the application to the iwi authority as decision maker? Or would the iwi authority both process (report on) and determine the application?

Thomson Wilson, Mansfield Terrace, PO Box 1042, Whangarei 0140, New Zealand
Telephone: 64 9 430 4380 : Facsimile: 64 9 438 9473 : Email: legal@thomsonwilson.co.nz : www.thomsonwilson.co.nz

Would the authority have the necessary expertise and resources to undertake the processing/ reporting role? A controlled activity can't be declined, so the determination would come down to imposition of appropriate conditions. Would the authority have the necessary technical expertise with respect to setting appropriate and enforceable conditions of consent?

We expect you would be looking for evidence from the authority that RMA professionals (eg suitably qualified and experienced planner) were part of the authority's decision making process, and how – for example an authority could obtain planning advice on contract, or from a member of the authority, but the power to make the decision would be delegated to the authority, not a contractor or individual.

1(c) – *is it possible to delegate decision making to iwi authorities under s34?* ***Yes***

Section 34 provides that a local authority may delegate any of its RMA functions, powers or duties to "any committee of the local authority" (or to "any community board", which is not applicable here). "Committee" is not defined in the RMA, but is defined in the LGA02 (s5) as including full Council, a standing committee or special committee, a joint committee, or a sub-committee of any of those.

Schedule 7 of the LGA02 deals with committees:
- Sch 7 cl 30(1)(b) and 30A provide for appointment of joint committees with another local authority "or other public body". The phrase "public body" is not defined in the LGA02, so could presumably extend to an iwi/hapu authority. (In the RMA, "public authority" is defined in s33(2) as including iwi authorities).
- Alternatively, Sch 7 cl 31(3) and (4) provide that *"The members of a committee or subcommittee may, but need not be, elected members of the local authority, and a local authority or committee may appoint to a committee or subcommittee a person who is not a member of the local authority or committee if, in the opinion of the local authority, that person has the skills, attributes, or knowledge that will assist the work of the committee or subcommittee".* At least one member of any committee must be an elected member of the local authority. "Person" is not defined in the LGA02, but is defined in the Interpretation Act 1999 as including a corporation sole, a body corporate, and an unincorporated body – and as such could extend to an iwi/hapu group, or the appropriate kaumatua / kuia.

For completeness, we note that while s43A RMA provides for delegation of powers to "other persons" (other than employees or hearings commissioners), s34A(2)(b) specifically excludes delegation of the decision on an application for resource consent to an "other person".

2 – *can Council transfer powers to hapu under s33?* ***Possibly- but s36B may be an alternative***

The definition of "iwi authority" in the RMA is very broad: "*Iwi authority means the authority which represents an iwi and which is recognised by that iwi as having authority to do so*". "Iwi" is not further defined in the RMA. At the time the RMA

was formulated however there was also a Runanga Iwi Act 1990 (repealed in May 1991) which, while not directly defining "iwi", did include s5 which provided:
"For the purposes of this Act, the essential characteristics of an iwi include the following:
(a) Descent from tupuna:
(b) Hapu:
(c) Marae:
(d) Belonging historically to a takiwa:
(e) An existence traditionally acknowledged by other iwi."

The reference in the Runanga Iwi Act to an 'essential characteristic of an iwi' including hapu tends to an interpretation of hapu as not being synonymous with iwi.

We have however found four RMA cases discussing "iwi authority", three of which deal with consultation rather than directly with transfer of powers.

- Whakarewarewa Village Charitable Trust v Rotorua DC PT Wellington W61/94, 4 August 1994: *"The [Whakarewarewa] village could very well exist as an iwi local authority and is a prime example of a situation to which the iwi authority provisions of the Act should apply."*

- Porirua CC v Transit NZ EC Wellington W52/2001, 16 July 2001, at para 10: *"The site falls within the rohe of Ngati Toa, which is represented by Te Runanga O Toa Rangatira, an iwi authority defined under s.2RMA. Ngati Toa is the recognised tribe with tangata whenua status within the wider Porirua area."*

- Trustees of Tuhua Trust Board v Minister of Local Government [2012] NZEnvC 202, at para 28: *"Clearly the Trust Board is a group that represents hapu in a district for the purposes of the Act, in this case Tuhua [Mayor Island]. In respect of whether it constitutes an iwi authority... Given that Tuhua is a separate district, we tentatively conclude that the Trust Board is an iwi authority within that district, ie Tuhua being the subject of the Plan."*

- Hoete v Minister of Local Government [2012] NZEnvC 282, at para 71: *"Just as in the case of Tuhua, we consider that the wording and definition of iwi authorities must, in the circumstances of a smaller district such as Motiti [Island], infer that subgroups who have a direct interest in the land. This situation is however not as clear as it was in Tuhua, and a great many people whakapapa to the Island."*

Of these cases, Porirua dealt with a recognised iwi, and Tuhua and Motiti dealt with islands which did not fall within another District and therefore had district plans developed directly for each of them. The Whakarewarewa case is the only one that has dealt with a hapu/whanau level within a wider District and would have more general application (although this is also the oldest decision, dating to 1994). Certainly in Whakarewarewa, Judge Kenderdine was prepared to accept that a defined small whanua/hapu group (already represented by a Trust) fell within the definition of an "iwi authority".

On the basis of that authority, and the lack of a definition of "iwi" in the RMA, we would tentatively conclude that powers could be transferred to a hapu group under s33 **if** that hapu group established that it met the definition of "iwi authority" – *represents an iwi and which is recognised by that iwi as having authority to do so.* (That is, leave it up to hapu or iwi groups to address how they meet the RMA definition).

However, following amendments to the RMA in 2005, there are additional provisions and definitions in the RMA that may affect that interpretation and ultimately prove more useful to you. As a result of the 2005 amendments, section 35A and 36B-E were inserted into the RMA.

Section 35A deals with the duty to keep records about iwi and hapu, and throughout the section differentiates between "each iwi authority ... and any groups that represent hapu for the purposes of this Act". The commentary on this section notes that it was intended to give greater certainty regarding consultation with tangata whenua, and that the express inclusion of hapu is a departure from the iwi-based approach in the RMA generally.

Sections 36B-36E deal with joint management agreements. The RMA contains a definition of "joint management agreement as an agreement made by a local authority with one or more public authority (local authority, statutory body or the Crown), iwi authority, or group that represent hapu. Neither "hapu" nor "group that represents hapu" are defined.

Section 36B provides the power to make joint management agreements, and mirrors s33 in that the local authority must notify the Minister and satisfy itself that the public authority, iwi authority or group that represents hapu "represents the relevant community of interest", "has the technical or special capability or expertise to perform or exercise the function, power or duty jointly with the local authority", and that joint management is an efficient method. Notably, there is no requirement for the SCP to be used. Section 36D provides that a decision made under a joint management agreement "has legal effect as a decision of the local authority."

Conclusion

The introduction of separate references to 'iwi authorities' and 'groups that represent hapu' in the 2005 amendments arguably restricts the definition of iwi authority to not including groups that represent hapu. However, section 33 was always in the RMA at a time when there were no references to hapu in the Act, and it is therefore possible to interpret the definition more broadly (as Judge Kenderdine did in the Whakarewarewa decision), particularly if it were left up to applicants (iwi or hapu) to establish how they met the statutory definition.

You may prefer however to investigate whether there are advantages in pursuing either a delegation to a committee of Council (incorporating hapu representatives) under s34, or a s36B joint management agreement with hapu. These methods would avoid the need for a

SCP process, but would stop short of transferring power to hapu as these arrangements would retain the decision making within the Council structure.

We are happy to discuss any of these points further, in particular as many relate to undefined and relatively untested provisions of the RMA.

Yours faithfully
THOMSON WILSON

Per:

SARAH SHAW
Associate

E-mail: sts@thomsonwilson.co.nz