



Report 07.373
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Committee Policy, Finance and Strategy
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Building Act 2004 – Proposed Transfer of Powers

1. Purpose

To seek approval to consult on the proposed transfer of selected functions, duties, and powers in Part 2 of the Building Act 2004 (excluding Subpart 7 – Safety of Dams); and, any other functions, duties and powers that are necessary to allow the transferee council to act as a Building Consent Authority.

2. Significance of the decision

Before making any decision on the transfer of powers, the Council is obliged to use the special consultative procedure as set out in section 83 of the Local Government Act 2002.

3. Background

3.1 Overview

In June 2006 report 06.326 (**Attachment 1**) outlined the requirements and implications of the Building Act 2004 (the Act) to Council. The Council is deemed to be a 'Regional Authority' for the purposes of the Act. In summary, the Act gives the following powers, functions, and duties to Regional Authorities:

- Responsibility for performing the functions of a Building Consent Authority (BCA) in relation to buildings that are dams, including the processing and grant of building consents for dams, the inspection of building work in progress, and the issue of code compliance certificates on the completion of building work.¹

¹ A 'dam' under the Act is defined as an artificial barrier capable of retaining three or more metres depth and holding more than 20 000 or more cubic metres of water or other fluid.

- The management of dam safety functions, including the adoption and implementation of a Dangerous Dams Policy, classification of dams and dam safety assurance programmes.

On 17 October 2006 Council adopted a Dangerous Dams Policy. The rest of the dam safety functions are yet to commence as regulations providing the detail to the provisions of the Act have not been finalised.

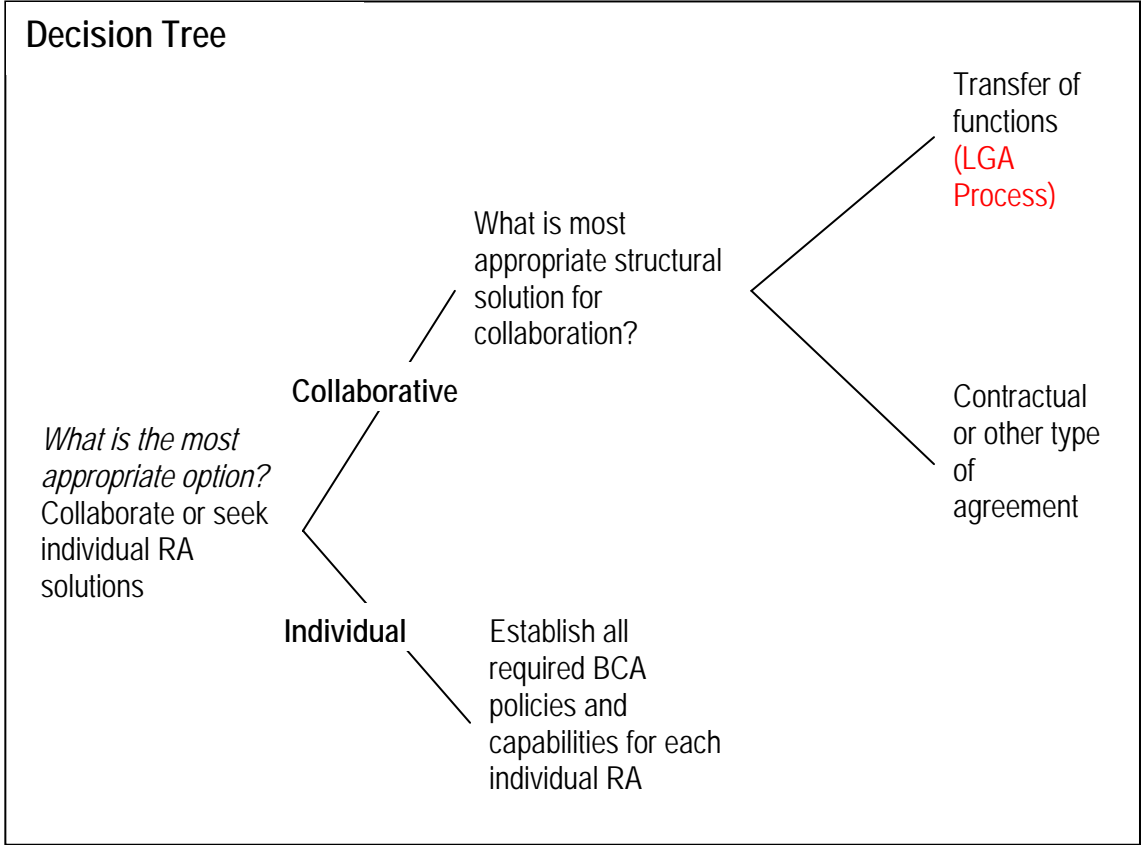
The functions of a BCA are somewhat more involved. In order to carry out those functions in relation to dams, a Regional Authority must be *registered* as a BCA under the Act, unless it formally transfers its powers to another Regional Authority.

Part of the registration process requires a Regional Authority to become accredited. Accreditation involves meeting a prescribed set of standards and criteria, which are set out in the Building (Accreditation of Building Consent Authorities) Regulations 2006. Under these regulations, Greater Wellington would be assessed for accreditation purposes on things such as documentation of procedures, guidance information for applicants, record keeping, competency of employees or contractors undertaking the work, training plans etc.

A Regional Authority must become a registered BCA by 30 November 2007. It is possible, however, for a Regional Authority to transfer its powers (thereby avoiding the need to become a BCA) under the Act, but only to another Regional Authority.

3.2 Approach

Regional Councils have been working collaboratively to determine the most efficient way to best meet our building consent and accreditation responsibilities under the Act. As a result of the mandatory nature of the Act, there is no 'do nothing' or 'status quo' option open to Council. Several options were investigated as to their appropriateness.



Given the number of building consent applications that are expected to be received nationally (between 20 and 50 per year), it was decided the best approach would be a collaborative model where two or three regional councils take a lead role and become accredited BCAs. This approach was endorsed by the Regional CEO's at their meeting early in 2007. The remaining regional councils would either contract a lead council to undertake the majority of work on their behalf, or formally transfer their powers to a lead council.

Numerous questions were raised from all regional councils about how such a transfer would work, what the liabilities would be for both parties, and what the costs would be. To assist in answering some of those questions, the regional council working group sought and obtained an analysis of the risks and liabilities of transferring functions, duties, and powers under the Act.

The analysis was provided by law firm DLA Phillips Fox, and covers all of the legal issues and options around transfers and contracting. The analysis report included consideration of all viable options for councils to minimise the amount of work required for accreditation such as transfer under the Local Government Act 2002 (LGA), contractual assignment of BCA functions, and a council-controlled organisation option.

The DLA Phillips Fox report recommended a full transfer of BCA functions under section 244 of the Act as being the preferred option as it:

- is procedurally the most straight forward;
- removes the obligation to obtain accreditation and registration;
- is flexible enough to allow for cost sharing arrangements; and
- legal liability can be divested to the transferee and any indemnity issues can be dealt with as part of the transfer agreement.

The main implementation risks for the transfer option were compliance with the special consultative procedure, compliance with the LGA's decision-making provisions, and the time available to complete the process before 30 November 2007. A further risk is that the transferee may decide to relinquish the function at any time or as may be defined in the transfer agreement.

4. Where to from here?

Three Regional Authorities have been giving some thought as to whether they will become a BCA and act as a lead council accepting transfers and/or contracts from other councils. To date Environment Canterbury is the only one to have formally approved a proposal to proceed with accreditation and to accept, in principle, transfer of powers from other councils. This month Otago Regional Council and Environment Waikato will also be considering whether to accept transfers from other councils.

Greater Wellington does not have a large number of dams in its region and over the last ten years has only received six resource consent applications that, if received now, would also require a building consent. However, this does not mean the number of future dam applications requiring building consents would not increase. In essence, the considerable amount of work required to become accredited is not warranted by the demand for this function. For this reason it is recommended that Greater Wellington pursue the option of transferring its powers, functions and duties to another Regional Authority.

Instead of transferring its functions, duties, and powers, Greater Wellington could pursue the option of contracting the services of a lead council; however, this option would still require Greater Wellington to become accredited and is therefore not seen as desirable.. It is possible under the transfer option for Greater Wellington to maintain relationships with customers in our region. There is the ability for the lead council (the BCA) to contract selected functions back to the transferring council, allowing customer relationships to be maintained through services such as application advice.

4.1 Scope of transfer

Under the Act, there is the ability to enable a full or partial transfer of functions, duties, and powers. The scope of transfer is a matter to be agreed between Greater Wellington (as the transferor) and the transferee. There are

two main portions of the Act that apply to Regional Authorities: the provisions relating to the building consent process (generally contained in Part 2, Subparts 1 to 6, and 8 of the Act), and those relating specifically to dam safety (contained in Part 2, Subpart 7 of the Act). It is recommended that the dam safety powers, functions and duties are retained by Greater Wellington as they:

- do not require accreditation;
- are primarily administrative; and
- dove-tail with RMA compliance processes.

Part 2 of the Act contains functions that must be carried out by a BCA, which therefore require accreditation. However, to further complicate matters, not all functions relating to the building consent process are carried out by a BCA. Some functions need to be carried out by a Regional Authority. Within those functions required to be carried out by a Regional Authority, there are some functions that may be best retained by Greater Wellington. For example, the process of compiling and issuing project information memoranda (which are necessarily composed of site-specific information held by Greater Wellington). Other parts of the Act contain certain provisions that relate to and allow Part 2 functions to be carried out – e.g. section 242 requires a regional authority to provide information to the Chief Executive of the Department of Building and Housing.

Attachment 2 shows the current thinking of the other Regional Councils with regard to the Building Act provisions. As can be seen, most Regional Councils, other than those seeking full accreditation (three councils) are seeking to transfer their BCA functions.

It is therefore recommended that Greater Wellington consult on transferring its functions, duties, and powers in Part 2 of the Act (excluding Subpart 7 – Safety of Dams) to another Regional Authority, along with any other functions, duties and powers that are necessary to allow the transferee Regional Authority to act as a BCA for dams in the Wellington region.

4.2 Cost

If Greater Wellington was to become a BCA, the estimated cost of developing and implementing a new system to process building consents in accordance with the accreditation standards and criteria is in excess of \$50,000. The accreditation application fee of \$16,000 is not included in this estimate (although has been budgeted for in the 2007/08 Annual Plan).

The Environment Regulation Department is ISO registered. It is estimated that it costs around \$15,000 to \$20,000 per year to maintain the registration (included in this cost is the registration fee of \$6,000). A similar cost, if not higher, could be expected to run and maintain the accreditation system required of a BCA. There is a biennial revalidation accreditation fee of \$12,800.

If Greater Wellington pursues a transfer of its functions to another Regional Authority, there will undoubtedly be a payment for services required. The amount of that payment has yet to be discussed and determined, however, it is not expected to exceed those costs Greater Wellington would incur should it carry out the BCA functions itself.

4.3 The transfer process

Should the council agree to consider transferring some of our Building Act functions, Section 245 of the Act sets out the process for the transfer of functions, duties or powers between Regional Authorities. To comply with that process, Greater Wellington must:

1. use the special consultative procedure in section 83 of the LGA; and
2. serve notice on the Minister of Building and Construction of its proposal to transfer particular functions, duties, or powers; and
3. agree with the other Regional Authority to whom the functions, duties, or powers are to be transferred that the transfer is desirable on either or both of the following grounds:
 - a) efficiency
 - b) technical or special capability, or expertise.

The action required in paragraph (a) is the next step to be progressed. **Attachments 3 and 4** are the Summary of Information and Statement of Proposal that are required for the LGA special consultative procedure, in accordance with section 83(1)(a) of the LGA. The special consultative procedure in the LGA creates a two-fold risk in that it involves a process that takes time, and it involves the potential for submissions from the public that may alter the overall intent and/or scope of the proposed transfer.

Once Environment Waikato and the Otago Regional Council have made a decision whether to accept transfers, Greater Wellington will pursue discussions as to the terms of a potential transfer.

The predicted time line for the process is as follows:

Task	Date
Consultation undertaken with major dam owners and interested parties – e.g. Iwi, Fish and Game, DOC etc	July/August 2007
Negotiate potential terms of agreements as required by ss 245 & 246 of the Act with lead Regional Authority	July/August 2007
Public Notice calling for submissions on Transfer Proposal	Saturday, 7 July 2007
Submission period closes	6 August 2007
Hearing of submissions by sub-committee	Late August 2007

Council adopts Transfer Proposal and signs/seals Transfer Agreement	September 2007
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4.4 Hearing of submissions

In order to be able to hear and consider any submissions received on the proposed transfer, a sub-committee will need to be formed. Terms of Reference for the sub-committee can be found in **Attachment 5**. It is recommended that no less than three Councillors form this sub-committee. Hearings (if required) are likely to be held on 28 August 2007.

The Policy, Finance and Strategy Committee will need to recommend that Council appoint members to this subcommittee. Councillors Turver, Baber and Laidlaw have indicated that they will be able to sit at such hearings.

4.5 Risks

There are some potential risks involved with the transfer of functions, duties and powers. Liability is a significant issue for some of the councils considering accepting transfers from other councils. Those lead councils do not wish to be exposed to liability for undertaking functions on behalf of Greater Wellington. The DLA Phillips Fox report referred to in section 3.2 above considered this issue and concluded that Greater Wellington could indemnify the lead council within the terms of the transfer agreement. The level of indemnification will need to be agreed to by both parties. It must, however, be remembered, that if Greater Wellington was to become a BCA and not transfer functions, duties and powers, Greater Wellington would still be responsible should any legal challenges be made.

Another risk in transferring functions, duties and powers under the Building Act is that they are not necessarily permanent. For instance, a transferee can 'cancel' at any time, unless the transfer agreement provides otherwise. It would therefore be prudent for Greater Wellington to ensure there are adequate provisions in a transfer agreement to safeguard Greater Wellington's position should the transferee wish to cancel the agreement.

5. Communication

If approved, the proposal to transfer will be advertised in the daily newspapers. A letter and the Summary of Information will be sent to existing dam owners and interested parties advising them of the proposal. In addition, we will post a copy of the Summary of Information and Statement of Proposal on our website.

6. Recommendations

That the Committee:

1. *Receives the report*
2. *Notes and contents; and*

3. **Recommends that the Council:**
- a. **Agrees to consult on the proposed transfer of those functions, duties and powers in Part 2 of the Building Act 2004 (excluding Part 2, Subpart 7 – Safety of Dams)**
 - b. **Notes proposed timetable for consultation**
 - c. **Approves the Summary of Information and Statement of Proposal for public consultation**
 - d. **Confirms membership of a sub-committee of the Policy, Finance and Strategy Committee to hear and consider submissions received on the Proposed Transfer of Powers; and**
 - e. **Approves the terms of reference for the sub-committee.**

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Attachment 1: Report 06.326

Attachment 2: Functions to be undertaken by other Regional Councils

Attachment 3: Summary of Information

Attachment 4: Summary of Proposal

Attachment 5: Terms of Reference for Building Act Subcommittee