

# Impact of Thorndon Quay Court of Appeal decision on business case development for local government



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In July this year the Court of Appeal released a decision regarding Council decision-making processes that confirms that Councils have a responsibility to actively consider options for significant decisions under the Local Government Act. This differs from the Treasury (central government) approach where there is a responsibility to *assure* that all reasonably possible options have been considered.

Significance has a particular legal meaning under the Local Government Act. Each council must adopt a Significance and Engagement Policy that sets out the criteria for assessing when decisions are significant or may have significant consequences. That policy will identify the pathways the council will follow in making decisions.

*“For example, the policy may require engagement with the community prior to decisions being made (as was the case with Thorndon Quay)”*

In the case of a major investment decision that is beyond the scope of budget identified in the Annual Plan or the Long-Term Plan, it may oblige the council to either undertake a Special Consultative Procedure (if outside of the Long-Term Plan cycle) or incorporate options for public consultation within the Long-Term Planning process. The Long-Term Plan, which contains the

council’s finance and revenue policies, is reviewed every three years. There is no equivalent to budget bid processes (excepting circumstances where councils can find a third party to pay - such as NZTA - but even then, it will still be subject to Local Government Act processes and accountability documents).

Delegations to committees or staff should be linked to any Significance and Engagement Policy. It is fair to assume that most major investment decisions that require a business case are likely to exceed internal delegations to officers.

## IMPLICATIONS FOR BUSINESS CASES

This decision confirms our view that standard full business case processes (Single Stage Business Case, Detailed Business Case) that take case development through the commercial, financial and management cases prior to confirmation with decision-makers do not sit well with local government processes, as the sponsor or Senior Responsible Officer (if an officer) is unlikely to have the delegation to make decisions.

In effect, many if not most cases will need as a minimum to be presented in a formal agenda to a committee of council, if not full council, at the economic case phase.

In most cases a presentation of the analysis with a recommendation will meet the requirements to consider options, providing that the optioneering is presented in such a way that enables the council or committee to consider the options, and either confirm any recommendation, or make a different decision. However, a different decision will have implications - potentially sending the process back a step or two to reconsider Investment Objectives and Critical Success Factors.

## GOOD PRACTICE - KEEPING OUR CLIENTS SAFE

Tregaskis Brown has developed decision pathways that provide for involvement of elected members from the first steps in the process, including engagement prior to Investment Logic Mapping to confirm scope, and identify Investment Objectives. There may also be a need to undertake a check-in once any framework for analysis has been developed to ensure decision-makers are comfortable that the framework covers the considerations they will need to take into account when they do consider options.

These processes will need to dovetail into existing council processes and policies. This might include informal workshops with elected members where key processes such as Multi-Criteria Decision Analysis are worked through.

Once decisions on options are taken, council can then direct officials to complete the business case (including the commercial, financial and management cases). It is possible that financial considerations will need to be considered separately, depending on how the investment is to be funded, prior to finalisation of the case. As with central government working closely with the council's finance and democratic services teams will be critical.

## INDICATIVE BUSINESS CASE (IBC) AND PROGRAMME BUSINESS CASES (PBC)

The IBC process is better aligned to local government approaches, as the decision at the end of an IBC is whether to continue (i.e., fund the development of a full case) - this will better meet council process obligations. The PBC process also fits better, but care would need to be observed to ensure that the council is not at risk of bias or predetermination of a decision by developing the case too far before taking it to decision-makers. Ideally this would be at the point where the preferred way forward is being identified.

## WHO ELSE CAN HELP?

It can be useful to engage with the council's legal advisers when developing processes as these advisers will have specialist knowledge of the legal requirements of the Local Government Act.

## WHY DOES IT MATTER?

Local government is a creature of statute, and all processes are subject to scrutiny in a different way to central government. Central government assurance processes come via Treasury's required processes e.g. Gateway, IQA. Scrutiny of local government processes are via legal processes (Judicial Review), and challenge to a council process can lead to decisions being set aside, or the council being sent back to start again.