Before Independent Hearings Commissioners

Wellington City Council

In the matter of The Wellington City Proposed District Plan and Intensification Planning Instrument

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Legal submissions on behalf of submitters – Dr Matthew Keir and Sarah Cutten - Submitters 415 – ISPP allocation issues

Date: 15 February 2023

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MAY IT PLEASE THE COURT

1 In Minute No 7 the Hearings Panel provided that any submitter who wished to take a position on Council's view of the 'jurisdiction issue' could do so by 1pm on 15 February 2023. The 'jurisdiction issue' is the Council's position that the Panel does not have any power to alter the classification of IPI provisions versus the Schedule 1 provisions. The Council's position, as Mr Whittington puts it, is 'the Council's identification on the face of the PDP as notified is conclusive'.

Paragraph 8 of Minute No 7

Para 1.4(a) and 5.1(a) of Council's legal submissions dated 8 February 2023

2 It is submitted that to take such an approach renders the Panel's power to regulate the hearing as it sees appropriate as redundant, it is contrary to the Panel's powers to 'hear submissions and make recommendations' on those to Council, it creates significant natural justice issues and ensures that the error in including new heritage listings as part of the IPI cannot be corrected in a timely way.

The Panel's powers

3 Mr Whittington submits that the Hearing Panel has no delegations which allow it to reallocate provisions from the IPI process to the usual Schedule 1 process.

Para 4.4 of Council's legal submissions dated 8 February 2023

4 It is submitted that the Panel can make these decisions as part of its power to establish a 'procedure that is appropriate and fair in the circumstances' under section 39 of the RMA. When submissions are heard and in which part of

Under clause 98 of Schedule 1 of the RMA, the provisions in sections 39-42 of the RMA apply to the Hearing Panel hearing the IPI

the ultimate recommendation report those submissions are addressed is a matter for the Panel to determine.

5 Even if that is not accepted, there is no disagreement that the Hearing Panel can 'hear submissions and make recommendations' to the Council on the IPI and non-IPI provisions. It is submitted that this must include hearing submissions on whether provisions are in the correct 'box' (ie, IPI or non-IPI) and making recommendations to the Council on that issue.

Clause 96(4)(a) and (1)(a)

6 Dr Keir and Ms Cutten have raised this issue in their submission and they are entitled to have their submission heard and a view on it from the Panel. Whether the Council accepts those recommendations or not is then a matter for it to determine. There is no doubt it is open to the Council to choose to make a different decision from the one it made at the May 2022 meeting referred to by Mr McCutcheon, in response to recommendations by the Hearing Panel. The Panel could do this now, as a preliminary issue if it wished.

7 The Hearing Panel also needs to consider the implication of accepting the argument put forward by the Council and Mr Whittington and what it means for the scope of what it is able to make recommendations on.

8 For example, if Mr Whittington's argument is followed through, does it also mean the Panel cannot consider whether:

8.1 The provisions 'give effect to' Policies 3 and 4 of the NPS-UD, because the Council has already determined that when it decided to include the provisions it did in the IPI?

8.2 A matter should be a 'qualifying matter', because the Council has already determined that when it decided to notify what it did in the IPI?

8.3 Provisions are 'related provisions' under section 80E of the RMA because again, this has already been determined by the Council.

9 Or does it go even further and mean that once notified, submitters cannot make submissions that an activity should have a different activity status, because Council had already determined that when it notified the plan and therefore, it crystallises at the point of notification? That is clearly incorrect and would defeat the point of calling for any submissions. How is that any different from the situation here?

10 The point is, where is the line and how is the allocation issue different from any of the matters the Council decided pre-notification in terms of what is in the IPI and what is not?

11 If the Hearing Panel considers any provisions have been allocated incorrectly, then now is the time to address that while there is still time to 'fix' the issue before the statutory deadlines and before the hearing progresses too far and this issue then has to be unpicked by the Courts. The Hearing Panel should be ensuring that a legally valid IPI is ultimately what is put before Council for approval.

Natural justice

12 There is also a real natural justice issued involved in this step in the hearing process. While Mr Whittington glibly says an affected submitter could have judicially reviewed the Council's allocation decision, why would they or should they? Submitters would have assumed they would have an ability to submit on these sorts of issues once the IPI was notified (as a number did), which is what crystallised exactly what Council was proposing in its IPI.

13 From a practical perspective, if Dr Keir and Ms Cutten had read the 12 May 2022 report referred to by Mr McCutcheon, the Committee was told that 'Schedules related to those chapters progressing through ISPP' (page 105) were recommended for inclusion in the ISPP process. In Table 2 (page 110) it refers to the whole heritage chapter being part of the ISPP process and 'appendices and schedule directly relevant to the chapters above' (page 114).

14 However, if they read that report, there was no suggestion that **new heritage listings** would be included in the IPI or what those new listings were. That would not know they were affected. The only time they definitively knew they were to be specifically affected by new restrictions was when the IPI was notified. At that point, a submitter would fairly assume any issues they had with the new heritage listing (process or merits) could be raised in submissions and addressed through the Council hearing process. Trying to block that now is, in my submission, an unreasonable and procedurally unfair approach by the Council.

15 In my submission, there is also a significant natural justice issue in proceeding with a **new heritage listing** as part of the IPI process.

16 The heritage listing (if it were to proceed) is the provision that triggers the significant constraints on development on Dr Keir and Ms Cutten's site. This is a substantive merits matter which imposes significant new limitations on their development ability and a financial cost on them. It is something that submitters should be able to appeal to the Environment Court on, rather than have no ability to challenge the merits of that listing at all.

17 It was not the intention of the IPI provisions that significant new constraints could be imposed on residential sites through an IPI. In fact, the opposite is anticipated – that more development would be enabled on residential sites. This is

At page 25

reflected in the Departmental Report on the Housing Enabling Bill which stated:

> We recognise that if the scope of the IPI is too narrow, it will result in provisions (including objectives, policies, rules and standards) left in plans that may not enable the intensification sought by this Bill. It may also require councils to undertake multiple plan change processes. This will be confusing, costly and time consuming. **The ISPP has not been designed for full plan reviews. We do not think it is appropriate for the ISPP to be used for this purpose, particularly as there are likely to be matters where it would not be appropriate to have no appeal rights (e.g. significant natural areas).**

Emphasis added

18 While the Departmental Report mentions significant natural areas as one example, heritage building scheduling is analogous in that it also creates considerable restrictions on the use of land and loss of development ability. Mr Whittington (at footnote 6) attempts to discount this by claiming it cannot be accurate because an SNA can reduce height and density. However, he appears to be referring where SNA's already exist and are identified as a qualifying matter. It cannot be correct that new SNA's are imposed through an IPI because those (like new heritage listings) are not 'consequential on' the MDRS of NPS-UD policies.

19 The issue here is not whether heritage is an appropriate qualifying matter, but whether it is lawful to list **new heritage buildings** as a matter that is 'consequential on the MDRS or Policies 3

and 4 ...of the NPS-UD'. That is the test in section 80E of the RMA for inclusion in an IPI.

20 There is no issue that heritage can be a qualifying matter under the IPI provisions in the RMA. However, adding a **new building** to the heritage list in Schedule 1 (and therefore being captured by those restrictive heritage provisions, rather than the usual residential provisions) is a different issue. In my submission, a **new heritage listing** requires a full substantive assessment through the normal Schedule 1 process, with merits appeal rights, due to the significant detrimental impact this has on landowners.

Is a new heritage listing a matter that is consequential on the MDRS or Policies 3 and 4 of the NPS-UD?

21 In my submission, a **new heritage listing** is not a 'related provision' under section 80E of the RMA.

22 The issue which arises is whether scheduling **additional heritage buildings** (including changes to the mapping) can be a ‘related provision’ on the basis that a new heritage listing is 'supporting' or 'consequential on' the MDRS or Policies 3 and 4 of the NPS-UD. It is submitted that it is not. There is no analysis by the Council that supports how this new listing supports the MDRS or Policies 3 and 4 of the NPS-UD. This is because it doesn't.

23 In terms of the plain and ordinary meaning of the terms ‘support’ and ‘consequential’, the New Zealand Oxford Dictionary relevantly provides:

23.1 **support** (transitive verb) 1. carry all or part of the weight of ...5. bear out; tend to substantiate or corroborate ...9. take a part that is secondary to

23.2 **consequential** (adjective) 1. following as a result or consequence 2. resulting indirectly

24 As set out above, a heritage listing is a substantive matter and the listing itself (if it proceeds) is what triggers the significant constraints. I cannot see how a **new heritage listing** is 'consequential on' or 'secondary to' the MDRS or Policies 3 and 4 of the NPS-UD. This means the listing cannot legally be progressed through the IPI as it is not provided for by section 80E of the RMA. Section 80G of the RMA specifically states that the Council cannot 'use the IPI for any purpose other than the uses specified in section 80E'.

Conclusion

25 Dr Keir and Ms Cutten's position on the jurisdiction issue is that:

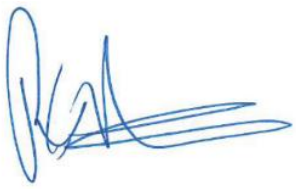
25.1 The Panel does have the power to address this issue now if it wishes, whether by relying on its power to regulate its own proceedings in section 39 of the RMA or by making recommendations on this

submission to the Council, which it is tasked to do by clause 96 of the First Schedule and its delegations. It could do this now, as a preliminary issue if it wished.

25.2 The new heritage listing for their property at 28 Robieson Street is not a provision that can lawfully be part of the IPI. The listing is a matter that should follow the usual Schedule 1 process because that is what section 80E of the RMA requires and also because of the significant costs and limitations on development that this listing imposes. This of itself shows that it should not be included as a 'related provision' to an IPI, which is focussed on increasing density and development in residential areas.

26 As set out in the separate submissions by Dr Keir and Ms Cutten, I am not instructed to appear at the hearing of this issue on 21 February 2023, but seek these legal submissions are taken into account when the Panel decides on next steps.

Date: 15 February 2023



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Kerry M Anderson

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