

**Under** the Resource Management Act 1991

**In the matter of** hearings of submissions and further submissions on the Proposed Wellington City District Plan

**By** **Wellington's Character Charitable Trust Inc**  
Submitter

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**SECOND MEMORANDUM OF COUNSEL FOR WELLINGTON'S CHARACTER  
CHARITABLE TRUST  
15 FEBRUARY 2023**

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**Counsel Acting**  
D W Ballinger  
Stout Street Chambers

(04) 915 9278  
duncan.ballinger@stoutstreet.co.nz  
PO Box 117, Wellington

## **SECOND MEMORANDUM OF COUNSEL FOR WELLINGTON'S CHARACTER CHARITABLE TRUST**

1. This memorandum is filed in response to the Panel's request in Minute 7 for submissions on whether the Panel has jurisdiction to consider challenges to the current classification of provisions in the Proposed District Plan and to modify that classification if it considers that to be appropriate.
2. My earlier memorandum dated 30 January 2023 made initial submissions on this topic. I have now had the benefit of reviewing the submissions filed by the Council on 8 February 2023. These submissions accordingly elaborate on my earlier submission and respond to the Council's submissions.

### **Summary of position**

3. This Panel is hearing submissions and making recommendations on two "plan change" instruments — an intensification planning instrument (IPI) and a 'regular' plan change. For convenience, those two instruments are comprised in a single "Proposed District Plan" document and they are the subject of a combined submissions and hearing process.
4. The Panel has ability to make recommendations on each of the two plan change instruments, including to amend, add or subtract from the provisions in the notified Proposed District Plan. It follows that:
  - (a) The Panel may make recommendations on how any additional provisions proposed by submitters are to be allocated in the decisions versions of the Proposed District Plan. Any new provisions must be allocated to either the regular plan change or the IPI.
  - (b) The Panel may also recommend reallocation of provisions by deleting them from the IPI and adding them to the regular plan change (or vice versa). Such a recommendation may be appropriate if there is a legal error, or as a consequence of a recommendation to amend provisions from the notified Proposed District Plan.
  - (c) The Council must make decisions on any such "allocation" recommendations in order for appeal rights to be known.

## Two plan changes and two processes, rolled together

5. The Proposed District Plan is a single document but with notation that bifurcates it into two instruments:
  - (a) An intensification planning instrument (IPI), which is a change to the district plan — labelled “ISPP”;<sup>1</sup> and
  - (b) A ‘regular’ change to the district plan, prepared following a review — labelled “P1Sch1”.<sup>2</sup>
6. Legally, the Proposed District Plan is two distinct plan changes that have been combined in one document for convenience and to improve integration and public engagement.
7. The public notice given on 18 July 2022 referred to these two instruments together as the Proposed District Plan, and requested submissions “on the Proposed District Plan”.
8. Nearly 500 submissions were lodged. None of the submissions I have reviewed contain any comment about whether they are on the IPI or on the regular plan change or on both.<sup>3</sup> This is not surprising. Given the Council’s goal of providing for relative ease of public engagement, there was no expectation for submissions to reference the legal bifurcation of the PDP into two instruments.
9. The Council has appointed this Panel to hear submissions and make recommendations to the Council on the Proposed District Plan. The statutory basis for the Panel to make recommendations is as follows:
  - (a) For the IPI, the Panel as an “independent hearings panel” must make recommendations on the IPI. Its recommendations must be related to a matter identified by the Panel or any other person during the hearing, but is not limited to being within the scope of submissions made on the IPI.<sup>4</sup> Clause 100 prescribes the format for

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<sup>1</sup> RMA, s 80E(1) defines an IPI as a change to a district plan or a variation to a proposed district plan.

<sup>2</sup> RMA, ss 73(1A) and 79.

<sup>3</sup> With the exception of the submission by Sarah Cutten and Matthew Keir (#415), which states that the listing of their property should be through the Schedule 1 process rather than the ISPP.

<sup>4</sup> RMA, schedule 1, clause 99.

the Panel's recommendations on the IPI and the corresponding submissions. The Council will then make decisions on those recommendations.<sup>5</sup>

(b) For the 'regular' plan change, the Panel will make recommendations to the Council, and the Council then give a decision on the provisions and matters raised in submissions. The ability to make recommendations is linked to the Council's decision making scope in clause 10 of Schedule 1. For example, the Council can only make decisions on matters reasonably and fairly raised in submissions.<sup>6</sup>

10. The Council will need to make decisions on both the IPI and the regular plan change once it has the Panel's recommendations. Decisions will need to be made on including (or not) any new provisions that have been proposed by submitters.
11. In making those decisions, the Council will need to engage with the issue of whether its decisions on a particular provision is on the IPI or on the regular plan change. This is necessary for it to be known which decisions have appeal rights and which decisions go to the Minister for a decision if they involve the Council rejecting a Panel recommendation.
12. The scope of the Panel's recommendations should be considered in light of the downstream Council decision that they will inform. The Council will need to engage with allocation issues, including issues that were not previously addressed prior to notification and appointment of the Panel. As the Council's decisions will be made after the Panel recommendations, it is logical that the Panel is competent to consider questions of allocation at the hearings stage and make recommendations on that.
13. There are three types of allocation issues that the Panel may need to address at the hearing stages:

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<sup>5</sup> RMA, schedule 1, clause 101.

<sup>6</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 166.

- (a) First, how should any new provisions that are not in the notified Proposed District Plan be allocated? This will naturally not have been addressed prior to notification.
  - (b) Secondly, should any notified provisions be reallocated in light of the Panel recommending changes to those provisions? For example, the Panel may recommend changing a provision to the extent that it is no longer a good fit with the scope of an IPI allowed by sections 80E and 80G.
  - (c) Thirdly, should any notified provisions be reallocated because the Panel has the view that the notified allocation was wrong?
- 14. The Panel's Minute 6 and 7 have focussed on the last of these three questions. However, in my submission the three types of allocation issue are similar and when considered together lead to the conclusion that the Panel has ability to engage with and make recommendations on allocation.
- 15. In my submission, there is ability for the Panel to address the second and third types of allocation issue (paragraph 13(b) and (c) above) by recommending a reallocation of provisions from the notified plan. The mechanism to achieve reallocation is a Panel recommendation and Council decision that:
  - (a) The provision should be deleted from the IPI and added to the regular plan change; or
  - (b) The provision should be deleted from the regular plan change and added to the IPI.
- 16. The Panel is able to hear such a submission and make recommendations on it, with such a recommendation being "on" both of the two instruments that comprise the Proposed District Plan. This is a logical extension of the Panel's ability to recommend the deletion or addition of provisions to the IPI and the regular plan change.
- 17. If this jurisdiction exists, then the Panel will need to exercise it for any allocation issues in light of:
  - (a) The mandatory and discretionary scope of an IPI as set out in section 80E;

- (b) The Council's prior decision for how to allocate provisions in the Proposed District Plan, and integration or consistency with that decision; and
- (c) The scope of submissions on any new provisions proposed by submitters.

**Response to points raised by the Council**

- 18. I now respond to some specific jurisdiction arguments raised by the Council.
- 19. First, the Council argues at paragraph [4.4] that the Panel's delegation needs to be exercised for the purpose for which it was given
- 20. I agree with that proposition.
- 21. However, I do not agree that this means the Panel cannot consider the Council's allocation decisions. One of the obvious purposes of delegating the recommendations on the IPI and the regular plan change to the same panel was that the Panel would make its recommendations on the two instruments in an integrated fashion. It follows in my view that the Panel is competent to:
  - (a) Recommend that new provisions be added to the Proposed District Plan, and include in that recommendation which underlying legal instrument those new provisions should be included in; and
  - (b) In appropriate cases, recommend that a provision in the notified Proposed District Plan be deleted from one instrument and added into the other instrument.
- 22. Secondly, the Council's submissions at [4.6] considers a thought experiment: the IPI and the regular plan change have been presented to the Panel as separate documents for recommendations. What should happen if the Panel concludes that a provision has been included in the IPI in error? In my submission, the obvious answer is that a Panel with a delegation to hear submissions and make recommendations on both documents would

recommend changes to the two instruments in an integrated way so as to correct any identified misallocation.

A handwritten signature in black ink that reads "D W Ballinger". The signature is written in a cursive style with a large, looped 'D' and 'W'.

**D W BALLINGER**  
Counsel for Wellington's Character Charitable Trust  
15 February 2023