

IN THE MATTER

of the Resource
Management Act 1991

AND

IN THE MATTER

of Submissions and Further
Submissions on the
Proposed Wellington City
District Plan

Minute 2:

Expert Evidence

Introduction

1. The purpose of this Minute is to address a series of questions the Hearing Panel has received from Ms Amanda Mulligan, on behalf of Wellington Heritage Professionals¹.
2. The background to Ms Mulligan's request is that the submitter is a group of heritage professionals whom Ms Mulligan describes as having collaborated on a submission on the heritage aspects of the PDP.
3. Ms Mulligan notes and expresses concern about the statements in our Minute 1 that:
 - (a) Expert witnesses need to have the ability to act independently of the submitter who calls them; and
 - (b) Submitters will likely need to provide expert evidence if the Section 42A Report does not support a suggested change.
4. Ms Mulligan observes that it is not possible for the nine heritage professionals who contributed to their submission to act independently of the submission, because they have all signed the submission. She seeks guidance from the Panel on the issue.
5. Secondly, Ms Mulligan notes the advice in Minute 1 that the hearing of PDP submissions has been divided into topics, which means that some submitters may have to attend/participate in more than one hearing. She observes that as there is content relevant to heritage issues distributed throughout the chapters of the Proposed Plan, this would on the face of the matter, require a significant input from her group at a number of hearings. She seeks that the Hearing Panel consider hearing their submissions and evidence on the heritage content of all chapters during the Heritage Stream (#3).
6. We have already provided some informal guidance to Ms Mulligan via the Hearings Coordinator, but we have produced a Minute to address these issues in the expectation that the Hearing Panel's position on Ms Mulligan's requests may be relevant to a number of parties.

¹ Submission #412

Expert Evidence

7. The Hearing Panel draws guidance from the rules of the Environment Court in relation to the role of experts in its hearings. Minute 1 sought to capture those rules in a way that the Hearing Panel hoped would assist submitters. Ms Mulligan's queries suggest we have been less successful than we had hoped.
8. We note first that Minute 1 was prepared in the light of the Environment Court's Practice Note 2014. That Practice Note has now been overtaken by the Environment Court Practice Note 2023, which was released by the Principal Environment Judge on 1 December 2022. While, as regards expert witnesses, the key concepts have not changed, there are some differences. Accordingly, for expert witnesses giving evidence at our forthcoming hearings, it is the Code of Practice contained in the Environment Court's Practice Note 2023 that they should agree to adhere to.
9. The Environment Court's Practice Note 2023 does not require expert witnesses to be independent of the party calling them. Rather, it directs² that:

“(a) An expert witness has an overriding duty to impartially assist the Court on matters within the expert's area of expertise. This duty to the Court overrides any duty to a party to the proceeding or any other person engaging the expert.

(b) An expert witness is not and must not behave as an advocate for the party who engages them.

(c) An expert witness must declare to the Court any relationship with the party calling them or any interest they may have in the outcome of the proceeding...”
10. That was why, rather than Minute 1 stating that experts had to be independent of the party calling them, it said that they needed the ability to act independently of that party. We were seeking to capture the idea that the focus was on the witness's state of mind.
11. The key instruction in the Court's Practice Note is that an expert witness must not behave as an advocate for the party calling them. In this context, an advocate is a person who presents a point of view that they may not

² Refer Clause 9.2

personally believe is correct, because their role is to present the views of others. Advocates can also seek to emphasise points supporting the position they are advancing, and either ignore or discount contrary considerations. Typically, one thinks of advocates being lawyers, but it is easy for non-lawyers to stray into advocacy mode. They may believe what they say is correct, but not be objectively weighing the evidence.

12. In the situation of this submitter, which is comprised of some nine heritage professionals, if one of their number were to appear before us presenting expert evidence, the issue would be whether that heritage professional is providing us with their own opinion, or are representing the views of others in the group.
13. Another relevant question in this submitter's case is how the point of view presented by the submitter's representative was arrived at. Is it an opinion that the person giving evidence genuinely believes to be correct, or is it the result of collective 'groupthink' that the witness has gone along with.
14. Further, has the 'expert' objectively considered contrary opinions and evidence, demonstrating their readiness to shift from a previously advanced position if that view is shown to be flawed?
15. The same issues will arise where experts are employed by a submitter. Similarly, the Council Officers who give evidence before us. As above, the Environment Court's Code requires witnesses to disclose any relationship the witness has with the party calling them.
16. We emphasise, that an employment relationship, or any other relationship for that matter, is unlikely to be regarded as inherently fatal. The thing the Hearing Panel will want to be satisfied of is that the witness is not acting under instructions and is giving us their professional opinion, rather than someone else's view.
17. Circling back to Ms Mulligan's questions, she expresses concern that the contribution of her and her colleagues "*may not be given the weight it deserves at the hearing*" because they have signed the submission. It is not for the Hearing Panel to advise submitters whether their interests would be advanced by their employing an 'independent' expert who is prepared to support the case they are advancing.

18. What we can say, however, is that the Hearing Panel will determine what weight the evidence brought for this submitter (and all other submitters for that matter) deserves based on the considerations set out above. It will not be discounted solely because the witness was a party to the submission.
19. To summarise, the fact that the representatives of this submitter seeking to give expert evidence (if that is what occurs) have been a party to the submission is not determinative, but it does raise questions that the Hearing Panel will need to satisfy themselves of.

Dividing Hearing Topics

20. In Minute 1 we attempted to explain why the hearing topics have been divided in the manner which they have. Ultimately, the Hearing Panel is working within the confines of externally fixed deadlines. In particular, as noted in Minute 1, the ISPP topics have to be the subject of decision by Council by 20 November 2023. The balance of hearing topics have to be the subject of a decision within two years of notification of the PDP i.e. mid July 2024, unless that time is extended by the Minister for the Environment. These are challenging timeframes, to say the least.
21. For that reason, the approach taken to the division of topics has prioritised the ISPP topics, with differently constituted hearing panels for different topics to enable the non-sitting hearing commissioners to be progressing their reports while other hearings are proceeding.
22. The division of the ISPP topics has also been designed to separate the issues into manageable 'chunks'.
23. If all topics were being heard together, all commissioners would have to sit on all matters, the hearing would be unmanageable, the task of formulating recommendations much more onerous, and there would be no prospect of the Hearing Panel being able to produce its recommendations to the Council within the statutory timeframe.
24. Ms Mulligan has, of course, only asked that the heritage matters her group raises be heard within Hearing Stream 3. However, if we were to accept Ms Mulligan's request, it would not be possible just to hear this submitter in relation to heritage matters arising throughout the PDP. We would need to hear all submitters with an interest in any heritage matters in Stream 3, because otherwise different Panel members would be hearing different

evidence on the same issues. We also could not make a direction to that effect without canvassing the views of the other affected submitters.

25. Moreover, if we were to agree with Ms Mulligan's request then we could not consistently decline the request of other parties for whom it might be more convenient if the issues of relevance to them were all heard in one hearing.
26. In summary, we have already considered the issues Ms Mulligan has raised when formulating our proposed 'mode of attack'. We appreciate that this will inconvenience parties who have an interest in multiple topics. We have endeavoured to provide submitters with other options to reduce that inconvenience: either to table representations/evidence in writing, or to participate in our hearings virtually, by Microsoft Teams.
27. What we cannot do, is accede to Ms Mulligan's request and shift all the heritage matters Wellington Heritage Professionals raise into Hearing Stream 3.



Trevor Robinson
Chair

For the Wellington City Proposed District Plan Hearings Panel

Dated: 23 January 2023