Dr M Keir and Ms Cutten
Submitter number 415
28 Robieson St
Wellington

The Hearing Panel of Commissioners
Wellington City Council Proposed District Plan
15 February 2023

Re: The procedural matter on the Hearing Panel's jurisdiction to consider challenges and recommend remedies on the current classification of plan provisions between the ISPP and Frist Schedule plan making process

Dear Commissioners,

We have prepared this submission ourselves, and while we hold related skills and experience, we do not have any formal legal training and are not lawyers. This submission accompanies a response from our lawyer Kerry Anderson from DLA Piper. It is not intended to repeat content. However, while there are overlapping themes this submission explores a wider variety of matters.

Introduction

Paragraph 8 of Minute 7 instructs submitters in support or opposition to the Council's position, that the Hearing Panel (Panel) does not have jurisdiction to alter the classification of topics between Frist Schedule and ISPP process, to file submissions by 1pm on 15 February 2023.

We are opposed to the Council's position that the Commissioners cannot reallocate topics. Preventing the Panel from making corrections to any misallocation, as determined through full consideration, contravenes section 39 of the RMA and obstructs the Panel's ability to avoid unnecessary formality, and to establish a fair and appropriate procedural framework in the circumstances. It will also add needless complexity to the plan making process, which could have been resolved at the outset as the Commissioners have sought to do and it significantly prejudices us as submitters as there was no suggestion until the section 42A report that this approach was going to be taken by the Council.

We note the point made by the Commissioners in Paragraph 9 of Minute 7, that parties should not expect to address the Panel verbally at length on 21 February 2023. Given this point, and as private homeowners, we have elected not to have legal representation attend the hearing on 21 February 2023 regarding this matter. We provide our rebuttal in this submission and leave the issue of jurisdiction to be resolved by the independent Commissioners, with input from the Council, and our well-resourced peers. These points expand on our earlier letter to the Commissioners dated 30 January 2023.

The Council, and their legal advisors, have misinterpreted section 80E(1)(b)(iii) of the RMA

The Commissioners have clarified in Minute 7 that matters regarding the allocation of individual provisions to either the ISPP or First Schedule process will be addressed within the hearing streams to which they relate. The Commissioners have also requested that we draw your attention to interrelated

matters. We expect to address our issues in relation to the addition of new buildings to Schedule 1 of the plan further in Stream 3.

We raise the following point to the Panel now as we believe the Council's misinterpretation of the RMA has a broader implication to the allocation of topics than for individual provisions. The issues we raise with the Panel are similar to those questioning 'allocations of entire topics' as they call into question the legality of all new provisions within the IPI that are not 'in support of' or 'consequential on' the MDRS and NPS-UD intensification policies. This submission aims to provide a clear explanation of the significance of the matter, which could potentially have far-reaching implications for the hearings. This information is intended to assist the Commissioners in determining the appropriate level of effort required to address the issues.

Section 80E specifies what must be included in an IPI. Specifically, clause (b) provides some discretion on what may also be included:

> (b) that may also amend or include the following provisions:
>
> *(iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—*
>
> *(A) the MDRS; or*
>
> *(B) policies 3, 4, and 5 of the NPS-UD, as applicable.*

The use of the phrase "consequential on" within 80E(1)(b)(iii) is worth exploring further as we believe the Council's confusion and subsequent interpretation of these words has resulted in the misallocation of topics to the ISPP process.

Consider the following phrases in the table below. While they might appear similar initially, careful consideration shows the 'directionality of consequence' and therefore the required timeline of events explicit within each phrase are opposite to each other giving them vastly different interpretations. We believe the Council has confused the correct phrase in 80E(1)(b)(iii) "consequential on" (the left column) with the phrase to have "consequence on" (the right column).

"consequential on"	**"consequence on"**
The intended context in the legislation. *When one event is "consequential on" another, it means that the **first event** is dependent on the **second event**.* Or *The outcome of the **first event** is determined by the outcome of the **second event**.*	The mistaken context the Council is relying on. *When one event has a "consequence on" another, it means that the **first event** has a direct impact or effect on the **second event**.* Or *The outcome of the **second event** is determined by the outcome of the **first event**.*

Meaning	Mistaken meaning (in relation to the RMA)
The qualification for inclusion of related provisions within an IPI applies to existing related provisions that are consequential on (ie dependent on) the implementation of MDRS or NPS-UD intensification policies. This is intended to allow consenting authorities to resolve issues where conflicts arise with the existing plan provisions (which are less enabling of development) and would reduce the effective implementation of the MDRS.	Any provision that has consequence on the MDRS or NPS-UD policies

'Related provisions' may be included in the IPI where they support the implementation of the MDRS and NPS-UD intensification policies.

However, for 'related provisions' that do not support intensification to qualify and to be included in the IPI they must be 'consequential on' the MDRS and NPS-UD intensification policies under section 80E(1)(b)(iii) of the RMA. To be consequential on the MDRS requires that they must exist prior to it, for it to have a direct impact on them (ie for them to be consequential ***on*** the MDRS).

Any new policies, that did not exist at the time of the MDRS, and where those polices intend to restrict development (more than the MDRS and NPS-UD intensification) are required to follow the First Schedule process (and section 77G and specifical 77G(6) would apply). They cannot legally be progressed through the IPI.

> *77G(6) A specified territorial authority may make the requirements set out in Schedule 3A or policy 3 less enabling of development than provided for in that schedule or by policy 3, if authorised to do so under section 77I.*

The correct interpretation of 'consequential on' (the left column in the table) and intended directionality of consequence (and implicit timeline) is confirmed by the explanation given for expanding the scope of the ISPP process to include section 80E(1)(b)(iii) in the Departmental Report on the Housing Enabling Bill, which states:

> *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 is plainly clear that section 80E(1)(b)(iii) was added to address concerns that existing provisions would remain in plans and be less enabling than the intensification sought through the implementation of the MDRS and NPS-UD intensification polices. The addition of this clause in the RMA is to enable local authorities to pull existing less-enabling provisions that are consequential on (ie dependent on) the implementation of the MDRS and NPS-UD intensification into the IPI and allow necessary modification

to address these concerns. This is the singular purpose of the 80E(1)(b)(iii) in relation any provisions that act to restrict the enabling development environment within the intensification policies.

This situation makes complete sense considering that the ISPP process is intended to assist the rapid implementation of intensification policies. Implementation was expected to be achieved through IPIs that augment existing plans and run independently from full plan reviews (as other councils have done – ie, a proposed plan and a variation or an operative plan and a plan change). We are not saying the two planning processes are unable to be run in parallel, but the Council must only include provisions within the IPI where they are lawfully entitled to do so.

It seems likely the Councils confusion is further confounded because the 'direction of causality' with application of the plan provisions themselves as this is in the opposite direction (via column 2 in the table) to the test for inclusion within the ISPP (via column 1). To state that differently, the MDRS has broad application and where qualifying matters apply, less-enabling provisions are permitted. That is, the qualifying matter and provisions that apply to it, have consequence on the MDRS and NPS-UD intensification provisions. While the test for inclusion of provisions in the ISPP process itself requires the MDRS to have consequence on it, that is, the provision must already exist. Given the drafting, it is not difficult to see how the Council and their legal advisers misinterpreted Section 80E(1)(b)(iii).

Using a correct interpretation of 'consequential on' as intended in section 80E(1)(b)(iii), we conclude the following outcomes in relation to non-supporting provisions within the IPI apply:

(1) For the listing of our home to proceed through the IPI, the listing would have had to been caused or is somehow arisen as the result or consequence of the implementation of the MDRS and Policy 3 and 4. Clearly this makes little sense and the use of the IPI to list our home (or other buildings for the first time) is not compliant with the clause and is unlawful. Further this breaches section 80G(1)(b) of the RMA.
(2) Contrary to the Council's legal interpretation, only provisions in the existing OPD or those that are expected to still apply after the IPI is completed may be included in the IPI. (This is because the First Schedule may not be completed before the IPI is completed and policies in the OPD survive it).
(3) To include a provision in the IPI that does not support the intensification sought, the Council would need to show that it:
    - existed prior to the MDRS (rather than a proposed provision in the IPI),
    - would persist past the implementation date for the IPI provision,
    - and that it would be 'consequential on' the MDRS and NPS-UD intensification policies.

The Commissioners must establish a procedure that is appropriate and fair in the circumstances, hear submissions, and to provide recommendations to the Council

The Panel's role for the plan review (IPI and First Schedule in this case) is to:

(1) establish a procedure that is appropriate and fair in the circumstances,
(2) hear submissions, and
(3) provide recommendations to the Council on the PDP and IPI.

Within Minute 7 the Commissioners have addressed the point of jurisdiction, namely whether the Panel has the ability to consider challenges to the current classification of Plan provisions as a <u>procedural</u>

argument. Section 39 of the RMA requires that the Panel establish a fair and appropriate procedure (point one above) given the circumstances, that is, the situation that has arisen where submitters have challenged the use of the IPI.

There is no dispute that the Panel can hear submissions relating to the misallocation of topics. They are submissions on the IPI.

Paragraph 4.2 of the advice from the Councils lawyer points out the Council has established the Panel and provided them with "any necessary delegation to hear submissions and make recommendations to the Council on the Proposed District Plan". These recommendations are not restricted to those matters the Council has listed in the s42A report.

Regardless of whether the Commissioner's determine they hold the authority to reallocate topics themselves as part of their hearing's procedure (ie. to direct the Council to reallocate topics), they are legally required to oversee fair and appropriate hearings process and have delegated authority to make recommendations to the Council on any submission on the IPI. We assume as part of this process, the Panel also wishes to ensure that their ultimate recommendations are on provisions that are legally valid (ie, validly part of the IPI).

There is nothing to prevent or otherwise restrict the Commissioners from providing recommendations on the allocation of topics between the ISPP and First Schedule or to recommend remedies to resolve such issues. This includes, where they may disagree with the allocation, or decide the existing allocation as notified in the PDP is unlawful. Making recommendations, including on remedies, is a broader responsibility than simply "recording reservations" as suggested but the Council's lawyer. In some cases, redress could be considered after the hearing process. For example, restoring appeal rights that ought to be retained but were inappropriately lost through the allocation to the ISPP.

We recognise that, were a situation to develop where the Commissioners believe topics are misallocated and due to the Council's approach they consider they do not have jurisdiction to remedy it prior to considering the matters themselves in hearings (under whichever process was notified), is far from an ideal outcome. Our submission is that the correct way forward is really for the Panel to ask itself, 'what procedure is appropriate and fair in the circumstances where matters have been unlawfully assigned to the IPI'?

While the Panel's recommendations may impact Council timeframes under the ISPP, any concern regarding the resulting impact on these should not limit or prevent the Commissioners raising their concerns and providing recommendations relating to the allocation of topics. The onus here was on the Council to ensure the allocation of topics was appropriate and lawful, and that invested parties understood the process to follow if they disagreed. We will expand on this further in the following point.

The Commissioners provide a critical role as an independent check and balance within this plan making process that is highly valued by submitters. They are responsible for the procedures followed in the hearing process. We respectfully request the Commissioners consider any concerns raised by submitters on their merits and either correct the allocation or provide recommendations to Council on reallocation (if they determine they cannot reallocate).

Any recommendations the Commissioners make in relation to ISPP topics (or their allocation) that are not accepted by the Council, will be passed to the Minister. In such a situation, we anticipate the Minister will weigh the advice from the independent Commissioners highly.

It is unclear if any decision was made by the Council regarding Schedule 1 of the PDP and its allocation to the ISPP

Our understanding has been that the hearing process was our opportunity to raise our concerns and grievances with the Councils allocation of topics and decisions regarding the proposed scheduling of our home. It is unreasonable to suggest that we should have known that the hearing process would not allow us to resolve such issues as the allocation to the ISSP or First Schedule process (as suggested by the Council's lawyer). We were only notified on 18 July 2022 of the proposal to list our home in Schedule 1 of the PDP, well after the allocation decisions were made by Council, and certainly before we knew what an ISPP or IPI was. We couldn't have been expected to use a Judicial Review process before we knew we were affected.

While the Council's lawyer suggests the allocation of topics was very deliberate. One might equally argue overly simplistic - the intention to keep groups of provisions together was likely, well-meaning. However, the consequence of each individual decision is severe – despite the classification to Councillors (in the officers report to Council) that the decision is rated 'low significance due to its regulatory nature'.

We note that little detail was provided on the plan schedules (they were not even named) in the allocation of ISPP topics that Councillors were asked to approve. They were listed as "any appendices and schedules that are directly relevant to any of the above". There was no consideration for how to treat different items within the individual schedules – which process is suitable for removal of listed buildings (for example the Wellington Central Library, Michael Fowler Centre), retaining items within the schedule, or the addition of 52 new buildings to the schedule including our home, 28 Robieson St.

We also note the Council's lawyer appears to hold differing opinions of the Panel abilities at the same time. In Paragraph 4.10 he asserts that the Panel is better placed make decisions than the Environment Court, while at the same time suggesting the Panel is not best to consider the misallocation of topics between the ISPP and First Schedule and suggests submitters should have used the Judicial Review to challenge the allocation.

Significance of preserving appeal rights

We support the Council's point that the Commissioners are informed and have a wide breadth of knowledge and experience. We expect our merits issue, supported by the evidence within our submission, to be easily resolved by the Panel. However, the Commissioners role is to provide recommendations to the Council who make decisions. No decision has been made for which an appeal can be lodged and it is not the purpose of the Panel to perform such a role. The hearing process is intended to inform this decision-making process.

Appeal rights are a critical component of natural justice as they provide a mechanism for individuals to challenge decisions they believe have been made arbitrarily, unjustly, or in error against them. This is particularly important for merits issues (such as whether a building should have a heritage listing). The availability of appeal rights ensures that decisions are subject to review and, if necessary, reversal,

thereby reinforcing the principle of natural justice and upholding the integrity of the decision-making process. They also provide incentives for those informing or making decisions to follow a high standard of conduct and practice knowing the merits, or their process, for decisions can be challenged and reviewed.

Appeal rights and natural justice are widely valued.

- The Wellington City Council Standing Orders commitment to *"ensure that decision-making procedures and practices meet the standards of natural justice".*
- Paragraph 84 of the Councils s42A overview report, records the strong preference expressed by Councilors "who took a view that submitters retaining appeal rights was preferable."
- The Departmental Report on the Housing Enabling Bill calls particular attention to matters where appeal rights should be preserved, highlighting this with an example similar to historic heritage. *"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)."*

The supporting Council Officer submission on the allocation of topics highlights the following section of the same report. *"As the MDRS and NPS-UD are directive in their outcomes and application, the ISPP was designed accordingly, and the removal of appeal rights was deemed appropriate."* It is this narrow and directive scope and the testing of the standards (MDRS) through select committee that supported this conclusion (admittedly based on an earlier drafting where 80E(1)(b)(iii) was not included). However, there is nothing within the MDRS, NPS-UD or its intended outcomes that directs the scheduling new heritage buildings in the PDP. The direction is specific in nature and is to implement the standards and intensification policies. Appeal rights should be retained in relation to merits issues such as the scheduling of new heritage buildings.

The Council's own experience and frustration with appeals (as presented in Paragraph 4.10 by the submission from Council's lawyer) that there are downsides (for them) to allowing appeals to the Environment Court is a redundant argument. This position speaks to the incentives on the Council to apply their discretion under ISPP liberally to deliberately avoid allowing submitters appeal rights.

As private homeowners, whose wellbeing would be significantly impaired should the listing proceed, for no established or discernable benefit to anyone, and based off low quality and dismissive evidence, we believe there is significant value in retaining our merits appeal rights to the Environment Court. While the Council and its legal advisors may have experience with these matters, this is the first time we have been personally involved, and our knowledge and understanding continues to grow through the process, as does our ability to protect our rights. Appeal rights provide us with options and options have value. It is not the Council lawyer's role to suggest these rights are not important to us.

For the Council to speak of placing incentives on submitters in Paragraph 4.10 to put their best foot forward by acting to remove appeal rights is plainly offensive. The obligation here is clearly for the Council to put their best foot forward with the PDP and the evidence and evaluation to inform and support it (for example, the Section 32 evaluation report). Does the Council's lawyer 'seriously suggest' the Council has put their best foot forward and that their supporting evidence and evaluation of the heritage listing is of the high standard expected?

We present the counter argument to that of the Council's lawyer, that removing appeal rights acts to lessen the incentive of Council to achieve a high standard of regulatory conduct that residents should expect from them.

Conclusion and summary points

In summary, our general submission points are:

- The intention of the ISPP is that it is a 'narrow and directed' process to implement the MDRS and NPS-UD intensification policies in a streamlined way. This narrow scope, in addition to the fact that the standards are being directed (meaning the Council has no discretion not to implement them), that the standards had been tested in select committee process, and that the intensification policy is generally 'enabling' and allowing affected parties to do more, supported the position that appeal rights were not required within the ISPP.
- Section 80E(1)(b)(iii) was included to provide local authorities discretion to pull in 'related provisions' already within their plans in to the ISPP, that would otherwise conflict with or limit the implementation MDRS. If this situation had not been resolved, it may have forced councils to undertake a First Schedule plan review immediately after the ISPP to resolve the confusion and conflicts the implementation of the MDRS alone created. This discretion sought to resolve this issue and avoid creating the need for immediate additional plan reviews. While section 80E(2) allows for a wide range of provisions to be considered related – the critical test for inclusion within the ISPP is does it 'support' the implementation of MDRS, or is it 'consequential on' (ie caused by) the MDRS and NPS-UD policies.
- The ISPP is clearly not intended to support the expansion of existing provisions, or the addition of any new provisions, that seek to be less enabling on development. Such provisions must progress through the First Schedule. This process would retain the affected parties' right of appeal and preserve the principles of natural justice in relation to substantive issues of merit.
- We have presented the correct interpretation of the ISPP legislation and shown it is consistent with the intended purpose illustrated throughout its development. However, the Council and their legal advisors have failed to correctly understand the intention underlying the discretion they are granted under Section 80E(1)(b)(iii), or to accurately interpret the test which must be applied to 'related provisions' to enable the use of this discretion. They have mistakenly believed any 'related provision' to the MDRS and NPS-UD intensification policies can be included in the ISPP. We have shown this is simply not the case and their allocation of topics is unlawful and in breaches section 80G(1)(b) of the RMA.

More specifically in relation to the including the proposal to list our home within the ISPP:

- The inclusion of new heritage listings in the IPI is unlawful, as it is outside scope of section 80E of the RMA and section 80G of the RMA prevents use of the IPI for anything other than what is allowed by section 80E.
- The new heritage listing is not 'in support of' or 'consequential on' the MDRS and NPS-UD intensification policies. While 'related provisions' may be included in the IPI, where they do not support intensification then to be included in the IPI they must support the implementation of the MDRS and NPS-UD intensification policies. A new heritage listing does not.

Finding a path forward:

- The Commissioners must establish a procedure that is appropriate and fair in the circumstances, hear submissions, and to provide recommendations to the Council. There is no dispute that the Panel can hear submissions relating to the misallocation of topics.
- There is nothing to prevent or otherwise restrict the Commissioners from providing recommendations on the allocation of topics between the ISPP and First Schedule or to recommend remedies to resolve such issues. We believe that the correct way forward is really for the Panel to ask itself, 'what procedure is appropriate and fair in the circumstances where matters have been unlawfully assigned to the IPI?'

We appreciate your further consideration of these matters.

Regards,

Matthew Keir and Sarah Cutten