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

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Minute 12:

ISPP Allocation Issues (4)

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1. As advised at the conclusion of the procedural hearing on 21 February, the Hearing Panel sought a legal opinion from Mr James Winchester, Barrister, on the jurisdictional questions that had been canvassed with the parties.

2. Mr Winchester's opinion, dated 8 March 2023, has been uploaded to the website and a copy is attached to this Minute for convenience.

3. While Mr Winchester generally agrees with the submission of counsel for the Council, Mr Whittington, that the Hearing Panel has no power to reallocate matters as between the ISPP and First Schedule processes, he also opines that there may be some limited circumstances where, as suggested by Mr Ballinger, counsel for WCCT, the Hearing Panel might recommend addition of matters to the IPI that have to date been classified as First Schedule matters, and vice versa.

4. More importantly, for present purposes, Mr Winchester indicates his agreement with the contention of counsel for Ryman Healthcare Limited and the Retirement Villages Association NZ Inc, Mr Hinchey, that Hearing Panel can make no decisions either way before hearing the submissions in question.

5. Although he doesn't say so explicitly, Mr Winchester's view contradicts the submission of Mr Whittington, for the Council, that we have the power to make an initial procedural decision on the point (that we have no jurisdiction to entertain submissions seeking directly or indirectly, reclassification of provisions as between the ISPP and the First Schedule process).

6. On the face of the matter, we consider that Mr Winchester (and Mr Hinchey) are correct and that pursuant to clause 96(1)(a)(ii), we can only make recommendations to the Council "*after the hearing of submissions is concluded".*

7. That must include both recommendations that matters currently classified as First Schedule matters be added to the IPI, and recommendations that it is not appropriate (or even within the powers of the Hearing Panel) to recommend that such matters be added to the IPI. Similarly recommendations to delete matters from the IPI, in order that they might form part of the First Schedule part of the Plan, or that matters should not be deleted from the IPI.

8. We have considered whether, as urged on us by counsel for WIAL, Ms Dewar, that we might recommend to the Council that it seek an urgent declaration from the Environment Court. We have decided not to take that step for three reasons.

9. First, as Mr Winchester observes, the Council would need to agree to take such action.

10. Second, although we agree with Ms Dewar that the Environment Court would likely give the matter as much priority as possible, we have no idea what that would mean in practice; and whether the guidance of the Court would be available in a timeframe that assisted our deliberations.

11. Third and most importantly, the Court could well come to the same conclusion that we have; that it is not appropriate to deal with the matter in a factual vacuum, and that no declaration can be made before the relevant submissions are heard. In that case we would be no further ahead.

12. Any party is of course free to seek the assistance of the Court if it wishes to do so.

13. In the meantime, it follows therefore that the hearing of submissions must take its course. We will hear parties seeking to contend either that matters should be taken out of the IPI, or put into it in the hearing stream to which the provisions in question relate.

14. Because we have had a preliminary argument on the point, it will not be necessary for parties to repeat their submissions on the matter. They need merely to cross reference back to them. They are free, however, to put additional arguments to us in due course.

15. We will make our recommendations both on the content of the Plan, and whether that content falls within the IPI, or not, as part of our recommendations to the Council.

16. It is therefore not appropriate that we comment further on the substantive issues that were debated on 21 February and that are the subject of Mr Winchester's opinion.

17. As discussed at the hearing on 21 February, that does leave the Panel with a practical problem in that it has a discretion to allow cross examination on IPI matters, but not on normal First Schedule matters. That discretion will

necessarily have to be exercise (if it exists) at a point when the Hearing Panel has not reached a concluded view on the allocation question.

18. Addressing the point pragmatically, the 'no-regrets' position is for us to consider such applications on their merits either when the matters is already classified as part of the IPI, or where a party contends that it should be part of the IPI. If, subsequently in our deliberations, we conclude that a matter in respect of which cross examination has occurred was not properly part of the IPI, we will disregard the evidence we hear.

19. That leaves only one issue to be determined at this point.

20. As discussed on 21 February, the practical problem for the Hearing Panel scheduling its hearings is that Council decisions (and therefore the Hearing Panel's recommendations) on the IPI are required to be made several months earlier than its decisions on non-IPI matters. We asked all parties whether anyone would contend that a matter currently scheduled in Streams 6-10 should be considered as an IPI matter.

21. WIAL responded that, although it was of the view that the Panel does not have the jurisdiction to reclassify provisions to the IPI, it considers that a number of additional provisions in the Noise Chapter, and related definitions, should be allocated to the IPI.

22. We also had a Memorandum from Counsel for Waka Kotahi suggesting to us that additional standards in the Noise Chapter (Noise – S5 and S6) should be heard together with the provisions the subject of Minute 4, that are currently identified as ISPP matters.

23. Although counsel for Waka Kotahi suggested to us that the preferable situation was that all noise matters be heard as part of the normal First Schedule process, we do not think that we can proceed on that basis at the moment.

24. Both responses call into question the view expressed in Minute 4 that the matters in the Noise Chapter identified as ISPP matters are sufficiently discrete that they can be heard separately from the balance of the Noise Chapter.

25. We note in passing that Dr Keir asked, somewhat rhetorically perhaps, why, if we could 'reclassify' the four noise provisions the subject of Minute 4, we could not reclassify other provisions. The answer to that is that Minute 4 did

not purport to reclassify any provision. Rather, it identified that those four provisions were already classified as ISPP matters, but that because they had initially been scheduled for hearing in a later Hearing Stream, would not be able to be the subject of recommendations in common with the other ISPP matters. Minute 4 altered the timetabling of the hearing of those matters but not their classification.

26. If the noise matters currently identified as part of the ISPP process are properly classified as such (and for the reasons set out above, we express no view at this point on that question) or that related provisions should be added to the Noise Chapter and likewise classified as ISPP matters, we must address them in the first tranche of hearings so as to be in a position to make recommendations on them in advance of the balance of the Plan.

27. In the circumstances, we think that the best approach is to hear submissions on all aspects of the Noise Chapter as part of Stream 5 and we direct that the schedule be amended accordingly.

28. Addressing counsel for Waka Kotahi's concern, that does not mean that all noise matters will be treated as ISPP matters. As above, that issue remains at large and open to argument. We will determine which classification the noise provisions fall into as part of our recommendations on Stream 5.

Trevor Robinson
Chair

For the Wellington City Proposed District Plan Hearings Panel

Dated: 14 March 2023

JAMES WINCHESTER
BARRISTER

8 March 2023

The Chair
Independent Hearing Panel
Wellington Proposed District Plan Hearings
c/- Wellington City Council
PO Box 2199
Wellington 6140

For: Trevor Robinson

Proposed Wellington District Plan and Intensification Planning Instrument – Allocation of Topics

1. This advice relates to a request from the Independent Hearings Panel (**IHP**) conducting hearings on the Wellington City Proposed District Plan (**PDP**) and the Wellington City Intensification Planning Instrument (**IPI**).

2. The same IHP has been appointed for both matters, with the matters identified as being within the IPI to be considered through an Intensification Streamlined Plan Process (**ISPP**)[1], while the remainder of the provisions of the PDP are being considered through the usual Schedule 1 process[2] under the Resource Management Act 1991 (**RMA**).

3. For both the IPI and the balance of the PDP provisions, the IHP is not a decision-maker, and its power is limited to making recommendations to WCC.

Background and issues

4. Concerns have been raised by a number of submitters that topics or provisions have been wrongly allocated to the ISPP or Part 1 Schedule 1 RMA processes by the Wellington City Council (**WCC**), both by inclusion of matters that are not legitimately within the scope of an IPI and/or through omission of matters that parties consider should be part of an IPI.

5. Submitters have therefore sought that the IHP make decisions to reallocate provisions or topics between the ISPP and "normal" Part 1 Schedule 1 processes. The primary implication of which process the IHP considers plan provisions through is that provisions considered through the ISPP are not subject to appeal to the Environment Court[3].

6. A further and important implication of which process is followed relates to timing considerations, in that a Ministerial direction requires that decisions on ISPP matters must be notified by WCC by

1 See ss 80D – 80H and Part 6 of Schedule 1 to the RMA
2 Part 1 of Schedule 1 to the RMA
3 Clause 107, Part 6 of Schedule 1

20 November 2023[4], meaning that the IHP must have completed hearings and deliberations on ISPP matters sometime in advance of that date in order to make its recommendations to WCC.

Questions to be addressed

7. The IHP has sought advice on the following key questions:

   a. what is the basis for and effect of WCC's decision to determine and notify a range of matters as being within the IPI?
   b. does the IHP have the legal ability to make a reallocation decision at this point and change the WCC's decisions as to what is considered as part of the ISPP?
   c. is the IHP's scope to address submissions on either the ISPP or Part 1 Schedule 1 process constrained and, if so, to what extent?

8. There are a range of consequential and related issues which will also be addressed in answering these questions.

Summary of advice

9. The circumstances facing WCC appear to be unique, in that to date WCC is the only Tier 1 territorial authority that (due largely to timing factors) is able to progress its IPI in an integrated manner as part of a full review of its district plan.

10. When WCC gave public notice of its PDP on 18 July 2022, it identified that decisions on the specified ISPP parts of the PDP that relate to housing intensification must be issued no later than November 2023. It also identified that decisions on the rest of the PDP, which follows the standard Schedule 1 RMA decision-making process, must be issued no later than July 2024.

11. The effect of this decision and public notice was to create two instruments, one being the IPI (which is a proposed change to the operative district plan) and the second containing the balance of the PDP provisions (**PDP instrument**), effectively being a broad-ranging proposed change to the operative district plan.

12. Importantly, the decision to determine the content of the IPI was made by WCC and could only be made by it[5]. Having made that decision, irrespective of whether submitters consider it wrongly allocated matters to the different notified instruments or went beyond the permissible bounds of matters to be included in an IPI, WCC is *functus officio*[6]. Subject to other statutory powers that are available, or that decision being set aside by the courts, the allocation decision has been made. In a public law sense, given that the IHP derives its powers from WCC, it cannot be in a better position to re-visit that decision.

13. Therefore, the allocation of topics or provisions between the ISPP and Part 1 Schedule 1 processes, which would essentially involve shifting provisions between the notified IPI and PDP instruments prior to hearing submissions on them, is not a matter that the IHP can re-visit and its does not have the authority to do so. The role of the IHP is to regulate its hearing procedures and

4 Resource Management (Direction for the Intensification Streamlined Planning Process to Tauranga City Council and Wellington City Council) Notice 2022

5 Clause 95, Part 6 Schedule 1

6 In essence, it has performed its legal function or discharged its legal duty.

otherwise comply with the requirements of Part 1 or Part 6 of Schedule 1 to the RMA as applicable, based on WCC's notification decision on the scope and content of the two instruments.

14. If there is a concern held by WCC about errors or mistakes in its allocation of matters between the two instruments, WCC (as distinct from the IHP) does have the power to initiate a variation to either the PDP instrument[7] or the IPI[8]. It is however specifically precluded from withdrawing the IPI[9].

15. If the IHP holds a concern about the correctness of WCC's decision to allocate topics or provisions to either planning instrument that it is considering, then it will need to address that issue once it has concluded its hearing of relevant submissions[10] and in making its recommendations on the merits of those submissions to WCC (again subject to the applicable provisions of either Part 1 or Part 6 of Schedule 1). It cannot however compel WCC to initiate a variation to either planning instrument.

16. This position is likely to create some practical and legal challenges for the IHP in terms of organising its hearing schedule and in formulating its recommendations on the merits of submissions. One of the challenges that is likely to arise relates to the scope of the IHP's power to recommend changes to each instrument, and whether it can only consider submissions on the respective planning instruments.

17. With regard to the IPI, the IHP's discretion to recommend changes, whilst less constrained, should be exercised for the purpose of ensuring that the IPI appropriately addresses mandatory and relevant matters required by the ISPP process and provisions, and is within the ambit set by section 80E of the RMA.

18. As far as the relationship between the IPI and PDP instruments is concerned, a question arises as to whether, as a consequence of a recommendation to include a new or modified provision in either instrument, the IHP has the lawful ability to recommend a deletion or modification to a provision in the other instrument. While the same IHP is appointed to hear and make recommendations on both instruments, the IHP must exercise its powers for each of those instruments carefully and for the purpose of those instruments in order to avoid suggestions that it has made recommendations on each instrument for an improper or collateral purpose.

19. The answer to the question of scope is more straightforward with regard to the IPI, in that the IHP can make recommendations to WCC related to a matter identified by the IHP or any other person during the hearing but is not limited to being within the scope of submissions made on the IPI[11].

20. In response to questions from the IHP at the preliminary procedural hearing on 21 February, it has been suggested by some counsel that, because the two planning instruments before the IHP are plan changes, the IHP will only be able to consider submissions and relief that are "on" the notified instrument – particularly for the PDP instrument. It has been suggested in this regard

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7 Clause 16A of Part 1 of Schedule 1
8 Clause 97(b) of Part 6, Schedule 1
9 Section 80G(1)(c) of the RMA
10 Clause 96(1)(a) of Part 6, Schedule 1
11 Clause 99(2) of Part 6, Schedule 1

that the IHP will be bound by the well-established case law on scope arising from the *Motor Machinists*[12] line of judicial authority.

21. I consider that the position with regard to scope for the PDP instrument is not as rigid as that suggested by some counsel. Firstly, it needs to be borne in mind that the exercise undertaken by WCC has been a full review of its district plan. But for the opportunity to advance its IPI as part of that full review, the question of scope would not be confined by whether or not a submission is "on" the planning instrument[13].

22. If there was to be a rigid application of the *Motor Machinists* approach, there is the risk of significant and unforeseen unfairness to submitters, when what they would have understood that they were submitting on was a full review of the PDP where they had the opportunity to submit on any issue and advance relief beyond that which was notified in the instrument(s). It may not be appropriate for the IHP to adopt a rigid application of the *Motor Machinists* position, which would not otherwise have applied, due to the quirk of WCC having the opportunity to divide the product of the full plan review into separate IPI and PDP instruments upon notification.

23. In any event, the question of scope on the PDP instrument could well be moot, given that one of the factors that was held to be relevant to scope in *Motor Machinists* was whether alternative options or relief should have been or were identified in a section 32 report or analysis. In this instance, it is understood that there was a single section 32 report prepared for the entire plan review, and therefore both the IPI and the PDP instrument are underpinned by the same section 32 report.

24. Assuming that the section 32 report was prepared to a standard that would be sufficient to support a full plan review process, it is likely that the section 32 report would provide the IHP with additional flexibility in terms of scope on the PDP instrument, even if it was inclined to the view that it should apply the *Motor Machinists* position.

Planning instruments being considered by the IHP

25. A key starting point in addressing the extent of the IHP's powers is to identify what planning instruments are before it, the IHP's delegated authority, and the statutory powers and functions that apply to those planning instruments.

26. It is clear from background documents that WCC undertook a full review of its operative district plan and, in the normal course of events, it would have notified the product of that review as an entire proposed district plan. This would have been dealt with through the "normal" Part 1 Schedule 1 RMA process.

27. This position was however subject to the intervention of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Enabling Act**), which amended the RMA by making it mandatory for Medium Density Residential Standards and intensification policies to be incorporated into the planning documents of specified territorial authorities through the use of an IPI. WCC is one of the specified territorial authorities and was therefore required to comply with the directions in the Enabling Act.

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12 *Palmerston North CC v Motor Machinists Ltd* [2013] NZHC 1290, f

13 *Albany North Landowners v Auckland Council* [2017] NZHC 138

28. WCC was in the somewhat unique position in terms of the timing of its district plan review to be able to progress the Enabling Act directions in an integrated way, whereas other territorial authorities at different stages of their planning cycles have been required to notify variations or discrete plan changes.

29. There are a range of publicly available reports and records of WCC decisions which outline how WCC officers and elected members could and would approach the implementation of the Enabling Act as part of its district plan review. Questions as to the lawfulness and reasonableness of WCC's reasoning and decision-making have been the subject of considerable scrutiny by submitters and a number of these issues have been put before the IHP.

Public notification of IPI and PDP instruments

30. Putting those matters to one side, WCC determined to identify a range of the PDP provisions as being part of its IPI, with the balance of the PDP provisions to be dealt with through the normal Schedule 1 RMA decision making process. This decision was in turn implemented when WCC gave public notice of its PDP on 18 July 2022. The public notice identified that decisions on the ISPP parts of the PDP that relate to housing intensification must be issued no later than November 2023. It also identified that decisions on the rest of the PDP, through the normal Part 1 Schedule 1 RMA process, must be issued no later than July 2024.

31. There have been different characterisations put to the IHP of the effect of WCC's notification of the PDP. The characterisation that I consider is most accurate is that advanced by counsel for Wellington's Character Charitable Trust Inc (**Trust**), who submits[14] that the IHP is hearing submissions and making recommendations on two plan change instruments – an IPI and a regular plan change.

32. The effect of WCC's notification of a single PDP document with different procedural notations of its provisions is to create two planning instruments, one being an IPI which is a change to the district plan[15], and the other containing the balance of the PDP provisions, effectively being a broad-ranging proposed change to the operative district plan.

33. Counsel for the Trust[16] identifies that, legally, the PDP is two distinct plan changes (an IPI and the PDP instrument) that have been combined in one document. I consider this position to be fundamentally correct. Accordingly, the public notice of the PDP on 18 July 2022 involved the notification of:

    a. an IPI by WCC in accordance with section 80F(1) and clause 95 of Part 6, Schedule 1 of the RMA; and
    b. a proposed change to the district plan in accordance with clause 5, Part 1 of Schedule 1 of the RMA.

The IHP's powers to reallocate provisions

34. There is an important consequence of the WCC notification step, which is that the decisions to notify the two planning instruments (including their content) were statutory decisions made by

14 Second memorandum of counsel for the Trust, 15 February 2023, para [3]
15 An IPI is defined in section 80E(1) of the RMA as including a change to a district plan
16 Second memorandum of counsel for the Trust, 15 February 2023, para [6]

WCC. In terms of relevant statutory powers under the RMA, those decisions were for WCC to make[17].

Allocation decision as between the planning instruments has been made

35. Having made the decisions, irrespective of whether submitters consider it wrongly allocated matters to the different notified instruments or went beyond the permissible bounds of matters to be included in an IPI, WCC is *functus officio*. Subject to other statutory powers that are available, or the decision(s) being set aside by the courts, the allocation of provisions to the two planning instruments through the notification decision is complete[18].

36. A further important consequence of WCC having made those decisions is that the IHP does not have the power to reallocate provisions between the two instruments, because that would involve it revisiting WCC's notification decision. In a public law sense, the IHP cannot be in a better position to do that given that it derives its powers from WCC. Rather, the IHP has the functions and powers provided in the respective statutory processes that apply to the IPI and the PDP instrument, and its powers are also subject to its delegated authority.

Statutory hearing powers and delegated authority of IHP

37. The role of the IHP is therefore to regulate its hearing procedures and otherwise (when conducting its hearings and deliberations) comply with the requirements of Part 1 or Part 6 of Schedule 1 to the RMA as applicable, based on WCC's notification decision on the scope and content of the two instruments.

38. Support for this view can be found in the statutory scheme which applies in Part 1 and Part 6 of Schedule 1 to the RMA. In that respect:

    a. for the PDP instrument, WCC has given public notice[19] and received submissions and further submissions[20], with the role and powers of the IHP commencing at clause 8B of Part 1 of Schedule 1 and being subject to delegated authority; and
    b. for the IPI, WCC has complied with clause 95 of Part 6 of Schedule 1 by notifying the IPI in accordance with the prescribed process, and clause 96(1) provides that it must establish an IHP to conduct a hearing of submissions on the IPI *once it has been notified* by WCC.

39. The IHP was appointed by WCC in December 2022, well after WCC had notified the planning instruments. I understand that the powers delegated to the IHP are relatively broad, being to "provide the Independent Hearings Panel with any necessary delegation to hear submissions and make recommendations to the Council on the Proposed District Plan".

40. The effect of this delegation is to give the IHP the relevant statutory powers necessary to hear submissions and make recommendations on the IPI and PDP instruments. I note that, for the

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17 Clause 95 Part 6 of Schedule 1 provides that preparation, notification and progressing an IPI must be undertaken by a local authority

18 A similar point is made in the legal submissions on behalf of Ryman Healthcare Limited and the Retirement Villages Association of NZ Inc, 15 February 2023 at [18]

19 Clause 5, Part 1 Schedule 1

20 Clauses 6 and 8 of Part 1, Schedule 1

purposes of the IPI, clause 96(3) of Part 6, Schedule 1 provides that WCC must delegate the "necessary functions" to an IHP. Necessary functions are in turn defined in clause 96(4) and are focused on the IHP's role in conducting hearings, as are the powers of the IHP under clause 98. For both the IPI and the PDP instrument, the power to make *decisions* following the hearings remains with WCC, having considered the IHP's recommendations.

41. All of these factors support the view that the IHP does not have the power to make a decision on the reallocation of provisions between the planning instruments.

42. In addition, as was noted by counsel for Ryman Healthcare Limited and the Retirement Villages Association of NZ Inc in oral submissions to the IHP on 21 February 2023, a purported decision by the IHP to re-allocate (or equally to determine not to re-allocate) identified provisions at this stage of the process would likely be in breach of clause 96(1)(a)(ii) of Part 6 of Schedule 1, because this requires the hearing of submissions to be concluded before the IHP can make recommendations. Decisions to re-allocate or not to re-allocate provisions are not therefore matters on which the IHP can make a firm decision at this point, because it has not heard submissions.

43. Quite apart from the fact that a decision on which planning instrument provisions should reside in is likely more than simply a procedural decision and would exceed the IHP's powers to recommend how the content of the two instruments should be amended based on the evidence it hears, the RMA provides that this power can only be exercised once the IHP has concluded hearing all of the submissions (at least for the IPI).

Other matters raised by submitters

44. It was submitted that the IHP has the power to make a reallocation decision as a consequence of the power under section 39 of the RMA to establish a hearing procedure that is appropriate and fair in the circumstances[21]. I do not consider that the effect of section 39 is to provide the IHP with a power to re-allocate (which would effectively be a substantive decision), nor that section 39 could be relied upon for that purpose, particularly in light of the constraints identified above. For the IPI, the IHP's procedural powers are specified in clause 98, Part 6 of Schedule 1[22] and do not include a reallocation power.

45. It is correct that the powers of the IHP with regard to making recommendations on the merits of an IPI are broader than those which apply to the normal Part 1 Schedule 1 RMA process, in that clause 99(1) enables recommendations to be related to a matter identified by the IHP or any other person during the hearing, and such matters are not limited to being within the scope of submissions made on the IPI.

46. Based on that broader scope to make recommendations, it is possible that the IHP might recommend to WCC that new or different qualifying matters or related provisions be included in the IPI, or conclude that IPI provisions as notified were not appropriately included within the IPI and should be deleted or modified. The IHP's discretion is not however open-ended and should be exercised for the purpose of ensuring that the IPI appropriately addresses mandatory and relevant matters required by the ISPP process and provisions, and is within the ambit set by section 80E of the RMA.

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21 Legal submissions on behalf of submitters Keir and Cutten, 15 February 2023, paras [4] and [25.1]

22 The IHP has the power to strike out submissions but does not have a reallocation power.

47. A more difficult potential issue is whether, as a consequence of a recommendation to include a new or modified provision in either instrument, the IHP has the lawful ability to recommend a deletion or modification to a provision in the other instrument. The answer to that question is, in part, likely to depend upon whether there is scope arising from submissions to make that change (at least for the PDP instrument).

48. A more important consideration is however that, while the same IHP is appointed to hear and make recommendations on both instruments, the IHP must exercise its powers[23] for each of those instruments carefully and for the purpose of those instruments. Particularly where there is the possibility of overlap, it will be important for the IHP to identify the basis, both in law and on the merits for recommended changes to each instrument.

49. For example, it would not be appropriate and would arguably be unlawful[24] for the IHP to recommend removal of a provision or the "filling of a gap" in one instrument as a consequence of recommending that a provision in the other instrument was inappropriate and or should be added or amended.

50. The form and content of the IHP's report and recommendations is provided for in clause 100. Importantly however, when considering the reallocation requests which are before the IHP at this time, there are at least two critical matters that constrain the IHP from making decisions on them, being:

    a. the lack of a decision-making power and/or lawful authority to re-allocate between different planning instruments; and
    b. the requirement in clause 96 that the IHP can only make *recommendations*, and then only after it has concluded a hearing of submissions.

Ability to address or revisit allocation decisions lies with WCC

51. If there is a concern held by WCC about possible errors or mistakes in its allocation of matters between the two instruments, it has the ability to initiate a variation to either the PDP instrument[25] or the IPI[26]. It is however specifically precluded from withdrawing the IPI[27]. For the sake of completeness, the IHP has no power nor authority to promote or direct variations.

52. If the IHP holds a concern about the correctness of WCC's decisions to allocate topics or provisions to either planning instrument that it is considering, then it will need to address that issue once it has concluded its hearing of relevant submissions[28] and in making its recommendations on the merits to WCC.

53. This position is likely to create some practical and legal challenges for the IHP in terms of organising its hearing schedule and in formulating its recommendations on the merits of submissions. One of the challenges that is likely to arise relates to the scope of the IHP's power to

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23 Noting again that the IHP's powers for the IPI and PDP instruments differ in material ways.
24 In the sense of it involving the exercise of a power for a collateral or improper purpose
25 Clause 16A of Part 1 of Schedule 1
26 Clause 97(b) of Part 6, Schedule 1
27 Section 80G(1)(c) of the RMA
28 Clause 96(1)(a) of Part 6, Schedule 1

recommend changes to each instrument, and whether it can only consider submissions on the planning instrument. This issue is addressed in further detail below.

Declaration proceedings

54. Finally, it is noted that counsel for one of the submitters urged the IHP to request that WCC seek an urgent declaration from the Environment Court regarding what should lawfully be within an IPI and about the extent of the IHP powers on the allocation of matters between the two planning instruments. Subject to timing considerations, that course may be seen as desirable by the IHP, but would of course be subject to WCC agreeing to take such action. In any event, a declaration, even if made, would not of itself have any substantive legal effect and might not provide a resolution of the current issues before the IHP.

55. It is possible for any person to apply to the Court for a declaration, so it is not necessary for WCC to be the applicant. There are a number of well-resourced and ably represented submitters who could approach the Court if they considered a declaration would be of assistance to the IHP and other participants in the PDP process.

Scope considerations for the IHP in making recommendations

56. Assuming that the IHP does not have the power to re-allocate provisions between processes, this raises questions about how the IHP will approach the hearing of submissions on the respective planning instruments and whether there is an issue of scope that will act as a constraint on the IHP in terms of both hearings and relief.

57. Legal submissions to the IHP have partially addressed this issue and it was explored further in oral submissions and questioning from the IHP on the opening day of the hearings.

Scope for the IPI

58. The answer to this question is more straightforward with regard to the IPI, in that the IHP can make recommendations to WCC related to a matter identified by the IHP or any other person during the hearing, but is not limited to being within the scope of submissions made on the IPI[29].

59. This potentially means that even if WCC has omitted matters from the IPI (including qualifying matters) or decided to include matters as being related provisions or consequential on the MDRS, the IHP is likely to have a reasonably broad discretion to make recommendations on the merits of the IPI[30]. Following the hearing of submissions, it will also likely have the ability to reach conclusions and make recommendations about whether matters should have been appropriately included within or omitted from the IPI when notified.

60. In my view it is theoretically possible that the IHP could conclude that a matter should not have been included in the IPI and/or was not justified on its merits as part of that instrument (and recommend its modification or deletion) but, subject to its scope powers on the PDP instrument, address the merits of that same matter as part of that process and effectively recommend what

29 Clause 99(2) of Part 6, Schedule 1

30 Albeit that, as noted earlier, its discretion should be exercised for the purpose of ensuring that the IPI appropriately addresses mandatory and relevant matters required by the ISPP process and provisions

could amount to a reallocation at that time (if WCC was inclined to accept the IHP recommendation).

61. There will of course be significant practical challenges for the IHP in managing and reconciling its recommendations across the two processes, but that is not of itself a legal barrier to the possible ability to make recommendations as suggested. This will be partially dependent on scope issues for the PDP instrument, which are addressed below.

Scope constraints for the PDP instrument

62. One of the issues discussed at the procedural hearing on 21 February was whether, because the two planning instruments before the IHP are plan changes, the IHP will only be able to consider submissions and relief that are "on" the notified instrument. Particularly for the PDP instrument, due to the absence of the relaxation on scope provided for the IPI, it has been submitted that the IHP will be bound by the well-established case law on scope for plan changes arising from the *Motor Machinists* line of judicial authority.

63. In normal circumstances where there is a full review of the district plan, the question of whether submissions are "on" an issue or within scope is of less relevance than for plan changes. In essence, if there is a question of scope, the issue would be whether a submitter is seeking a change which is beyond the scope of its submission and/or the range of relief to be determined by the submissions as a whole.

64. In the context of a full plan review, the High Court in *Albany North Landowners* recognised that the *Motor Machinists* approach was not applicable. It carried out a full review of case law on scope, and endorsed the approach of identifying whether an issue or relief was reasonably and fairly raised by a submission. This arises from the *Countdown Properties*[31] case which seeks to ensure that all are sufficiently informed about what is proposed such that the potential unfairness of an unforeseen or unanticipated outcome is avoided.

65. In the present circumstances, while what was prepared by WCC was a product of a full review of the operative district plan, because it is now two planning instruments, the PDP instrument is a broad ranging plan change. This raises the prospect of submitters and the IHP being bound by the *Motor Machinists* approach to scope.

66. The effect of adopting a rigid approach to the application of *Motor Machinists* would be that both submitters and the IHP would need to carefully evaluate whether submissions and relief are "on" the PDP instrument. This requires a two-step approach being first, the consideration of whether the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, whether there is a real risk that persons potentially affected by the relief sought have been denied an effective opportunity to participate in the plan change process.

67. The first limb, considering whether submissions reasonably fall within the ambit of the plan change, can be addressed by asking whether a submission raises matters that should have been addressed in the section 32 evaluation and report. It can also be addressed by asking whether the management regime for a particular resource is altered by the plan change.

31 *Countdown Properties (Northlands) Ltd v Dunedin CC* [1994] NZRMA 145

68. The second limb is whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process. The Court in *Motor Machinists* held that a precautionary approach was required to receiving submissions that sought more than incidental or consequential further changes to the notified document. The Court also considered section 32 to be relevant to this limb, in that incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change.

69. The tests have been confirmed and applied by the High Court in later cases such as *Turners and Growers Horticulture Ltd v Far North District Council*[32] where the Court held that the changes to the district plan sought by Turners would affect a much wider class of persons than the change as notified, which would effectively cut that wider class out of the submission process. The submission in that case was therefore held not to be "on" the plan change.

Application to the present circumstances

70. The position with regard to scope for the PDP instrument may not be not as rigid as an initial view of *Motor Machinists* might suggest, both in terms of the potential application of legal principles and because of the particular circumstances relating to the PDP instrument.

71. Firstly, in terms of the application of *Motor Machinists*, it is important to bear in mind that the exercise undertaken by WCC has been a full review of its district plan. But for the opportunity to advance its IPI as part of that full review, the question of scope would not be confined by whether or not a submission is "on" the planning instrument and the broader position as outlined in *Albany North Landowners* would have applied.

72. If there was to be a rigid application of the *Motor Machinists* approach, there is the risk of significant and unforeseen unfairness to submitters, when what they would have understood that they were submitting on was a full review of the PDP, and where in normal circumstances they could submit on any issue and advance relief beyond that which was notified in the instrument(s). In my opinion, this view could reasonably have been reached by submitters based on reading the plain language of the Public Notice[33] which notified the IPI and PDP instruments.

73. It may therefore be appropriate for the IHP to adopt a less rigid application of the *Motor Machinists* position, which would not otherwise have applied, due to the quirk of WCC having the opportunity to divide the product of the full plan review into separate IPI and PDP instruments upon notification.

74. Irrespective of the level of flexibility that might be able to be applied to the *Motor Machinists* formulation by the IHP, and accepting that there is no express judicial authority that would support a more flexible application of the tests, it is likely that the particular circumstances of the PDP instrument will provide the IHP with relatively broad scope to consider relief. This is for three main reasons:

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32 [2017] NZHC 764

33 Dated 18 July 2022

a. the PDP instrument will still cover a very broad range of matters and resources, both in terms of its geographical coverage of Wellington City and in terms of the subject matter that it addresses;
b. related to the preceding point, because the IPI and PDP instrument were notified together, people could still submit on all issues covered by the instruments and there is little prospect that any person who wanted to submit would have been denied an opportunity to participate through a misunderstanding or unforeseen outcomes on the potential scope of relief; and
c. to the extent that section 32 considerations are relevant to both limbs of the test, in terms of whether alternative options or relief should have been or were identified in a section 32 report or analysis, WCC prepared a single section 32 report for the purposes of assessing both the IPI and the PDP instrument, meaning that the report should provide a broad consideration of options for both instruments.

75. It may therefore be the case that the IHP could adopt a relatively orthodox application of the *Motor Machinists* test without such an approach appreciably impacting on the permissible scope available to the IHP to consider different relief, particularly for the PDP instrument.

76. Assuming that the section 32 report was prepared to a standard that would be sufficient to support a full plan review process, it is likely that the section 32 report would of itself provide the IHP with considerable flexibility in terms of scope on the PDP instrument.

Summary of position

77. The advice above has addressed each of the IHP's questions and I consider that no further elaboration is required at this point.

78. I trust that this advice has been of assistance. Please let me know if you require any further advice or clarification on this matter.

Yours sincerely

James Winchester

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