

Matthew Keir and Sarah Cutten
Submitter number 415
28 Robieson St
Wellington

**The Hearing Panel of Commissioners
Wellington City Council Proposed District Plan
30 January 2023**

Re: Allocation of topics between the ISPP and normal First Schedule process under the RMA

Dear Commissioners,

We became aware at the PDP pre-hearing meeting on Thursday 26 Jan 2023 that the hearing panel had requested notification of any submitter objections to the classification and allotment of topics between ISPP and the First Schedule on or before 30 January 2022. We note that expert evidence as referred to in paragraph 75(b) in Minute 1 is due 7 Feb.

To assist the Commissioners understanding the position we set out in this document in relation to allocation of topics between the ISPP and First Schedule process, we provide the following context. We are seeking the removal of our home, 28 Robieson St, from listing in Schedule 1 as a heritage building as proposed in the DP.

The crux of the issue

Our original submission challenges the use of the ISPP process for the expansion of heritage and listing of new heritage buildings, particularly where the building is isolated and not associated with any previous heritage or character area. The identification and addition of new heritage buildings in schedule one in the district plan is separate from the treatment of scheduled heritage as a qualifying matter. There are only a small number of parties affected by this issue.

Paragraph 81 in the Section 42A report highlights the Council Officer's (Officers) response to our submission on this point. Their response fails to address the merits of the challenge in our submission and seeks to dismiss it due to a point of law.

My view of all these matters, informed by the legal advice of Mr Nick Whittington, is that the plan making process through which provisions were notified on 18 July 2022, cannot be changed post notification by the Council, not does the independent hearings panel have the power or authority to do this. This is my response to WIAL [406.1] and Sarah Cutten and Matthew Keir [415.15].

However, we note that on face of it, the request by the Hearing Panel to receive advance notification of objections relation to the allocation of topics in relation to the ISPP would be an odd request if it were as simple as the Officers believe.

Unfortunately, we were unaware of this timeline (30 Jan 2023) related to challenges of topic allocation until the prehearing meeting. This timeline is not listed on the webpage titled "[Hearings topics and schedule](#)" nor within the "[Notice of Hearing - Stream 1](#)". The earliest deadline to provide information in this notice is listed as 10 days prior to the start of the hearing which is 7 Feb 2023. This deadline is also highlighted on the website via the banner below.



Submitters expert evidence deadline

Submitters expert evidence for Hearing Stream 1 is due by Tuesday 7 February 2023. Submitters must let Council's Hearings Co-ordinator know by Friday 3 February 2023 if they are seeking to be heard in Hearing Stream 1.

As such, we have not had time to seek any expert advice on this matter but set out our preliminary points below. We have requested that the Council provide us a copy of the advice from Mr Nick Whittington in relation to this point as this advice is not published alongside other expert evidence under the heading "Statements of evidence" provided to the Council in relation to Stream 1.

We are actively considering seeking additional legal advice on this matter and intend to provide any additional material by the 7 February. Our initial legal advice on this matter is included in Section 4 of our original submission which we have attached.

The allocation of topics to the ISPP is important

The Commissioners correctly point out in Minute 1 that the division between ISPP topics and the balance of PDP topics is important, because the hearing procedures for the ISPP are different to the normal First Schedule process followed for the non-ISPP topics, and secondly because the ISPP is on a much tighter timeline, with Council decisions required to be released by 20 November 2023.

However, it is also very important to submitters who would like to retain their appeal rights. Appeal rights are lost through the ISPP process which Officers will be acutely aware. Hence, the Officers are naturally incentivised to push more through the ISPP process than the First Schedule process. It would be a poor legal design that allowed this division of topics to be set by the Council without challenge as Mr Nick Whittington has advised.

We note the Commissioners have agreed to shift several items from the First Schedule process as identified in the PDP to the ISPP process in Minute 4, well after the 18 July 2023 notification date. This change would appear directly at odds with the legal advice Officers received and used to dismiss the point we raised in our submission.

The option to appeal the outcome in relation to the district plan – particularly on the grounds of poor process (see our full submission) is of significant value to submitters. This appeal right is meant to encourage a high standard of process on the Council's part – an important incentive to preserve.

The expansion of heritage in Schedule 1 of the PDP acts to limit intensification

The ISPP process along with the NPS-UD and MDRS have arisen due to the successive policies employed by Councils over decades that have restricted the availability of housing and the ability of cities to respond to the need for housing demand. These restrictive policies have often evolved in response to political pressure from small interest groups within their constituency but with significant consequences for cities' ability to provide for the needs of inhabitants and future inhabitants efficiently and effectively. These restrictive policies include those seeking to protect heritage.

Importantly, these new legislative mechanisms seek to cut through these restrictive regimes and rebalance planning to explicitly recognise future generations of inhabitants as stakeholders in these decisions and policies.

The NPS-UD sets out to enable housing supply, and in relation to heritage specifically includes:

- Policy 6 signals that some detracting from amenity values can be expected as a result of changes to the urban environment to accommodate projected growth.
- Objective 4: New Zealand's urban environments, including their amenity values, develop and change over time in response to the diverse and changing needs of people, communities, and future generations.

Further context is available in Section 6 and 7 of our original submission.

The ISPP process does not apply to the identification and scheduling of new heritage in Schedule 1 of the District Plan

We're sure you'll be very familiar with the ISPP process.

Section 80E(1)(a) of the RMA requires that the IPI include the MDRS and gives effect to Policy 4 and 5 of the NPS-UD. These relate to enabling development and building height or density requirements.

While Section 80E(1)(b) provides the Council discretion to include items that support or are consequential of the MDRS or policies 3, 4, and 5 of the NPS-UD. Section 80E(2) expands on this further including to list "qualifying matters identified in accordance with section 771 or 770". These allow the Council to make relevant building height or density requirements of the MDRS less enabling of development in response to the qualifying matter.

Heritage is a qualifying matter and policies in the PDP related to restrictions on development normally permitted through the MDRS in relation to heritage are within the scope of Section 80E(1)(b)(iii) and allowing the ISPP process to be used.

The identification and listing of new heritage building in Schedule 1 of the PDP is a separate process entirely and is not appropriate for consideration under the ISPP process. To state that differently, the ISPP process only applies to policies restricting the development in relation to heritage but not the identification of heritage itself.

This difference is an important distinction, particularly given the natural incentives of the Council to over-provide heritage discussed in Section 6.3 of our submission. This issue also highlights the critical role of the Hearing Panel as an independent check and balance within the process in relation to heritage and its merits that we look forward to addressing in Hearing Stream 3.

The Section 42A Overview Report details the intent of the Councils planning process

Section 4.3.3 of the Section 42A Overview Report sets out the Councils intended plan making process and specifically that only items relating to intensification should proceed through the ISPP process.

The PDP has been notified using two planning processes under the First Schedule:

a) ISPP, Part 6 of the First Schedule of the RMA

i. For provisions relating to housing intensification. The Council is required to give effect to the MDRS in Schedule 3A of the RMA and those provisions that give effect to Policies 3 and 4 of the NPS-UD. There are no appeals to the Environment Court on these provisions.

b) Part One of Schedule One

i. For all provisions not relating to intensification.

Section 4.3.4 highlights decisions of the Planning and Environment Committee to take a conservative approach to the discretion granted, and only use the ISPP process for topics that meet the definition of s80E(1)(a).

Council's Planning and Environment Committee resolved on 12 May 2022 to take a strict interpretation of section 80E of the Act so that only plan content required to follow the ISPP under s80E(1)(a) be included in that process.

In that way it opted not to utilize its discretion under section 80E(1)(b) and 80E(2) of the Act to include provisions that may be included, including those that support or are consequential to those provisions required to follow the ISPP or relate to 'qualifying matters'. Qualifying matter provisions that do not engage Policy 4 of the NPS-UD by varying building height and/or density were generally not included.

Following our earlier comments on the incentives on Officers to use the ISPP process above, it should be no surprise to the Commissioners that a much broader approach was initially taken in as outlined in Paragraph 83. This broad approach was rightly knocked back by the Council who valued the preservation of appeal rights for affected parties, as we do.

Officers had earlier provided advice that taking a broader approach and including content relating to 'qualifying matters' more generally (ie as defined under s771 and s770 of the Act and NPS-UD), as well as consequential, supporting or otherwise desirable to ensure a coordinated implementation of provisions should be included within the ISPP.

This advice was not accepted by Council, who took a view that submitters retaining appeal rights was preferable.

Accordingly, several chapters contain provisions that are subject to both the ISPP and Part One Schedule One process. Provisions included within either process are marked up in the PDP.

Paragraph 85 illustrates that chapters in the PDP already have provisions that are split between the ISPP and First Schedule process meaning this differentiation can easily be accommodated.

The relationship between the outcome of the 12 May 2022 Planning and Environment Committee meeting regarding the allocation of topics to the ISPP and the Council meeting predating this on 31 March that is described as setting this division of topics (as described in Paragraph 28 of Minute 1) is unclear. We ask was the outcome of 12 May 2022 implemented?

The division from the two shown in the attached schedule is the Council's view of the matter, as determined at a Council meeting on 31 March 2022.

We request that the Panel consider the following

We request the commissioners consider the following points.

Firstly:

- That the expansion of heritage listings in Schedule 1 of the PDP is not related to intensification and should be considered under the First Schedule process, not the ISPP process. The addition of new buildings to SCHED1 within the urban environment use the First Schedule process just as those outside of the urban environment were notified.

Secondly:

- Whether the allocation of topics between the ISPP and First Schedule process reflects the directive of the Planning and Environment Committee (12 May 2022) ensuring the democratic process of representation is followed.
- Whether it's appropriate for heritage objectives HH-O1 to HH-O3 to be considered under the ISPP. While heritage is qualifying matter, and the development restrictions or responses in relation to this should be considered under the ISPP, the objectives of heritage themselves are external to the ISPP so should be considered under the First Schedule process.
- Whether it's appropriate for heritage policies HH-P1 through to HH-P6 to be considered under the ISPP. These policies are unrelated to addressing qualifying matters in relation to heritage and development.

We note that HH-P7 through HH-P10 and those policies related to existing heritage areas are more likely applicable to consideration under the ISPP process.

We thank you for your attention and consideration on this matter.

Attachments

Please find attached a copy of our original submission. We draw your attention to the following sections.

- Section 4 including preliminary legal advice in relation to the use of the ISPP process.
- Section 6 and 7 covering background and context including 6.3 on Council incentives regarding heritage.
- Section 8 and 9 as broad context for why we value our appeal rights given our significant concerns around Council process. We look forward to addressing these issues more specifically in Hearing Stream 3.