



**Nick Whittington**

BARRISTER

# Legal Advice

<b>TO</b>	Wellington City Council
<b>FROM</b>	Nick Whittington
<b>DATE</b>	16 November 2023
<b>SUBJECT</b>	Process for Council decisions on IHP recommendations

- 1 The next stage in the Council's District Plan Review is for the Council to consider and make determinations on the recommendations of the Independent Hearing Panel (**IHP**) on the Intensification Planning Instrument (**IPI**). You have asked me to advise:
  - (a) What determinations the Council may make;
  - (b) What information the Council:
    - (i) Must consider;
    - (ii) May consider; and
    - (iii) Must not consider;in making its determinations; and
  - (c) What other legal process risks may arise.
- 2 My advice below addresses the **ISPP**, or Intensification Streamlined Planning Process, set out in Part 6 Schedule 1 of the Resource Management Act. The Council will also have to consider in due course some provisions that are not part of the IPI and therefore follow the usual Part 1, Schedule 1 process. This advice does not cover that.

## **Accept, reject, or reject and provide an alternative**

- 3 Under clause 101, the Council must decide whether to accept or reject each recommendation of the IHP. Any rejected recommendation will be referred to the Minister for the Environment to determine. Where it rejects a recommendation, the



Council may (ie, has a discretion to) provide an alternative recommendation to be referred to the Minister.

### **Information the Council must consider**

- 4 The starting point for the Council's determination is the IHP's report(s). Councillors must read and consider each report carefully. Clause 100 provides that each report must:
  - (a) set out the IHP's recommendations on the provisions of the IPI covered by the report; and
  - (b) identify any recommendations that are outside the scope of the submissions made in respect of those provisions; and
  - (c) set out the IHP's recommendations on the matters raised in submissions made in respect of the provisions covered by the report; and
  - (d) state the IHP's reasons for accepting or rejecting submissions; and
  - (e) include a further evaluation of the IPI undertaken in accordance with section 32AA (requirements for undertaking and publishing further evaluations).
- 5 To explain the reference to recommendations "outside the scope of submissions", ordinarily the submissions made on a plan control the range of decision outcomes. For example, if a proposed provision contains a height limit of 10m, and submissions seek to amend the height limit variously between 8m and 12m, the legitimate decision outcomes are ordinarily limited to a height limit between 8m and 12m.
- 6 Accordingly, the power provided to the IHP to make "out-of-scope" recommendations means that it may ultimately recommend a provision or provisions that are not strictly within the scope of submissions, though they must be related to a matter identified by the IHP or any other person during the hearings.
- 7 The purpose and context of the ISPP are relevant and must also be considered. The Council's decisions follow a carefully designed submission and hearing process. It follows that the Council should not lightly reject any of the IHP's recommendations, and for context, I note that under usual Part 1 processes it is rare for a Council to reject an IHP recommendation. That is because the IHP is a body chosen for its expertise, has heard the submissions, considered written and oral evidence and submissions, taken advice from a large number of experts, questioned participants

and tested evidence in the open public forum of the hearings and undertaken site visits. Before deciding to reject a recommendation Councillors must pay careful attention to the reasoning supporting the recommendation in the report(s). I note too that there will need to be an internal process for Councillors to work with officers to formulate appropriate reasons for rejection of any recommendations and supporting any alternative recommendations proposed for consideration by the Minister.

#### **Information the Council may consider**

- 8 Clause 101(4) provides that the Council:
- (a) is not required to consult any person or consider submissions or other evidence from any person;
  - (b) may seek clarification from the IHP on a recommendation in order to assist it to make a decision.
- 9 This means that the Council is not obliged to go beyond the report of the IHP. It need not, for example, read the public submissions or evidence filed before deciding to accept or reject the IHP's recommendations. It is entitled to rely on the procedures adopted and expertise of the IHP. However, as a matter of administrative law, If Councillors wish to review the submissions or evidence before the IHP on a particular issue, they will have to be careful to read all submissions and evidence relevant to the particular issue to avoid getting a one-sided view in breach of natural justice.
- 10 The Council may also have regard to any information given by the IHP in response to clarifications sought by the Council.

#### **Information the Council must not consider**

- 11 Under clause 101(4)(b), the Council must not consider any submission or other evidence unless it was made available to the IHP before the panel made the recommendation. The basis for this prohibition is the principle of natural justice or fairness.
- 12 Councillors are being asked to make determinations that are regulatory and quasi-judicial in nature (which means the decision follows a court-like process, requires an evaluative assessment of evidence and submission, and affects people's legal rights).

- 13 To have regard to additional information given to Councillors, for example by any submitters in public forum or directly by email or letter, about the recommendations undermines the process and would be unlawful. Additional information, in whatever form that may come, has not been subject to the rigour of the hearings process or the expertise of the IHP. Any failure to disregard such information could expose the Council's decision-making to judicial review on the basis of both error of law and that the Council's decision has been influenced by irrelevant considerations.

#### **Other legal process risks**

- 14 Decisions must be approached with an open mind. This is the case with any Council decision but is a stronger directive here because of the hearing process that the decisions follow. Accordingly, Councillors must also be more vigilant than usual not to make public statements suggesting a closed mind about any recommendations. Any Councillor who has been involved in the making of submissions should disclose that and consider how to manage that conflict in respect of any recommendations relating to the particular submission or topic. I would strongly recommend that any such Councillor seek legal advice.
- 15 There is a further substantive limitation on the Council's decisions. The text and purpose of the ISPP does not allow for the Council to adopt positions that are not within the scope of submissions except when accepting out-of-scope recommendations. The ability to reject a recommendation and provide an alternative is not an invitation to rewrite IPI provisions in a way that is not anticipated by the IPI, not the subject of submissions, or not the subject of an out-of-scope recommendation. The Council's decisions must be reasonable, not based on irrelevant matters, and have some evidential basis. Any alternative which is not the notified position or the subject of a submission will in principle not be supported by any evidence before the IHP. Accordingly, if the Council decides to reject an out-of-scope recommendation, any alternative position it recommends to the Minister must be within scope.

