

IN THE MATTER

of the Resource
Management Act 1991

AND

IN THE MATTER

of Hearing of Submissions
and Further Submissions
on the Proposed Porirua
District Plan

Minute 7 – Further Hearing Procedure Issues (2)

1. In Minute 6, we addressed procedural issues that could not wait for the Hearing Panel to meet as part of its Hearing Stream 1 deliberations.
2. The Hearing Panel has now been able to discuss all of the feedback received on the Hearing Procedures and thus is in a position to make further directions. It is noted that in the interim, the Resource Management (Enabling Housing Supply) Amendment Bill has been introduced in Parliament. If and when it is enacted, that Bill will have significant implications for the First Schedule Hearing process we are engaged in.
3. From the Hearing Panel's perspective, however, our task is to hear and determine the submissions and further submissions on the Proposed District Plan that are before us. If the Bill is enacted substantially in the form that has been introduced to Parliament, the scope of our task will reduce, with a range of PDP provisions governing the height and density (in particular) of residential and non-residential activities in the urban area withdrawn and replaced by new provisions that will be considered in a bespoke submission and hearing process, likely to occur in the second half of 2022.
4. It is likely, therefore, that Hearing Stream 7 will not proceed as originally envisaged, but with the Bill still to be considered by the Select Committee and to pass through the parliamentary process, it would be premature to make any firm plans for an alternative process. What can be said with confidence, however, is that the previously foreshadowed variation intended to give effect to the National Policy Statement for Urban Development 2020 will not now be notified in 2021, pending enactment of the Amendment Bill and confirmation as to what it will require in the future.

5. It follows that the Hearing Panel does not intend to make any directions about Hearing Stream 7 for the moment.
6. It is appreciated that this situation creates a degree of uncertainty in relation to an important component of the Proposed District Plan. However, for the reasons set out above, this is a result of actions that are out of the Hearing Panel's control (or the Council's for that matter).
7. Turning to the matters that are within the Hearing Panel's control, we received feedback suggesting amendment to the Hearing Procedures in three respects. We deal with each in turn.

Council Rebuttal

8. The Council's experience with Hearing Stream 1, and the likelihood that subsequent hearing streams will involve significantly more evidence than was the case in that Hearing Stream, has prompted the Council to request provision in the timetabling of the forthcoming timetabling of Hearing Streams for it to file rebuttal. As foreshadowed in Minute 6, the Hearing Panel regards provision of rebuttal by Council as a useful addition to the hearing procedures, because it will assist in highlighting the issues in contention, and the reasons for the different positions being adopted. We do not consider that the merits of rebuttal evidence are limited to the Council. It is foreseeable that in future Hearing Streams, the Hearing Panel would be assisted by rebuttal evidence from submitters, where they join issue with the relief sought by other submitters.
9. Accordingly, the Hearing Panel will make provision for rebuttal evidence to be filed, generally five working days after the receipt of submitter expert evidence.
10. It is important to record that the purpose of rebuttal evidence is to respond to evidence that could not reasonably have been anticipated prior to that. Provision for rebuttal evidence is an opportunity to supplement evidence in chief, whether by Council (in its Section 42A Reports) or by submitters (in their expert evidence), not an alternative to evidence in chief.

Informal Conferencing

11. Ms Robyn Smith (Submitter #168) has suggested that the Hearing Procedures be amended to specifically allow for, and encourage, parties to engage with each other outside the formal hearing. Ms Smith's Memorandum

suggests informal “without prejudice” conferencing, analogous to that undertaken by experts.

12. Expert conferencing occurs under a clear set of rules promulgated by the Environment Court to assist its hearing procedures and adopted, for convenience, by first instance hearing panels. Experts have committed to compliance with the Code for Experts contained in the Environment Court’s Practice Note and their contribution to expert conferencing reflects the obligations they have under that Code, among other things, not to act as advocates and to endeavour to assist the Hearing Panel. Lay participants in the hearing process are not subject to the same rules and generally have a personal interest in the subject of their submission.
13. It appears to us that Ms Smith recognises this and that what she describes is more in the nature of mediation, rather than conferencing.
14. We consider that mediation between willing dispute participants is generally a good thing. However, to be productive, there must be a genuine wish to engage and compromise on both sides. It is not appropriate that we direct such meditation.
15. We are also conscious that the calls on the time of Council Officers are numerous. If the Amendment Bill we refer to above is enacted, they are likely to have even less time to devote to engaging with submitters in the kind of informal dialogue Ms Smith describes, which is another reason that we should not make directions on this subject.
16. In summary, we have no difficulty with informal dialogue going on in the background. We do not consider, however, it appropriate to amend the Hearing Procedures to provide specifically for it.

Deferral of State-Highway/Rail Corridor Reverse Sensitivity Provisions

17. As also foreshadowed in Minute 6, we have received a request from Kāinga Ora to defer the hearing of submissions addressing the provisions governing the effects of noise and vibration within the State Highway and rail corridors. The Memorandum of Counsel for Kāinga Ora noted that the same issue was being litigated in a number of First Schedule processes and suggests it would be desirable if Kāinga Ora, Waka Kotahi and KiwiRail arrive at a common position on these provisions.

18. Minute 6 contained two relevant directions: firstly, seeking feedback from other interested parties (including Council) on Kāinga Ora's request, and secondly that Kāinga Ora identify exactly which submission points it is seeking be deferred, and the hearing stream in which it is proposed that those submission points would ultimately be heard.
19. A number of parties responded to our invitation to comment, as follows:
- (i) Council: Do not object but noted potential differences from other Councils considering the issues, given that it is a Tier 1 Council under the NPSUD, with the North Island main trunk rail line providing rapid transit services and a busy freight service, and State Highway 1 running through the city. Council also noted that considerable time has already lapsed since notification of the PDP and queried whether agreement will in fact be reached in time for later hearing streams currently scheduled for mid-2022.
 - (ii) Mr Paul Botha (Submitter #118) also noted the differences between the Porirua situation and that in other districts, agreed that national agreement would be extremely useful, but doubted that any agreement will be agreed within an acceptable timeframe.
 - (iii) Waka Kotahi NZ Transport Agency (Submitter #82) does not oppose Kāinga Ora's request, but sought to ensure any deferral not extend beyond the first half of 2022.
 - (iv) Transpower NZ Limited (Submitter #60) noted the lack of clarity as to exactly which provisions are sought to be deferred, but expressed a preference to retain the current scope of Hearing Stream 4 on the basis that deferral would likely lead to a need for a stand alone hearing on the issues, and that it would be more efficient to cover all infrastructure chapter points at the same time.
20. Kāinga Ora's further Memorandum dated 21 October provided a Schedule of submission points suggested to be deferred, while noting that it may be more efficient to defer the entire Noise Chapter. Kāinga Ora's Memorandum does not advise when the deferred provisions would actually be heard, if its request is granted.

21. We share the consensus view that agreement as between Kāinga Ora and the infrastructure parties with a direct interest in these issues is desirable. We consider that if such an agreement were able to be reached, it might materially reduce the amount of hearing time required to address these issues. However, we share the expressed concern also that the districts where these issues are being litigated have particular characteristics that mean that agreements reached, or decisions made in other First Schedule processes might not necessarily be determinative in a Porirua context. As a number of parties note, the significance of the North Island main trunk line and State Highway 1 mean that it could be argued, for instance, that greater weight might be placed on reverse sensitivity effects on those infrastructure facilities in Porirua than would be the case for rail and road corridors elsewhere in the country.
22. We also share the concern that if this issue has not been resolved to date, there are grounds for doubt whether agreement will be able to be reached by mid-June 2022. We note in this regard that in the New Plymouth District Plan (one of the plan processes Counsel for Kāinga Ora referred us to), Kāinga Ora's application to defer hearing of these issues was made as long ago as July 2021. That application was in almost identical terms to the one we have received and sought a deferral until the first quarter of 2022 – which is when Porirua Hearing Stream 4 is currently planned to be heard. The fact that Kāinga Ora did not seek deferral of these matters in both districts in July (when we sought feedback on the draft hearing procedures), and are now rather belatedly raising the matter, suggests to us that earlier optimism regarding the time required to reach a consensus has proven unfounded.
23. We agree also with the concern expressed both for Transpower and Waka Kotahi NZ Transport Agency about potential delays beyond mid-June next year. Deferral beyond mid 2022 would clearly be inconsistent with our meeting the two year statutory timeframe for decisions on the PDP, and even assuming the Minister would grant an extension of time, we consider it would be inconsistent with our obligation under Section 21 to exercise our functions as promptly as is reasonable in the circumstances.
24. We are also concerned about the practical effect of the deferral sought. The Memorandum for Kāinga Ora identifies its own submission seeking amendment to Objective INF-02 as being sought to be deferred. We do not understand how that submission point could be deferred, but not the submissions of KiwiRail Holdings Limited (86.16), Firstgas Limited (84.88),

PowerCo Limited (83.25), Waka Kotahi NZ Transport Agency (82.37), Transpower New Zealand Limited (60.30), and Radio New Zealand Limited (121.16) all seeking that that Objective be retained in its current form.

25. More to the point, given that all of the policies, rules and standards in the Infrastructure Chapter related to reverse sensitivity flow from and seek to achieve that objective, it seems to us that if hearing of submissions on the Objective were to be deferred then, so too must the submissions on all of the subsidiary provisions.
26. We directed that Kāinga Ora provide us with a list of submission points which would need to be deferred, in order that we might make directions accordingly should we find merit in Kāinga Ora’s application. We find that we cannot rely on the list of submission points Kāinga Ora has supplied to us and thus, even if we were minded to do so, we could not make the directions sought at this time.
27. On the merits, however, we find that Kāinga Ora’s applications materially overstates the benefits of deferral, while significantly understating the extent of the disruption to the Hearing Schedule.
28. For all of the above reasons, we do not direct amendment to the Hearing Schedule in the manner requested by Kāinga Ora.

Hearing Timetable

29. As above, we direct that the timetable for Hearing Stream 3 set out in Minute 2 be amended to provide all parties with the right to file rebuttal evidence at latest by 1pm on 27 November 2021.
30. We also confirm the timetable for Hearing Streams 4-6 inclusive as follows:

Hearing Stream	Hearing Step	Date/Deadline(1pm in each case)
Hearing Stream 4	Section 42A Report(s) and any supporting expert evidence	3 December 2021
	Confirmation of request to be heard and any requests for more than 15 minutes hearing time	17 January 2022

	Submitters expert evidence	21 January 2022
	Rebuttal Evidence	28 January 2022
	Submitter statements longer than 3 A4 pages and legal submissions	4 February 2022
	Hearing	8-9, 11, 14-15 February 2022
	Council Reply	18 February 2022
Hearing Stream 5	Section 42A Report(s) and any supporting expert evidence	31 January 2022
	Confirmation of request to be heard and any requests for more than 15 minutes hearing time	23 February 2022
	Submitters expert evidence	2 March 2022
	Rebuttal Evidence	9 March 2022
	Submitter statements longer than 3 A4 pages and legal submissions	11 March 2022
	Hearing	16, 18, 21-23, 25, 28 March 2022
	Council Reply	11 April 2022
Hearing Stream 6	Section 42A Report(s) and any supporting expert evidence	31 January 2022
	Confirmation of request to be heard and any requests for more than 15 minutes hearing time	24 March 2022

	Submitters expert evidence	31 March 2022
	Rebuttal Evidence	8 April 2022
	Submitter statements longer than 3 A4 pages and legal submissions	13 April 2022
	Hearing	19-20 April 2022
	Council Reply	27 April 2022

31. While the Porirua area remains at Level 2 (or equivalent), the Council's Health and Safety Rules require that the hearings continue to be undertaken by Zoom, as was the case in Hearing Stream 1. When and if that changes, so as to enable more "normal" hearing process, you will be advised.

Hearing Administration Contact

32. Lastly, please note that Ash Morton-Adair has taken over as our hearing administrator from Jack Marshall. You can contact Ash on 04-237-1422 or dpreview@porirua.govt.nz. She will in contact with you on a regular basis.

Dated 28 October 2021



**Trevor Robinson
Chair
For the Proposed Porirua District Plan Hearings Panel**