

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 19 – Hearing Timetable for Streams 5-6

1. On 16 December, the Hearing Panel received a Memorandum from the Council seeking that the previously advised timetabling for Hearing Streams 5 and 6 be amended so that the Stream 5 hearing would commence no earlier than 2 May and that a minimum of five weeks be provided between the conclusion of the Stream 5 hearing and the commencement of Stream 6, along with consequential changes to all related hearing dates.
2. The reasons stated for the requested change were primarily related to the unavailability of experts required to provide input into preparation of the Section 42A Reports required for those Hearing Streams, but also to provide time for Officers to consider the implications of the Resource Management (Enabling Housing Supply and other Matters) Amendment Act 2021 (“the Amendment Act”) with respect to their recommendations on submissions.
3. The Council’s Memorandum noted the Council’s intention to notify the Intensification Planning Instrument (IPI) required by the Amendment Act by mid-2022, but advised that a definitive date would only be able to be confirmed after further work was undertaken in the New Year.
4. Council’s Memorandum expressed the hope that the IPI might be able to be heard by late 2022, noting that it would incorporate and extend the topics proposed to be heard in Stream 7.
5. The Chair requested that the Hearing Administrator circulate Council’s Memorandum to submitters inviting comment by close of 14 January.
6. Six substantive responses have been received:

- (i) Waka Kotahi NZ Transport Agency and Kāinga Ora advised that they had no comments or concerns with the amendments Council had proposed;

- (ii) Ms Robyn Smith filed a detailed Memorandum indicating concern about the Council's suggestion that the provisions of the Amendment Act might colour the content of Section 42A Reports, suggesting that if this is correct, the Amendment Act might equally colour what submitters may have said in their submissions if given the opportunity. However, the suggested timetabling amendments would not provide the same opportunity for submitters as for Council Officers. She suggests that this is contrary to the principles of natural justice and that if the Amendment Act in fact has implications for Streams 5 and 6, the relevant aspects of the PDP need to be withdrawn and considered via the Variation (i.e. the IPI) the Amendment Act requires. Ms Smith also expresses concern about such an important judgment call being made by Council Officers and suggests that the Panel might usefully seek independent legal advice.

- (iii) Mr John Cody provided initial comment that was more in the nature of a series of questions about the process from here. Mr Cody queried, in particular, what has happened to the requirement to complete the First Schedule process within two years of notification that the Panel had previously referred to, how the IPI relates to the previously foreshadowed Variation to address aspects of the NPSUD 2020 that are not covered in the PDP, and how that Variation and the IPI fit in with the work of the current Hearing Panel? As regards the latter, Mr Cody queried whether both the IPI and the Variation will be notified with the opportunity for interested parties to make submissions, whether they would be notified separately or together, and whether the Variations would refer to the current PDP or to a future District Plan adopted by the Council. Mr Cody followed up with advice that he opposed a substantive change from the previously advised hearing process on the basis that this would provide a 'firm reference' for the IPI Variation. Mr Cody also suggested a need for communication between the Chair and the Mayor/Councillors, because the substantive matters at issue require political leadership and discussion between residents.

- (iv) Mr Officer responded on behalf of Titahi Bay Amateur Radio Club suggesting that the varied height requirements for residential development in the Amendment Act would have implications for amateur radio antenna configurations and that Stream 4 should be delayed also, or alternatively, if Stream 4 is not delayed, Streams 5 and 6 should proceed as currently directed.
7. We suspect that Mr Cody is not alone in being unclear about the procedural complexities the Amendment Act has created. The Hearing Panel cannot answer all of the questions Mr Cody poses, but his queries are a useful starting point to consideration of the Council's request.
 8. The first point to make is that as Mr Cody notes, there is a legislative requirement (in Clause 10(4)(a) of the First Schedule to the RMA) requiring that decisions on submissions and further submissions should be made no later than two years after notification of a Proposed District Plan.
 9. The PDP was notified on 28 August 2020 and accordingly the two year period expires 28 August 2022 (not June 2022 as Mr Cody suggests – the Hearing Panel's desire to complete its hearings by June was driven by the need to have a window following that for preparation of its decisions).
 10. In his email to the Hearing Administrator, Mr Cody noted that it was not clear what would happen if the two year time limit was not met. That is a fair observation. Like a number of other RMA time limits, the Act does not prescribe what happens if the time limit is not met. Clause 10A however, gives the Minister for the Environment the discretion to extend the two year time limit if a Council is unable to meet it.
 11. Mr Cody is correct that a number of the procedural decisions the Hearing Panel have made to date have focussed on the two year time limit and the need to ensure that it is met if at all possible, and if not, that any extension required to be sought from the Minister is as short as possible.
 12. The Hearing Panel, however, recognised that its ability to meet the two year timeframe was complicated by the NPSUD 2020 having been gazetted virtually contemporaneously with notification of the PDP. Council has previously advised its intention to implement the NSPUD 2020 by way of a Variation that it proposed to notify in late 2021, in order that it might 'catch-up' with the PDP procedurally. The way in which hearing topics were divided,

with submissions related to Urban Zones not heard until late in the hearing process (in Stream 7), was largely motivated by the need to accommodate the proposed Variation, and the desirability of avoiding a situation where the same or substantially similar matters needed to be heard twice.

13. The resulting timeline was 'tight' to say the least, but any prospect of being able to complete the hearings and issue decisions by end August 2022 was effectively derailed by introduction of the Bill that ultimately became the Amendment Act in October 2020. That Bill foreshadowed substantive amendments to the NPSUD 2020 that the proposed Variation Council had in mind was seeking to implement. The potential for the Bill to be further amended before enactment meant also that there was little point trying to resolve how to proceed until the 'goalposts' stopped moving.
14. The Amendment Act was enacted and took effect on 21 December 2021. Although the broad direction of the Bill remained unchanged in the enacted version there were important differences from the Bill as introduced. Among other things, the Amendment Act broadened the potential scope of the IPI it required from what had been foreshadowed in the Bill to enable inclusion of changes that are consequential or support the required urban intensification. As a result, it does not appear likely that there will need to be two variations, one following the Intensification Streamlined Planning Process (ISPP) directed by the Amendment Act, and one following the normal First Schedule process. That will not, however, be confirmed until the Council has scoped out in much greater detail the IPI Variation that it will need to notify before August 2022, in compliance with the Amendment Act.
15. What is clear, however, is that once the IPI Variation is notified, all interested parties will have the opportunity to make submissions on it and those submissions will be heard by a separate Hearing Panel appointed by the Council pursuant to the provisions of the Amendment Act. The process the ISPP follows will also be different in important respects, with potential for cross examination and no right of appeal to the Environment Court (among other things).
16. We do not know at this point whether the Hearing Panel appointed to oversee the ISPP will have any overlap in membership with the current Hearing Panel. The Minister for the Environment will direct what qualifications the new Hearing Panel will need to have, and how many Panel Members will serve. The Council then determines who will be appointed. In any event, the

differences in hearing process cause us to doubt how 'firm' a reference point the existing Hearing Panel's decisions would provide for the new Panel.

17. We also need to factor in the inefficiency of embarking on a hearing of matters we know will be reconsidered afresh in the ISPP.
18. It is also noted that the Amendment Act retains most of the normal requirements for consultation in relation to the IPI Variation and so the Hearing Panel anticipates that interested parties will have the opportunity to provide feedback to Council before the notified version of the IPI Variation is settled. That is the process the RMA provides for the dialogue Mr Cody seeks.
19. As regards his suggestion of a need for communication between the Chair on the one hand, and the Mayor and Councillors on the other, this would not be appropriate. The Council has delegated the job of hearing and deciding submissions on the PDP. That includes management of the process. The Hearing Panel will exercise the powers delegated to it to the best of its ability, seeking feedback from the parties to the process (including but not limited to the Council) as appropriate, on a transparent basis. The Council can, however, shift the goal posts by withdrawing parts of the PDP and/or notifying Variations to it. These are ultimately political decisions (albeit constrained by the statutory framework) in which neither the Chair nor the Hearing Panel as a whole has any role.
20. The Hearing Panel's reading of the Amendment Act suggests that the IPI Variation will be a variation to the PDP. The Council has indicated that it will likely incorporate and extend the topics proposed to be heard in Hearing Stream 7.
21. Less clear is how the IPI Variation will fit in with the work of the current Hearing Panel (another of Mr Cody's questions).
22. It appears to us that the role of the current Hearing Panel will be to determine the final form of provisions that are not the subject of the IPI Variation. It may be that the Hearing Panel will need to take independent legal advice to confirm that, as Ms Smith suggests, but in the Hearing Panel's view, it would be premature to do so before the Council settles the final form of its IPI Variation.
23. Until the content of the latter is confirmed, we do not know how big (or small) a task determining the form of the balance of the PDP will be.

24. What can be said with greater certainty is that there is now no possibility that the PDP hearing process will be completed by August 2021. As the Council has foreshadowed, the best case scenario is that the IPI Variation might be able to be heard by late 2022, with the recommendations of the Hearing Panel appointed as part of the ISPP released in the first half of 2023. In practice, the Minister will determine the exact timing via the discretion he/she has under the new section 80L to direct the time within which the ISPP is completed.
25. Turning to Ms Smith's Memorandum, the Hearing Panel has considerable sympathy for the concerns that she raises. Normally, when legislative amendments are made affecting statutory processes, transition provisions provide that actions commenced under the pre-existing legislation are completed as if the legislative change had not been made. That is not the case in this instance. The Amendment Act took effect on 21 December 2021. To the extent that it directs amendments to the NPSUD 2020 or is relevant to the PDP hearing process in some other respect, the Hearing Panel must give effect to those amendments in its decisions on submissions and further submissions.
26. While unusual, however, this situation is not unique. There have been examples of First Schedule processes where changes to higher order planning documents have occurred part way through the process. The direction of the High Court has been that the decision-maker needs to give effect to the changed higher order document to the extent that that is possible within its jurisdiction¹.
27. Ms Smith suggests natural justice requires that if the Amendment Act has implications for future hearing streams, the relevant aspects of the PDP need to be withdrawn and considered via the IPI Variation.
28. Irrespective of the merits of that view, that is not an option open to us. The procedural powers delegated to the Hearing Panel did not include the power to withdraw parts of the PDP. That is a decision the Council would need to make. We note, however, that whereas the Bill as introduced provided for withdrawal of proposed plan provisions overtaken by the intensification provisions (directing that occur if hearing of the proposed plan provisions had

¹ See e.g. *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191

not been completed), those provisions do not appear in the Amendment Act. That change might arguably indicate a changed Parliamentary intent.

29. We observe also that Council Officers do not have the option of not taking account of the Amendment Act, to the extent that it is relevant to formulation of Section 42A Reports they are writing. Equally, however, their view is not determinative. Submitters in future hearing streams can dispute Officers' analysis, and we will make our own decisions, based on the material before us.
30. We can also envisage a situation where, as the Council develops its IPI Variation, it may identify aspects of Stream 5 that should sensibly be deferred in order that they can be considered as part of the ISPP, just as Ms Smith suggests.
31. Against that complex procedural background, we turn to consider the substantive request the Council has made, namely to defer the timelines for Hearing Streams 5 and 6.
32. The principal reason Council provides for a deferral is the unavailability of expert advisers to provide input for the Section 42A writers. While it is important that the Section 42A Reports be robust as possible, that factor alone might not have weighed sufficiently with the Hearing Panel to justify an effective two month deferral had we been focussed on completing hearings by end June and decisions by end August 2022 (as previously).
33. As it is, however, with the overlay of the procedural complexities created by the Amendment Act, that timing consideration is no longer a meaningful factor. We consider, rather, that the priority needs to be on identifying a sensible and efficient hearing process in the changed circumstances we are addressing. We do not consider it would be either sensible or efficient to rush into a Stream 5 hearing if there is potential for the IPI Variation to include matters currently scheduled for hearing as part of Stream 5.
34. In terms of the obligation Section 21 of the RMA imposes on us, we consider that a pause to understand the full implications of the Amendment Act and to plot out a course that implements a direction is reasonable in the circumstances.
35. As to how long that pause should be, we consider it unwise to direct an alternative timetable at this point. Rather, we direct that Stream 5 Section 42A Reports will not be required to be circulated before 21 March 2022 and

that the Stream 5 hearing will not commence before 2 May 2022. PDP participants should, however, treat those days as indicative of what the Panel currently has in mind i.e. as being 'pencilled in'.

36. We will aim to issue another minute confirming the Stream 5 timetable before the end of February.
37. The timing of Stream 6 will obviously reflect the directions we make for the Stream 5 hearing but, indicatively, we will aim to convene that hearing in mid-June.
38. Mr Officer has sought that Stream 4 be delayed if Streams 5 and 6 are going to be delayed, and vice versa.
39. We do not think it follows that Streams 5 and 6 should not be delayed if Stream 4 proceeds on 8 February, as currently planned. The reverse proposition – that all three are delayed, does, however, have some logic.
40. That said, we consider that there are important differences between the different streams. Preparation for the Stream 4 hearing is well advanced. The Section 42A Reports were issued on 3 December. That timing was put in place at the request of submitters to enable their expert evidence to be substantially completed before Christmas, so we anticipate that many parties will have invested considerable time and resources already in preparation for the hearing. By contrast, Section 42A reports have not been prepared, much less released for the later streams, and so the balance of advantage and disadvantage is much more clearly in favour of deferral in that case.
41. Mr Officer has told us that the altered height standards directed by the Amendment Act has implications for amateur radio installations. We accept that may be so, but the height requirements it specifies are clear, so we have difficulty understanding what the problem is anticipating implementation of those standards.
42. In summary, we find that with the Section 42A Reports for the Stream 4 hearing already circulated and submitters' expert evidence due to be filed at the end of this week, it should proceed generally as previously directed. The Hearing Panel expects that Stream 4 parties will address the relevance of the Amendment Act (if any) as part of the case they present. If that poses a particular problem for any party, we can address how that might best be addressed at the hearing.

43. In conclusion as regards Stream 4, we note that we have recently learned that due to an administrative error, Firstgas Limited was not advised of the availability of the Stream 4 Section 42A Reports and only downloaded them on 14 January. It asks for an extension of the deadline for filing expert evidence in consequence, to 28 January.
44. While we are surprised that the submitter did not investigate it not receiving formal advice of the availability of the Section 42A Reports when expected, we accept that it has been prejudiced by an administrative error within the Council, and ought to have more time to finalise its expert evidence.
45. We direct that Firstgas Ltd has until 1pm on 28 January to file its expert evidence. If that extension causes issues for any other party, they are requested to advise the Hearing Administrator and we will consider what consequential orders need to be made to address any prejudice.
46. There is one final procedural issue that we should address. As above, the Amendment Act has directed changes to the NPSUD 2020 with immediate effect. The Hearing Panel will need to give effect to those changes, to the extent that it has jurisdiction to do so, in all of its decisions, including in relation to the Hearing Streams that have already concluded. It may be that there are other changes to the RMA in the Amendment Act that would impact on our decisions also.
47. If any party to Streams 1-3 considers that its submissions are affected by the changes contained in the Amendment Act, they are requested to advise the Hearing Administrator of same by 1pm on 4 February, identifying the submission points concerned and the reasons (in summary) why it considers the Amendment Act relevant to determination of those submission points. The Hearing Panel will consider the process for addressing such matters and issue further directions thereafter.
48. In conclusion, we apologise for the long and complex discussion set out above. It is probably longer and more complex than it needs to be to answer the Council's request, but we considered it would be helpful if we set out in

some detail our thinking as we grapple with the changed legislative situation we are operating under.

Dated 18 January 2022

A handwritten signature in blue ink, consisting of a large, stylized 'T' followed by a series of loops and a horizontal line extending to the right.

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