

BEFORE THE INDEPENDENT HEARINGS PANEL

IN THE MATTER OF: An application for land use consent,
pursuant to section 9(3) RMA for
Partial Demolition and Additions and
Alterations to All Saints Church

AND

IN THE MATTER OF: A hearing by Palmerston North City
Council

MEMORANDUM OF COUNSEL

29 January 2021



227-231 Broadway Avenue
PO Box 1945
Palmerston North
DX PP80001



N Jessen / S Johnston

06 353 5210



06 356 4345



njessen@crlaw.co.nz

MEMORANDUM OF COUNSEL

MAY IT PLEASE THE HEARING PANEL:

1. As directed in Minute 4 of the Hearing Panel, this Memorandum replies to the Memorandum of Counsel Concerning Procedural Issue, dated 25 January 2021 (the “**Applicant’s Memorandum**”).
2. The issue which appears to be described in the Applicant’s Memorandum is whether legal counsel assisting the Reporting Officers is entitled to present legal submissions. The Applicant argues that an applicant and submitters are entitled to legal representation at a Council hearing to make submissions and advocate on their behalf, and that right is to the exclusion of all others. Even when putting aside the issue of “advocacy” (which is discussed in further detail below), this is a narrow reading of the Resource Management Act 1991 (“**the Act**”), and one which disregards the Commissioners’ powers under s 39(1) to regulate hearing procedure.
3. This is also a different issue to the one raised at the beginning of the third day of the hearing by the Applicant. The complaint at that time was that counsel for the Reporting Officers had overstepped the boundaries of established convention, by presenting legal submissions which (in part) amounted to advocacy, thereby causing “perceptual fairness” issues.
4. As a preliminary point, the Applicant’s Memorandum repeatedly refers to Mr Jessen as the “Council’s Lawyer”, with this label explained at paragraph 2(a) by Mr Maassen. However, the label (or description) is somewhat misleading as to the role adopted by Mr Jessen in this hearing process.
5. Mr Jessen was engaged, by the Council, to assist the Reporting Officers with articulating the legal aspects of the issues they raised and to assist the Hearing Panel with understanding the legal issues with the application at large. This role was made clear in both Mr Jessen’s initial pre-hearing Memorandum, and indeed when he introduced himself at the beginning of the hearing. The legal submissions themselves are entitled “*Legal Submissions for the Reporting Officers*”, which accurately captures, in a transparent and public manner, the role Mr Jessen was performing.

Statutory Provisions

6. The Applicant argues, at paragraph [4], that s 40(1) of the Act should be read as if the rights afforded by s 40(1) to applicants and submitters are given to the exclusion of all others. That is, only applicants and submitters may be heard and have legal representation in a resource consent hearing.
7. Section 40 is not so strongly worded. The section contains no express prohibition on other parties having representation at a resource consent hearing, nor, in our submission, does any other section in the Act.
8. The Applicant's assertion relies on a narrow reading of s 40(1) and the assumption that the parties enumerated there are *exclusively* entitled to the rights described. The Hearing Panel is being invited to interpolate the word 'only' into s 40(1) – "At any hearing described in section 39, [*only*] the applicant, and every person [...]".
9. We take a different view. Rather than granting exclusive rights to applicants and submitters, s 40(1) of the Act should be viewed as setting a minimum standard. That is, the applicant and submitters *must* be given the opportunity to speak, but the section remains silent on other participants' contributions.
10. This view is supported by the balance of s 40, which describes the procedural circumstances where that minimum standard can be avoided by the consent authority (when submissions are likely to be unnecessarily repetitive or if the applicant or submitter fails to turn up to the hearing).
11. Section 40(2) would also not make sense on the Applicant's reading. The preface "Notwithstanding subsection (1)" implies that the following sentence constitutes an *exception* to s 40(1). The subsection also broadly refers to "parties", without limiting itself to the applicant or submitter.
12. The interpretation proffered for the Applicant also overlooks the application of s 40 to "any hearing".¹ On its approach, there would be no standing for any person other than the applicant or submitter to appear in any hearing under the Act, including, for example, plan change hearings. This would be a

¹ At section 40(1), RMA.

nonsensical outcome when considering Council's statutory responsibilities under the Act including, by example, under s 42A.

13. The Applicant's reading of s 40(1) additionally disregards the powers of the Hearing Panel under ss 39(1) & 39(2)(a) of the Act.

14. Section 39(1) says:

Where [...] a person given authority to conduct hearings under [section] 34A [...] holds a hearing in relation to [...] an application for a resource consent [...] [they] shall establish a procedure that is appropriate and fair in the circumstances.

15. Section 39(2)(a) says:

In determining an appropriate procedure for the purposes of subsection (1), the authority shall avoid unnecessary formality.

16. These sections provide a consent authority (or those it delegates its authority to under s 34A) broad powers to invite and hear submissions and evidence, and to regulate proceedings as they see fit (so long as they are appropriate, fair, and not unnecessarily formal). We submit that the Commissioners have appropriately established such a procedure here.

17. In this case, the procedure established by the Hearing Panel is evidenced by its written and verbal directions:

(a) The reporting team of Council are referred to in the Panel's Minutes as a 'party', or one of the 'parties', to the hearing (for example in Minute 1 at 2 & 11, Minute 2 at 1 & 4, Minute 3 at 1).

(b) In their first Minute, the Panel directed at paragraph 18: "Any legal submissions by counsel for the parties can be tabled at the hearing and is not subject to pre-circulation". Considered alongside the inclusion of the Council reporting team as a party, this evidences an expectation that Council will present legal submissions.

(c) Also, in their first Minute, the Panel noted at paragraph 21: "our preference is for proceedings to be relatively informal. However, a

degree of formality is inherent in hearings of this nature, and we will speak to that at the outset of proceedings”. In their third Minute, the Panel reminded the parties at 10: “We will, however, endeavour to keep the proceedings as informal as possible”.²

- (d) When arranging the hearing schedule, the Hearing Panel (alongside the Applicant and other parties) was aware that Mr Jessen was presenting submissions, setting a time, and making provision for him to present those submissions when orally setting out the hearing timetable on the first day (in a manner consistent with the Hearing Panel’s direction highlighted at (b) above).
 - (e) At the outset of the hearing, counsel for the parties (which specifically included Mr Jessen) were asked to give legal views on specific legal issues, including whether recourse to Part 2 of the RMA was required, the statutory basis for considering positive effects from the Application, the statutory basis for considering the conservation plan, and comments on the road encroachment issue.
18. In reliance on the procedure established by the Commissioners, it is submitted that the legal submissions for the Reporting Officers were appropriately given, with a view to providing an overview of the law, and a summary of the essential connections between the evidence and the identified legal principles. This approach is not uncommon – sometimes referred to analogously as the “tendons and ligaments” of the case – irrespective of the party being represented, whether it be applicant, submitter, or a team of Council Reporting Officers.
19. In the absence of any specific examples within the Applicant’s Memorandum, it is difficult to respond to the assertions of advocacy within Mr Jessen’s submissions. Suffice to say for now, that the application of the law will often be dependent on factual evidence, expert opinion and, as recognised in the

² However, as noted in *Phillips v Hopper Nominees Ltd* (1998) 4 ELNZR 265 at p 19, “The mere existence of [the words “avoid unnecessary formality”] in [s 39(2)(a)] cannot be used [...] to override or extend specific statutory provisions.”

Applicant’s Memorandum, the “relevance of particular considerations”.³ Viewed in this context, it is submitted that there is a degree of artificiality in the suggestion for the Applicant that critique of assumptions or evidence is not legal in nature.

20. For the reasons traversed above, it is submitted that the Hearing Panel can accept Mr Jessen’s submissions with reference to their inherent power to regulate their own proceedings under s 39(1) of the Act.
21. Section 42A of the Act is therefore irrelevant to the procedural issue. However, if the Hearing Panel decides they must consider Mr Jessen’s submissions under the framework of s 42A, they are, of course, free to do so. In that instance it would be open for the Hearing Panel to find that they have waived ss 42A(3)–(4) under s 42A(5) implicitly by the established procedure referred to in these submissions (particularly Minute 1 at paragraph 18).
22. Alternatively, under s 41(1)(b) of the Act, it is submitted that the Hearing Panel has the power to accept any statement, document or information that may assist them to deal effectively with the application before them.

The Role of Council

23. It is well accepted that a local authority (like any entity) can have different roles. This can give rise to inherent tensions between those functions. However, such tensions between dual roles are anticipated and accepted by the Act. See, for example, *Enterprise Miramar Peninsula Inc v Wellington City Council*⁴ and *Wakatu Inc v Tasman District Council*.⁵
24. In managing the inherent conflicts that may arise in the different roles Council officers and their representatives perform under the Act, processes must be established that avoid apparent conflicts and minimise procedural complications. The appointment of the Hearing Panel accords with these principles of openness and transparency, and acts to manage perceptual

³ Memorandum of Counsel for the Applicant concerning procedural issue about the Council’s legal submissions, 25 January 2021, at [7].

⁴ *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZHC 614 at [139].

⁵ *Wakatu Inc v Tasman District Council* [2008] NZRMA 187 (HC) at [24]–[27].

unfairness or bias arising out of the role of Council officers or legal counsel assisting them in reporting to Council as a decision maker.

25. Section 34(8) provides:

Except as provided for in the instrument of delegation, every person to whom any function, power or duty has been delegated under this section may, without confirmation by the local authority, exercise or perform the function, power, duty in like manner and with the same effect as the local authority could itself have exercised or performed it.

26. Assignment of the decision making function for a resource consent removes the Council from its usual statutory function of determining the application. The role of Council officers is to assist the Hearing Panel with its decision making function by making reasoned recommendations. These recommendations can go to the outcome sought by way of decision. Those Council officers and their representatives/experts/advisors do not enjoy any advantage or privilege under the Act, or generally, in putting a case.

27. The Hearing Panel is a quasi-judicial body, which is governed by principles of natural justice and due process (supported by statutory requirements for fair and appropriate procedures and public hearings). In acting with an 'open mind' any Hearing Panel must ensure transparency in how they deal with all parties, and provide fair opportunity for parties to participate on an open basis.

28. The Applicant's Memorandum places little to no weight on the delegation of Council's powers to independent Hearing Commissioners to make the final decision on Land Use Consent 5331, or the open and fair process the Hearing Panel has conducted in hearing the resource consent application.

29. Further, the Applicant's Memorandum has not particularised, in any form, the assertions of unfairness raised orally before the Hearing Panel on days two and three of the hearing. It is notable that it has also not established that the Hearing Panel could not go on to exercise its independence in its consideration of the consent application under section 104 of the Act.

30. It is submitted that the integrity of the hearing process has been maintained by the Hearing Panel and the reporting Council team.
31. Ultimately, as is the norm, it will be for the Hearing Panel to determine the relevance and weight to be attributed to the legal submissions filed on behalf of the Reporting Officers (as with any counsel appearing before a decision maker) in accordance with its delegated authority.

Next steps

32. If the Commissioners retain doubts regarding Mr Jessen's submissions, a question of how they should assuage them arises.
33. It is not clear how the questions posed in the Applicant's Memorandum would assist in establishing the "perceptual unfairness" that the Applicant has alleged in oral submissions before the Hearing Panel. In our submission, they will not establish that the Hearing Panel, as a decision maker, has made an error of law, acted for an improper purpose, failed to consider a mandatory relevant consideration, or demonstrated bias.
34. The Hearing Panel's role is also relevant. This Hearing Panel is convened under the Act for the purpose of determining the application for Land Use Consent 5331. The ultimate question before it is whether resource consent should be granted to the Applicant for the activity they describe.
35. The Hearing Panel is not empowered under their s 34A delegation to provide declaratory relief of any kind, or to consider the RMA scheme in the abstract. To the contrary, it is submitted that any independent legal advice sought by the Hearing Panel should be in direct service of determining the consent application before them.
36. Additionally, the Applicant has changed the questions to be posed to an independent legal advisor, with a focus now on theoretical "abstract" questions, as opposed to analysis of Mr Jessen's legal submissions (as originally suggested to the Hearing Panel). This change in tact invites reconsideration of the original issue and the necessity of seeking advice in the first place. Particularly, in circumstances where the abstract questions fail to

address any substantive issue relating to the application or the somewhat illusory assertions of perceptual bias and unfairness.

37. Nevertheless, it is acknowledged that the Hearing Panel has set out a process in Minute 4 for seeking legal advice, which the Commissioners may wish to continue with. If so, it is respectfully submitted that the question posed to the independent legal advisor must result in advice that will assist in resolving the issue before the Hearing Panel, bearing in mind (as described above) its independent decision making function and duty under s 21 to avoid unnecessary delay.

38. There are two steps recommended for consideration:

(a) First, the Hearing Panel may wish to seek advice on whether a response to the abstract questions is:

(i) necessary, when having regard to the role of the independent Hearing Panel; and/or

(ii) relevant, when considering the issues requiring determination under s 104.

(b) Second, if the independent advice establishes that the Applicant's questions should be addressed as part of the decision making of the Hearing Panel, it is submitted that the question should be put as:

Were the submissions given by legal counsel for the Reporting Officers appropriate, in the light of the process established by the Commissioners?

39. On any approach, counsel note the direction in Minute 4 regarding the ability of the parties to respond to any independent advice received. Counsel wish to expressly reserve their position to respond to such advice.

29 January 2021



N Jessen / S Johnston
Legal Counsel