

PALMERSTON NORTH CITY COUNCIL
RC LU 5331
ALL SAINTS CHURCH – 338 CHURCH STREET
MINUTE 5 OF HEARING PANEL

Introduction

1. On 26 January of this year, we issued Minute 4, which (among other matters) recorded a procedural matter arising at the hearing and our proposed process for addressing it. We asked the Applicant and Council to provide initial responses to our proposed process, and we are now in receipt of those responses.
2. The general function of this Minute is to confirm the process for resolving the procedural matter from here. Specifically, we:
 - (a) summarise the respective positions set out in the responses from the Applicant and Council; and
 - (b) record our formal request to commission legal advice in light of the respective positions.
3. As discussed further below, we will issue additional minutes with further requests and instructions as required in the coming weeks.

Respective positions of Applicant and Council

4. Each party has now had the opportunity to formalise its position, including in relation to the advice we should seek towards resolution of this procedural matter. The full text of each position is available on the Council web site. In summary, and as noted in Minute 4, the procedural matter at the heart of the current exchange relates to the parties' difference in position about the ability for the Council to be represented by Counsel at these proceedings, and in the event that such representation is permissible, whether that representation can (and did) include advocacy for a particular outcome. As the outline of respective positions illustrates below, counsel were polarised on this matter.
5. We have grouped the parties positions by topic below; firstly addressing the respective views on representation before outlining the questions each party has recommended we seek advice on.

Respective positions on representation

6. Mr Maassen¹ for the Applicant submitted that “*only the applicant and submitters have the privilege of having a legal representative to make submissions and advocate on their behalf because the RMA says so at s40(2) [sic]*”².”

¹ Memorandum of Counsel for the Applicant concerning procedural issue about the Council's Legal Submissions (25 January 2021). Para 4

² We gather that Mr Maassen's reference to s40(2) should be 40(1) as referenced in the memorandum of counsel for the Council (29 January 2021), at para 6.

7. This was contested by Ms Johnston and Mr Jessen³ for the Council. They submitted that:

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, s40(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.*

Respective positions on independent advice

8. While Mr Maassen has expressed the view that parts of Mr Jessen's submissions amount to advocacy, he has stopped short of identifying particular passages within the submissions that fit into that classification. Consistent with that approach, Mr Maassen submitted that the matter we should receive advice on is of an abstract nature, rather than in relation to the detailed content in Mr Jessen's submissions. As expressed by Mr Maassen⁴, the overarching question is whether the Council should have arranged, and the Council's Panel received, legal submissions in the way and form given by Mr Jessen.

9. Through Mr Maassen⁵, the Applicant has identified the following specific questions it believes we should ask of an independent legal advisor:

- (a) *What is the appropriate scope of the Council's legal advisor's role in a hearing where the Council is not the applicant, and the Council has a regulator's role with a reporting function under RMA s 42A?*
- (b) *To what the extent should, as a matter of good practice, should [sic] Council legal advice to the Panel only address matters of law?*
- (c) *Should legal advice be provided only in a section 42A report or obtained at the Commissioners' instigation in an open process?*
- (d) *Can Council's lawyer, when the Council is performing a regulatory function, turn up at a hearing and make submissions and critique an applicant's evidence, advocate for a particular outcome and make contentions about what evidence the Council's Commissioners should or should not accept?*

10. Counsel for the Council⁶ expressed difficulty in responding to the Applicant's assertions of advocacy within Mr Jessen's submissions given the absence of any specific examples identified by Mr Maassen. In relation to the specific questions posed by the Applicant above, Ms Johnston and Mr Jessen⁷ added (in summary):

³ Memorandum of Counsel (29 January 2021). Para 7-9

⁴ Memorandum of Counsel for the Applicant concerning procedural issue about the Council's Legal Submissions (25 January 2021). Para 14

⁵ Memorandum of Counsel for the Applicant concerning procedural issue about the Council's Legal Submissions (25 January 2021). Para 15

⁶ Memorandum of Counsel (29 January 2021). Para 19

⁷ Memorandum of Counsel (29 January 2021). Paras 33-35

- (a) 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; and
- (b) the questions 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; and
- (c) the Panel is not empowered under its s34A (RMA) delegation to provide declaratory relief of any kind, or to consider the RMA scheme in the abstract; and
- (d) rather, the Panel's role is to determine whether consent should be granted for the current application, and any independent advice should be in direct service of that role.

11. Rather than focus on the abstract issues suggested by the Applicant, Ms Johnston and Mr Jessen submitted that the question (if any) we should ask for independent advice on is: *Were the submissions given by legal counsel for the Reporting Officers appropriate, in the light of the process established by the Commissioners?*

Commissioning advice under s41C (4)

12. Having considered the respective positions, our obligation under s21 of the RMA to avoid unreasonable delay, the powers delegated in us by Council under s34A and our authority under s41C(4) of the RMA to commission a report on a matter for which we require further information, we adopt Ms Johnston and Mr Jessen's position as to the question that we should ask for the reasons they have given.

13. For completeness, we record that our ability to commission this advice is on the basis that the three requirements under s41C(4) are met as:

- (a) the activity subject to the application *may*, have a significant adverse environmental effect; and
- (b) given that the applicant has requested that we obtain the advice,
 - i. the applicant has been notified that the advice is being commissioned; and
 - ii. we have proceeded on the basis that the applicant does not refuse to agree to it being commissioned.

14. As foreshadowed in our previous Minute, we require assistance from the Council's in-house legal advisors to commission the report. We hereby request that the Council instruct a suitably experienced independent legal advisor to answer the question recommended by Counsel for the Council and provide reasons for that answer – the question again being:

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

15. The independent legal advisor should be provided with the following material for contextual purposes:
 - (a) Minute 1;
 - (b) Minute 4;
 - (c) Mr Jessen's legal submissions as amended in response to Minute 4 (and dated 21 January 2021);
 - (d) Mr Maassen's memorandum in response to Minute 4; and
 - (e) Ms Johnston and Mr Jessen's response to Minute 4.
16. While the above question does not exactly align with the four questions recommended by Mr Maassen, we note that it bears considerable resemblance to the overarching question he posed at the hearing as to whether we should receive legal submissions in the way and form posed by Mr Jessen. To be clear, we are not seeking an essay response on abstract queries but instead a short and reasoned opinion on the single and specific question formulated above.
17. In an effort to avoid unreasonable delay in resolving this matter, we request that the advice be commissioned immediately and be received no later than **5pm on Monday 22 February 2021**.
18. Following receipt of the advice, we will invite the Council to provide any written comments on the advice, before inviting the Applicant to address any relevant matters in its written right of reply.
19. Provided no further matters of process or substance arise in the meantime, we would then expect to conduct our deliberations, close the hearing and deliver our decision within the statutory timeframes. In the meantime, the hearing remains adjourned.
20. In any case, we will formalise a timetable for receiving further information from the parties during the week commencing 22 February. Should Counsel for the Applicant and Council wish to confer in the intervening period to agree to a timetable that is suitable to both parties in principle, we would happily be guided by the parties to that end for the sake of expediency. Failing that or any indication as to other commitments that would otherwise delay the final information exchange, we will set out a timetable that we consider to be reasonable.

Next Steps

21. As soon as practicable, we request the Council to commission the advice set out above.
22. For any questions of clarification regarding the above, we ask the parties to email Ms Susana Figlioli at Susana.figlioli@pncc.govt.nz in the first instance.

3 February 2020



DJ McMahon
Hearing Panel Chair

For and on behalf of:
Commissioner J Black
Commissioner H Lutz
Commissioner DJ McMahon