

Our advice

Prepared for All Saints Church Hearing Panel, Palmerston North City Council
Prepared by James Winchester / Sam Hart
Date 22 February 2021

PRIVILEGED AND CONFIDENTIAL

Appropriateness of submissions given by legal counsel for the section 42A Reporting Officers

Background In November 2020, a hearing panel (**Panel**) was appointed by the Palmerston North City Council (**Council**) to hear and determine an application from the Anglican Diocese of Wellington (**Applicant**) for resource consent to carry out works on All Saints Church.

On 21 January 2021, external legal counsel engaged by the Council provided legal submissions to the Panel (**Submissions**) in support of the position taken by the Council's reporting officers. The Council officers' report was provided under s 42A of the Resource Management Act 1991 (**RMA**), but the submissions were not part of that pre-circulated report and were presented at the hearing.

Counsel for the Applicant has objected to the Submissions. It has been argued that the Submissions amount to advocacy for the s 42A report officers' position, and that only the Applicant and submitters have the privilege of having a legal representative make legal submissions and advocate on their behalf.

The Panel has now commissioned a report on the issue under s 41C of the RMA. It has requested that the Council seek independent legal advice to answer the question as stated its fifth Minute dated 3 February 2021.

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

Answer Whether the Submissions are "appropriate" should be judged primarily against applicable legal requirements set by statute and case law, but can also be assessed by reference to the Environment Court's code of conduct for expert witnesses (**Code**) and other good practice guidance.

Provided the Panel complies with the requirements of natural justice and procedural fairness, the Submissions do not breach any legal standards or requirements. There is no legal barrier to the Council seeking legal assistance as part of its s 42A reporting function, and nor is there any statutory or common law barrier preventing the Panel receiving and considering such Submissions. Even if the content of Submissions was considered to be "inappropriate", case law is clear that this would not invalidate the Panel's decision-making process or negate its ability to make

a valid decision on the application.

Because there is no legal barrier preventing the Submissions being given or received, in our view an assessment of appropriateness involves matters of weight or reliability rather than a threshold legal issue as to “admissibility”.

In that respect, while they are advocacy rather than evidence and therefore not strictly subject to the Code, the Submissions appear to be consistent with the Code’s intentions and do not otherwise raise any material issues in terms of other good practice guidance.

Based on our review of the Submissions, they appear to address relevant legal issues and were stated to be provided to assist the Panel on the determination of those key issues. It is now a matter for the Panel to decide how much weight it should give to the Submissions after having considered all of the material before it. Indeed, the Submissions openly acknowledge that this is the Panel’s role.¹

In order to satisfy fairness or natural justice considerations, the Panel should make provision for the Applicant and other participants in the hearing to comment on and/or reply to the Submissions.

	Page
Reasoning (summary)	
This is because:	
• What is “appropriate” should be considered against legal criteria, directions of the Panel and other good practice guidance	3
• There is no legal constraint in the RMA and the Panel’s directions were lawful	3
• There is no public law or common law constraint	5
• In light of the Panel’s directions, the Council in its s 42A reporting capacity should adhere to the Code of Conduct for Expert Witnesses	7
• The Submissions, while given by legal counsel rather than an expert witness, are generally consistent with intention of the Code of Conduct	8
• The Submissions do not raise any material issues when considered in light of other best practice guidance	9

¹ See para 7 of the Submissions.

Reasoning explained

What is “appropriate” should be considered against legal criteria, directions of the Panel and other good practice guidance

1. The Panel has asked us to advise whether the Submissions were “appropriate”. This question requires both legal and non-legal evaluation.
2. Clearly if the Submissions are in breach of an applicable legal standard they will be inappropriate. But even if legally permissible, the Submissions could nonetheless be assessed to be inappropriate if they fall below standards of good practice.
3. We therefore first address legal issues which may arise, secondly whether the Submissions comply with the Panel’s directions, and finally whether the Submissions align with other best practice guidance.

There is no legal constraint in the RMA and the Panel’s directions were lawful

4. There are two main reasons for our conclusion that the RMA permits legal submissions to be made on resource consent applications as part of the Council’s s 42A reporting function. First, there is no express bar on the Council being able to do so. Secondly, this conclusion is supported by a contextual reading of the RMA.
5. We have considered the legal submissions for the Applicant which argue that s 40(1) of the RMA prohibits counsel for the Council from making legal submissions in support of a s 42A report. We respectfully disagree.
6. Section 40(1) states:

At any hearing described in section 39, the applicant, and every person who has made a submission and stated that they wished to be heard at the hearing, may speak (either personally or through a representative) and call evidence.
7. Section 40(1) is targeted at the applicant, and people who are entitled to make (and have made) a submission on an application. This is not exhaustive and does not address the Council’s role in and participation at a hearing.
8. In our view, ss 41, 42A and 41C provide discretion for Submissions to be given on behalf of the Council at a hearing.
9. Should the decision-maker direct, there is discretion to have a s 42A report writer (and their associated team) provide information or advice at a hearing. This is due to s 41(4) of the RMA:

At every hearing conducted in relation to a matter described in section 39(1), the authority may request and receive, from any person who makes a report under section 42A or who is heard by the authority or who is represented at the hearing, any information

or advice that is relevant and reasonably necessary to determine the application.

10. In our view, the words “*any person who makes a report under section 42A*” can extend to legal counsel who provide legal submissions in support of a report. This is because a consultant (and therefore an external lawyer) can be commissioned to contribute to a s 42A report.² There is some flexibility as to how a Council puts together a s 42A report-writing team and what disciplines are utilised, depending upon the facts and circumstances of an individual application. If legal assistance or analysis is considered necessary, then it is not precluded by s 41(4).
11. Similarly, s 42A(2) provides that a s 42A report can be considered at any hearing conducted by the local authority. Section 42A is not prescriptive about the format of such a report, nor about inputs from other officers or consultants. Rather, we consider s 42A provides the reporting officer or consultant commissioned to prepare the report some discretion as to its content and the inputs that are relied upon.
12. Given this discretion and based on the factors we have identified above regarding the issues and disciplines that might be relied upon to prepare a s 42A report, it is our view that unless an express pre-hearing direction is given by a decision-maker which precludes legal submissions or analysis being given, the RMA provides Council officers with discretion to seek legal analysis or submissions on relevant issues raised by the s 42A report.
13. The Panel is also able to give directions under s 41C concerning any submissions. In this instance, the Panel has not directed that legal submissions be presented in support of the s 42A report, but in combination with its powers under s 39 does have some flexibility as to how it manages hearings, including receiving information and hearing from participants. These matters are largely addressed in the Panel’s first Minute.
14. Section 39(1) requires that the Panel establish a procedure that is appropriate and fair in the circumstances. In doing so, the Panel must “avoid unnecessary formality”.³ Aside from this requirement (and the others listed in s 39(2)) the RMA is non-prescriptive as to how a hearing is to be conducted.
15. It appears that the likely role and participation of legal counsel for the Council at the hearing was foreshadowed in advance of the hearing⁴, so it was a matter that parties and the Panel had advance notice about. The Panel could have, at that stage, issued directions about the involvement of counsel in support of the s 42A report but, it appears, exercised its discretion to not make any such direction.

² Section 42A(1AA)(b).

³ Section 39(2)(a).

⁴ Memorandum of Counsel for the Council, 29 January 2021, para [5].

There is no public law or common law constraint

-
16. Additionally, it appears that the potential involvement of legal counsel for the Council was already covered by the Panel's first Minute⁵, in that no specific preclusion of legal submissions for the Council in its s 42A report-writing function was identified and a direction for presentation of legal submissions by any party at the hearing was made. For the reasons identified above, we consider that the Panel's provision in the first Minute for the possibility of the Submissions was lawful in terms of the provisions of the RMA.
17. In any event, we understand that the essence of the Applicant's objection and the Panel's request for advice relates less about the participation of counsel for the Council, but more the manner of participation and the content of the Submissions.
-
18. Throughout the hearing of the resource consent application, the process must be fair and consistent with the principles of natural justice.⁶ Broadly, there are two issues that can come into play: whether every party is provided opportunity to be heard, and whether the decision-maker is unbiased.⁷
19. A hearing must be conducted fairly by providing every party the opportunity to be heard. However, factors such as *who* should be provided an opportunity to be heard, and how they should be provided an opportunity to be heard (i.e. by written or oral submissions) will depend on the circumstances. This is largely addressed in the Panel's first Minute, and subsequent procedural directions given in other Minutes.
20. Here, at minimum, the Panel should ensure:
- (a) the Submissions are made available to every interested party;
 - (b) interested parties are given a reasonable amount of time to consider the Submissions; and
 - (c) interested parties are able to respond to the points made in the Submissions.
21. We have reviewed the Panel's fourth Minute dated 26 January 2021, which gives directions about resolving the Applicant's procedural concerns and commissioning this advice. This Minute appropriately indicates⁸ that further directions will be given after the receipt of this advice, which would then provide opportunities for the Applicant and Council to comment on the advice.
22. What is not clear to us is whether submitters will also have that opportunity and indeed have been afforded the opportunity to
-

⁵ Para [18] of Panel's first Minute.

⁶ New Zealand Bill of Rights Act 1990, s 27(1); *Board of Education v Rice* [1911] AC 179 (HL) at 182.

⁷ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1024-1025.

⁸ At para [17].

consider and respond to the Submissions for the Council as well as this advice. In our view, it would be appropriate for the sake of completeness, for such an opportunity to be provided to all parties (if this has not already been done).

23. Turning now to the fact of the Submissions having been made in support of the s 42A report, it is our view that the Submissions cannot bring into play issues of bias⁹. Two types of bias are relevant: presumptive bias, where a decision-maker has “a personal interest that presents a manifest danger of influencing the outcome”,¹⁰ and apparent bias.¹¹
24. There is no risk of either type of bias here. This is due to the role of a s 42A report in the decision-making process. In *Nga Puawaitanga (Meremere) Ltd v Waikato District Council*, the High Court gave the following assessment of allegations of bias of the decision-makers, based on the content of reports prepared by that council and its consultants:¹²

Such a report comes from a staff member or a consultant engaged by the local authority. **The staff member or consultant does not have any decision making power in relation to the granting or refusal of the application.** The report is not dissimilar to the report of a probation officer who makes a recommendation to a sentencing Judge as to a particular sentencing option. **The Judge has a discretion as to whether to accept or reject the recommendation.** The staff report will simply be one piece of evidence which is before the panel. It can be criticised by the plaintiff.

(emphasis added)

25. The Court proceeded to strike out claims that the decision-makers (in that case hearing commissioners) were affected by bias or presumptive bias due to reports from staff members and consultants for the Council. The Court concluded that, as the commissioners “alone have the power to decide the plaintiff’s applications for resource consents”, claims of bias could not be made out – the decision-maker is entirely separate from the report writer.
26. The above statement in *Nga Puawaitanga* applies here. Whether the content of the Submissions is appropriate or has otherwise crossed the line into inappropriate advocacy has no bearing on the independence of the decision-maker.
27. Put another way, provided that the Panel appropriately observes the requirements of natural justice and fairness, the validity of the Panel’s decision cannot be attacked on the basis that the Council’s s 42A

⁹ Noting that this appears to have been raised by use of the term “perceptual fairness”.

¹⁰ *Findlay v Slovak* HC Hamilton CIV-2007-419-164, 19 February 2008.

¹¹ The classic test for apparent bias is whether “a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide” *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122.

¹² [1998] NZRMA 529 at 543.

approach (including the content of the Submissions) is asserted to be biased or inappropriate.

28. The Submissions are only one piece of a large body of information to be considered. Other parties (including the Applicant) have the ability to consider and respond to the matters raised. The Panel is obliged to consider the Submissions in exactly the same manner as submissions made or evidence given by any other party. It may decide to accept or reject any matters outlined in the Submissions after having considered them.

In light of the Panel's directions, Council officers and witnesses should adhere to the Code of Conduct for Expert Witnesses

-
29. In its first Minute dated 11 November 2020, the Panel issued the following direction:¹³

all experts must participate in accordance with the code of conduct for expert witnesses as set out in part 7 of the Environment Court's Practice Note...

30. The evidence produced by experts (including the Council) should therefore be in accordance with the Code.

31. For the purpose of the Panel's question, the relevant part of the Code reads:

7.2 Duty to the Court

An expert witness has an overriding duty to impartially assist the Court on matters within the expert's area of expertise.

An expert witness is not, and must not behave as, an advocate for the party who engages the witness...

32. As we noted earlier, the Panel's first Minute made a separate direction regarding legal submissions¹⁴ and therefore while the Submissions were in support of the s 42A report, they were not part of the pre-circulated report. The request for advice does however raise the question of how the content of the Submissions is to be measured in terms of "appropriateness".

33. Bearing in mind the obvious limitations of seeking to strictly apply the Code to legal counsel, we have sought to apply the underlying intentions of the Code to the Submissions given that they were made in support of the s 42A report. We do so with some reluctance in an effort to answer the Panel's question, noting that seeking to judge appropriateness based on non-legal considerations is inherently subjective.

34. First, a key yardstick for experts and officers is "impartial assistance". Submissions which support the opinions of officers on these issues and their recommendation to decline consent cannot strictly be
-

¹³ At [13(b)].

¹⁴ At para [18]

considered as “impartial assistance”. Nevertheless, the Submissions are stated to have the purpose of assisting the Panel on relevant issues and, on our reading, appear to relatively well-focused on that purpose¹⁵.

35. Secondly, for the reasons outlined above, the Code should be considered and applied to legal counsel with some caution and in light of the circumstances. Plainly, the Submissions engage in a degree of advocacy. They take positions on key issues and give reasons why those positions are correct. They also seek to respond to matters raised by the Applicant, including responses to legal submissions and evidence which criticise the Council’s position. The Submissions are in places critical of both counsel and witnesses for the Applicant, and suggest that opinions and legal positions advanced by witnesses and counsel are wrong or irrelevant.
36. At face value, these factors seem to be in conflict with the second paragraph of 7.2 of the Code above. But as noted earlier, the Code is drafted with expert witnesses, and not lawyers, in mind. If, however, the Council considers that there are key legal issues arising from its s 42A report that the Panel should consider, it may be appropriate for such issues to be the subject of legal submissions by a suitably experienced lawyer as occurred in this case.
37. There is no doubt that the Submissions advocate for the Panel to decline the application. However, this in itself is not determinative. What matters is whether the Submissions cross the line to such a degree that shows the Council is not seeking to assist the Hearings Panel and is engaging in improper advocacy, or is addressing matters beyond its function or role.
38. We are not persuaded that such a line has been crossed. While in our experience it is not common for legal submissions to be given for a Council as part of its s 42A reporting role, such a practice is not precluded. In our experience, it will be open to the Council, based on either the complexity or importance of an individual application to determine that the decision-maker might be assisted by legal submissions. We are aware that this practice has been adopted by other councils in such circumstances.
39. We would also observe that there may be some justification for having legal counsel assist with the presentation of the s 42A report (even if that counsel was not an author of the report) where the legal correctness of matters raised within the report is significantly at issue.
40. It is apparent that there were strong opinions being expressed by experts for the Applicant and the Council, and that many opinions were sharply divided (including on matters such as the interpretation and application of relevant plan provisions). It also appears that the

¹⁵ We put to one side any issues of possible emotive language and tone, which are largely a matter of personal style and are inherently subjective.

Applicant's witnesses and counsel had been strongly critical of material produced by experts for the Council and other parties.

41. Bearing in mind that context, and having reviewed these matters in the Submissions, we consider that they address issues which are relevant to the determination of this application. They also properly relate to technical and evidential matters where it is appropriate for legal input to be given. These matters primarily concern the interpretation and application of the RMA and policies in the District Plan, and whether the evidence provided by the Applicant is suitable given the requirements of the RMA, the District Plan and the Conservation Plan.
42. For these reasons, we consider the Submissions to be provided for the purpose of assisting the Panel, so that it has the necessary tools and information to make an appropriately informed decision. In particular, the Submissions seek to assist the Panel with central issues of interpretation which are in dispute, matters that are relevant (and irrelevant) to the Panel's decision, and the relative merits of evidence which has been produced. All of these matters appear, in our view, to be relevant considerations for the Panel.
43. In any event, it is the Panel's task to weigh and place an appropriate level of reliance on all of the relevant information before it when reaching its decision on the merits. Based on the common law position addressed earlier in this advice, the tone or content of the Submissions is not of itself a matter which creates particular decision-making risks for the Panel.

The Submissions do not raise any material issues when considered in light of other best practice guidance

44. In our view, the Submissions are not unreasonable in light of best practice guidance referred to by the Panel.
45. In Minute 1, the Panel encouraged all submitters to refer to the guides about resource consents and hearings produced by the Ministry for the Environment.¹⁶ These guides are non-binding on hearing participants. But they may help determine what is best practice in this situation.
46. The Ministry's guide has a section titled "Who else will be at the hearing".¹⁷ This section refers to Council officers but does not refer to Council using lawyers. However, this list should not be read as exhaustive. It states that "other council officers... might also be there to give technical advice". If there is a live or important legal issue, we consider that any legal input can be regarded as "technical advice". In any event, the Panel's direction makes provision for legal submissions to be given, as we have noted earlier.

¹⁶ At para 20 of Minute 1.

¹⁷ Ministry for the Environment "An everyday guide: Appearing at a council resource consent hearing" <<https://www.mfe.govt.nz>>.

-
47. Counsel for the Applicant has also referred to a Practice Guide¹⁸ in a memorandum dated 25 January 2021. For the reasons we have addressed earlier, there is no legal constraint on the Council seeking legal representation as part of its s 42A report-writing function.
48. On our reading of this guidance material, it does not expressly deal with counsel appearing at a hearing to support s 42A report writers, but nor does it say there is no such role for counsel or that the only appropriate ways of participating are through legal opinions tendered as part of the s 42A report or in response to Panel requests for advice.
49. We note that while the approach to providing Submissions as occurred in this instance is not common, consistent with the guidance document referred to, the Submissions (and legal analysis within) have been made openly and transparently. Parties should have the opportunity to address those submissions¹⁹, and we also note that there is no suggestion that the Council's lawyer has sought to direct the content of the hearing or otherwise be involved in the Panel's deliberations after the conclusion of the hearing²⁰.
-

**Please call or
email to discuss
any aspect of this
advice**

James Winchester/Sam Hart
Partner/Solicitor



+64 4 924 3503/ +64-4-924 3459
+64 21 303 700

james.winchester@simpsongrierson.com/sam.hart@simpsongrierson.com

¹⁸ This Guide was apparently produced or endorsed by the Resource Management Law Association in 2011, and is entitled "A Practice Guide for the Conduct of Resource Management Hearings at First Instance", September 2011

¹⁹ Consistent with the second paragraph under the heading "Issue" at 3.5 of the Guide and item 2 under the heading "Best Practice"

²⁰ Ibid, see item 4 under the heading "Best Practice"