

IN THE MATTER OF Resource Management Act 1991

AND

IN THE MATTER OF Proposed Plan Change 14 Housing and
Business Choice pursuant to Part 5, subpart
5A and Part 6 of Schedule 1 of the Resource
Management Act 1991

MINUTE 31:

**RESPONSE TO AND FURTHER DIRECTIONS ON MEMORANDUM OF COUNSEL FOR
THE COUNCIL OF 22 DECEMBER 2023 SEEKING AN ADJOURNMENT OF FURTHER
HEARINGS ON PC14**

[1] This is the thirty first (31) procedural Minute to be issued by the Independent Hearings Panel (IHP) established by the Christchurch City Council (the Council) to conduct the hearing of submissions on proposed Plan Change 14 Housing and Business Choice (PC 14) notified by the Council and to make recommendations to the Council, after the hearing of submissions is concluded, pursuant to Part 5, subpart 5A and Part 6 of Schedule 1, of the Resource Management Act 1991 (RMA).

[2] The purpose of this Minute is to:

- (a) acknowledge the receipt of the memorandum of counsel for the Council dated 22 December 2023 seeking an adjournment of hearings on PC14 scheduled to recommence on 30 January 2023, pending further directions from the Minister for the Environment, and
- (b) issue further directions to the Council and provide an opportunity for submitters and further submitters who may wish to comment further, on the powers the IHP to adjourn the hearings by 5pm on 5 January 2024.

Background

[3] By memorandum of 6 December 2023 counsel for the Council advised that the Council had resolved to request the Minister for the Environment (the Minister) to issue directions under section 80M of the Resource Management Act 1991 to pause the hearings on PC14 considering an anticipated change in government policy on the mandatory requirements of the Medium Density Housing Standards (MDRS).

[4] In our Minute 29 issued on 14 December 2023 the IHP requested that the Council keep the IHP advised of any response from the Minister and referred to legal advice the IHP had received to the effect that we do not have the power to suspend the hearings.

[5] The Council filed a memorandum on 22 December 2023 after the IHP Secretariat office closed for the year. In the memorandum the Council advised that the Minister was unable to respond the Council's request until after 26 January 2024. Considering that delay, the Council has now requested the IHP to exercise discretionary powers to regulate our own procedures to adjourn the hearings which are due to recommence on 30 January 2024.

[6] The Council has also advised that the timeline for the IHP to make its recommendations to the Council builds in sufficient time for the Council to meet the current legal requirements to make its decisions by 12 September 2024 and a delay in the IHP issuing its

recommendations could be accommodated by the Council if the Minister's direction was to proceed with the current hearing schedules. Further the Council says it could, if necessary, ask the Minister to extend the period for making its decision to accommodate any delay in the IHP recommendations due to adjourning the hearings.

[7] The Council's request has been given urgent attention by the IHP despite the Christmas holiday period.

[8] The IHP has previously sought independent legal advice as to our powers to adjourn the hearings pending clarification of the government's intentions about the mandatory MDRS. The outcome of that advice is that we do not possess the powers to suspend the hearings and must continue to work towards the existing Ministerial direction, until such time as we receive specific directions from the Minister or the Council, in the event of any changes to the legislative framework.

[9] Attached to this memorandum is a copy of the legal advice received by the IHP on the powers of adjournment (IHP legal advice).

Further directions

[10] If it is yet to do so the Council is to serve a copy of its memorandum of 22 December 2023 on all submitters and further submitters **by 5pm on 28 December 2023**. The Council is also to serve a copy of this Minute 31 on all submitters and further submitters **by 5pm on 28 December 2023** and must also follow up individually with submitters and further submitters who are scheduled to be heard in weeks 9 and 10 to notify them of the Council's request for an adjournment and the IHP directions in this Minute.¹

[11] The Council is to provide legal submissions in response to the IHP legal advice and Minute 31 **by 5pm on 5 January 2024**.

[12] Any submitter or further submitter who wishes to comment on the request for an adjournment by Council or to respond to the IHP legal advice and/or Minute 31 with legal submissions may also respond to the IHP Secretariat by email by **5pm on the 5th of January 2024**.

[13] Due to the late timing of the Council's request and the limited number of statutory days between now and the scheduled hearings the IHP makes the above directions to enable the

¹ A copy of the list of submitters and further submitters scheduled to be heard in weeks 9 and 10 will be provided by the Secretariat when this Minute is served on Council.

IHP to urgently consider the Council's submissions and any responses received submitters and further submitters on the request for an adjournment. The IHP will issue a decision on the Council's request for an adjournment **on Monday 8 January 2024** including any further directions in relation to the hearings.

Dated 28 December 2023

A handwritten signature in black ink, appearing to read 'C.Robinson', with a long, sweeping flourish extending to the right.

Cindy Robinson
Chair
for Independent Hearings Panel

13 November 2023

By Email: jo.daly@chch2023.ihp.govt.nz

Christchurch City Council

ATTENTION: Jo Daly

Dear Jo

LEX 24726 - ADVICE TO IHP - PC 14

Introduction

1. We refer to your email of 10 November 2023, seeking advice as to the powers of the Independent Hearing Panel (**IHP**) to adjourn hearings for Plan Change 14 (**PC14**), in light of concerns raised by submissions seeking a delay based on a possible change in government policy as a result of the change of government after the 2023 General Election.
2. You have also sought advice on the appropriate process that the IHP should adopt in order to seek the views of parties, including submitters and the Council, if the IHP does have the power to adjourn hearings for PC14.

Summary

3. The IHP was appointed by the Council to conduct hearings and make recommendations for PC14 under an intensification streamlined planning process (**ISPP**). Council has been granted an extended deadline by the Minister of the Environment until 12 September 2024 to incorporate the necessary provisions of the National Policy Statement – Urban Development (**NPS-UD**).
4. Powers available to an IHP under an ISPP are granted under Schedule 1, Part 6 of the Resource Management Act 1991 (**RMA**). These powers, while relatively broad, are prescriptive – and do not include the ability to waive or extend time periods, including the ability to adjourn or delay hearings. Furthermore, the specific power to grant waivers or extend time periods under s 37 of the RMA is not available to IHP's.

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5. A tier 1 territorial authority must give effect to provisions of the NPS-UD “as soon as practicable”, meaning that delaying hearings in order to await any change in government policy would likely be in breach of the NPS-UD. Ultimately, the IHP must make recommendations with regard to PC14, and it must make these recommendations within sufficient time for the Council to meet the NPS-UD deadline.
6. In light of our conclusions, we have not addressed the appropriate process that the IHP should follow were it considering whether to adjourn or not,
7. The exact form of the government after the 2023 election is still unclear due to ongoing negotiations between the parties. Based on policies released during the election period, National, ACT and New Zealand First all envisage, to some degree, either a repeal or reform of the NPS-UD and MDRSs. However, the nature of this reform or when such reform will happen is likely to be subject to coalition negotiations between the parties. As such, it is not possible to predict at this stage whether any reform will happen before September 2024. The details of any reform agenda may be included in a formal coalition agreement released after the formation of a new government or may be signalled in briefings to incoming ministers.
8. We note that under s 80G(1)(c) of the RMA, as a tier 1 territorial authority, Council must not withdraw an IPI. On this basis, any reform by the new government would need to ensure that Council is not breaching s 80G(1)(c).

Analysis

IHP's powers under the RMA

9. As we understand it, the IHP was appointed by Council pursuant to Clause 96, Part 6 of Schedule 1 of the RMA to hear submissions and make recommendations on PC14 under an intensification streamlined planning process (**ISPP**).¹ In a recent memorandum authored by counsel for the Council, it was noted that the Minister for the Environment has granted an extension request for incorporation of the NPS-UD until **12 September 2024**.²
10. Clause 98 of Schedule 1 of the RMA prescribes the powers and functions of an IHP under an ISPP. It states:³

98 Powers of independent hearings panel

(1) To the extent applicable, an independent hearings panel has the same duties and powers as a local authority under the following provisions:

- (a) section 39 (which provides for how hearings are to be conducted), except section 39(2)(c) and (d):

¹ Resource Management Act 1991, Schedule 1, Part 6, Clause 96(1); also see Minute 12: Response to Correspondence received from Combined Residents' Association Christchurch, Independent Hearing Panel, dated 26 September 2023, at [7].

² Memorandum of Counsel for Christchurch City Council in the matter of the hearing of submissions on Plan Change 14 (Housing and Business Choice) to the Christchurch District Plan dated 11 August 2023 at [10].

³ Resource Management Act 1991, Schedule 1, Part 6, Clause 98.

(b) section 39AA (which enables a hearing to be conducted using remote access facilities):

(c) section 40 (which provides for the persons who may be heard at a hearing):

(d) section 41 (which provides for the application of certain provisions of the Commissions of Inquiry Act 1908):

(e) section 41A (which relates to the control of hearings):

(f) section 41B (which provides for the giving of directions as to the time for providing evidence in relation to a hearing):

(g) section 41C (which sets out the directions and requests that may be given before or at a hearing), except section 41C(4):

(h) section 41D (which provides for submissions to be struck out before or at a hearing):

(i) section 42 (which provides for the protection of sensitive information).

11. We note that, of the powers and duties listed under clause 98, the power to waive or extend a time period is not included. That power, which is found in s 37 RMA, states:⁴

37 Power of waiver and extension of time limits

(1) A consent authority or local authority may, in any particular case,—

(a) extend a time period specified in this Act or in regulations, whether or not the time period has expired; or

(b) waive a failure to comply with a requirement under this Act, regulations, or a plan for the time or method of service of documents.

12. Section 37B of the RMA further prescribes which persons or bodies are able to utilise the waiver or extension powers under s 37. These people or bodies include the Minister for the Environment, the EPA, Boards of Inquiry and Special Tribunals. IHPs are not listed.⁵
13. Having considered the powers that are listed under clause 98, we believe that none of these allow for the IHP to delay or adjourn a hearing. For example, we note that s 39, while it provides for how hearings are to be conducted, its scope does not allow for the IHP to suspend, or delay hearings.⁶ This would not include the ability of the IHP to make accommodations for witnesses or panel members as part of its day-to-day functions, for example in the event of sickness, which we believe would fall under the exercise of its powers to conduct hearings under clause 98.

⁴ Resource Management Act 1991, section 37.

⁵ Resource Management Act 1991, section 37B.

⁶ Resource Management Act 1991, section 39.

14. We also considered the possibility of the IHP lengthening the hearing process rather than issuing a formal adjournment or delay until the policy priorities of the new government become clear. We do not believe that this approach would be in line with the provisions of the NPS-UD. Under clause 4.1(1), a local authority must amend its plan to give effect to the provisions of the NPS-D “as soon as practicable.”⁷ The High Court in *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc.* recently found that any additional timetable obligations do not diminish the general obligation to give effect to the NPS-UD “as soon as practicable.”⁸
15. Ultimately, the IHP must make recommendations with regard to PC14.⁹ As we see it, the IHP must make these recommendations within sufficient time for the Council to meet the NPS-UD deadline in September 2024. On this basis, we believe that unjustifiable delays by the IHP would contravene the obligation under clause 4.1(1) to ensure the policies of the NPS-UD were integrated “as soon as practicable”.
16. Therefore, we conclude that the RMA does not grant the IHP the power to extend or delay the hearings for PC14, for the purpose of awaiting the Coalition’s pronouncements on the MDRS.

Formation of a new government

17. As you will be aware, the results of the 2023 General Election indicate that a National, ACT and New Zealand First government will be formed. The exact nature of this government is not yet known due to ongoing coalition negotiations.
18. While the three parties have differing policies, we note that across the board, there appears to be a desire for the MDRSs and the NPS-UD to be either reformed or repealed. For example:
 - (a) The National Party has stated that it will allow Councils to opt out of the MDRSs so long as they can demonstrate they can meet future demand. National has stated that it supports the retention of NPS-UD rules which require Councils to zone for at least six storeys in catchments near rapid transit;¹⁰
 - (b) ACT has stated that it will repeal the MDRSs and replace them with a system similar to the Auckland Mixed Housing Suburban Zone;¹¹ and

⁷ National Policy Statement – Urban Development dated August 2020, clause 4.1.(1).

⁸ *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948 at [82].

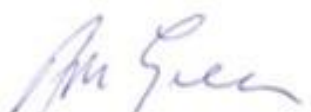
⁹ Resource Management Act 1991, Schedule 1, Part 6, Clause 96(1)(a)(ii); also see clause 99(1).

¹⁰ For reference, see a press release by Chris Bishop MP dated 28 May 2023, ‘National’s Going for Housing Growth Plan’, accessed online at: <[National’s Going for Housing Growth Plan](#)>

¹¹ For reference, see a press release by David Seymour MP, ‘ACT Proposes Improvements to Housing Legislation’, accessed online at: <[ACT proposes improvements to housing legislation - ACT New Zealand](#)>.

- (c) New Zealand First has been critical of both the NPS-UD and MDRS but has not indicated in its 2023 policies whether it would support reform or repeal of either.¹²
19. Once negotiations for the formation of a government are complete, a coalition agreement may be released which may detail how reform will happen. This may provide Council with some insight into whether the NPS-UD and MDRSs will be reformed/repealed, and if so, when.
20. We also note that, should a coalition agreement remain silent on the issue of NPS-UD and MDRS reform, the policy of the new government may be gleaned from briefings to the incoming Minister of the Environment, which are usually released publicly on either the MfE website or Cabinet website several weeks after being presented to the new Minister.
21. Ultimately, it is difficult to predict the likelihood of any legislative reform before September 2024. We believe that the question of when reform occurs will be determined by the legislative priorities of the new government.
22. We note that under s 80G(1)(c) of the RMA, as a tier 1 territorial authority, Council must not withdraw an IPI.¹³ On this basis, any reform by the new government would need to ensure that Council is not breaching s 80G(1)(c).
23. In any case, regardless of whether the new government will progress with reform, the RMA does not empower the IHP the power to waive, extend or delay hearings for PC14, except to the limited extent discussed in paragraph 12 above. Our advice is that, until further notice, the Council remains bound by the September 2024 deadline to incorporate elements of the NPS-UD and MDRS into the district plan. It will not be able to achieve that if the IHP process is halted for a lengthy period.

Yours sincerely
BROOKFIELDS



Andrew Green
Partner

Direct dial: +64 9 979 2172
email: green@brookfields.co.nz

¹² For reference, see New Zealand First 2023 Policies, accessed online at: <[New Zealand First 2023 Policies - New Zealand First \(nzfirst.nz\)](#)>

¹³ Resource Management Act 1991, s 80G(1)(c).