

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of hearing submissions and further submissions on the Proposed Waikato District Plan.

AND

IN THE MATTER of expert conferencing in respect of the Ohinewai Rezoning: Hearing Topic 19.

FURTHER MINUTE FROM HEARING COMMISSIONERS

4 May 2020

1. On 19 April 2020, Council's Hearing Coordinator for the Proposed District Plan wrote to all submitters on the Ohinewai Rezoning Hearing Topic advising that Ambury Properties Ltd ("APL") had proposed that expert conferencing occur prior to the hearing commencing on 8 September 2020. The Hearing Coordinator advised that Council considered there was value in expert conferencing occurring and suggested the sessions be facilitated by Dr Phil Mitchell and Mr Paul Cooney, the Chair and Deputy Chair of the Hearings Panel.
2. The Hearing Coordinator requested feedback from submitters and further submitters regarding the proposal that Dr Mitchell and Mr Cooney facilitate the expert conferencing sessions.
3. The Hearing Coordinator received one response in support from APL.
4. The Hearing Coordinator received two further responses from three submitters – a joint response from the Waikato Regional Council and Waka Kotahi NZ Transport Agency ("WRC/NZTA response") and a response from David Whyte. Mr Whyte's response (which appeared to be in his personal capacity) did not raise any opposition but rather sought clarification generally about the process for expert conferencing.
5. The WRC/NZTA response stated that as a matter of principle, it was their view that the Hearing Commissioners *should not* facilitate *mediation* on matters that they are to subsequently hear and determine. No reasons were provided in support of their principled position.
6. After discussion between a representative of Council and WRC to better understand the WRC/NZTA response, a further response was received on behalf of WRC and NZTA advising that their *preference* is still that any expert conferencing is facilitated by an independent person. Again, no reasons were advanced to support that position.

7. Having considered the latest position of WRC/NZTA, we are of the view that we have jurisdiction to proceed to facilitate the expert conferencing sessions on hearing topic 19 Ohinewai Rezoning.
8. Our statutory duty as Hearing Commissioners under section 39(1) of the Resource Management Act 1991 ("RMA") is to establish a procedure for the plan hearings (including any procedural matters relating to the hearings) that is *appropriate and fair in the circumstances*. This affords the Hearing Panel a high degree of flexibility in the setting of its own procedures. Section 39(2) sets out the mandatory matters that we must adhere to in determining an appropriate and fair procedure. We consider none of the listed matters in section 39 preclude us from facilitating the conferencing sessions.
9. We consider that Council's proposal that we facilitate the expert conferencing sessions is both appropriate and fair in the circumstances of the Ohinewai Rezoning Hearing Topic as it will result in a more efficient and effective hearing for the following reasons:
 - (a) The Ohinewai Rezoning Topic is the largest hearing topic to date, and one of the larger hearing topics. APL lodged a significant amount of technical information in support of its proposal in December 2019 (consisting of an AEE and 20 separate appendices). The s 42A report on behalf of Council attaches a further 10 technical reports. Between APL and Council alone, there are at least 24 expert witnesses covering a wide field of disciplines and further experts are likely to be representing other submitters. Further, the issues to be considered are both broad and complex.
 - (b) The Ohinewai Rezoning hearing is to commence on 8 September 2020. The Rural Zone hearing, another significant hearing, is scheduled to take place on 22 September, nine working days after the Ohinewai hearing. Any delay of the Ohinewai Rezoning and /or Rural Zone hearing will push the hearing schedule out and put at risk the need for all hearings (including Stage 2) to be concluded in sufficient time to ensure decisions are notified no later than 18 September 2021, being the extension granted by the Minister for the Environment. Any efficiencies in the processes preceding the hearing (and indeed the hearing itself) will mean there is a better chance of meeting the statutory timeframes.
 - (c) The use of expert conferencing is a highly efficient way of identifying and narrowing complex technical issues prior to hearing. The advantage of having two members of the Hearing Panel facilitate the expert conferencing sessions is to ensure that:
 - (i) The discussions are focused on the issues that are most critical to our decision-making; and
 - (ii) We are well appraised of those technical issues (in particular the reasons particular experts may not agree) so that we have a full and complete understanding of them at the hearing. This will result in a more efficient and effective hearing, particularly when the briefs of evidence of technical witnesses are not read out at the hearing and cross examination of expert witnesses by other parties is not permitted pursuant to section 39(2)(d) of the RMA.
 - (d) Having members of the Hearing Panel facilitate the conferencing sessions will, in our view, result in less formality at the hearing when dealing with the expert witnesses.

This would not be the case if the sessions were to be facilitated by another facilitator. We note we are expressly required to avoid unnecessary formality under section 39(2)(a).

- (e) We consider the principles of natural justice can be achieved through the Hearing Panel facilitating the conferencing session for the Ohinewai Rezoning hearing. The key principles of natural justice in the context of expert conferencing is that the Hearing Panel members involved in the conferencing sessions do not pre-determine the ultimate decision to be made on submissions and further submissions on the Ohinewai topic, will approach our decision-making with an open mind and that all submitters have an opportunity to be heard at the hearing. We are satisfied these principles can be met because:
 - (i) The Hearing Panel on the Ohinewai topic will involve a further two Hearing Commissioners. The decision makers are not limited to the two members facilitating expert conferencing.
 - (ii) At conferencing, the members of the Hearing Panel have no power to compel the experts to reach consensus. Their role is limited to that of facilitation. No legal counsel will be present at the conferencing sessions. Further, all experts attending the session are required to comply with the Environment Court Practice Note 2014, Appendix 3. The experts must not advocate for their respective clients.
 - (f) The Environment Court Practice Note 2014 deals with expert conferencing in Appendix 3. It expressly anticipates that Environment Court Commissioners who facilitate conferencing may also sit as a member of the Court to hear the substantive matter, although it qualifies that by requiring the agreement of all parties (paragraph 5(b)). However, expert conferencing in the context of a first instance hearing is a different context from a matter that is proceeding to the Environment Court. We refer to the Court of Appeal Decision in *Royal Australasian College of Surgeons v Phipps* [1993] 3 NZLR 1 where the Court observed at page 22 that the obligations of natural justice:

... need not be met in any particular formal way. This is an area of broad principle, not precise rules, turning on the nature of the power being exercised and all the circumstances.
 - (g) All submitters have an opportunity to be heard at the substantive hearing, even if some submitters are not represented at conferencing because they do not have expert witnesses.
 - (h) A member of the Hearing Panel has successfully facilitated expert conferencing in relation to the Hampton Downs hearing topic and three members of the Hearing Panel will be facilitating expert conferencing on the Tangata Whenua hearing topic.
10. If any submitter has a contrary view to us facilitating the conferencing sessions, they are invited to send a written response with reasons to the Hearing Coordinator by **5pm on Thursday 7 May 2020**. If necessary, a Zoom meeting can be convened to discuss any issues arising.

11. Assuming all submitters agree to the conferencing being facilitated by members of the Hearing Panel, we propose to convene a Zoom meeting in the near future to discuss the following process issues relating to conferencing:
- (a) The scope of expert conferencing and the topics to be covered, including any overlap between topics;
 - (b) The name and discipline of each expert participating in each topic. It is our intention that only technical experts attend conferencing, not lay persons;
 - (c) Whether planners attend each topic or a planning topic(s) only;
 - (d) The provision of information to be circulated in advance of each session, including an agreed agenda and key issues for each topic;
 - (e) The requirement for a Joint Witness Statement to be prepared at the conclusion of each topic session, in compliance with the Environment Court Practice Note 2014;
 - (f) The timing of the first set of conferencing sessions and whether a second round of conferencing will be required in advance of APL finalising its evidence.
12. Any questions concerning this Minute should be addressed to the Hearing Coordinator Ms Sandra Kelly. Her contact details are as follows:

Email: Districtplan@waidc.govt.nz

or

Telephone: 027 382 0021



PH Mitchell (Chair)

On behalf of the proposed facilitators, Commissioners P Mitchell and P Cooney

4 May 2020