

BEFORE THE HEARINGS PANEL

IN THE MATTER

of the Resource Management
Act 1991

AND

IN THE MATTER

of Proposed District Plan for
Waimakariri District Council
2023

**MEMORANDUM SEEKING CLARIFICATION ON EXPERT WITNESS
CONFERENCING**

ANDREW CARR (SUBMITTER #158)

21 March 2024

1. INTRODUCTION

- 1.1 The Submitter has lodged evidence in relation to Stream 12.
- 1.2 Expert witness conferencing between all planners who have provided Statements of Evidence relating to Stream 12 is presently expected to take place in the week commencing 25 March 2024. In preparation for this, the Council has circulated an outline of expectations and a draft agenda.
- 1.3 Paragraph 85 of Minute 1 of the Hearing Panel set out that “*all expert witnesses, in both preparing and presenting their evidence as well as when attending expert conferencing, are expected to comply with the Environment Court Consolidated Practice Note 2023 Code of Conduct*”.
- 1.4 The Submitter has concerns that the approach proposed by the Council for the upcoming planning expert witness conferencing may not meet this expectation. This then has a risk that the expert conferencing will not be carried out in an effective or efficient manner.
- 1.5 The Submitter has attempted to engage with the Council directly to address these matters but without success. The issue appears to be one of interpretation of the Panel’s initial instruction.

2. COUNCIL’S PROPOSED APPROACH

- 2.1 Council has advised that at the expert conferencing there is to be a “*recording of discussions*”. However Council advises that this is not expected to be a Joint Witness Statement but rather, appears to be a document that sets out the positions of the parties, which might be an “*interim position*”. There may then be further conferencing at some unspecified time, with a view to producing a Joint Witness Statement at some point prior to the deadline of 26 April.
- 2.2 After an email exchange with Mr Wilson of the Council, it appears that the Council interprets the Panel’s intent in paragraph 85 of Minute 1 as applying only to the personal obligations of expert witnesses. Mr Wilson’s email to the Submitter’s planning expert (dated 20 March 2024) noted that “*a component of the Practice Note, particularly in relation to the conduct of expert witnesses in expert*”

conferencing does apply, but the wider [Practice] Note does not (my emphasis).

- 2.3 He goes on to say that the provisions of the Practice Note that relate to expert witness conferencing “*apply to Court proceedings ... and not to District Plan hearings as such*”. For example, he is not of the view that there is a need to finalise a Joint Witness Statement immediately after conferencing.
- 2.4 Consequently it seems that Mr Wilson is of the opinion that the process of expert witness conferencing for the purposes of a District Plan hearing does not need to be the process set out in the Practice Note and can follow a different approach.

3. SUBMITTER CONCERNS

- 3.1 The Environment Court Consolidated Practice Note 2023 Code of Conduct for Expert Witnesses is set out in Section 9. However an expert cannot ‘cherry pick’ which parts of the Code of Conduct that they follow. As such, to meet their obligations under the Code of Conduct (as specified by the Panel in Minute 1) all experts, including those of the Council, are required to adhere to Section 9 of the Practice Note.
- 3.2 There are two parts of the Code of Conduct that relate to how expert witness conferencing is to be carried out and reported (Sub-sections 9.4 and 9.5 relate to the duty to confer and the provision of Joint Witness Statements respectively).
- 3.3 Interim positions (presumably meaning the expert’s stated position can change later) and ‘recording of discussions’ are not outcomes of expert witness conferencing under the Code of Conduct. Under paragraph 9.4(c), the only output is a Joint Witness Statement, which is to be signed on the day of the conference or shortly after (paragraph 9.5(c)).
- 3.4 If the process of expert witness conferencing does not follow that set out in the Practice Note 2023 Code of Conduct (that is, if Sub-sections 9.4 and 9.5 do not apply), this removes the ‘ground rules’ for conferencing and introduces confusion. For example, how do written

'records of discussions' relate to the expectation that the only output is a Joint Witness Statement? Are verbal discussions, or the 'records of discussions', confidential if paragraph 9.4(c) of the Code of Conduct does not apply? Is there still an expectation that experts attempt to reach agreement or do not 'horse trade'?

- 3.5 Similarly, if the intent is that a Joint Witness Statement will only be produced at some later date this then introduces inefficiencies in the process because it necessarily presupposes further discussions. This is not only costly because it contemplates additional inputs, but in practice all parties might not be able to attend all discussions which introduces matters of fairness.
- 3.6 If the Council is seeking to modify the provisions of the Code of Conduct such that only some parts of Sub-sections 9.4 and 9.5 apply but not others, the Submitter considers that this needs to be communicated to all parties in advance of expert witness conferencing taking place. Unless this is done, there can be no mutual understanding of the 'rules of engagement'.

4. REQUEST FOR CLARIFICATION

- 4.1 The Submitter genuinely regrets troubling the Panel with this matter and had hoped to resolve it directly with the Council. However it is not trivial, because it is imperative that all expert witnesses undertaking conferencing understand their roles and responsibilities, conferencing is carried out in an efficient manner, and ultimately that all involved in this matter, including the Panel, can have confidence in the robustness and fairness of the process followed and its outcomes.
- 4.2 The Submitter seeks the following from the Panel:
- (a) Clarification of whether all parts of the Environment Court Consolidated Practice Note 2023 Code of Conduct (that is, the entirety of Section 9 of the Practice Note) apply to expert witnesses and to their conferencing;
 - (b) In the event that all parts do apply, a direction to the Council to align its proposed process for the forthcoming expert witness

conferencing for Stream 12 with that set out in the Environment Court Consolidated Practice Note 2023 Code of Conduct, particularly Sub-sections 9.4 and 9.5;

- (c) In the event that all parts do not apply, a direction to the Council to identify which parts of the Environment Court Consolidated Practice Note 2023 Code of Conduct do not apply to the forthcoming expert witness conferencing, and for this to be communicated to all experts attending the conferencing at least 24 hours prior to conferencing commencing.

Andy Carr
21 March 2024