IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Submissions and Further Submissions on the Proposed Wellington City District Plan

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Minute 28

Viewshaft Follow Up

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1. During the course of the Stream 3 hearing, the Hearing Panel became concerned about the lack of clarity as to the spatial coverage of the Viewshaft Chapter as notified, and whether it would have been apparent to readers of the PDP that it extended beyond the Central City area.

2. In addition, the Reporting Officer, Ms Stevens, recommended a number of changes to the Chapter on the basis of the Council submission that appeared to the Hearing Panel to be seeking relatively narrow relief.

3. The fact that the Reporting Officer was evaluating a Council submission and determining that it provided scope for relatively wide-ranging amendments (or apparently so) might have been less significant as an issue had there been a party opposing the Reporting Officer's recommendations and seeking alternative relief.

4. As it happened, however, Mr Ballinger for WCCT largely supported the Reporting Officer's recommendations and Ms Tree for Argosy Property No. 1 Limited and Mr de Leijer for David Walmsley focussed on relatively narrow issues related to the implementation of the viewshaft provisions.

5. It is also fair to say that the Hearing Panel found the Viewshaft chapter exceedingly complex.

6. Against that background, the Hearing Panel determined that it required independent legal advice and requested Mr James Winchester, Barrister, to provide it with an opinion focussing on the Viewshaft Chapter as notified, identifying what it regulated, and the scope provided by submissions to amend that position in the manner recommended by the Reporting Officer. Mr Winchester's opinion is attached and speaks for itself.

7. Given the conclusions Mr Winchester has reached, it is appropriate that we give the Council the opportunity to respond in relation to those areas of Mr Winchester's advice where he does not agree with the Reporting Officer's recommendations. We emphasise that this is not an opportunity to repeat arguments we have already heard, but rather to alert us to any additional considerations we might need to bear in mind before reaching our own view.

8. Mr Winchester's advice has drawn our attention to two other areas where we consider that we need further assistance from the Council. Firstly, Mr Winchester has identified the fact that Viewshaft 18 is not mapped in the online mapping system and suggests that the area(s) within which activities

are regulated by that viewshaft is unclear. We request that the Council advise us its view as to the area(s) within which activities are regulated by the Viewshaft Chapter as it relates to Viewshaft 18, and the reasons for that view.

9. Secondly at paragraphs 115-117 of his opinion, Mr Winchester addresses an issue of Plan interpretation arising from the fact that, as notified, View-R2 specified that the construction of new buildings and structures, and alterations and additions to existing buildings within an overlay were restricted discretionary activities where compliance cannot be achieved with View-S1, but contained no rule governing activities that did comply with that standard. As Mr Winchester identifies, that raises questions as to whether such activities are 'innominate' and therefore to be considered as discretionary activities. The Council's comment on that question is requested.

10. Further, the permitted activity rules that the Reporting Officer has recommended as View-R2.1 and View-R2.2 cross reference the height standards in the MRZ and HRZ respectively. The Hearing Panel is interested to the reasons for cross referencing the Zone Rules rather than managing intrusions into the viewshaft under View-S1 or some amendment thereof.

11. Lastly, the Hearing Panel notes Ms Stevens' advice in her written reply at paragraph 48 that the HRZ zoned Kelburn sites within VS13-15 require further analysis to understand if development built to a 21 metre height limit would intrude into these viewshafts. The Hearing Panel notes that the Reporting Officer's recommendation in Stream 2 is that the height limit for this area should be 22 metres and Mr Rae's evidence for Kāinga Ora supports a height limit of 43 metres. The Hearing Panel considers that it needs to know with more certainty which, if any, of these height limits would impinge on the Cable Car viewshafts and we request further analysis be undertaken on this subject. This would not necessarily need to be modelled – we consider that some reasonably basic geometric calculations could give a reasonable assessment of the likelihood of intrusion into the viewshafts.

12. We direct that the Council response to our requests be in hand not later than Friday 18 August.

13. If any other party to the Viewshafts Chapter wishes to challenge Mr Winchester's reasoning on any aspect of his opinion, they can provide submissions within the same timescale, that is to say, not later than Friday 18 August 2023.

Trevor Robinson
Chair

For the Wellington City Proposed District Plan Hearings Panel
Dated: 28 July 2023

JAMES WINCHESTER
BARRISTER

27 July 2023

The Chair
Independent Hearing Panel
Wellington Proposed District Plan Hearings
c/- Wellington City Council
PO Box 2199
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For: Trevor Robinson

Proposed Wellington District Plan and Intensification Planning Instrument – Viewshaft Provisions

1. This advice relates to a request from the Independent Hearings Panel (**IHP**) conducting hearings on the Wellington City Proposed District Plan (**PDP**) and the Wellington City Intensification Planning Instrument (**IPI**) for advice on the correct interpretation and application of the provisions relating to viewshafts and the scope provided by submissions to amend those provisions.

Background issues and question to be addressed

2. Provisions have been included in the IPI/PDP regulating activities which affect identified viewshafts within Wellington City. The viewshafts provisions, being objectives, policies and rules, have been included in Part 2 – District-Wide Matters, while the specific viewshafts which have been identified for protection are recorded in Schedule 5 of Part 4 – Appendices, Design Guides and Schedules. There are also mapped overlays of most of the viewshafts in the planning maps.

3. An issue about the interpretation of the viewshafts provisions has arisen because Wellington City Council (**WCC**) has made a submission on the IPI/PDP seeking to clarify the application of the provisions. In turn, WCC officers in their reporting role under section 42A of the Resource Management Act 1991 (**RMA**) have recommended additional substantive changes to the viewshafts provisions, and further material changes are also advanced in the WCC right of reply. The IHP has formed a preliminary view that the changes recommended by WCC officers could raise difficulties in terms of the scope available from submissions to make such changes, and has sought advice on that issue.

4. In addition, the IHP has identified that it would be of assistance in addressing these issues to better understand the effect of the viewshafts provisions as notified, in order to determine whether any clarification is required. This advice addresses the correct interpretation and application of those provisions in the IPI/PDP as notified, as well as scope issues, and then considers the implications for the IHP's deliberations.

5. As a preliminary matter, I apologise for the length of this advice, which is largely due to the unexpected complexity of the issues and factual background.

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Summary of advice

6. Case law regarding the correct approach to interpretation of plan provisions is relatively well-settled. Nevertheless, the analysis is largely a factual exercise based on the relevant provisions being assessed, with the particular context deserving of significant weight.

7. In this instance, the factual context and background is complex, due to a range of factors. In particular, there are a number of material inconsistencies and discrepancies between the notified viewshaft provisions in the IPI/PDP when considered on their face, and what is set out in the WCC submission, WCC reports, advice and legal submissions.

8. There is also relevant case law on the viewshaft provisions in the operative Wellington City Plan (**ODP**) that provides guidance. There are however material differences between the ODP and IPI/PDP which likely means that the interpretation and application of the notified viewshafts provisions is different.

9. I am unclear whether WCC fully appreciated that what was notified in the IPI/PDP would have a substantially different legal effect to what was in the ODP. On the face of the issue, the viewshafts provisions as notified apply not only in the City Centre and Waterfront Zones (as is the case with the ODP), but also in multiple zones within the viewshaft overlays (except where expressly excluded). In addition, the activities regulated are, subject to some exclusions, wider than in the ODP, being any development of buildings and structures within a viewshaft.

10. The WCC section 32 report does not clearly identify that this is the effect of the viewshafts provisions as notified, meaning that the analysis in the WCC section 32 report has not accurately identified the full range of benefits and costs, nor correctly analysed the vertical alignment and regulatory effect of the provisions in the viewshafts chapter, as well as their relationship with descriptions in Schedule 5 and the overlays shown in the planning maps.

11. The contextual factors usually relied upon to resolve RMA planning uncertainties do not "pull in a consistent direction" and therefore offer little assistance in determining the correct interpretation of the provisions as notified. I consider that the IPI/PDP viewshafts provisions are relatively clear on their face. This in turn raises questions about whether some of the relief sought in the WCC submission is necessary. More importantly however, there is a live question as to whether the extent of clarification and amendment recommended in WCC's section 42A reports and written reply is within scope.

12. A related issue is whether the IHP will have sufficient evidence and advice before it to enable it to satisfy its own obligations in terms of section 32AA of the RMA. The content of the original WCC section 32 report also raises a risk that people would not have understood the application and effect of the viewshafts provisions as notified, which could create concerns for the IHP in terms of fairness and natural justice.

13. In general, looking at submissions on viewshafts provisions in a global sense, the scope available from those submissions to make significant changes is relatively confined. The WCC submission provides the broadest scope for relief, albeit that it is still quite limited in the changes that it seeks.

14. The WCC section 42A report, right of reply and final set of recommended provisions promotes substantial amendments to the viewshafts provisions. There is however a relatively limited

analysis of the basis for relief in the WCC material and its position on scope is very difficult to follow. While scope is fundamentally derived from relief sought in submissions, the WCC reports suggest a range of other ways for the IHP to justify making the changes sought, including clarification of errors, clarification of what the IPI was intended to say, reliance on expert statements of evidence, and use of the power in clause 16(2) of Schedule 1 to the RMA to make changes.

15. Even taking a relatively generous interpretation of scope, a comparison of the changes recommended by the WCC in its right of reply with the relief sought in relevant submissions suggests that many of the changes are beyond scope.

16. This creates two main issues for the IHP, being the reasonableness of exercising its powers to recommend out-of-scope changes to the IPI and whether the IHP has a satisfactory evidence base before it to support its recommendations, in terms of section 32AA of the RMA.

17. The IHP's discretion to make out-of-scope recommendations is not open-ended and should be exercised for the purpose of ensuring that the IPI appropriately addresses mandatory and relevant matters required by the ISPP process and provisions, and is within the ambit set by section 80E of the RMA.

18. In terms of section 32AA considerations, there now appears to be a substantial analysis before the IHP which is focused on and supports the suite of provisions which has been recommended by WCC. If there are areas where there are gaps, it would likely be open to the IHP to seek supplementary evidence or reports from WCC to address those.

19. A more difficult issue for the IHP is however likely to be the fairness and natural justice issues arising from the contents of the original WCC section 32 report and the substantial out-of-scope changes now being advanced by WCC officers. Both the number and extent of WCC officer changes which are out-of-scope would, on their face, create heightened natural justice and fairness issues if accepted by the IHP. It is important to observe that most of the problematic facts and circumstances are not of the IHP's making and arose prior to the IHP's appointment.

20. The IHP is required to observe fairness and natural justice considerations as an integral part of its IPI/PDP hearing process but, within the bounds of its powers and the extent of its delegation, must also follow the statutory process. Ultimately, WCC and the Minister for the Environment are the decision-makers and their decisions are potentially subject to judicial review. Nevertheless, the extent of out-of-scope recommendations that the IHP is being asked to make would likely raise genuine questions as to whether the IHP's exercise of discretion was reasonable in a public law sense.

21. The position that the IHP finds itself in is highly unfortunate and it is understandable that the IHP has concerns about the integrity of the process and the quality of the outcomes. Ultimately those concerns can and should be identified in the IHP's recommendation to WCC, and it will then be a matter for WCC and potentially the Minister for the Environment to address in terms of the specific IPI decision-making process under Schedule 1 to the RMA.

Case law on plan interpretation

22. There is a substantial body of case law that has developed under the RMA relating to the correct approach to interpretation of plans and provisions in plans. There are several formulations and a

number of variations in the way that the correct approach has been expressed, but the fundamental position which is common to all of the leading cases is now generally accepted.

23. A widely accepted statement is that, in construing the provisions of a plan, the plain, ordinary meaning of the words must, where possible, be applied, together with a purposive interpretation, having regard to the total context of the words and the purpose of the plan[1]. If there is conflict among the various objectives and values protected by a plan, that must be resolved by reading the plan as a whole and making a balanced decision as between the objectives, policies, and rules pertaining to those issues[2].

24. The process of ascertaining the meaning of legislation in the particular context of the RMA should also be undertaken in a manner that avoids absurdity or anomalous outcomes, is consistent with the expectations of property owners, and is consistent with the practical administration of the rule[3].

25. In some instances, the courts have ascertained the meaning of objectives and policies by referring to the explanation and reasons for the policy. There is however a need for caution in that explanatory statements do not override the wording of the objectives, policies and rules and need to be considered in the broader context of the plan[4].

26. Because the provisions of a plan under the RMA are delegated or secondary legislation, it is appropriate to apply the Legislation Act 2019. This position was confirmed by the Court of Appeal in the *Powell*[5] case, and has subsequently been identified by the Environment Court[6] as enabling the application of the following relevant factors:

    a. the text of the relevant provision in its immediate context;
    b. the purpose of the provision;
    c. the context and scheme of the plan and other indications in it;
    d. the history of the plan;
    e. the purpose and scheme of the RMA; and
    f. any other permissible guides to meaning.

27. In recent case[7] the Chief Environment Court Judge has sought to explain the position in a common-sense manner as follows:

> *The purposive light in which text is to be read and understood cannot be separated from it and so text and purpose must be comprehended together in a unified way rather than treated as dual requirements for a cross-check. Further, the current legislative requirement includes the context of the text, that is, what is with the text. In law, context is everything[8]. All three elements of meaning combine to promote a wholistic purposive approach to the interpretation of legislation.*

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1 *Queenstown Lakes DC v McAulay* [1997] NZRMA 178 (HC)
2 *Hoyle v Auckland CC* EnvC W053/97
3 *Nanden v Wellington CC* [2000] NZRMA 562 (HC)
4 *Waterfront Watch Inc v Wellington City Council* [2018] NZHC 3453
5 *Powell v Dunedin CC* [2004] 3 NZLR 721 (CA)
6 *Queenstown River Surfing Ltd v Central Otago DC* [2006] NZRMA 1 (EnvC)
7 *Auckland Council v Teddy and Friends Limited* [2022] NEnvC 128 at [27]
8 The quoted paragraph includes a footnote to the Privy Council case of *Maguire v Hastings DC* [2001] NZRMA 557 at [9]

28. The advice below will analyse the viewshafts provisions of the IPI/PDP with reference to this approach and having regard to relevant factors where appropriate. I will first consider the viewshafts provisions on their face, and then consider the assistance that broader contextual matters might offer including the history of the IPI/PDP, a comparison with the ODP, and the content of the WCC section 32 report.

Interpreting the notified IPI/PDP viewshafts provisions

29. The viewshafts provisions in the IPI/PDP comprise:

    a. a chapter of text including and Introduction, Objectives, Policies and Rules in the Historical and Cultural Values section of Part 2 – District-Wide Matters;
    b. Schedule 5 in Part 4 of the IPI/PDP - Appendices, Design Guides and Schedules, which includes both text and photographs identifying individual viewshafts and their features and characteristics; and
    c. viewshaft overlays in the planning maps of the IPI/PDP, which depict the viewpoints and the catchment/extent of the viewshafts.

30. Because the viewshafts provisions operate together, they should be considered holistically in terms of their meaning and effect.

Wording and approach of viewshafts chapter

31. The Introductory text identifies the purpose of the viewshafts provisions as being to identify and maintain significant views within Wellington City that contribute to its sense of place and identity. There are 18 views, and the text notes that the views are experienced from a range of positions, some of which may be in a different zone to their intended focal point. The three types of views identified are views from the City Centre, wide-angled views across the harbour from the Cable Car station viewing platform, and views of landmark buildings and places within the City Centre.

32. The views are in turn characterised as either contained views and vista views, with contained views being typically those experienced along a street that is vertically framed by buildings and terminating at an identified focal point. Vista views are more expansive, typically from elevated positions which establish the relationship of the City Centre with its wider landscape and harbour setting and reinforce the City Centre's identity and sense of place. The viewshafts provisions are intended to protect the identified views (in Schedule 5) to ensure that they are not compromised by future development.

33. Other potentially relevant plan provisions are identified in an inclusive manner, but attention is given to the relevance of the City Centre Zone and Waterfront Zone in particular. It is identified that resource consent may be required under the rules in the Viewshafts chapter as well as other chapters.

34. The two objectives are a purpose and outcome objective:

    a. View-O1: Views that contribute to the City's identity and sense of place, and that support an understanding of the City's topography and urban form, are recognised and maintained.
    b. View-O2: Views from public places to key City landmarks are recognised and maintained due to their regional, national and/or international significance.

35. The three policies are to *identify* important views (View-P1), *maintain* important views by restricting development that could affect these views (View-P2), and *avoid intrusions* into identified iconic and landmark views except in limited circumstances (View-P3). In that respect, the policies create a distinction between "local" and "iconic and landmark" viewshafts with identified iconic and landmark viewshafts regarded as being more important and warranting a higher level of regulation/protection.

36. The policy position is reflected in the rules, with View-R1 permitting verandahs subject to compliance with a Central City Zone standard. Rule View-R2.1 requires consent as a restricted discretionary activity for development that could affect local viewshafts identified in View-S1, and as a wholly discretionary activity in View-R2.2 for development intruding into iconic and landmark views. I note that the subject matter of rule View-R2 refers to "*construction of new buildings and structures, and alterations and additions to existing buildings, within a viewshaft*". The word intrusion is not defined in the IPI/PDP definitions in Part 1, and only appears to expressly apply to rule View-R2.2 in any event.

37. There are some express exclusions from the rules and standards, including buildings and structures within the coastal marine area, and land within the Commercial Port area of the Port Zone. The exclusions only appear to apply to local views identified in View-S1. Otherwise, there are no exclusions from intrusions into iconic and landmark views.

38. I consider that the language used in rule View-R2 for the type of activity that triggers the need for consent is significant in terms of coverage and effect of the viewshafts provisions, and I will return to this later in this advice.

Schedule 5

39. Schedule 5 identifies 18 important viewshafts. These are identified as being either of local significance or iconic and landmark significance, as discussed above for the purposes of the rules. Each viewshaft is identified with a photograph showing the edges and extent, and includes a description, the type of view it is, what its focal, context or continuum elements are, the viewpoint and a description of the margins of the view.

Viewshaft overlay – planning maps

40. The planning maps are in an electronic format, and the viewshaft overlays can be activated by clicking a map layer. Each of the viewshafts is activated and shown in two dimensions[9] as a triangular wedge extending from the viewpoint to an identified point where the map could imply that the viewshaft terminates. For example, VS13 from the Cable Car viewing platform to Matiu Somes Island and Mokopuna Island terminates at what appears to be a line running north-south through the centre of Matiu Somes Island (but excludes Mokopuna Island to the north, which the Schedule 5 description identifies as being part of the view). Interestingly, there is no representation at all of VS18 Cable Car Panoramic View on the planning maps overlay, which is not explained.

9 Akin to a bird's eye view from above

The context and scheme of the IPI/PDP

41. The IPI/PDP is organised and structured differently to the ODP, which came into effect in 2000. There has been significant change to and evolution of the RMA in the meantime, and the introduction of new national standards, policies, and new statutory processes has been influential in the approach to plan drafting. There is also a body of case law which has developed in more recent years which has placed greater weight on the role of plan provisions in providing certainty and direction in RMA decision-making, which has led to an increased focus on the accuracy and interpretation of language used in plan drafting.

42. In particular, the introduction of the National Planning Standards[10] (**Standards**) has had a structural and, in some instances, substantive impact on how RMA plans are required to be drafted. For the purposes of the IPI/PDP, the Standards direct the use of an overlay approach and method to address matters such as viewshafts (rather than their inclusion in underlying zone provisions), and this has been adopted by WCC in this instance.

43. In Part 1 of the IPI/PDP, there is a section entitled "How the Plan Works" which includes an explanation of the relationships between the spatial layers and methods that are used[11]. It includes this statement:

> *Overlays are applied to areas which have specific values or risks that need to be managed carefully. An overlay may apply across an area that also has a precinct. The rules that apply in overlay areas are in addition to those of the underlying zone or precinct rules in relation to the specific value or risk that is being managed. The Overlay Chapters only include rules for certain types of activities. If a proposed activity is within a particular overlay area or on land containing an identified feature, but there are no overlay rules that are applicable to your activity, then your activity can be treated as a permitted activity under the relevant Overlay Chapter, unless stated otherwise. However, resource consent may still be required under other Part 2: District-wide Matters chapters or Part 3: Area-Specific chapters (or both).*

44. The consequence of this approach is that viewshafts are included as District-Wide Matters in Part 2 of the IPI/PDP, under the Historical and Cultural Values tab.

Analysis of notified viewshafts provisions

45. As a preliminary comment, I consider that both the structural change (ie. to use the Overlay mechanism intended by the Standards) and the drafting approach for the viewshafts provisions in the IPI/PDP can be objectively interpreted as resulting in a materially different management approach compared to the ODP. In addition, for the reasons that I discuss below, it is likely that the IPI/PDP viewshafts provisions regulate a wider area and scope of activities compared to the ODP.

46. When considering the viewshafts provisions as a whole, there is a reasonably clear alignment between the objectives and policies with the rules in the viewshafts chapter (ie. the language) and the description of the viewshafts in Schedule 5. There is some mis-alignment between the language in the chapter, the viewshafts in Schedule 5 and the overlays shown in the planning maps, but I do not consider that this is significant enough to lead to a materially different interpretation of the viewshafts provisions as a whole.

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10 Promulgated under sections 58B – 58J of the RMA

11 See https://eplan.wellington.govt.nz/proposed/rules/0/169/0/0/0/32

47. The particular issues that I have identified are:

a. the likely geographical extent of the viewshafts provisions and their legal effect extends across multiple zones rather than just the City Centre and Waterfront Zones;
b. the practical effect of the viewshafts provisions might trigger the need for consents most often in the Central City, but that is not the actual legal effect of the provisions;
c. an interpretation that limited the regulatory effect of the viewshafts provisions only to development occurring in the Central City and Waterfront Zones might create risks that development or activities that impact viewshafts might not be captured;
d. the activities regulated by the proposed rules, on a plain and ordinary interpretation of the language, appear to be significantly broader than what was previously regulated by the viewshaft provisions in the ODP; and
e. the effect of the rules may impose an arguably significant additional regulatory burden compared to the ODP.

48. These issues and my conclusions are discussed in turn below.

Geographical extent of coverage of notified viewshafts provisions

49. In my opinion, it is clear from the context and scheme of the IPI/PDP that the viewshafts provisions are not intended to regulate activities in an identified zone or zones, but rather can span across and affect multiple zones depending upon their spatial extent and the triggers for consent in the rules. This follows, amongst other things, from the fact that the viewshaft provisions are now a District-Wide Matter and are therefore not limited or confined to specific zones, but rather operate as an overlay except where they have been specifically excluded. This is a material difference compared to the ODP, which expressly only applied to activities in the Central Area as the viewshafts controls were included in that chapter.

50. In some instances, the mapped overlays clearly show a viewshaft extending over Residential Zones, different types of Special Purpose Zones (Tertiary Education, Wellington Town Belt, Port and Waterfront), the Open Space Zone, the City Centre Zone, the Sport and Active Recreation Zone, and the coastal marine area[12]. While in most circumstances development or structures that could trigger the need for a viewshaft consent may not be feasible within some of the IPI/PDP zones identified above, that does not mean that the viewshafts provisions do not apply to those zones.

51. Although the viewshaft overlays are similarly represented on the planning maps in the IPI/PDP and ODP (being wedges from the viewpoint to an end point), the difference is that the IPI/PDP does not confine the application of the viewshafts provisions to specific zones whereas the ODP does expressly do so.

52. This approach appears to be a result of a structural change driven by the application of the Standards, but it also has had a legal consequence. There is no express limitation of the application of the provisions to the City Centre and Waterfront Zones as occurred in the ODP, albeit that these zones are an understandable area of focus.

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12 In the case of VS18, while it is not shown as an overlay on the planning maps, it could potentially cover additional zones to the ones identified.

53. The only express exclusions from the rules are verandahs in some discrete circumstances, buildings and structures within the coastal marine area, land within the Commercial Port area of the Port Zone, and cranes/elevators/lighting poles and cargo/passenger handling equipment. There is also an intention to exclude vegetation intrusions (expressed in an advice note). It appears however, from the structure of the rules as notified, that the exclusions in standard View-S1 only apply to views that are identified as *local views*. There are no exclusions from intrusions into iconic and landmark views, which apply to all "development".

54. None of the viewshaft descriptions in Schedule 5 identify an end point, and therefore there is some uncertainty as to the two and three dimensional extent of land and resources which are intended to be regulated by the viewshafts provisions, except for the express exclusions (which only apply to local views) and the fact that the IPI/PDP cannot regulate activities outside the boundaries of Wellington City.

55. In my view the uncertainty as to an end point is largely resolved by the extent of the overlays shown on the planning maps, which generally appear to show the viewshafts terminating at or near the focal elements of each view. As an example, if the viewshafts did not terminate in accordance with the mapped overlays, then in some circumstances considerably greater areas of land beyond the extent of the overlay could be subject to the provisions[13].

56. While the Introduction to the viewshafts chapter suggests a strong focus on the City Centre and Waterfront Zones, the viewshafts objectives, policies and the rules do not provide any clear statement of geographical limitation to specific zones (except for very discrete exclusions, as noted earlier).

57. The provisions (objectives, policies, rules, schedules, and planning maps), when read together, mean that they traverse a considerably greater number of zones. I also observe that the planning maps are usually the starting point for any examination of a planning document and, notwithstanding the need for close examination of words in the provisions themselves, these reveal the extent of the coverage of the viewshafts provisions. This is apparent when considering the viewshaft overlays on the planning maps of the IPI/PDP.

58. If the viewshafts provisions were interpreted as only applying to the City Centre and Waterfront Zones, there is a risk that the purpose of the viewshafts provisions could be compromised by not capturing developments that impact a viewshaft.

59. For example, particularly for viewshafts extending from the Cable Car viewing platform, there is a theoretical possibility that development in Residential, Tertiary Education, Town Belt, Open Space and Sport and Recreation Zones could be proposed within a viewshaft, but would not be captured by the provisions.

60. Having reached a conclusion on likely geographical extent of the viewshafts provisions, it is necessary to consider what activities are captured and would trigger the need for resource consents.

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13 For example, VS14 could extend to the Miramar Peninsula and VS15 could extend to a significant area of Roseneath beyond St. Gerard's. I note however that there is no mapped viewshaft for VS18 and therefore its geographical extent and end point is in my view highly uncertain.

Triggers for consent - rule interpretation issues

61. I do not have any comment on rule View-R1 relating to verandahs. It is Rule View-R2 that creates interpretation issues. Its approach to distinguishing between *local* and *iconic and landmark* views is intentional and has been well signalled. It does this by making development that could affect local views a restricted discretionary activity, and development intruding into iconic and landmark views wholly discretionary.

62. An interpretation issue arises due to the wording of View-R2 in terms of the activity that it captures and regulates. It expressly relates to construction of new buildings and structures, and alterations to existing buildings, *within* a viewshaft. In that respect, it does not rely only the language of intrusion, but rather appears to regulate any change within a view through construction of new buildings and structures, and alterations and additions to existing buildings[14]. Depending upon what is within an individual viewshaft (as shown in Schedule 5), this could cover quite significant areas of land and significant numbers of properties.

63. The language in Objectives View-O1 and O2 of the IPI/PDP provides little guidance as to what is intended to be regulated. It is the policies which provide greater clarity and direction about what appears to be intended by the viewshafts provisions. The first action is *identification* of important views through View-P1, which uses general language supporting the listing of identified views. The features that are the subject of the views are the harbour, hills and iconic and landmark features from public places.

64. The second goal is *maintaining* identified views in View-P2. This policy does not necessarily focus on intrusions in the same way that the relevant provisions in the ODP did, but rather uses more general language that suggests that both intrusions into the view and development within the view itself could be regulated. For example, the chapeau of View-P2 refers to "*maintain[ing] views ... by restricting development that could affect these views*". I consider that this language is reasonably open-ended about the coverage of the policy and the activities that it is intended to capture. It then identifies matters to have regard to when considering whether development could affect these views:

    a. *whether the development will positively frame the view horizontally or vertically* is not clear in its intended effect, but does suggest that it relates to activities around the margins of the view;
    b. *the extent to which the relationship between context and focal elements will be maintained* is again unclear, given that in some instances the context elements are very broadly described in Schedule 5;
    c. *whether the development will disrupt the view vertically or horizontally and whether this is of a minor nature* again uses general language applying to development and disruption of the view, noting that the view is the whole view[15] and what constitutes disruption is not clear nor defined, leaving uncertainty about what is intended;
    d. *whether the development will encroach on one or more of the view's focal elements and whether this is of a minor nature* uses different language of encroaching (albeit on an identified focal element), but is potentially subjective in terms of what level of encroachment is acceptable; and

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14 Not just an intrusion as interpreted by the Environment and High Courts in the *Waterfront Watch* cases, discussed later

15 Rather than the focal elements or context elements of a view

e. *the extent to which the development will remove existing intrusions or increase the quality of the view, particularly in relation to focal elements* does provide some direction but still suggests a need for assessment of any development within the view.

65. It is difficult to discern clear policy guidance about what View-P2 intends should be regulated. I consider that it more likely than not supports the interpretation that any development (construction of new buildings and structures, and alterations and additions to existing buildings) within a viewshaft triggers the need for resource consent.

66. This is because the only way that the matters in View-P2 can be resolved is through a case-by-case assessment of the relevant factors as to whether the intention of the policy[16] is achieved. In that respect, there appears to be a relationship between rule View-R2.1 and this policy, because the rule identifies the matters in View-P2 as the matters over which discretion is restricted.

67. The final policy goal is *avoiding intrusions into iconic and landmark views* in View-P3. Iconic and landmark views are those specifically identified in Schedule 5 and regulated under rule View-R2.2 as wholly discretionary activities. I note at this point that this part of the rule specifically refers to intrusions by development as triggering the rule. The policy uses strong and directive language which is to *avoid* intrusions into iconic and landmark views, unless any of the three factors or outcomes in the policy can be demonstrated. These are:

a. *the development will result in the removal of an existing intrusion or increase the quality of the view experienced*, the effect of which is partially dependent on what is meant by an intrusion but also applies generally to development; or
b. *the intrusion is of a minor nature and will not detract from the overall appreciation of the view*, is again dependent on what is meant by an intrusion; or
c. *in the case of verandahs, the intrusion will either be screened by another verandah or building element in the foreground or be contained within the outline of a building (that is not a context or focal element) in the background*, is a very specific factor that could potentially be capable of being objectively ascertained in terms of what activities might be intended to trigger the need for a resource consent.

68. It is arguable that the focus on intrusions in rule View-R2.2 suggests that it applies to a narrower band of activities and has a different focus compared to rule View-R2.1. Given however the avoidance goal of View-P3 and the use of a more stringent activity status in rule View-R2.2, it would seem to be anomalous to regard the policy as intending a narrower "entry point" for regulation than rule View-R2.1.

69. I consider that (subject to any express exclusions) the preferable interpretation of the provisions as notified is that the rule regulates any new building or structure or any alteration to an existing building or structure in all zones *within* any identified view up to its mapped end point.

70. In reaching this preferred interpretation, I accept that this would have a potentially far-reaching regulatory effect in terms of what activities and the extent of land that it might cover, and that this could be regarded as an anomalous outcome which may not be consistent with the expectations of landowners[17]. Nevertheless, if the Council's intention was for an interpretation

16 Which is *maintaining identified views*

17 Noting that the submission by David Walmsley interpreted the effect of the notified provisions as applying to residential zones, but regarded this as anomalous

that is different to what I have concluded, this would have been readily achievable through greater clarity of language and more precise drafting.

71. Given that the likely effect of the viewshafts provisions is materially different to the corresponding provisions in the ODP, it is worth considering the influence that other relevant and contextual factors could have on the interpretation of the provisions.

The history of the IPI/PDP, broader contextual matters, section 32 reports

72. The IPI/PDP is an entirely new RMA instrument and therefore its history is of little direct assistance in determining the meaning and effect of the viewshafts provisions. It is however useful (and relevant) to consider the difference between the approach in the IPI/PDP and the ODP. A number of the differences between these instruments have already been identified above.

73. In addition, consideration of relevant case law relating to the interpretation and application of the viewshafts provisions in the ODP, as well as the Council's section 32 report on viewshafts[18], could be of assistance.

74. Under the ODP, the viewshafts provisions are part of the Central Area chapter. As such they only apply to and regulate activities undertaken within the Central Area. A number of the viewshafts are common to both documents, including some viewshafts that have a viewpoint location outside the Central Area.

75. Unlike the IPI/PDP, there is no specific viewshaft rule in the ODP which triggers the need for resource consent to be sought, but rather it is a view protection standard[19] to be met in Chapter 13 of the ODP for buildings and structures. The standard simply provides that *"no building or structure shall intrude on any viewshaft as shown in Appendix 11"* (although limited exceptions are provided to that control).

76. The viewshaft provisions in the ODP have been the subject of judicial consideration in a case[20] involving the proposed development of a Chinese Garden in Frank Kitts Park on Wellington's waterfront. Both the Environment Court and High Court focused on the Central Area as being of primary relevance for the viewshafts provisions.

77. Both the Environment Court and High Court held that the viewshafts provisions protected the view *of* what is identified in the relevant viewshaft (ie. Franks Kitts Park), not the view of what is *in* the viewshaft (ie. the elements within Frank Kitts Park). It was held that the purpose of the viewshaft was to preserve the focal and contextual elements *of* the view from a specified place, so a proposal that did not intrude or impinge on the focal elements by blocking or restricting the view of Frank Kitts Park from the viewpoint was not the subject of the regulation. In other words, a change to the focal element of the view (ie. the Park) did not amount to an intrusion into the viewshaft.

78. As I have noted earlier, the notified IPI/PDP viewshafts provisions are not zone-specific nor geographically limited by the rules, and therefore differ from the ODP. In addition, the framing of

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18 See this link
19 Standard 13.6.3.3
20 *Waterfront Watch Inc v Wellington CC* [2018] NZEnvC 39 and on appeal to the High Court in [2018] NZHC 3453

the rules (as supported by objectives and policies) appears different in terms of the scope of activities which are regulated. Instead of regulating the view *of* what is identified in a viewshaft, the IPI/PDP appears to regulate the view of what is *in* the viewshaft and applies a trigger for consent of development within each viewshaft. Based on my earlier analysis, but for the WCC section 32 report which I discuss below, the only reasonable inference that is available is that the change between the ODP and IPI/PDP is conscious and deliberate.

79. One consequence of the apparently different approach to viewshafts in the IPI/PDP is that it is incumbent on WCC to clearly explain and justify the change from the status quo. In considering the section 32 report, as well as subsequent WCC reports and evidence, I do not consider that a clear explanation has been provided to date.

Section 32 report for IPI/PDP viewshafts

80. WCC's section 32 report is a permissible guide to meaning to the extent that it explains both the history for and context of the IPI/PDP viewshafts provisions, and usually also identifies what the WCC's intended regulatory effect and interpretation of those provisions is.

81. It is apparent that the section 32 report does not regard the IPI/PDP viewshafts approach as being significantly different in intention and effect from the comparable approach in the ODP. For example:

a. Section 1.1 states that 23[21] views traversing the City Centre and Waterfront Zones are covered by the overlay;
b. Section 2.0 identifies that the viewshafts section 32 report should be read in conjunction with the reports for the City Centre and Waterfront Zones;
c. Section 6.1 (scale and significance of the proposal) implies that there is little change, that the focus of the viewshafts provisions is on the City Centre Zone, that there is moderate change from the status quo mostly in respect of a need to ensure compliance with the Standards, and that the geographical scale of effects is primarily limited to the proposed City Centre, Waterfront, Port and Stadium Zones;
d. Section 6.1 states that the level of risk is low because the provisions have a limited geographical scale and application to a similar range of viewshafts to those currently identified in the operative plan;
e. Section 8.0 states that all viewshafts are contained within the City Centre and Special Purpose Waterfront Zone; and
f. Section 9.0 assessment of objectives identifies at page 28 under the "Reasonableness" criterion that the IPI/PDP proposal represents a moderate departure from the ODP but will be unlikely to generate significant additional compliance costs because the provisions apply to a relatively limited geographic area (ie. discrete parts of the City Centre and Waterfront Zones) and because there is a high level of certainty around the proposal.

82. A number of these statements and assessments are, in my view, incorrect or materially inaccurate when compared against the actual interpretation and effect of the notified viewshafts provisions. I note however that section 7.0 Overview of the Proposal *does* accurately and expressly identify the regulatory effect of the rules which is that they restrict the construction, alteration or addition or buildings and structures *within* the identified views. On its face, this description of regulatory seems to confirm a different approach than was held to apply under the ODP, but is

[21] There are in fact only 18 spatially defined views

itself inconsistent with other statements in the section 32 report. There is however no detailed section 32 analysis which confirms or otherwise addresses the intended effect of the rules either way.

83. Usually, the section 32 report would deserve considerable weight in resolving any interpretational uncertainties. In this instance however, there is such a significant disparity between what the section 32 report suggests and the results of an orthodox interpretation of the viewshafts provisions that it is difficult to give it any weight. In short, from an *interpretation perspective*, the section 32 report provides little to no assistance and in my view should be largely disregarded.

84. Assuming, however, that the section 32 evaluation represented WCC's intention, it appears that there is a significant mismatch between what WCC intended to achieve through the notification of the IPI/PDP viewshafts provisions and what their likely effect is when objectively interpreted having regard to applicable legal principles. Despite the relatively clear statements of intention in the WCC section 32 report, the viewshafts provisions on their face do not demonstrate the level of clarity nor certainty that has been asserted, compared to their likely actual effect.

85. Based on the WCC section 32 report, it might be considered that the actual application of the viewshafts provisions might lead to potentially anomalous consequences.

Problems created by WCC's section 32 report

86. One problem that the section 32 report creates is a potential fairness and natural justice issue, in that it is quite possible that submitters or potential submitters may have been misled by the section 32 report into thinking that the notified viewshafts provisions are effectively a continuation of the status quo, when in fact they are a relatively significant change in approach and regulatory effect. It is conceivable that, if the section 32 report was relied upon, people may have either decided not to submit or otherwise made a submission which sought relief on a materially uninformed or misguided basis.

87. Under an orthodox RMA process, there is often an opportunity to rectify such issues as the process develops, and the *de novo* consideration of appeals by the Environment Court can also cure procedural irregularities[22]. Because the viewshafts provisions are part of an IPI, there is less opportunity to address and resolve such issues, given that there is no right of appeal. WCC could potentially notify a variation[23] but the IHP cannot compel the WCC to undertake a variation. There are also considerable timing constraints on the IHP in terms of decision-making that would likely make this option unpalatable, even if WCC was inclined to pursue it.

88. It is possible that these problems could be at least partially addressed by the WCC's own submission on the viewshafts provisions, to the extent that it could seek changes or clarifications which align with or otherwise usefully clarify the notified provisions. A related issue is whether WCC's submission provides scope for the changes which are now sought. These matters are addressed below.

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22 Noting that section 32A(1) of the RMA provides that there are limited ways of challenging the adequacy of a section 32 assessment

23 Clause 97(b) of Schedule 1 to the RMA

Submissions on viewshafts

89. The WCC submission was one of 16 original submissions on viewshafts matters. There were 6 further submissions made. Having read the WCC submission[24], I make the following observations:

a. in general, the WCC submission seeks relatively confined changes to the viewshafts provisions which are in large part consistent with my interpretation of the legal effect of the provisions as notified;
b. a number of the WCC submission points would appear to seek to clarify or make the effect of the notified viewshafts provisions more explicit, rather than changing the interpretation and/or effect of the notified chapter;
c. the submission addresses certain limited identified errors (eg. mapping of overlays, incorrect cross-references[25]); and
d. where the Council submission seeks to materially change the effect of the notified provisions, in a number of instances, this would act to confine or reduce the regulatory effect of the notified provisions (eg. the triggers for consent are sought to be narrowed to align with the ODP language of "intrusions"[26], the application of rules to zones is sought to be clarified to be dependent on the type of the viewshafts/views with more extensive coverage for the viewshafts originating from the Cable Car viewing platform[27]).

90. I have also reviewed other submissions on the viewshafts provisions. It is readily apparent from the summary of submissions[28] that there are few substantive matters identified and/or relief sought in other submissions. Many of the submissions are in support of the provisions as notified, and it is the submission of WCC which seeks the broadest and most substantive relief.

91. There are some submissions which seek the addition/reinstatement of, or amendment to, individual viewshafts identified in Schedule 5, but these would have little bearing on the interpretation or regulatory effect of the viewshafts provisions. One submission[29] is notable for what it implies to be the effect of the provisions as notified, which is that six storey high-density residential buildings should be allowed in all of Kelburn (with a viewshaft protection from the top of the cable car). The WCC summary of relief sought in that the submission is that it "seeks that a viewshaft protection is *retained* from the top of the cable car" (my emphasis).

92. Another submission[30] on the mapping of the viewshaft overlays (and viewshaft 15 in particular) seeks removal of viewshafts from residential zones in the IPI/PDP because those zones were not subject to the viewshafts provisions in the ODP. This submission has clearly interpreted the notified viewshafts provisions as applying in zones other than the City Centre and Waterfront Zones and cites correspondence from WCC's section 42A reporting officer which indicates that

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24 See https://wellington.govt.nz/-/media/Your-council/plans-policies-and-bylaws/district-plan/Proposed-district-plan/Files/original-submissions/250-299/Submission-266-Wellington-City-Council.pdf
25 Submission points 6 and 74
26 Submission point 73
27 Submission points 27, 75 - 77
28 See https://wellington.govt.nz/your-council/plans-policies-and-bylaws/district-plan/proposed-district-plan/submissions-database/summary-of-submissions
29 See the submission of Jonathan Markwick
30 See the submission of David Walmsley

WCC would seek, through its own submission, to remove the effect of the viewshafts provisions from residential zones in the IPI/PDP[31].

93. In my opinion, it is apparent that the scope afforded to materially amend the notified viewshafts provisions is relatively limited. I will address the implications of this position below when addressing the recommendations in the WCC section 42A report, right of reply statement and legal submissions in reply.

94. I note in this regard that the IHP does of course have some discretion to make "out of scope" recommendations on relief, which I discussed in my earlier advice on allocation of submissions and topics between the IPI and PDP instruments. I have a reservation as to whether this discretion could or should reasonably be exercised to make changes to the viewshafts provisions to the extent recommended by the WCC reporting officer.

Scope to make changes recommended by WCC

95. I have considered the original WCC section 42A report, as well as the WCC right of reply report and legal submissions. The final recommended version of the viewshafts provisions is in Appendix 1 to WCC's right of reply report (**Appendix 1**), and colour codes the basis for different changes recommended based on which report or statement they were first identified in. There are numerous and, in some instances, significant recommended changes in Appendix 1, but the basis for the changes in *submissions* is not identified in that Appendix.

96. For that reason, and as a consequence of a lack of clarity in the WCC reports, the WCC position on scope is very difficult to follow. Scope is fundamentally derived from relief sought in submissions. Clarification of what the planning instrument should have said does not of itself provide scope for amendments, in the absence of a submission which seeks relevant relief. Nor is the fact that the instrument can be interpreted as already providing for a position a particularly sound basis for making changes to other provisions, in the absence of a submission which seeks relevant relief. Statements of evidence provided to the IHP do not provide independent scope for changes, unless that evidence supports the relief sought in a submission.

97. Clause 16(2) of Schedule 1 to the RMA appears to also be relied upon, but this is a distinct statutory power (subject to well-understood legal tests[32]) to be exercised by WCC and does not of itself relate to scope – indeed it is usually relied upon to change or correct a planning instrument where there is no scope available from submissions. It is not entirely clear but it is doubtful that the IHP has delegated authority or power to make clause 16(2) recommendations[33]. This may not be a significant issue given the IHP's discretion to make out of scope recommendations, which could potentially encompass neutral changes to rectify errors or make clarifications[34].

98. The WCC reporting officer states at paragraph 9 of her right of reply that she relies on paragraphs 6.1 to 6.12 of the legal submissions in reply for WCC as providing a scope foundation for her recommendations. The legal submissions in reply for WCC are however relatively general in

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31 If this correspondence is correct, then it seems to be inconsistent with the Council's own submission seeking a "new" specific control mapping layer on viewshafts 13-15 from the Cable Car viewing platform

32 The test for "minor effect" is whether the amendment affects the rights of some members of the public, or whether it is merely neutral. Only if it is neutral may such an amendment be made under clause 16: *Re an Application by Christchurch CC* (1996) 2 ELRNZ 431

33 See paragraphs 39 and 40 of my advice dated 8 March 2023 to the IHP on allocation of topics

34 Although see paragraph 17 of my 8 March 2023 advice as to the purpose of making recommendations on an IPI

nature and in part rely on the views expressed by the WCC reporting officer in her evidence as to the scope to make changes. The net effect is that there is little in the way of clear advice to the IHP in either document which identifies scope arising from submissions.

99. A legal submission has been made on behalf of WCC that my previous advice to the IHP suggested a broader than orthodox approach to scope is appropriate[35]. I am unsure what is intended by that suggestion, but I do not consider my previous advice advised that there need not be a basis for relief in a submission (rather it was directed to the question of whether there was a scope constraint based on whether submissions needed to be "on" the IPI or PDP respectively).

100. The WCC officer's right of reply deals with scope issues at paragraphs 9 to 15 and 99 to 106. The focus of the earlier paragraphs is on the geographical extent and effect of the viewshafts provisions extending to other zones beyond the City Centre and Waterfront Zones. This advice concludes that this is the effect of the notified provisions in any event. The second set of paragraphs relates to inclusion of a discrete viewshaft (viewshaft 21 from the ODP) and is not therefore of wider application.

101. Given this situation, is probably of greatest assistance for the IHP if I work through Appendix 1 and the various changes recommended, and then identify my view as to whether or not there is scope arising from submissions for the changes. This approach may assist the IHP in identifying whether out of scope recommendations might need to be considered.

Introduction to Viewshafts Chapter

102. The WCC submission expressly seeks relief, being an additional sentence added to the final paragraph of the Introduction, which clarifies that the rules apply in the Central City Zone, the Waterfront Zone and the Viewshaft Control Area on the planning maps, and only to development that impinges on the specific parameters of each view set out in Schedule 5[36].

103. This is the only submission that seeks relief in relation to the Introduction. The WCC submission also seeks changes to the Viewshafts chapter in Part 2 of the IPI/PDP, by making distinctions between the application of the rules so that Rule View-R1 (Verandahs) only applies in the Central City Zone, Rule View-R2 relating to local views only applies in the Central City and Waterfront Zones, and for Rule View-R3 relating to iconic and landmark views to apply in all zones covered by the mapped overlay. If that relief is accepted, it would arguably be within scope for the Introduction chapter to be changed to align with the rules.

104. WCC also made a general submission on mapping that the viewshafts need to be amended to provide clarity and certainty around the rule framework. The stated reason is to avoid impacts on the development potential of residentially zoned properties in the focal element of VS13-15 (ie. their ability to achieve MDRS)[37]. The relief sought is to amend the ePlan by adding a new specific control mapping layer 'Viewshaft Control Area' that dissects through TEDZ (Tertiary Education Zone), MRZ (Medium Density Residential Zone) and HRZ (High Density Residential Zone) properties under Viewshafts 13-15.

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35 Legal submissions on behalf of WCC Hearing Stream 3, 5 July 2023 at para 6.2 and associated footnote 3
36 Council submission point 266.89
37 Council submission point 266.37

105. WCC did not submit on Schedule 5, and the only material submissions on Schedule 5 that could have broader effect are those of Markwick and Walmsley. Considering this relief in a "global" sense, including potentially consequential relief:

a. First paragraph (red text) – probably beyond scope, except potentially as consequential relief from the WCC submission point on the Introduction and intended application of the rules only to development that impinges on the specific parameters of each view (albeit that this regulatory intention is ambiguous and was never made clear by any express relief sought for the rules, and therefore may not be reasonably foreseeable);
b. Second paragraph – first sentence is beyond scope, the remainder is likely beyond scope but is probably inoffensive as factual and contextual statements;
c. Third paragraph – the red text and bullet points identifying zones in which the provisions have effect are within scope, as this clarification of the actual effect of the provisions as notified was the subject of the WCC submission;
d. Fourth paragraph – new red text is within scope;
e. Fifth paragraph (green text) – out of scope, and advances a clarification of the rules and relative values of the different views (whilst possibly reasonable) that was not identified in any submission;
f. Sixth paragraph at top of page 2 – probably beyond scope as amendments not sought and there is no other submission seeking to clarify the identified types of viewshafts, albeit that it probably reflects the effect of the provisions as notified;
g. Seventh paragraph - probably beyond scope as amendments not sought and there is no other submission seeking to clarify the forms of views, albeit that it probably reflects the effect of the provisions as notified;
h. Eighth, ninth, tenth and eleventh paragraphs – probably beyond scope but are inoffensive and non-material changes;
i. Twelfth paragraph (including significant new purple text) – probably beyond scope, except potentially as consequential relief from the WCC submission point on the Introduction and intended application of the rules only to development that impinges on the specific parameters of each view (albeit that this regulatory intention is ambiguous and was never made clear by any express relief sought for the rules, and therefore may not be reasonably foreseeable); and
j. Final paragraph – largely within scope as a consequence of express relief sought by the WCC submission, but goes further than the relief sought by including clarification that is beyond scope (the words "but not to prevent changes to the views' (focal and context elements) themselves" are a material and unforeseeable change that does not reflect the effect and intent of the notified provisions).

Other relevant District Plan provisions

106. The deletion in red text is likely within scope as consequential relief based on the WCC submission points on the Introduction and mapping.

Viewshafts Objectives

107. The changes (green text) to View-O1 are beyond scope. It will be a question of judgment for the IHP as to whether they are considered useful to better describe the purpose and outcome of the viewshafts provisions, are neutral, and do not result in unfairness issues, so as to warrant an out-of-scope recommendation.

108. The changes to View-O2 are beyond scope, although might be considered to be of neutral effect given that they essentially describe the effect of the provisions as notified.

Viewshafts Policies

109. The changes to View-P1 are beyond scope but of neutral effect. The changes to View-P2 are also likely beyond scope, except potentially as consequential relief from the WCC submission point on the Introduction and intended application of the rules only to development that impinges on the specific parameters of each view (albeit that this regulatory intention is ambiguous and was never made clear by any express relief sought for the rules, and therefore may not be reasonably foreseeable).

110. I consider that the introduction of the language of "intrusion" is new in this Policy (and does not arise from any submission), and appears to be intended to limit the regulatory effect of the rules to be in line with the ODP case law. The changes could not be considered to be of neutral effect.

111. The changes to View-P3 are likely beyond scope, although could be of neutral effect when considering the policy in isolation. As noted above however, the general intention of the changes recommended by WCC appears to be to reduce the regulatory effect of the rules as notified to be more in line with the concept of intrusion considered in the *Waterfront Watch* case. As such, the changes to this policy should probably be considered in conjunction with the relevant rules.

Viewshafts Rules

112. The changes to Rule View-R1 are within scope as they are expressly identified in the WCC submission.

113. The changes proposed to Rule View-R2 are extensive. This needs to be seen against the context that there were no submissions which expressly sought substantive changes to the wording of Rule View-R2 as notified. It is however arguable that the clarification sought in the WCC submission of the effect of the notified provisions as applying to the zones under the mapped overlays, and the inclusion of a Viewshaft Protection Area provides a basis for the need to take a more zone-specific approach. This could enable the change to the wording in bold in the heading of Rule View-R2, which identifies the activities within the Viewshaft Overlay that trigger the rule.

114. The introduction of permitted standards for buildings in the medium and high density residential zones in Rule View-R2.1. and 2.2 could be seen as reasonably consequential on the Markwick submission, which also provides a foundation for the exception relating to properties in Kelburn under viewshafts 13 – 15. In my view, the wording of Rule View R2.4 is also foreseeable as a consequence of the changes to Rules View-R2.1. and 2.2. The inclusion of a new reference to Policy View-P1 as a matter of discretion in Rule View-2.4 is however beyond scope.

115. There is also an issue with Rule View-R2.3 in the WCC reply, which has been carried through from Rule View-R2.1 as notified. It is not related to scope but rather is a certainty and interpretation issue. The "entry" activity status in Rule-R2.3 is restricted discretionary, and that only applies where standard View-S1 is contravened, but it is unclear what is intended if View-S1 is not contravened.

116. This uncertainty is resolved by the WCC officer recommendations for permitted activity rules for the MRZ and HRZ in Rules View-R2.1 and 2.2. It is however possible for rule View-R2.3 that any

proposal that complies with View-S1 is innominate and may therefore need to be considered as a discretionary activity under section 87B(1)(b) of the RMA as a result.

117. That position would be anomalous and would appear to be inconsistent with the intention of the viewshafts provisions. My view is that the permissive presumption with regard to land use would apply to permit a use that is not prohibited or regulated by a rule. In that respect, I consider that the rule does not expressly require a resource consent to be obtained for the use when compliance with standard View-S1 *is* achieved. Nevertheless, the drafting and the uncertainty created is unhelpful.

118. Considering Rules View-2.5 and 2.6, for similar reasons as identified earlier, most of the changes would be consequential on the WCC submission seeking clarification of the application of the provisions within the Viewshaft Protection Area overlay. What is however beyond scope are the changes seeking to include Viewshafts 11 and 12, which essentially seek to re-classify the relevant views as iconic and landmark views. The WCC right of reply and legal submissions assert that the basis for this relief arises from the submissions of Juliet Broadmore and Kāinga Ora. In my opinion, neither of those submissions can reasonably be interpreted as providing a basis for the specific relief of re-classifying those viewshafts.

119. The changes to View-S1 are, with the exception of the correction of the cross-reference to CCZ-S7 for verandahs, all beyond scope. The majority of the changes are however relatively neutral and inoffensive, with the exception of the proposed changes to Viewshafts 11 and 12 (as identified above).

Definitions

120. All of the changes to relevant Definitions are beyond scope as such relief was never expressly nor implicitly sought in any submission. In addition, given the importance of definitions to the interpretation and application of the provisions, most of the changes and additions are material. The only new or changed definition that is potentially within scope is the Viewshaft Overlay definition, which is likely a consequence of the relief sought in the Council submission.

Consequences of conclusions on scope

121. If the scope for amendments is as limited as I have identified, this creates two issues for the IHP:

a. should the IHP make out-of-scope recommendations to rectify problems with the clarity and effect of the provisions, and would such recommendations be permissible in terms of section 80E of the RMA?
b. does the IHP have a satisfactory evidential base in terms of fulfilling its section 32AA RMA obligations?

122. As to the first issue, it will be a matter of judgment as to whether the IHP considers that out-of-scope recommendations are justified on the merits. Considering clause 99 of Schedule 1 to the RMA, the prerequisite for the IHP to make such recommendations would appear to have been satisfied in that they would relate to matters identified by the IHP or any other person during the hearing.

123. As I noted earlier in this advice and in my 8 March 2023 advice, the IHP's discretion is not open-ended and should be exercised for the purpose of ensuring that the IPI appropriately addresses mandatory and relevant matters required by the ISPP process and provisions, and is within the ambit set by section 80E of the RMA.

124. It appears, when considering the recommendations advanced by WCC, that there is a degree of tension between some of the recommendations. Some of the WCC officer recommendations seem to be focused on reducing the regulatory effect of the notified viewshafts provisions (ie. likely more enabling of the Medium Density Residential Standards and better giving effect to policies 3 and 4 of the NPS-UD) while in some instances the recommendations appear to seek to widen or expand the number and extent of qualifying matters relating to the viewshafts provisions.

125. While this might be considered to be an inconsistent approach, it does not mean that the WCC recommendations are necessarily beyond the ambit of section 80E of the RMA.

126. In terms of section 32AA considerations, there now appears to be a substantial analysis before the IHP which is focused on and supports the suite of provisions which has been recommended by WCC. If there are areas where there are gaps, it would likely be open to the IHP to seek supplementary evidence or reports from WCC to address those.

127. Obviously however, the underlying concern for the IHP is likely to be the fairness and natural justice issues arising from the contents of the original WCC section 32 report and the quite substantial out-of-scope changes now being advanced by WCC officers. While there is no right of appeal against the outcome of the IPI process, clause 108 of Schedule 1 to the RMA recognises that judicial review of IPI processes or decision-making remains an available option.

128. It is quite possible that members of the public or submitters might consider that the process and circumstances with regard to the viewshafts provisions is unfair or inconsistent with the principles of natural justice.

129. The IHP is required to observe fairness and natural justice considerations as an integral part of its IPI/PDP hearing process and, within the bounds of its powers and the extent of its delegation, must also follow the statutory process. Ultimately, WCC and the Minister for the Environment are the decision-makers and their decisions are potentially subject to judicial review. Nevertheless, the extent of out-of-scope recommendations that the IHP is being asked to make would likely raise genuine questions as to whether the IHP's exercise of discretion was reasonable in a public law sense, would could in turn give rise to judicial review risks for final decisions.

130. The position that the IHP finds itself in is highly unfortunate and it is understandable that the IHP has concerns about the integrity of the process and the quality of the outcomes. Ultimately those matters can and should be identified in the IHP's recommendation to WCC, and it will then be a matter for WCC and potentially the Minister for the Environment to address in terms of the specific IPI decision-making process under Schedule 1 to the RMA.

Summary of position

131. While the factual and legal situation concerning this advice is highly complex, I trust that the advice above has addressed the IHP's questions such that no further elaboration is required at this point.

132. If you require any further advice or clarification on this matter, please let me know.

Yours sincerely

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