

Under the Resource Management Act 1991

In the matter of hearings of submissions and further submissions on the Proposed Wellington City District Plan

By **The Trustees of the Eldin Family Trust**
Submitter

MEMORANDUM OF COUNSEL ON "VIEWSHAFT FOLLOW UP"
8 SEPTEMBER 2023

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MEMORANDUM OF COUNSEL — “VIEWSHAFT FOLLOW UP”

1. I refer to the Panel's Minute 28 dated 28 July 2023, which enclosed a letter of advice from Mr Winchester dated 27 July 2023.
2. The Trustees of the Eldin Family Trust are grateful for the opportunity and extended timeframe to provide a submission on these issues.
3. The Trustees' position in summary is as follows:
 - (a) The Trustees disagree with Mr Winchester's statement at paragraphs 54–55 of his advice that the viewshaft provisions as notified are geographically limited in their application to the extent of the viewshaft overlays shown on the planning maps. Such an interpretation is not consistent with the purpose of the viewshaft provisions as stated in the relevant objectives and policies and described in Schedule 5. In any event, the geographical scope of the notified provisions has a significant and undesirable level of ambiguity, which could not have been intended by the Council when it notified the viewshaft provisions.
 - (b) The Panel should recommend amendments to the viewshaft provisions, as promoted by the Council officer, to remove this ambiguity and bring the geographical scope of the provisions into alignment with their clear purpose and intent. If such amendments are out of scope, they should in any event be promoted under schedule 1, clause 99 of the Resource Management Act 1991 on the basis they are clarificatory in nature.
 - (c) In the unlikely event that, contrary to (a) and (b) above, the Panel were to conclude that it is not appropriate for it to recommend the clarificatory amendments that are promoted by the Council officer, it should indicate in its report that the notified viewshaft provisions contain material inconsistencies and discrepancies and are highly unsatisfactory. There would appear to be a strong justification for the Council to then take the opportunity to correct and re-notify the viewshaft provisions as a variation to the IPI in those circumstances.
4. I now explain each of points (a), (b) and (c) further.

(a) — Geographical application of the viewshaft provisions as notified

5. The first substantive issue that Mr Winchester addresses is the interpretation of the viewshaft provisions as notified. I agree with his approach of taking a “purposive interpretation having regard to the total context of the words and the purpose of the plan.”¹
6. At paragraph 54 of his advice, Mr Winchester explains that none of the viewshaft descriptions in Schedule 5 identifies an end point, and that there is “some uncertainty” as to the two- and three-dimensional extent of land and resources which are intended to be regulated by the viewshaft provisions. He recommends resolving that uncertainty by reference solely to 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.
7. This approach to resolving the uncertain geographical scope fails to give sufficient weight to the purpose of the viewshaft provisions. This is because confining the application of the viewshaft provisions to the mapped overlay extent would mean that the provisions:
 - (a) Fail to meet the objective of VIEW-O2 of recognising and maintaining views from public places to key City landmarks, such as the views of the Beehive and Parliament Buildings against the backdrop of Te Ahumairangi Hill (Viewshafts VS1 and VS4); and
 - (b) Fail to promote policy VIEW-P2, which is to “maintain views ... by restricting development that could affect these views, having regard to ... the extent to which the relationship between context and focal elements will be maintained”. Again, taking VS1 and VS4 as examples, the provisions would not protect the relationship between the focal elements of the Beehive and Parliament Buildings and the context element of Te Ahumairangi Hill.
8. Mr Winchester's narrow focus on the mapped viewshaft overlays also fails to reconcile the language used in the notified viewshaft provisions.
9. The Introduction to the viewshafts chapter in the notified plan stated that “Views, including associated focal and context elements, that are the

¹ Mr Winchester's advice at paragraph 23.

subject of this overlay are identified in Schedule 5". Schedule 5 was in turn labelled "SCHED5 – Viewshafts". This suggested that the extent of the views or viewshafts was to be defined by the technical descriptions in Schedule 5, which include a statement about the location, margins and base of each viewshaft. There was no statement in the notified plan to alert readers that the mapping contained a separate Viewshaft Overlay that would also be relevant to understanding the intended spatial extent and application of the provisions. There was no definition of the term "Viewshaft Overlay".

10. The rules and standards as notified did not refer to the Viewshafts Overlays as defining or limiting their spatial coverage. Instead, they refer to certain activities "within a viewshaft". They do not refer to activities "within a Viewshaft Overlay". Further, VIEW-R2 and VIEW-S2 refer to the views "identified in Schedule 5", which indicates Schedule 5 gives definition of where those provisions apply.
11. The Trustees understanding, when they lodged their initial submission in September 2022, was that the viewshaft provisions provided protection to context elements such as (for VS1 and VS4) Te Ahumairangi Hill as the backdrop to views of the Beehive and Parliament Buildings. On that assumption, they supported the descriptions of those viewshafts and proposed amendments to place greater recognition on the contributing role of Te Ahumairangi Hill. They also identified a concern that six to nine storey structures in Selwyn Terrace and adjoining streets would almost inevitably clash with the viewshafts.
12. The premise of the Trustees' submission was a (correct) purposive interpretation of the viewshaft provisions, namely that they protect against intrusions into views of focal *and* context elements as defined in Schedule 5.
13. The Trustees therefore consider that Mr Winchester has erred in his interpretation of the viewshaft provisions by failing to give sufficient weight to the purpose of the viewshaft provisions, in particular with regard to VS1 and VS4.
14. At the very least, Mr Winchester's advice highlights that the notified viewshafts provisions contain material inconsistencies, discrepancies and

misaligned language, as he acknowledges.² That is not an outcome which the Council could have intended.

(b) — Clarificatory amendments are required

15. To give clearer effect the Council's intentions, the Council officer's right of reply report dated 5 July 2023 understandably and sensibly recommends amendments to the viewshafts chapter, Schedule 5 and the viewshaft overlay mapping.
16. The Trustees support those amendments to the extent that they clarify the intent for VS1 and VS4 to apply in the geographical area between the Beehive and Parliament Buildings and Te Ahumairangi Hill.
17. Scope to make those amendments is provided by the Trustees' submission point 287.7. This submission point was that:³
 - (a) Construction of new six to nine storey structures in Selwyn Terrace and nearby areas of Hill Street and Guildford Terrace would almost inevitably clash with the viewshafts;
 - (b) This clash should be resolved at this stage rather than left to future resource consent processes; and
 - (c) The obvious resolution of the clash is to prioritise the viewshafts by adjusting the minimum and maximum height controls in Selwyn Terrace.
18. This submission point did not explicitly seek the amendments to the viewshafts chapter now promoted by the Council officer and supported by the Trustees. However, those amendments would have materially similar effect to the relief sought by the Trustees in their original submission.
19. If, however, the Council officer's proposed amendments are considered to be out of scope, then they should nonetheless be promoted by the Panel for the following reasons:

² Mr Winchester's advice at paragraph 7 and 46.

³ [Eldin Family Trust Submission 287](#) at paragraph 6.5–6.8 and 6.11 and 11.1(c).

- (a) Such amendments are clarificatory in nature and/or are necessary to rectify obvious errors in the notified plan.⁴
- (b) The amendments are consistent with the clear premise of the Trustees' original submission that the viewshafts would protect views towards Te Ahumairangi Hill as the backdrop to the Beehive and Parliament Buildings.
- (c) The amendments, insofar as they touch upon Selwyn Terrace and adjoining streets, are consistent with the Trustees' primary submission seeking adjustments to the height controls in Selwyn Terrace to remove a clash between the minimum height controls and the viewshafts.
- (d) The Trustees' submission is supported by a number of residents of Selwyn Terrace and neighbouring streets, which indicates that any greater regulatory burden that is imposed has been understood and endorsed by affected people.⁵
- (e) The Trustees' submission in hearing stream 3 was supported by Parliamentary Services.⁶ Parliamentary Services has also reviewed this memorandum in draft and has asked me to convey their continued support for the Trustees' position.

(c) — Alternative position is highly unsatisfactory

- 20. If, contrary to sections (a) and (b) of this memorandum, the Panel were to conclude that the proposed amendments to the viewshaft chapter are out of scope and was not inclined to make out-of-scope recommendations, then it would follow that you would need to reject many of the understandable and sensible changes proposed by the Council officer's right of reply report in accordance with the Council's intentions.
- 21. The fact that this would create a highly unsatisfactory situation not only reinforces my submissions in sections (a) and (b) above, but also means that the Panel would then be recommending the adoption of provisions that it

⁴ [Right of reply of Anna Stevens dated 5 July 2023](#) at paragraph 90.

⁵ [Eldin Family Trust Submission 287](#) at paragraph 11.4.

⁶ [Speaking notes of David Wills](#) at paragraph 1.7.

knows contains material inconsistencies, misaligned language and discrepancies, and in circumstances where the section 32 report was deficient.

22. I note Mr Winchester's view that the Panel should identify any concerns about the integrity of the process and the quality of the outcomes. I agree with him that, if contrary to sections (a) and (b) of this memorandum, the Panel were to conclude that its 'hands are tied' by a lack of scope, then your report should explain the unsatisfactory nature of that position.
23. Were the Council to receive such a report, it would have a strong justification to seek to correct and re-notify the viewshafts chapter and associated provisions as a variation to the IPI. Such a variation could be processed relatively efficiently if it has a narrow focus on the technical and complex viewshafts provisions.



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8 September 2023