

**Before Independent Hearing Commissioners
Wellington City Council**

**I Mua Ngā Kaikōmihana Whakawā Motuhake
Te Kaunihera o Pōneke**

In the matter of **The Wellington City Proposed District
Plan**

**Legal submissions on behalf of
Wellington City Council
Hearing Stream 3**

5 July 2023



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Legal submissions on behalf of Wellington City Council

Hearing Stream 3

1 Matters addressed

1.1 The Panel has invited responses to the following questions:

- (a) Can Counsel provide an update on the timeframe for the hearing of the appeal of the Environment Court's decision in the Waikanae Land litigation?
- (b) What matters in Hearing Streams 1-3 should be considered ultra vires if the reasoning of the Environment Court's decision in the Waikanae land litigation applies?
- (c) Can Counsel provide authority to support the proposition advanced in legal submissions that the Hearing Panel is not bound by the Environment Court's decisions?
- (d) Does the Hearing Panel need to make findings on Dr Kahn's allegation of discriminatory conduct under the Human Rights Act?
- (e) Is Counsel satisfied the Council's classification of provisions related to total demolition of heritage buildings (HH-P10 and 16, HH-R9 and 16) as IPI matters is intra vires (noting that Hutt City Council has received legal advice to the contrary in relation to its IPI Plan Change), and if so, why is that the case?
- (f) In relation to viewpoint scope issues:
 - (i) Is there scope to alter the right hand side of viewshaft 8 in the manner proposed?
 - (ii) Is there scope to apply viewshafts outside the Central City Zone and Waterfront Zone generally, and to the extent proposed (especially with respect to the potential effect on 1 Carlton-Gore Road)—or more specifically:
 - (A) Would a reader of the notified Plan have reasonably understood it had that effect?

(B) If not, do the submissions of the Council, or Eldin Trust (or any other submitter) provide scope to amend the PDP in the manner recommended?

(iii) If the answer to the first two questions is 'no', is this an appropriate case to exercise the Panel's jurisdiction to recommend 'out of scope' relief given the number of properties that would encompass?

(g) Is there scope to alter the categorisation of viewshafts 11 and 12?

2 *Waikanae Land Development Company v Kāpiti Coast District Council*

Update on timing

2.1 I am advised that this matter still does not have a hearing date allocated by the High Court.

If correctly decided, what matters would be ultra vires?

2.2 I have considered whether it is possible to list provisions that, adopting the reasoning of the Court in *Waikanae Land Development Company*, would be ultra vires. However, because of the reasons expressed in the next section, specifically that Environment Court decisions are particular to their facts and the planning framework in issue, it is difficult to draw clear conclusions about what provisions of the Council's IPI may be ultra vires. Complicating matters is the fact that it depends on how the Environment Court's *ratio decidendi* is framed. The exercise of trying to address this question has reinforced my belief that the decision is wrongly decided.

2.3 If the ratio is that it was not permissible to include a new wāhi tapu site in the IPI at all, that would affect all proposed new listings of heritage items, new character precincts, or any matter not already addressed in the ODP that relied on policy 4 to impact the otherwise presumptive application of policy 3 or the MDRS.¹ But even if so, that would not necessarily preclude the Council from including related provisions, such as demolition

¹ Of course, this just goes to show how wrong the decision is, since if reliance on qualifying matters in areas or sites of new heritage listings was not possible then there would be no logical justification for the inclusion of s 77K in the legislation.

controls for heritage buildings, to the extent that such provisions applied to existing heritage buildings listed in the ODP.

- 2.4 Alternatively, if the ratio is that KCDC was not permitted to include in its IPI rules controlling, for example, fencing other than on the perimeter of a site, on the basis that such rules were not sufficiently supportive of or consequential on the MDRS, then there appears to be a mismatch between the reasoning of the Court and the relief granted. Regardless, that would not necessarily mean that similar related provisions within the Council's IPI (ie, Wellington City Council's IPI) were not sufficiently supportive or consequential on the MDRS or policy 3. That would depend on how those objectives, rules or policies were framed, and might require a close comparison with the equivalent provisions in the KCDC IPI. As the specific KCDC IPI provisions in question are not stated in the judgment, it is impossible to make that comparison without some guesswork.
- 2.5 Even adopting the reasoning of the Court in *Waikanae Land Development Company*, the Council does not therefore accept that provisions included in the IPI as related provisions (as set out in Mr McCutcheon's "Officer response to memorandums on allocation of topics to the ISPP") are ultra vires.
- 2.6 If the Panel would like the Council to prepare a list of the provisions it considers could be ultra vires it would be helpful for the Panel to provide some guidance as to its interpretation of the ratio of the *Waikanae Land Development Company* case, and an indication of whether it intends to take the same approach.

3 Authority on the Hearings Panel being bound by the Environment Court

- 3.1 As I submitted at the hearing, the Panel is not bound by a decision of the Environment Court. The authors of *Environmental and Resource Management Law* state:²

Applying [the doctrine of precedent], a decision of the Environment Court does not bind another constituted Environment Court, and technically the same court is not required to come to the same conclusion on similar facts. ...

² Nolan KC (ed) *Environmental and Resource Management Law* (7ed 2020) at [1.19].

As a matter of strict legal principle, a decision of the Environment Court can only bind the parties and the local authority in respect of a particular case. But in practice, certain decisions of the Environment Court may well form clear guidelines and standards which are likely to be followed by local authorities and other judges, unless distinguished or found to be not applicable in the factual circumstances.

3.2 Accordingly the decision of the Environment Court in *Waikanae Land Development Company* is binding on KCDC until such time as it is successfully appealed, but not binding on other councils because, as noted in the Council's submissions, it relates to entirely different provisions and aspects of the KCDC IPI which are not included in the Wellington City Council's IPI.

3.3 It is of course nonetheless of persuasive value.

4 Findings about discriminatory conduct under the Human Rights Act

4.1 I have approached this question not as one of jurisdiction, but to identify whether there is any mandatory requirement for the Panel to make findings. This is because it is plain to me that even if jurisdiction exists (which is not accepted), it is not appropriate for the Panel to exercise that jurisdiction.

4.2 For the reasons I explain, there is no requirement, and in my submission the Panel should decline, to make findings on the allegation of discriminatory conduct under the Human Rights Act 1993 made by Ms Kahn.

4.3 I understand that Ms Kahn has complained to the Human Rights Commission that the Council's proposal that the Kahn House be listed as a heritage building discriminates against her on the grounds of race, ethnic or national origins, or religious belief under the Human Rights Act. I have not seen the actual complaint, only the letter from the Human Rights Commission provided by Ms Kahn.

4.4 The Human Rights Act provides for resolution of disputes of this nature through voluntary mediation followed by civil proceedings through the Human Rights Review Tribunal. The Human Rights Review Tribunal has jurisdiction to enquire into and make findings about whether a particular practice is discriminatory on a prohibited ground. The existence of the complaint makes it undesirable that the Independent Hearings Panel

makes such findings due to the risk of inconsistent conclusions (let alone the lack of necessary information before you on which to make such findings).

- 4.5 The proposed heritage listing relates to the s 6(f) exhortation to recognise and provide for the protection of historic heritage from inappropriate subdivision, use, and development. The heritage evaluation suggests that its heritage value lies in its association with the important historical themes of European pre-WWII refugee émigrés and its contribution to an understanding and appreciation of International Modern Movement principles applied to a New Zealand setting.
- 4.6 Under s 32 the Panel is required to consider the costs and benefits of the proposed listing, including its effect on the current owner. This does not *require* the Panel to make a finding on whether the proposed listing is discriminatory.
- 4.7 Likewise, none of the clauses governing the Independent Hearings Panel's powers (cls 96-100) of Schedule 1 *require* the Panel to make findings on each and every point made by a submission.
- 4.8 Because the Panel is not well placed in an informational or expertise sense to make findings, and there is a suitable alternative avenue for Ms Kahn's complaint, and because of the risk of inconsistent approaches, it would not be appropriate for the Panel to make such findings.

5 Are provisions about demolition of heritage buildings correctly in the IPI?

- 5.1 Yes. This matter is similar to the position taken by the Council in relation to demolition of buildings in character precincts. In that regard Mr McCutcheon explained the Council's position in his HS1 "Officer response to memorandums on allocation of topics to the ISPP" at [43]-[50].
- 5.2 Section 80E(1)(b) permits the inclusion of related provisions that support or are consequential on the MDRS or policies 3 or 4. Provisions controlling demolition of heritage buildings support provisions giving effect to policy 4 by protecting historic heritage (s 6(f)). Without such controls in the IPI there would be a risk that reliance on policy 4 to protect heritage would be undermined.

6 Viewshafts

- 6.1 The following questions focus on whether there is scope to make amendments proposed in the s 42A report.
- 6.2 Given that the orthodox test for whether a change is scope of submission made on a proposed plan was addressed in HS1 (in relation to whether it, or a different test applied to submissions made in the ISPP), I have assumed that the Panel is familiar with the test.³ I can provide a more detailed summary if the Panel would like it, perhaps in the ISPP wrap up hearing.
- 6.3 Ms Stevens has provided a thorough assessment of the submissions that provide scope in an orthodox sense in her reply evidence. I will not seek to repeat that assessment at length and focus below on the key legal aspects. I note that even if the Panel is not satisfied that there is scope for a particular change, the ISPP provides, in clause 99 of sch 1, a power for the Panel to make recommendations that are not within scope (though they must be related to a matter identified by the Panel or any other person during the hearing).
- 6.4 I note that when exercising this discretion whether to make such a recommendation or not, a key consideration for the Panel will be the purpose of the ISPP, which is to enable the Council to give effect to the NPS-UD through its district plan, including particularly the directive policies 3 and 4.

Scope to alter viewshaft 8

- 6.5 As noted by Ms Stevens, this proposed change reflects a number of submissions. I would go further and say that this change is authorised by the power in cl 16(2) to correct minor errors. As I read it, the change is necessary to ensure that the mapped extent of the viewshaft is consistent with the description of the viewshaft in Schedule 5 of the plan and the photo depicting it.

³ I note that in his advice to the Panel dated 8 March 2023, Mr Winchester considers that a broader approach than the orthodox one is appropriate: at [74].

Scope to apply viewshafts outside Central City and Waterfront Zones

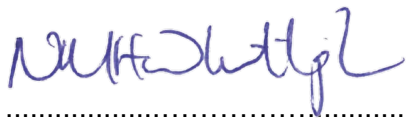
- 6.6 I consider there is scope to confirm that the viewshafts apply outside of the City Centre and Waterfront zones.
- 6.7 To the extent that it was not clear that the viewshaft overlay was intended to apply outside those two zones in particular there are three important matters of context:
- (a) The plan did not display rule boxes identifying the zones in which the overlays applied. This was an error in complying with the National Planning Standards, and so has rightly been corrected.
 - (b) Regardless, the overlay mapping depicts the overlays reaching into residential areas (eg, Roseneath, Mt Victoria).
 - (c) Viewshafts in the operative district plan apply in residential zones, so the position is no different from the current situation.
- 6.8 As to whether a reader of the plan would have appreciated that viewshafts applied in zones other than the CCZ and WFZ, that depends on how much of the plan they read. Schedule 5 does not purport to state which zones they apply in explicitly and does specifically refer to focal and context elements in other zones. Nonetheless, a person who limited themselves to reading Schedule 5 may not have appreciated that it applied in residential zones.
- 6.9 However, plans are interpreted holistically, so the approach to be taken is not to make an assessment based on a person who read Schedule 5 but failed to look at the overlay maps which depict the viewshafts extending into other residential areas – including variously the HRZ, Tertiary Education Zone, and Open Space Zone. See in particular viewshafts 13 and 15.
- 6.10 To some extent, this situation is the reverse of the one just addressed for Viewshaft 8, in that it seeks to ensure that the wording of the plan is consistent with the mapping. While arguably cl 16(2) therefore applies, I nonetheless also agree with Ms Stevens that the submissions of the Eldin Family Trust and the Council provide scope to make the change.

6.11 And of course even if that is not accepted, there is the cl 99 power to make out-of-scope recommendations and this would be an appropriate matter to apply that power.

Scope to alter categorisation of viewshafts 11 and 12

6.12 I consider there is scope to alter the categorisation of viewshafts 11 and 12 through the submissions of Kāinga Ora and Juliet Broadmore, as explained by Ms Stevens.

Date: 5 July 2023



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Nick Whittington
Counsel for the Wellington City Council