

**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**

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## **Further submissions (Viewshafts)**

**14 September 2023**

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# Further submissions (Viewshafts)

## 1 Matters addressed

- 1.1 This memorandum provides additional legal response on issues raised about viewshafts in Minute 28. In particular:
- (a) The status of viewshaft 18;
  - (b) VIEW-R2 and the prospect of an innominate activities;
  - (c) Scope of submissions and use of cl 99 out-of-scope-recommendations.

## 2 Viewshaft 18

- 2.1 In light of the position taken by Ms Stevens in her further evidence, subject to the Panel's recommendations, this matter may no longer be live.
- 2.2 Ms Stevens has identified that the inclusion of the panoramic view, Viewshaft 18, appears to have been inadvertent. As conceived of in the ODP, it sought to ensure consideration during the resource consent process of the impact of over-height buildings on the depicted panorama. That is not feasible in the PDP assuming there is no height limit in the CCZ, as there will be no hook on which to hang a consent requirement. Perhaps more fundamentally, it would be at odds with the direction of the NPS-UD and the significance placed in that document on maximising the benefits of intensification in the CCZ.
- 2.3 In my submission, the most appropriate course is to recommend its deletion from the plan.

## 3 VIEW-R2

- 3.1 I agree with Mr Winchester that, in the absence of an express permitted activity rule, the permissive presumption regarding land use would apply where compliance with VIEW-S1 is achieved. Nonetheless, it is better for clarity and certainty that this be expressly provided as a permitted activity rule.

#### **4 Scope and clause 99 out-of-scope recommendations**

- 4.1 I agree with Mr Winchester about the correct approach to plan interpretation. However, undertaking that process, I am satisfied despite some of the wrinkles that the intent of the notified version of the plan was clear, and that the viewshafts applied in a number of zones, and not only in the CCZ and WFZ. This is because:
- (a) As Mr Winchester notes at [56], the rules do not provide a clear statement of geographical limitation. But it is nowhere said that application is limited to the CCZ and WFZ, and so reading the policies and rules with the mapped and imaged geographic extents (which clearly cover at least the Residential, Tertiary Education, Town Belt, Open Space, and Sport and Recreation Zones) leads to a clear conclusion that they are not so geographically limited.
  - (b) The main reason to think that it might be so limited is because that is how it is approached in the ODP, but the s 32 report records that the PDP involved a “moderate departure” from the ODP approach.<sup>1</sup> As well, this was not a circumscribed plan change but the notification of an entirely new plan (in two instruments), which makes reference to the ODP an unusual interpretive step.
  - (c) While the National Planning Standards may have been the prompt to include viewshaft provisions in a standalone chapter instead of being included in a zone chapter, that does not mean that plan readers should discount that change as significant to the interpretation.
  - (d) As Ms Stevens notes, a number of submitters plainly (and in my view correctly) interpreted it that way.
- 4.2 Accordingly, albeit for slightly different reasons, I agree with Mr Ballinger’s conclusion on that point.
- 4.3 There were undoubtedly elements of the application of the rules that were unclear. Notably, for example, at the time of the s 32 report, Council officers had not appreciated that the application of the viewshaft provisions in residential zones could engage the need to establish a

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<sup>1</sup> Section 32 Report: Viewshafts, p 20.

qualifying matter. However, there is now a package of proposed amendments that, in my submission, meet the requisite plan-making tests.

- 4.4 That leads to the question of out-of-scope amendments. I have worked through the different issues raised in Mr Winchester's memorandum with Ms Stevens and agree with the positions taken in her further evidence as to which amendments are within the scope of submissions, and those that are not.
- 4.5 Mr Winchester questions whether using clause 99 for the number of proposed out-of-scope amendments raises an issue as to reasonableness in judicial review terms. I agree that:
- (a) Whether an out-of-scope recommendation is justified is a matter of judgement for the IHP.
  - (b) The prerequisite, that the matter is one identified by the IHP or any person during the hearing, is satisfied.
  - (c) The exercise of the IHP's discretion must take into account ensuring the IPI addresses mandatory and relevant matters required by the ISPP and is within the ambit set by s 80E.
  - (d) Fairness and natural justice are relevant considerations.
- 4.6 I also agree that the issue is not one of the IHP's making, but I do not see what relevance that has to the exercise of the discretion. In my view it is irrelevant.
- 4.7 However, I would add to the list of considerations:
- (a) whether the exercise of discretion advances the implementation of the NPS-UD, and Part 2 of the RMA. This includes considering the effect of not making an out-of-scope recommendation, especially where not exercising the discretion could result in a period of inadequate regulation of the matter, and thereby not sustainably managing natural and physical resources.
  - (b) That at least part of the reason for the existence of the power to provide out-of-scope recommendations is that councils were being asked to produce IPIs in very quick time, and given the nature of integrated plans, series (plural) of consequential changes were

likely to be necessary that may not have been within the scope of submissions that were equally having to be produced in very quick time. This has been borne out in the Viewshafts chapter where making amendments to fix identified problems has begat multiple additional amendments.

4.8 I do not share Mr Winchester's concerns about the number of changes:

- (a) In my view, the changes should not be addressed as a package, but individually, and the High Court is not likely to take a numerical approach and conclude, say, that 17 changes would have been fine but 18 is too many.
- (b) Reinforcing this, the justifications are different for different changes, and so it may be that all, or some, may be recommended.
- (c) I consider that the natural justice and fairness concerns can be overstated. Natural justice is a flexible doctrine and the very existence of the power suggests that Parliament was prepared to subordinate natural justice to appropriate implementation of the NPS-UD. Process should not trump substance if the Panel is otherwise satisfied of the substance.
- (d) If the outcome of not recommending an out-of-scope recommendation(s) is inadequate protection of viewshafts or undue limitation of development capacity, that would be a greater evil.

Date: 14 September 2023



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Nick Whittington  
Counsel for the Wellington City Council