Further memorandum for the Wellington Company Limited in response to Minutes 1 and 3

Applicant:	**The Wellington Company Limited**
Location:	**232, 264, 270 and 276 Shelly Bay Road**
Application Number:	**Service request 368659**
Date:	**7 June 2019**

1. This memorandum is filed on behalf of the Wellington Company Limited (the **applicant**).

2. On 31 May 2019, the applicant provided an initial response to the Commissioners' Minutes 1 and 3 of 24 May 2019 and 30 May 2019, respectively, but indicated that a more substantive response would be filed by 7 June 2019. This memorandum contains that response.

HEARING

3. In Minute 1, the Commissioners indicated that "a hearing will be required" for reconsideration of the applicant's resource consent application (service request 368659).

4. Section 20 of the Housing Accords and Special Housing Areas Act 2013 (**HASHA**) enables an applicant for a resource consent to choose whether to apply under HASHA or under the Resource Management Act 1991 (**RMA**). As the Court of Appeal identified in *Enterprise Miramar Peninsula Incorporated v Wellington City Council*:[1]

> "If a person chooses to apply for a resource consent under HASHAA, rather than the RMA, the local authority must give effect to the more permissive resource consenting regime under pt 2 of HASHAA."

5. One aspect of the "more permissive resource consenting regime under pt 2" is found in s 29 of HASHA, which provides that the Council "must not notify, or **hold a hearing** in relation to, an application for resource consent made under section 25".

6. The Court of Appeal described the effect of s 29 of HASHA in the following way:[2]

[1] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [18].
[2] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [18] (emphasis added).

> "In a significant departure from the RMA regime, notification and a hearing are **prohibited** save for certain limited circumstances."

7. The Council may only notify an application to a person if he or she is enumerated in one of the categories in s 29(3) of HASHA. If the Council exercises its *discretion* to notify such a person,[3] the person may make a submission and may indicate whether they wish to be heard.[4]

8. It is only in those very limited circumstances that the Council is permitted to notify an application and to hold a hearing. Otherwise, notification and hearings are prohibited.

9. The Court of Appeal acknowledged that "**in accordance with** s 29 of HASHAA, the Application was neither notified, nor was a hearing held".[5]

10. This bespoke scheme is not altered by the fact that the Council has delegated its "functions, powers, or duties" to hearings commissioners, under s 34A of the RMA.

11. Section 76 of HASHA, which incorporates s 34A of the RMA into HASHA, provides that s 34A of the RMA applies "as if every reference to the Resource Management Act 1991 were a reference to this Act." It follows that s 34A of the RMA, in the HASHA context, reads:

> A local authority may delegate to an employee, or hearings commissioner appointed by the local authority (who may or may not be a member of the local authority), any functions, powers, or duties **under the HASHA Act**.

12. Under HASHA, the Commissioners may only hold a hearing if it is permitted under s 29. It follows that there is no statutory basis for the Commissioners' view in Minute 1 that "a hearing will be required".

INVOLVEMENT OF ENTERPRISE MIRAMAR INCORPORATED

13. Even if the Commissioners were empowered to hold a hearing under s 29 of HASHA, because one of the s 29(3)-category persons was notified and wanted to be heard, this would not provide any basis for the involvement of Enterprise Miramar Incorporated.

14. Section 29(7) of HASHA is clear: "a person may only make a submission if that person is notified under subsection (4)".

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[3] HASHA, s 29(4)(a).

[4] HASHA, s 29(6)(c).

[5] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [24] (emphasis added).

15. Enterprise Miramar is not permitted to make a submission. The corollary is that the Commissioners are not permitted to receive a submission from Enterprise Miramar.

16. Moreover, under s 40 of the RMA, which is incorporated by virtue of s 76(2)(g) of HASHA, a person can only call evidence at a hearing if he or she has made a submission. It follows that Enterprise Miramar is also not permitted to present evidence.

17. In Minute 3, the Commissioners afforded the applicant an opportunity to comment on the matters raised in Enterprise Miramar's letters of 29 May 2019 "in the interests of natural justice".

18. Respectfully, given that there is no legal basis for the Commissioners to receive Enterprise Miramar's submissions, let alone for them to engage with the substance of those submissions, it would not be permissible 'in the interests of natural justice' for the applicant to respond. Were the applicant to engage with the points made, it, and therefore the Commissioners, would be having regard to the submissions of Enterprise Miramar which would not be lawful.

19. For these reasons, the Commissioners must disregard the content of Enterprise Miramar's "advice" and refuse to receive any further correspondence.

20. Accordingly, it is not permissible for the applicant to say anything further about Enterprise Miramar's submissions. Instead, it highlights salient points for the reconsideration process that have been made by the Court of Appeal.

RELEVANT LEGAL PRINCIPLES

21. In reconsidering the application, the Commissioners should be guided by the terms of HASHA and the principles espoused by the Court of Appeal in *Enterprise Miramar Incorporated v Wellington City Council*:[6]

Section 14

a. "The inclusion of the hotel in the proposal was considered by the Council in the context of assessing whether the proposal was a qualifying development under s 14 of HASHAA … We do not consider that the Council was obliged to make a further assessment about the extent to which the proposed development provided housing under s 34(1)(a) at the resource consent stage. Such matters are assessed at the prior stage of determining whether the proposal is a qualifying development … The Council assessed the proposed development against those criteria and determined that they were met. We see no error in that assessment."[7]

[6] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA).
[7] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [34] - [37].

Section 34(1)

b. "s 34(1) of HASHAA deliberately and explicitly creates a 'hierarchy' of matters that must be taken into account when considering an application for resource consent under the Act. The weight given to each factor is greatest for the first, with lesser weight to be applied in descending order down to the fifth and last factor...The plain words indicate, therefore, that greatest weight is to be placed on the purpose of HASHAA. That said, other considerations have been deliberately included. Decision-makers must be careful not to rely solely on the purpose of HASHAA at the expense of due consideration of the matters listed in (b) to (e)."[8]

c. "s 34(1) required the decision-maker to assess the matters listed in subs (1)(b)-(e) uninfluenced by the purpose of HASHAA before standing back and conducting an overall balancing… The scheme and plain text of s 34(1) requires individual assessment of the listed matters prior to the exercise of weighing them in accordance with the prescribed hierarchy."[9]

d. "Pt 2 considerations were required to be considered under s 34(1)(b)".[10]

e. "We accept that, under HASHAA, ss 104 - 104F of the RMA do not directly apply, therefore a development that could not proceed under those provisions of the RMA could still be consented under s 34 of HASHAA."[11]

f. "We do not consider that a timeframe of 13 years is out of the ordinary given the scale of the development, or that this should be viewed as a matter overlooked by the Council in carrying out a s 34(1) evaluation… In itself we are unable to see this as a factor that the Council was obliged to acknowledge and consider under s 34(1)(a)."[12]

Section 34(2)

g. "We are not persuaded that there has been an error in the Council's approach to infrastructure matters … the decision-makers had before them a large number of reports that contained what we consider to be sufficient detail for the Council to be satisfied under s 34(2) … We agree with the submission for the Council and TWCL that to require a higher standard of detail at the pre-consent phase would be costly and impractical."[13]

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[8] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [40] and [41].
[9] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [52] and [53].
[10] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [58].
[11] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [54].
[12] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [33].
[13] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [63].

h. "The Council's decision imposed a large number of conditions in relation to infrastructure matters … If the conditions are not fulfilled, the resource consents will not be able to be exercised. Therefore, as a matter of logic, by attaching the conditions, the Council could properly be satisfied that sufficient and appropriate infrastructure would be provided to support the development… In the end we have not been satisfied that there was an error in the Council's approach to infrastructure matters."[14]

22. While the Council's April 2017 decision has been set aside by the Court of Appeal, these principles and conclusions from its judgment are directly on point and need to be considered and applied.

Meeting with the Commissioners

23. While, for the reasons given, a hearing of the substantive application is not permissible, as was said in paragraph 17 of the memorandum for the applicant of 31 May 2019, a procedural meeting or teleconference between the applicant, the Council and the Commissioners would be appropriate so that these and any related issues can be addressed.

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Paul Radich QC
Counsel for the Wellington Company Ltd

[14] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 (CA) at [64], [66] and [67].