

**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**

**Reply (Legal Points)
Hearing Stream 4**

4 August 2023



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Reply (Legal Points)

Hearing Stream 4

1 Matters addressed

1.1 These submissions address the following matters:

- (a) The use of “enabled” instead of “anticipated” in the Plan;
- (b) Various aspects of the Council’s proposed City Outcomes Contribution;
- (c) Questions around car-parking in the CCZ;
- (d) Scope for a wind-assessment trigger.

2 “Enabled” and “anticipated”

2.1 At the hearing there was some debate about incorporating into objectives and policies references to “anticipated” or “planned” or “enabled” or another synonym as a descriptor of the urban form intended to result from the intensification directed by the NPS-UD. A proponent of this was Kāinga Ora, which has several submissions seeking to include such language (see, eg, 391.697, 391.698, 391.700 and 391.701).

2.2 As I understand Ms Stevens’ position, the submissions have merit. Nonetheless some care needs to be taken in adopting the language in light of case law on the ODP.

2.3 Under the ODP there is no permitted baseline for new buildings in the Central Zone as the starting point for a new building is a restricted discretionary activity. Policy 12.2.5.10 of the ODP provides:

Provide for consideration of ‘permitted baseline’ scenarios relating to building height and building bulk when considering the effect of new building work on the amenity of other Central Area properties.

2.4 The purpose of the policy is, I understand, to enable consent planners to consider the level of development anticipated by the height, bulk, and location provisions in the Central Zone of the ODP. Nonetheless, consistent with this policy, and through rules 13.3.4 and 13.3.8, the Council could find the effects of a new development to be acceptable (or,

for notification purposes, less than minor) by comparing them to the development otherwise anticipated for the site by application of these rules. A practice developed of consent applicants making direct comparisons to an “anticipated development” model. It was a quasi “permitted baseline” – hence the quotations in the policy.

- 2.5 This came to a head in *Sydney Street Substation Limited v Wellington City Council* [2017] NZHC 2489. The High Court quashed a resource consent granted non-notified on the basis that the Council’s application of the “anticipated development model” approach was unlawful.
- 2.6 That is not the only notification case which addresses what the plan “anticipates”. In *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 the High Court found that the Council’s notification decision was lawful because the level of traffic effects on neighbours was at a level “anticipated and accepted” by the plan as likely to occur.
- 2.7 In my submission the point to be taken from these cases is that the level of development “anticipated” by a plan is a relevant consideration in resource consenting, as long as it does not become a de facto permitted baseline, with effects of restricted discretionary activities being discounted. I see the same risk with a word such as “planned”.
- 2.8 The risk that such language poses suggests to me that adopting an NPS-UD-compliant term like “plan-enabled” may be preferable. That is defined as including activities provided for as restricted discretionary activities. Including it in policies would mean it could be appropriately used to contextualise the adverse effects of a proposal, without potentially becoming a de facto permitted baseline.
- 2.9 I note for completeness that I do not see the same risk applying to use of the word “anticipated” where it appears in policies such as CCZ-P10 in the context of referring to an evolving scale of development and reflecting policy 6(b) of the NPS-UD.

3 City Outcomes Contribution

- 3.1 At the hearing I discussed district plans as instruments of regulation, and it being well-recognised that regulations are about incentivising desirable behaviour and disincentivising undesirable behaviour. I also commented that plan-making sometimes involves adopting triggers that have a

reasonably arbitrary function of dictating whether a consent process is necessary or not, rather than directly affecting the outcome of the process. In such situations the purpose of the trigger is to identify the point at which effects are likely to require a consent process, as opposed to where a permitted activity is appropriate. By necessity any line drawn as a trigger for a consent process may be over-inclusive in some respects and under-inclusive in others.

- 3.2 The proposed public notification for non-compliance with the City Outcome Contribution is an example of the former (incentivising provision of a City Outcome Contribution), and the height threshold trigger an example of the latter (an appropriate trigger being needed).
- 3.3 That is not to say that they do not have independent justifications. As noted, the City Outcome Contribution seeks to encourage the mitigation of adverse effects on the public from intensification, eg, on the use of public open space, infrastructure, or accessibility; public notification may on that basis seem to be rationally linked to non-compliance. Equally, height is one aspect of intensification and a reasonably accurate proxy of the anticipated evolution in intensification.
- 3.4 I am not aware of any case law relating to plan-making suggesting that public notification may not have an instrumentalist or incentivising purpose. Whether or not it is appropriate to adopt it into the plan is, in my submission, legitimately within the scope of a section 32 assessment.
- 3.5 Nonetheless, I am aware that Ms Stevens has reflected on the hearing and recommends a different approach to notification. City-Outcomes-Contribution-compliant applications may not be publicly or limited notified, but, in the event of non-compliance, the usual notification tests apply.
- 3.6 That, too, is a legitimate approach, and while it is all carrot and no stick, it is less likely to result in notification of proposals that do not impose comparatively substantial public impact while also providing some additional publicly beneficial outcome (albeit one that does not meet the City Outcomes Contribution). It is therefore less likely to be over-inclusive, though it risks being a little under-inclusive.

4 Carparking in the CCZ

4.1 The same instrumentalist argument applies to the debate about not providing for ground-level carparking as a permitted activity in the CCZ. The purpose of this is generally to discourage ground-level carparking. Ms Stevens' reply evidence identifies a number of exceptions, and a realistic consenting pathway is provided for situations not meeting the exceptions. The restricted discretionary status promotes efficient utilisation of CCZ sites. It also gives effect to policy 3(a) of the NPS-UD, and the strategic direction objectives and CCZ objectives and policies listed by Ms Stevens.

5 Scope for wind-assessment trigger

- 5.1 In my submission there is scope for a two-tier trigger. As Ms Stevens' reply evidence notes, the notified version provided a discretion for Council processing planners to determine whether a qualitative or quantitative wind study would be needed. That was considered unsatisfactory by the Property Council (338.8) which wished to simplify the overall consenting process. A two tier height trigger simplifies that process.
- 5.2 Ms Stevens has also discussed the extent to which the change responds to a submission made by Kāinga Ora. And of course, if considered an appropriate outcome, even if the Panel agrees with Mr Ballinger, there is the cl 99 out-of-scope recommendation power.
- 5.3 More generally, this issue is another reflecting the theme discussed above about providing for triggers in plans. What these triggers do is provide a simple way of enabling wind effects to be considered at different levels of detail for different buildings commensurate with the wind risk higher buildings pose.

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