

**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 5**

28 August 2023



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Reply (Legal Points)

Hearing Stream 5

1 Matters addressed

- 1.1 These submissions address two matters arising from the Panel's questions in Hearing Stream 5 and officers' reply evidence:
- (a) Legal issues in adopting the proposed policy framework for hydraulic neutrality;
 - (b) Scope to make amendments to provisions following the Part 1, Sch 1 process for consistency with amendments to ISPP provisions where there may not be scope for such amendments.

2 Hydraulic neutrality

- 2.1 The Panel has sought:

Advice from legal counsel on the proposed policy approach for hydraulic neutrality (THW-O3, THW-P5 and subsequent rules) that will require developers to reduce the stormwater runoff from sites as if the sites were undeveloped – that is, under pasture. In particular, what authority is there for policies and rules that seek to retrospectively reduce the stormwater effects of existing development through requirements on new development?

- 2.2 The question mischaracterises in two respects what the policy and rule framework seeks to achieve:

- (a) It is not “retrospective”; and
- (b) It does not seek to “reduce the stormwater effects of existing development”.

- 2.3 The policy and rule framework does nothing retrospectively. Retrospective operation would require existing buildings or undertakings to make changes to the quality and/or quantity of stormwater run-off. Existing buildings and operations have existing use rights under s 10 and the policy and rule framework does not purport to affect the application of this provision. But s 10 is not engaged because, by definition, any application to which the policy and rule framework would apply is seeking to change the character, intensity and/or scale of development on a site.

- 2.4 Nor does it seek to “reduce the stormwater effects of existing development”. What it seeks to do is create a policy framework requiring future developments to internalise the stormwater effects of the development beyond the existing level, so as to meet the objectives of higher order documents and drive an overall improvement in the environment. That is an altogether different thing.
- 2.5 Implicit in the question is a premise that landowners have a right to produce the same effects on the environment as they do at the commencement of a plan. That is not necessarily what sustainable management permits.
- 2.6 The s 32 analysis, s 42A report, and Ms Cook’s evidence suggest a significant resource management issue in Wellington City is the quality and quantity of stormwater. Quality and quantity are intertwined. As Ms Cook acknowledges, one cause of the problem is the existing state of the city’s stormwater network. Another, however, is the failure of existing development to better internalise stormwater effects.
- 2.7 The purpose for requiring modelling to an undeveloped state within the hydraulic neutrality policy framework is to give effect to 3.5(4) of the NPS-FM 2020. This expressly refers to promoting positive effects and avoiding, remedying, or mitigating adverse effects. As the proposed introduction to the Three Waters Chapter records: “The Three Waters chapter in the District Plan has a role to play by promoting positive effects and avoiding, remedying or mitigating adverse effects of urban development on water in relation to three waters infrastructure, by including objectives, policies and rules which help to achieve these outcomes and contribute towards giving effect to Te Mana o te Wai”.
- 2.8 More generally, s 7(f) requires those making plans to have particular regard to maintenance *and enhancement* of the quality of the environment. Enhancement connotes an improvement in the quality of the environment. If any authority was required for a plan to seek to drive an improvement by requiring development to better internalise its effects, that is authority enough.
- 2.9 Section 32 is entirely consistent with plans being framed so as to direct positive outcomes, or environmental enhancement, even if that imposes cost on development that exceeds the cost related to the specific

proposal. That is because “effect” is defined in s 2 as including positive effects, and cumulative effects. Of course, the Council recognises that the provisions must be the most appropriate to meet the objectives, but the question seems to doubt whether the objective of requiring an improvement beyond the status quo is a legitimate or lawful one.

- 2.10 The discussion during Hearing Stream 4 suggested that the premise of the question perhaps stems from an in-practice presumption that at the resource consent stage (which requires effects of a proposal on the environment to be assessed), a proposal that has neutral effects (that is, its stormwater effects are no worse than the status quo) should be granted. This may be how the vast majority of consenting is approached,¹ but it is not actually what the RMA requires.
- 2.11 Whether a consent authority grants a restricted discretionary, discretionary, or non-complying activity (which meets the gateway tests) is a discretion² exercised having regard to, among other things:³
- (a) The actual and potential effects on the environment;
 - (b) Any relevant provisions of a plan or proposed plan, which includes objectives and policies.
- 2.12 Section 104 does not provide for a threshold test, though “acceptable” is often used as a descriptor of the decision-maker’s assessment of the effects.
- 2.13 These provisions necessarily leave it open to a decision-maker to decline a consent where the plan’s objectives, policies, and rules require substantial internalisation of stormwater effects (more even than those to be caused by the activity), but where a proposal only seeks to preserve the status quo – that is have no worse, but equally no better, effects than the status quo. It follows that there is no reason associated with the provisions governing resource consents making it unlawful, or

¹ ... and is a major reason why the Randerson Review recommended repealing the RMA – see Resource Management Review Panel *New Directions for Resource Management in New Zealand* (Ministry for the Environment, June 2020) at p 17, para [19]-[20] and Chapter 5 “A more responsive system: addressing status quo bias”.

² RMA, ss 104B(a), 104C(2) and 104D(1)

³ RMA, s 104(1).

undesirable, to adopt the proposed policy and rule framework for hydraulic neutrality.

- 2.14 All this is also quite apart from the NPS-FM derived points made by Ms Cook in her explanation as to why this approach was an appropriate planning outcome.⁴

3 Scope

- 3.1 The question that arose during the hearing was how to approach provisions following the Part 1, Sch 1 process which ought to be amended as a consequence of (such as, for consistency) amendments recommended for provisions forming part of the IPI (and following the ISPP). Where the scope of relief sought in submissions on such non-ISPP provisions is such that they fairly and reasonably raise the prospect of amendment, no issue arises. And in general terms, while the proposed plan is expressed in two instruments, it purports to encompass the entire Wellington City territory and address every aspect of the status quo in planning terms.⁵ A broad approach to scope is entirely appropriate, and consequential amendments to provisions for consistency with amendments to other proposed provisions does not raise the same natural justice implications that they otherwise might where the potential for change was not foreseeable.
- 3.2 Further, cl 16(2) of Sch 1 permits changes to provisions to alter information or correct minor errors. It is likely that some of the changes recommended to ensure consistent language in the framing of objectives and policies will not in fact change the intent of the provisions and so will be able to be made without a need to point to submissions providing scope.
- 3.3 However, the Council acknowledges that a problem may arise particularly where the Panel recommends an amendment to provisions within the IPI in reliance on the out-of-scope power in cl 99(2)(b) of Sch 1. If, in such a case, consequential amendments are also desirable to provisions within the non-IPI part of the proposed plan for consistency or other reasons and the amendments are outside the relief reasonably and fairly raised in

⁴ Section 42A Report (Three Waters) at [100]ff.

⁵ Akin to the PAUP considered by Whata J in *Albany North Landowners Inc v Auckland Council* [2016] NZHC 138 at [129].

submissions on those provisions, there may be little the Panel can do other than to note the issue in its report and leave it for the Council to incorporate, if desirable, in a future plan change or variation.

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