29 May 2019

Bill Stevens
Resource Consents Team Leader
City Consenting and Compliance
Wellington City Council

By email: bill.stevens@wcc.govt.nz

Dear Bill

Reconsideration by the Council of Application by the Wellington Company Limited for Resource Consents to Redevelop Shelly Bay

1. We are writing to you on behalf of Enterprise Miramar Peninsula Incorporated ("**Enterprise**"), for whom we act, in relation to The Wellington Company's application under HASHAA for resource consents to redevelop Shelly Bay.

2. As you know, Enterprise successfully judicially reviewed the Council's earlier decision granting resource consents to The Wellington Company under HASHAA. The outcome on appeal to the Court of Appeal was the Council's decision granting the resource consents was quashed and the Court of Appeal remitted The Wellington Company's application for resource consents under HASHAA to the Council for reconsideration.

3. Enterprise understands from information that the Council has published on its website (https://wellington.govt.nz/services/consents-and-licences/resource-consents/recent-resource-consents/resource-consent-applications) three independent commissioners ("the Panel") have been appointed by the Council to determine the HASHAA resource consents application as remitted. Enterprise also understands from the information the Council has published on its website, which includes a letter dated 9 May 2019 from The Wellington Company's lawyers Gibson Sheat and addressed to you ("**the Gibson Sheat letter**"), that The Wellington Company claims not to have revised its application but indicates that it has provided further (updating) information to the Council in support of the resource consents it is seeking. That letter also suggests a that the Council adopt a particular approach to the application.

4. Enterprise is concerned at the position taken in the Gibson Sheat letter that the Court of Appeal quashed only parts of the Council's earlier decision granting resource consents to The Wellington Company under HASHAA. Counsel for Enterprise Miramar in the High Court (Mr Milne and Mr Smith) are of the view this is an incorrect reading of the Court of Appeal's decision. That decision quashed the earlier Council decision as a whole, not discrete parts of it. That outcome reflected the Court of Appeal's error of law findings tainted the reporting officers' consideration of all environmental effects as well as overall effects and section 34(2) considerations. It follows in their view that it is wrong as a matter of law to read the Court of Appeal's decision to endorse parts of the earlier

Council decision for the purpose of excusing the Panel from having to discharge their legal obligation to independently consider all aspects of the HASHAA resource consents application afresh and to make their own decision on it.

5. Enterprise has instructed Counsel Philip Milne to review the Gibson Sheat letter and requirements in terms of the Court of Appeal decision and HASHAA. Mr Milne's advice is **enclosed**. In summary he has concluded:

a) The Gibson Sheat suggestion the Council and Panel need not consider some aspects of the proposal, is incorrect and if adopted will lead to an error of law.

b) The Panel must consider all aspects of section 34, and it must reach independent conclusions under both sections 34(1) and (2).

c) The Court of Appeal did not endorse those parts of the officer's report which suggested the purpose of HASHAA is to maximise the amount of housing within special housing areas. If the Panel were to interpret the purpose of HASHAA in that way it would be making an error of law.

d) The Panel is obliged to consider the proposed staging under section 34 (1) in terms of the purpose of HASHAA.

e) The Panel is obliged to consider whether the proposed boutique hotel and other commercial aspects of the development are necessary to serve the purpose of HASHAA, when weighing that purpose against the other matters in section 34(1), including the visual impact of such buildings.

f) The Panel is obliged to consider the bulk and location of the proposed buildings, in terms of the District Plan Design Guide and Open Space B provisions. That requires accurate simulations showing the proposed building in comparison to what the District Plan envisages.[1]

g) The Panel is entitled to put considerable weight on the settled provisions of the District Plan both in their own right and the settled means of achieving the purpose and principles of the RMA. (Part 2 being the second most important consideration under section 34(1)). [2]

h) The Panel is obliged to consider the traffic safety and efficiency effects of the proposal under section 34(1). This includes inter alia:

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[1] We understand that although the Applicant has provided an updated visual assessment, that it has still not provided such simulations. The simulations attached to the affidavit of Chris Morris of 25 January 2018 provides the necessary comparison, (assuming that the Applicant has not amended the proposed building heights and locations). Those simulations were not challenged in High Court.

[2] The recent Court of Appeal decision in *R J Davidson Family Trust v Marlborough District Council [2018] NZCA 316* is authoritative in this regard.

- The adequacy of the proposed carriage way design for Shelly Bay road for cyclists, pedestrians and vehicles.
- The effects of the proposed traffic from the development on the efficiency of the Miramar Peninsular circuit, Miramar Road and State Highway 1. [34]

i) The Panel is obliged to be satisfied… "*that sufficient and appropriate infrastructure will be provided to support the qualifying development."*

j) The Panel is required to consider whether it has sufficient and reliable information before it on all relevant matters.

k) The Panel is entitled to request whatever further information it considers appropriate from Applicant and/or Council officers (see section 28 of HAHSAA).

l) In relation to section 34 (2) the Panel is entitled to request whatever further information it considers appropriate from NZTA or other infrastructure providers such as Wellington Water (section 34 (4)).

6. In addition, Enterprise questions whether the Applicant is entitled to place revised assessments before the Panel. This was not something the Court of Appeal provided for in its directions or indeed envisaged in its decision. Nor was this something The Wellington Company requested the Court of Appeal to consider or make directions to that effect (a request that would have been met with legal submissions in opposition from Enterprise had it been made). In this regard, the Court of Appeal's decision can be contrasted with other cases where the Court of Appeal has specifically addressed this very issue, after giving the parties a chance to be heard on it.[5]

7. If we are wrong, and it is legally permissible for further (updating) information to be considered for the purposes of a reconsideration of the HASHAA resource consents application, then in our view logic, and fairness, requires that the expert evidence Enterprise filed in the judicial review – including the independent traffic analysis in Tim Kelly's affidavit of 17 January 2018; the independent planning analysis in Robert Nixon's affidavit of 23 January 2018 and in Yvonne Legarth's affidavit of 26 January 2018; and the independent spatial analysis in Chris Morris' affidavit of 25 January 2018 – are equally relevant and they too should be considered by the Commissioners for the purposes of reconsideration of the HASHAA application. That must particularly be so

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[3] We understand that the Applicant has revised its traffic predictions upwards.

[4] For the reasons outlined in the affidavit of Mr Tim Kelly in the High Court, the Enterprise Miramar maintains that the original information on these matters (including the information from Council officers) was inadequate. As far as it is aware that information has not been updated to provide the necessary safety and efficiency assessments. For example, there is no assessment from NZTA of the impact of the proposal on SH1 and no assessment of the safety impacts of the proposed Shelly Bay carriage way width and suggested shared path.

[5] An example is *Vilceanu v Minister of Immigration* [2008] NZCA 486. There President Young recorded at para 11 of the judgment that it was "*common ground between counsel that on such a reconsideration the Tribunal will have to address the situation as it then pertains*".

where, as we understand it, the further (updating) information The Wellington Company has put before the Commissioners for the purposes of a reconsideration includes information seeking to address some of the issues and concerns Enterprise raised in the judicial review and upheld by the Court of Appeal.[6]

Shelly Bay Road

8. The applicant (through its updated Traffic Assessment Report dated 18 April 2019) is proceeding on the basis that the Council has taken responsibility for and is committed to do the work for the 1.0-1.5m shared pedestrian and cycle path (refer paragraph 2.5, 4.2, and 7.4). Enterprise does not believe this is an accurate reflection of the Council's position on what the Council is planning for Shelly Bay Road. Mr Spence said in his affidavit to the High Court:

   The Council has also agreed to investigate the design of the road between Shelly Bay and Miramar Avenue to take account of public input during the 2017 public engagement process. This is expected to address the provision for pedestrians and cyclists, including recreational use. This investigation has not yet been completed.

9. The background to this commitment to these investigations is the Council was not satisfied with the proposal for a 1.0-1.5m path which was heavily criticised and questioned in the 2017 consultation. Officers advised in September 2017 that 'the path would not be appropriate for cycling'. Officers gave advice in September 2017 that *"A preferred solution being to widen the 'shoulder' with continuous asphalt, with a more robust built edge to the coastline. This shoulder would be suitable for cycling and pedestrians. It will be a minimum of 1.5 metres wide for approximately 40% of the length with the balance a minimum of 2 metres wide. It will run immediately adjacent to the carriageway."*

10. It is evident that the 1.0-1.5m option is no longer the Council's position and unless the investigations referred to in Mr Spence's affidavit have been completed and the Council's position confirmed, then there is no Council position on Shelly Bay Road. Consequently, the Application must only be assessed (by the officers preparing the section 42A report and by the Commissioners in their decision) against Shelly Bay Road as it currently exists.

11. Given the nature of the issues raised in this letter, and the party raising them, it is in our view appropriate for the Council to provide the Commissioners with a copy of this letter

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[6] We refer to our earlier request that these affidavits be put before the Panel, which was set out in para 5 of our letter to the Council's lawyers dated 17 December 2018 and also note that Mr Chick has already advised that the Commissioners will be made aware of the affidavits and will be making a decision on this issue. Note also the request in our client's email of 15 April 2019 to be advised of the Commissioners decision when this procedural decision is made.

(and Mr Milne's advice to Enterprise). We ask you confirm in writing when you have done that.

Yours faithfully
Morrison Kent

Michael Wolff
Partner

Direct Dial: (04) 495-8919
Direct Fax: (04) 472-0517
E-mail: michael.wolff@morrisonkent.com

Copy to: Kevin Lavery
Chief Executive Officer
Wellington City Council
By email: kevin.lavery@wcc.govt.nz

Nick Whittington
Meredith Connell
By email: nick.whittington@mc.co.nz