



COURT OF APPEAL OF NEW ZEALAND

TE KŌTI PĪRA O AOTEAROA

3 December 2018

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**ENTERPRISE MIRAMAR PENINSULA INC v WELLINGTON CITY COUNCIL
CA218/2018, [2018] NZCA 541**

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

1. The Court of Appeal today released its judgment in *Enterprise Miramar Peninsula Inc v Wellington City Council*. The Court allowed the appeal and quashed a decision granting resource consents for a significant development at Shelly Bay, Wellington.
2. The Court found that the Wellington City Council (the Council) made an error of law in its interpretation and application of s 34(1) of the Housing Accords and Special Housing Areas Act 2013 (HASHAA) when determining whether or not to grant resource consent. As a result of the error, matters such as the environmental effects of the proposed development were not given appropriate consideration and weight by the Council.
3. The effect of the Court’s judgment is that the Council must reconsider the application for resource consent afresh. The Court has ordered that the Council should consider whether or not to appoint independent commissioners to perform that task, given the extent to which the Council has defended its original decision in this litigation.

Background

4. The Wellington Company Ltd (TWCL) applied for resource consent for a significant development at Shelly Bay on 15 September 2016. The proposed development involved the construction of some 350 dwellings made up of 12 multi-level apartment buildings of up to six storeys high (containing approximately 280 apartments), 58 townhouses and 14 individual dwellings. The proposal also included a 50-room boutique hotel, an aged care facility and buildings for commercial and community activities.
5. Prior to this, in 2015, the Governor-General, on the recommendation of the Minister for Building and Housing, declared Shelly Bay to be a special housing area under HASHAA. The purpose of this legislation is to enhance housing affordability by facilitating an increase in land and housing supply in regions or districts identified as having housing supply and affordability issues. Given that the development company's proposal was predominantly residential, the application for resource consent was determined under the more permissive resource consenting process available under HASHAA. Under HASHAA, the usual controls in the Resource Management Act 1991 (RMA) are relevant considerations, but they do not directly apply. Therefore, a development that could not be granted resource consent under the RMA could be granted resource consent under HASHAA.
6. The Council granted the application, subject to conditions. Enterprise Miramar Peninsula Inc (Enterprise), an incorporated society representing the interests of the business community in Miramar, challenged that decision in the High Court. The High Court upheld the Council's decision in a judgment released on 9 April 2018. Enterprise appealed to the Court of Appeal.

The judgment

7. This Court has found that, in considering the application for resource consent, the Council had relied on the purpose of HASHAA, which is to enhance housing supply, without giving sufficient consideration to the other matters listed in s 34(1) of the Act. For example, the Council failed to give substantive consideration to the matters in Part 2 of the RMA, such as the preservation of the natural character of the coastal environment and the protection of historic heritage from inappropriate use and development.

8. Furthermore, the Council relied on the need to enhance housing supply in order to find that the environmental effects of the proposed development were no more than minor. The need to enhance housing is not logically relevant to the question of whether an environmental effect is more than minor. The Council's approach meant that the environmental effects of the development were not given the required recognition and weight.
9. Properly interpreted, s 34(1) of HASHAA required the Council to assess the matters listed in subs (1)(b)–(e) uninfluenced by the purpose of the Act, before standing back and conducting an overall balancing. The Court has therefore directed that the application for resource consent be remitted back to the Council for reconsideration.
10. The Court rejected Enterprise's arguments that the Council had made other errors in its application of the law. The Court also rejected Enterprise's argument that the Council should have appointed independent commissioners to determine the developer's application for resource consent from the outset. Enterprise argued that the Council was interested in the application because of its public and private support of the proposed development and its ownership of land that the developer would need to lease or purchase to carry out the development.
11. The Court rejected these claims, finding that the Council had brought an open mind to its decision, and was not disqualified by the interests referred to by Enterprise. However, given the extent to which the Council has defended its original decision in this litigation, with Council employees being required to give evidence, the Court ordered that the Council should consider the appointment of independent commissioners to reconsider the resource consent application.