IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-803
[2018] NZHC 614

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER OF	an application for judicial review
BETWEEN	ENTERPRISE MIRAMAR PENINSULA INCORPORATED Applicant
AND	WELLINGTON CITY COUNCIL First Respondent
	THE WELLINGTON COMPANY LIMITED Second Respondent

Hearing: 5 and 6 March 2018

Appearances: M S Smith, P Milne and M R C Wolff for Applicant
N M H Whittington and A E Minogue for First Respondent
P J Radich QC and T P Refoy-Butler for Second Respondent

Judgment: 9 April 2018

JUDGMENT OF CHURCHMAN J

Pursuant to r 11.5 of the High Court Rules I direct
the delivery time of this judgment is
11.30 am on 9 April 2018

Introduction

[1] The Housing Accords and Special Housing Areas Act 2013 ("HASHAA") was enacted on 13 September 2013. The MBIE Regulatory Impact Statement said that the Act was an endeavour to respond to New Zealand's "significant housing affordability problem".[1]

[2] The passing of HASHAA had been preceded by a report from the New Zealand Productivity Commission on housing affordability.[2] The Commission had identified both the Resource Management Act 1991 and local authorities' consenting processes as contributing to the perceived housing shortage.

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1 MBIE *Regulatory Impact Statement: Creating Special Housing Areas* (15 April 2013) at [8].
2 New Zealand Productivity Commission "*Housing Affordability*" (March 2012).

[3] The purpose of HASHAA is stated to be: "... to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts ...".[3]

[4] HASHAA does not apply to all of New Zealand but only to the regions and districts listed in Schedule 1. The district administered by Wellington City Council is listed in Schedule 1 as being an area with significant housing supply and affordability issues.

[5] In order for a development to be governed by HASHAA, it must fall within certain parameters:

(i) The Minister responsible for the administration of HASHAA and the territorial authority listed in Schedule 1 must enter into a "housing accord" which sets out agreed targets for residential developments.

(ii) The territorial authority then recommends to the Minister that an area be established as a special housing area.

(iii) If the Minister is satisfied that adequate infrastructure to service qualifying developments in the proposed special housing area either exists or is likely to exist, the Minister may recommend that an area be designated as a special housing area ("SHA").

(iv) If a housing accord is terminated or the parties are not able to conclude a housing accord, the Minister may, of his or her own initiative, recommend that an area be designated an SHA.

(v) If the Minister so recommends, the Governor-General may, by Order in Council, declare an area to be an SHA for the purposes of HASHAA.

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3 Housing Accords and Special Housing Areas 2013, s 4.

[6] The Minister and Wellington City Council (WCC) signed a housing accord on 24 June 2014. The intention of that accord was to increase housing supply and improve affordability by providing an environment that facilitated development.

Approval of an SHA

[7] Subsequent to the establishment of the accord, the Minister approved a number of SHAs within the territory of WCC, including the subject site of these proceedings at Shelly Bay.

[8] Once an SHA has been established, a person can apply for a resource consent under HASHAA in relation to any "qualifying development".

[9] Section 14 of HASHAA defines "qualifying development" as one that will be "predominantly residential" and one in which dwellings and other buildings will not be higher than six-storeys or a maximum of 27 metres. Where there is to be a prescribed minimum number of dwellings or prescribed percentage of affordable dwellings, a "qualifying development" must comply with these requirements. The prescribed minimum number of dwellings to be built in the Shelly Bay SHA is 20 but there is no prescribed minimum number of affordable dwellings.[4]

[10] Once land is designated as an SHA under Part I of HASHAA, then the provisions of Part II apply. Part II has significant Resource Management Act (RMA) implications. As the Court said in *Ayrburn Farm Developments Ltd v Queenstown Lakes District Council*:[5]

> It sets up a permissive resource consenting regime which is designed to facilitate an increase in residential land and housing supply by making it easier for developers and owners of SHA land to obtain resource consents for certain qualifying housing developments.

[11] Part II of HASHAA provides that an application in relation to an SHA is dealt with very differently to an application under the RMA. One of the most striking

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4 Criticism of the proposal on the basis that it has no or insufficient provision for affordable housing is therefore misplaced.

5 *Ayrburn Farm Developments Ltd v Queenstown Lakes District Council* [2016] NZHC 693 at [16].

differences relates to the circumstances in which such an application is to be notified and whether or not a hearing is to be held.

[12] The Act provides:[6]

> An authorised agency must not notify, or hold a hearing in relation to, an application for a resource consent made under section 25, except as provided in subsections (3) to (5).

[13] Subsections (3) to (5) refer to owners of land adjacent to the land subject to the application, local authorities in whose district the land falls, infrastructure providers who have assets on, under or over the land and any requiring authority in relation to a designation. This is fundamentally different to the notification regime under the RMA. The same applies in relation to the positive instruction in s 29(1) not to hold a hearing except as provided in subs (3) to (5).

[14] Section 22 of HASHAA specifically provides that the RMA 1991 does not apply to an application, request, decision or any other matter under Part II of the Act unless HASHAA expressly applies the provisions of the RMA.

The site

[15] Shelly Bay is located on the western side of the Miramar Peninsula and is about mid-way between Miramar Avenue to the south and Point Halswell, the northern tip of the Miramar Peninsula. It contains the largest area of flat land between those two points. The site is about 8 kilometres from Wellington CBD.

[16] Human activity on the Miramar Peninsula goes back to the time of Kupe and various iwi have occupied the area over the past 600 or so years. The Māori name for the peninsula is Te Motu Kairangi reflecting the fact that, at the time of initial Māori occupation, it was an island rather than the peninsula it is today.

[17] Various iwi have come and gone over the years including Ngāti Tara, Ngāti Ira, and Ngāti Kahungunu. Since their invasion in the 1830s, Taranaki Whānui (Ngāti Tama, Ngāti Mutunga and Te Āti Awa) have held mana whenua status.

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6 HASHAA s 29(1).

[18] European activity at Shelly Bay has been dominated by various military activities. It was the site of a naval base from 1885 and the oldest extant building is the Submarine Mining Depot Barracks (submarine mining refers to the laying of underwater mines to protect the entrance to Wellington Harbour) from 1887.

[19] Much of the flat land at Shelly Bay was reclaimed during World War II and the wharf structures date from that period. Structures such as Shed 8 and the Shipwrights Buildings also date from this period.

[20] Following World War II, Shelly Bay was the site of an air force base until 1995 when it was declared surplus to military requirements.

[21] It is thought that some parts of the site may be potentially contaminated by things such as explosives, heavy metals and hydrocarbons as a legacy of its military use, although little actual evidence about the extent or nature of any contamination appears to exist.

[22] Since 2005, WCC has owned a 1.6 hectare irregular shaped parcel of land largely along the waterfront. It is zoned Business 1 in the operative District Plan.

[23] Since 2010, the Port Nicholson Block Settlement Trust ("PNBST"), which is the entity representing Taranaki Whānui, has owned two separate parcels of land at Shelly Bay totalling 5.0445 hectares. This land was acquired by PNBST pursuant to its Treaty of Waitangi Settlement with the Crown. The relatively flat land within these parcels is zoned Business 1 and the balance which rises steeply up behind Shelly Bay is zoned Open Plan B.

[24] The wharf structures are owned by PNBST and held by way of a coastal permit which expires in 2019. The coastal permit is renewable but requires the works situated in the coastal marine area to be kept in a good state of repair. Presently, the wharves are derelict and dangerous. That may have implications for the renewal of the coastal permit.

[25] Since the area ceased to be actively used for military purposes some 25 years ago, there has been a lack of maintenance on the built structures and several are in a state of significant disrepair. Parts of the site look rundown and neglected.

The application

[26] Following Orders in Council being made by the Governor-General on 29 June 2015 and 7 December 2015 declaring Shelly Bay to be an SHA,[7] the second respondent, The Wellington Company Ltd ("TWC") applied to the first respondent, WCC, under s 25 of HASHAA for resource consent to redevelop and subdivide Shelly Bay. Consent was also sought to use a potentially contaminated site.

[27] TWC is a joint venturer with PNBST and they have jointly established a company, Shelly Bay Ltd, to own the land at the site.

[28] WCC has agreed to enter into an arrangement with TWC to sell to it or enter into a 125 year lease of the land it owns at Shelly Bay to facilitate development of the SHA.

[29] The application involves the construction of some 350 dwellings made up of 12 multi-level residential apartment buildings (containing approximately 280 apartments); 58 townhouses; 14 individual dwellings; a 50-bed boutique hotel and possible construction of an aged care facility accommodating some 140 residents across 120 living units comprising approximately 68 independent apartments, 20 serviced apartments and 32 care suites. As well as buildings to accommodate commercial/community activities and the adaptive reuse of buildings such as the Submarine Mining Depot Barracks, Officers' Mess and Shipwrights Building, there is also provision for the development of a village green public open space and for the realignment of the road through Shelly Bay.

[30] Instead of providing a detailed design for each proposed building, the application was made on the basis of a Master Plan setting out building locations, footprint, maximum building envelope and activity use. There was also a proposed

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7 The site initially approved covered 2.79 hectares and that was subsequently increased by an additional 7.32 hectares.

design guide within which the design parameters for the proposed structures would fall.

[31] The maximum height of the proposed buildings was the 27 metres permitted under HASHAA rather than the much lower height limit in force in the Business 1 zoning.

[32] In the application process, unsurprisingly, there was close collaboration between the commercial arm of WCC and TWC in relation to the preparation and submission of the application.

[33] In accordance with the provisions of s 29 of HASHAA, the application was neither notified nor was a hearing held.

[34] WCC appointed Hanna Hanson, an employed planner, to process the application. She assessed it under s 88 of the RMA to determine whether it was sufficiently complete to be formally accepted for processing and it was formally accepted on 21 September 2016. Ms Hanson requested further information on 7 October 2016 which was received on 10 November 2016. On 14 November 2016, the building which housed the Council's resource consent team was significantly affected by the Kaikoura earthquake, resulting in a delay to the processing of this application.

[35] On 10 January 2017, Ms Hanson went on maternity leave and the application was reallocated to Nathan Keenan, a senior consents planner at WCC. Mr Keenan had not been involved in the pre-application process.

[36] The Council appointed Halley Wiseman, the Resource Consents Manager at WCC, as peer reviewer and delegated decision maker.

[37] On 18 April 2017, Mr Keenan and Ms Wiseman issued their decision. The decision dealt with both the decision not to notify the application under s 29(3) of HASHAA and the resource consent. The application was granted subject to extensive conditions.

Judicial review

[38] By statement of claim dated 29 September 2017, Enterprise Miramar Peninsula Inc (the applicant) sought judicial review of two decisions. The first was the decision of WCC not to engage independent commissioners to determine the application and the second decision was to grant the resource consent. In relation to the decision to issue the resource consent, the applicant alleges that WCC made mistakes/errors of law; acted for improper purposes; failed to consider mandatory relevant considerations; and was tainted by apparent bias on account of alleged conflicts of interest affecting WCC.

[39] An application for judicial review of a statutory power of decision is concerned with the process of decision-making. This case does not involve an appeal on the merits from the Council's decision, neither does it involve a challenge to the issuing of the Order in Council declaring Shelly Bay to be an SHA.

[40] Jurisdiction is a key concept in administrative law. If a decision is made within jurisdiction (intra vires), then it is not open to a court on judicial review to interfere with the decision merely because it thinks that the decision is wrong on the merits.

[41] However, if a decision-maker has made an error of law, acted for an improper purpose, failed to consider a mandatory relevant consideration or has demonstrated bias, then it is likely to be found to have acted without jurisdiction (ultra vires).[8]

[42] In the present case, WCC was obliged to exercise the statutory powers given to it by HASHAA in accordance with the terms of that statute. It was also obliged to act within jurisdiction.

[43] Bodies which are particularly affected by the exercise of a statutory power of decision may apply to judicially review that decision. The applicant is an incorporated society which has amongst its objects the fostering and promotion generally of the welfare of the business community of Miramar and to advocate for the improvement of utilities, transport, services or other infrastructure to the benefit of Miramar.

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[8] See the discussion of jurisdiction as the basis for judicial review in James A Grant "Reason and Authority in Administrative Law" (2017) 76(3) Cambridge Law Journal 507.

[44] It says that these objectives give it standing to seek a judicial review of WCC decisions.

[45] While neither the first nor second respondent has formally challenged the applicant's standing, TWC notes that among the objects of the applicant "... are to advance the commercial interests of business people and businesses in Miramar, to drive employment and economic growth there, to capitalise on Miramar's "unique assets" and to improve the amenity of the area".[9]

[46] TWC said that it "harbours significant concerns about what it is that underlies this proceeding". Counsel for the applicant, during the course of the hearing, indicated that members of the applicant were concerned that they might be levied a special rate to assist with WCC's infrastructure costs incurred as a result of this project. There seems only to be a tenuous connection between such an apprehension and the objects of the applicants. However, as the applicant's standing to bring these proceedings has not been put in issue, this matter need not be taken further.

Particular challenges

Non-compliance with HASHAA procedural rules

[47] Section 29(4) of HASHAA sets out certain procedural requirements in relation to the notification of an application for consent. It says:

> The authorised agency must, within 10 working days after the date that the application is first lodged —
>
> (a) decide whether to notify the application to any of the persons referred to in subsection (3); and
>
> (b) notify the application to those persons if it decides to do so.

[48] Section 41(1)(a) stipulates a time limit for notification of a decision on a resource consent under Part 2 of the Act as being:

> (a) if the application was not notified and a hearing is not held, 20 working days after the date on which the application was first lodged with the authorised agency ... .

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[9] Submissions of counsel for Second Respondent at [14] referring to Rules of Enterprise Miramar Peninsula Incorporated.

[49] Neither of these time limits were met and the applicant asserts that each of the failures to meet the time limits amounts to an error of law (procedural ultra vires).

[50] It is first necessary to consider the facts as to why the two procedural time limits were not complied with and then determine whether non-compliance has the effect of resulting in the decisions being ultra vires and invalidating the decision to grant the resource consent.

[51] The application for resource consent was first lodged with WCC on 15 September 2016. Section 29(4) meant that WCC had 10 working days to decide whether or not to notify the application.

[52] WCC did not notify the application and there is no evidence as to the precise date on which it made that decision. The resource consent decision of 18 April 2017 records that such a decision was made. Ms Legarth, a planner who gave evidence for the applicant, records that there was a lapse of 132 working days between the lodging of the application and 18 April 2017.

[53] In relation to the failure to comply with s 41(1)(a), the 132 working days that it took to issue the decision is clearly longer than the 20 working days stipulated in s 41(1)(a).

[54] The applicant acknowledged that WCC issued formal decisions purporting to extend the time available to it to make a substantive decision on the application but noted that those extensions required a decision to be made by 24 January 2017.

[55] The affidavits filed by the council planners provided little real explanation. There was a vague reference to delays with the decision-making process attributable to the Kaikoura earthquake and disruption it caused to WCC's operations. The applicant makes a valid point in saying:[10]

> Even if it was a cause of some delay, it is impossible to see how in the absence of any direct evidence on this point, the 14 November 2016 earthquake explains the delay between 24 January 2017 (when the Councils second

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10 Submissions of counsel for applicant at [85].

extension of time expired) and 18 April 2017 (when the second decision was made and issued).

[56] Counsel for the second respondent claimed that s 29(4) only required WCC to notify within 10 working days after the date that the application is first lodged if it decided to notify. It claimed: "A Council, having decided not to notify, was not bound by this timeframe".[11]

[57] However, this is not what s 29(4) says. Section 29(4)(a) indicates that the agency processing a resource consent must within 10 working days "**decide** (bolding added) whether to notify the application to any of the persons referred to in subsection (3)" (emphasis added). The obligation is to make a decision within that timeframe not to notify within that timeframe.

[58] The second respondent refers to s 76 of HASHAA which in subs (1) states that certain provisions of the RMA apply. Section 76(2)(f) states that among the RMA provisions that apply are s 37 (power of waiver and extension of time limits) and s 37A (requirements for waivers and extension).

[59] Section 37A of the RMA permits a consent authority to extend a time period only if "the time period as extended does not exceed twice the maximum time period specified in this Act."[12]

[60] Included in the bundle of documents were two file notes, one made by Hanna Hanson on 2 December 2016 extending the timeframe for the decision on the resource consent to 24 January 2017[13] and the second being made by Nathan Keenan on 18 April 2017 extending the expiry until 18 April 2017.[14] Neither of the file notes explain exactly why it was necessary to extend the time.

[61] In any event, the total time of the extensions greatly exceeds the period of twice the maximum time limit authorised by s 37A(4) of the RMA.

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11 Submissions of counsel for second respondent at [159].
12 Resource Management Act 1991, s 37A(4)(a).
13 ABD 5 at 2217.
14 ABD 5 at 2705.

[62] WCC has not put forward any explanation as to why the decision to notify was not made within 10 working days but was incorporated into the final decision.

[63] It seems that it may be a practice at WCC, in relation to applications for resource consent under the RMA, for decisions in relation to notification to be combined with substantive decisions. Ellis J addressed this practice in the case of *Sydney St Substation Ltd v Wellington City Council* where she said:[15]

> The application for review attacks both the decisions not to notify and the substantive decision itself. Because the reasoning in relation to the notification decision is dependent on the reasoning in relation to the substantive (s 104) decision (and I must confess I have some doubts as to the wisdom of this conflationary practice) it is necessary to consider the substantive decision first.

[64] Ellis J's criticism of this practice in relation to applications under the RMA applies equally to applications under HASHAA. When the statute clearly requires decisions on whether or not an application should be notified to be made within 10 working days, there is no warrant for ignoring that obligation and simply recording the decision on this point in the final substantive resource consent decision.

[65] However, a finding that both the notification and substantive decisions were not made within the timeframes stipulated in HASHAA does not, as the applicant submits, automatically make the decisions ultra vires and invalid. As noted in *Judicial Review: A New Zealand Perspective*, the effect of such a procedural breach will depend on a number of factors including: the nature of the provisions; the degree of non-compliance; and the effect of non-compliance.[16] Such an approach is consistent with that taken by Venning J in *North Holdings Ltd v Rodney District Council.*[17] That case involved an allegation that because a consent authority had made a decision to notify an application for a resource consent later than the time limit specified in the RMA for such decisions, the decision to notify was unlawful. Venning J noted the importance of s 94 and the right of affected parties to be notified. This can be

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15 *Sydney St Substation Ltd v Wellington City Council and Equinox Capital Ltd* [2017] NZHC 2489 at [66]. The planner processing this application was also Mr Keenan.

16 See Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 13.05.

17 *North Holdings Ltd v Rodney District Council* HC Auckland CIV-2002-404-002402, 11 September 2003.

contrasted with the position under HASHAA where notification is not the expectation and is prohibited other than in limited circumstances to a limited range of parties. Significantly, the applicant in these proceedings is not a party authorised by HASHAA to be notified.

[66] Venning J referred to the authorities at being cited in 13.05 of *Judicial Review: A New Zealand Perspective* and concluded:[18]

> The submission that a decision made outside a statutory timeframe in circumstances such as the present is prima facie invalid is not supported by those authorities.

[67] Venning J noted that the relevant factor was that the RMA did not provide a remedy or a sanction if the Council did not comply with the statutory timeframe for notification and contrasted that with the provisions in the Building Act 1991.[19] He found that the failure to comply with the time requirements did not invalidate a notification decision.

[68] The submissions on behalf of WCC noted that, instead of the RMA containing a provision stating that lacking of compliance with time limits invalidated a consent, it provided a mechanism to address this by virtue of a Resource Management (Discount on Administrative Charges) Regulations 2010 which permitted an applicant, when a local authority failed to comply with the specified timeframes, to request a discount on fees paid at a rate of 1 per cent for every additional (overtime) working day.

[69] Relevant to a consideration of the effect of non-compliance in this situation is the fact that the applicant was never a party that the HASHAA permitted to be notified and therefore suffered no detriment in the notification decision not being made within 10 working days of receipt of the application. The only people authorised to make submissions on a notification are people who are notified.[20] There is no suggestion that notification to any one of the entities listed in s 29(3) was required.

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18 At [28].
19 At [37].
20 HASHAA, s 29(7).

[70] In relation to the failure to comply with the time for issue of the decision there is no adverse effect on the applicant. The minutes of the council officers recording the extensions both confirmed the agreement of the applicant for the resource consent to the extension.

In these circumstances, while the failure of WCC to comply with the statutory timeframes is regrettable, having regard to the nature of the provisions, the degree of non-compliance and the effect of non-compliance, failure to comply with the time limits does not render either of the decisions invalid.

The first decision

[71] The applicant challenges WCC's decision to act as a decision-maker in relation to the application for resource consents under HASHAA. It claims that an independent hearing commissioner or an ATA[21] panel rather than WCC (through delegated officers) should have been the decision-maker.

[72] It gives as justification for this view the fact that WCC owned some of the land at Shelly Bay that was affected by the proposed development and the fact that WCC had publicly promoted and supported a development at Shelly Bay prior to receiving the application as well as having worked closely with TWC to refine the application following its lodgement. The pleaded grounds for review were apparent bias/conflict of interest.

Legal test

[73] The applicant submitted that the correct test was the one applied by the Supreme Court in *Saxmere*:[22]

> A judge should not sit if a fair-minded and informed lay observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

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21 ATA is the acronym for Accord Territorial Authority.

22 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 (SC) at [89].

[74] The applicability of the *Saxmere* test in the context of resource consents, particularly those under HASHAA, was contested by the respondents.

[75] WCC submitted that the rule against bias was flexible and highly contextual.[23] It submitted that the statutory context defined the scope and standard of any applicable test for bias and referred in particular to the decision of the Court of Appeal in *Lower Hutt City Council v Bank* and the observation by the Court of Appeal that the application of the rule against bias:[24] "... must be governed by the relevant circumstances, including, especially, the statutory provisions relating to the function [of the Council being exercised]."

[76] Counsel also referred to the decision of the Privy Council in *Jeffs v New Zealand Dairy Production Marketing Board* where the submission that the Board should not make a decision on a zoning application because it had a financial interest in the proceeding was rejected, with the Privy Council having determined that the structure of the empowering legislation exhibited an intention to depart from the usual rule that a person should not be a judge in his or her own cause.[25]

[77] WCC also referred to the decision of the High Court in *Wakatu Inc v Tasman District Council* where MacKenzie J said, in response to a submission that the Council there, in relation to a resource consent application, should have obtained an independent assessment because it had an interest in the matter said:[26]

> ... there is in the legislation no indication of an intention that those powers should be invoked in respect of all administrative decisions in which the council may be perceived as having a potential interest

[78] In relation to the question of whether the fact that the Council owned land justified a finding of bias, WCC referred to the decision in *Anderton v Auckland City Council* where the Court had held that the fact that the Council had a financial interest in the outcome of a rezoning application because it owned part of the affected land was not a "financial interest" disqualifying the Council from processing the

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23 *Man O'War Station Ltd v Auckland City Council (Judgment No 1)* [2002] 3 NZLR 577 (PC) at [11].

24 *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA) at 549.

25 *Jeffs v New Zealand Dairy Production Marketing Board* [1967] NZLR 1057 (PC).

26 *Wakatu Inc v Tasman District Council* [2008] NZRMA 187 (HC) at [27].

application.[27] There was an appeal by WCC to the principle that the WCC owned the land for the benefit of the city and that WCC member had a financial interest in his or her own right.

[79] WCC said that the two decisions relied upon by the applicant were distinguishable. It said *Urban Auckland v Auckland Council* involved an allegation of apparent bias against a particular commissioner because of her prior involvement as a barrister assisting the community organisation which made submissions related to the activities of one of the parties.[28]

[80] In relation to the case of *Woods v Kapiti Coast District Council*, the bias alleged arose from the fact that one of the counsellors should have recused herself from a vote about continuing fluoridation of the district's water supply because she was also the Deputy Chairperson of the Mid-Central District Health Board which supported adding fluoride to the water.[29] This was an allegation of actual bias.

[81] The WCC also relied on the approach taken by Baragwanath J in *Friends of Turitea Reserve Society Inc v Palmerston North City Council*.[30]

[82] WCC sought to distinguish between the nature of the function undertaken by a court in a case like *Saxmere* and the functions of a territorial local authority.

[83] Some emphasis was placed on the provisions of ss 12 and 14 of the Local Government Act 2002 which constituted local authorities as bodies corporate with full powers and obliged them to ensure prudent stewardship of resources, including undertaking prudent commercial transactions in the interests of ratepayers.

[84] The submissions of TWC were consistent with those of WCC.

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27 *Anderton v Auckland City Council* [1978] 1 NZLR 657 (SC).
28 *Urban Auckland v Auckland Council* [2015] NZHC 1382.
29 *Woods v Kapiti Coast District Council* [2014] NZHC 1661.
30 *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661.

Analysis

[85] As Baragwanath J noted in *Friends of Turitea Reserve Society*[31]

> The notion of bias for reasons of self-interest does not travel comfortably across from the role of a judge to that of a council which is in substance a trustee for its ratepayers.

[86] The statutory context in which WCC exercises its powers is important. The Local Government Act provides guidance as to the standards that territorial local authorities are obliged to meet in the context of undertaking both regulatory and non-regulatory functions:[32]

> [A] local authority should ensure that, so far as is practicable, responsibility and processes for decision-making in relation to regulatory responsibilities is separated from responsibility and processes for decision-making for non-regulatory responsibilities.

[87] The applicant has urged the Court to follow the approach of Venning J in *Urban Auckland*[33] and Collins J in *Woods v Kapiti Coast District Council*[34] as opposed to the decision of Wylie J in *Protect Pauanui Inc v Thames Coromandel District Council.*[35] It submitted that in *Protect Pauanui*, "weak facts meant no rigorous legal analysis".

[88] The facts of the *Urban Auckland* decision are very different to the present case. In that case, the allegation was that a Commissioner was biased because she had failed to disclose that previously she had acted as a barrister for a community group which had made submissions related to the activities of one of the parties. Venning J held that there was no question of actual bias:[36]

> In the present case a fair-minded observer with full knowledge of Ms Macky's experience and background and her actual involvement as a barrister with the Parnell Community Centre would not be concerned that she might have exhibited the reverse bias suggested in this case.

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31 At 689.

32 Local Government Act 2002, s 39(c).

33 *Urban Auckland, Society for the Protection of Auckland City and Waterfront Inc v Auckland Council and Ports of Auckland* [2015] NZHC 1382, [2015] NZRMA 235.

34 *Woods v Kapiti Coast District Council* [2014] NZHC 1661.

35 *Protect Pauanui Inc v Thames Coromandel District Council* [2013] NZHC 1944.

36 *Urban Auckland*, above n 33, at [165].

[89] In *Woods v Kapiti Coast District Council*, the allegation of bias was personal to a particular Council member alleging that she should not have taken part in the vote to fluoridate community water supplies because she was Deputy Chairperson of a Health Board which supported adding fluoride to water.[37] This was effectively an allegation of actual bias although it seems that the self-represented plaintiff framed the test as one of apparent bias. Collins J said:[38]

> A conflict of interest may arise in the public sector where an official's duties and responsibilities to a public entity could be influenced by other interests or duties that official may have. There is a potential for a conflict of interest where there is a convergence of an official's duties and responsibilities to a public body with their personal interests or their duties and responsibilities to another entity or person.

[90] That is not the type of conflict of interest alleged in the present case.

[91] After having stated that general principle, Collins J said:[39]

> Conflicts of interest that arise through a public official's conflicting responsibilities to a public body and another entity or person may lead to the official's decision being challenged on the basis of apparent bias.

[92] Collins J noted that the self-represented litigant did not refer to the concept of apparent bias but in any event found that there was no apparent bias there.

[93] Neither of these cases discuss the exercise of the statutory power of decision which was sought to be reviewed in the context of the statute which provided that power.

[94] The Court of Appeal in *Lower Hutt City Council v Banks* said:[40]

> ... no man can be a judge in his own cause. But again, the extent to which this fundamental principle applies must be governed by the relevant circumstances, including, especially, the statutory provisions relating to the function.

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37 Above n 29.
38 At [17] above n 29.
39 At [19].
40 *Lower Hutt City Council v Banks*, above n 24, at 549.

[95] In the context of councils exercising regulatory powers of decision such as in *Friends of Turitea Reserve Society* and *Protect Pauanui*, the courts have recognised the dual function of councils and the consequent inappropriateness of applying the *Saxmere* formulation to them in relation to the exercise of the regulatory functions.

[96] Such an approach is consistent with that taken by Kós J in *Back Country Helicopters Ltd v Minister of Conservation.*[41] That case involved an application for judicial review of decisions taken by Ministers of the Crown. Counsel for the applicant had advanced a claim of apparent bias and had relied on the decisions of the Court of Appeal in *Muir v Commissioner of Inland Revenue*[42] and of the Supreme Court in *Saxmere*.

[97] In rejecting the applicability of those decisions Kós J focused on the source and context of the power being exercised. He said:[43]

> Both of those are, however, cases involving alleged apparent bias by judicial officers. The principles expounded there are not appropriate standards to apply in the case of Ministers of the Crown in exercising statutory powers of decision. The proposition that a Minister could effectively discharge his or her duties in the same way that a Judge does need only be stated to be rejected as unsound. The accountabilities, and standards applicable, are altogether different.

[98] Kós J went on to say:[44]

> What does make a difference is the patent character of the decision maker. Where Parliament vests the decision in a Minister of the Crown, it must be taken to have accepted that that decision maker will bring a policy perspective to his or her determination, and with it a probable predisposition on the merits. It cannot then be the case that to make a lawful decision that Minister must delegate away the decision entrusted to him or her by Parliament.

[99] In the present case, the approach taken by Baragwanath J in *Friends of Turitea Reserve Society Inc* accurately describes the standard to be met by WCC. Baragwanath J said:[45]

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41 *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982.
42 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA).
43 *Back Country Helicopters*, above n 41 at [130].
44 At [133].
45 *Friends of Turitea,* above n 30, at [108].

> As a corporation the Council acted, as it was entitled, through many natural persons, councillors and staff. There may well be predisposition to a particular result. But in a case such as this provided the ultimate decision is made with minds not closed to argument it will not be invalidated for bias.

[100] Baragwanth J went on to say:[46]

> Here both by the original form of the agreement and by the last-minute amendments the Council has tried very hard to do what it lawfully can to facilitate the wind farm project. But it has taken care to avoid overstepping the line drawn in *CREEDNZ* and the later authorities. No attempt was made to challenge the denial of closed minds by Council members by cross-examination on their affidavits.

[101] In the present case, the delegated decision-makers, Nathan Keenan and Halley Wiseman, both filed affidavits. Neither was required for cross-examination. Both attested to having exercised their independent professional judgement. Mr Keenan said:[47]

> I did not experience any pressure from any person within the Council to approve the resource consent application. Commercial negotiations between the Council and the Wellington Company in relation to the proposed development at Shelly Bay were carried out by a different part of the Council. I was not aware of the position reached in those negotiations, the role of the Council in the proposed development or the financial implications for the Council of the decision. I did not take into account these matters when deciding the resource consent application.

[102] Ms Wiseman made similar comments. Ms Wiseman confirmed that, for significant proposals, a pre-application process may include substantial preparation in advance to understand the proposal, consultation with a subject matter experts within Council and interactions with the applicant. She said: "The pre-application process never results in a formal decision and we cannot and do not advise the applicant whether their application will be successful."[48]

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46 At [109].
47 Affidavit of Nathan John Keenan, 1 February 2018, at 5.5.
48 Affidavit of Halley Ann Wiseman, 2 February 2018, at 3.3.

[103] She confirmed that she was not involved in the pre-application process in this case. Ms Wiseman also said:[49]

> I am confident that when processing an application for resource consent, regardless of who the applicant is, Council planners exercise their independent judgment ... . Where the Council has an interest in the relevant activity or development, the decision-making process is not influenced by the fact of the Council's interest.

[104] Thomas Wutzler, a witness for the applicant, articulated the applicant's position in his statement that the applicant believed a "backroom deal" had been done between "... the Council and the developer that is designed to maximise the profitability of a development at this site, rather than to achieve an outcome that is sensitive to the history of Shelly Bay ... and the natural landscape that is an important part of it."[50] The facts referred to in support of this allegation related to correspondence between the Chief Executive of WCC (Mr Lavery) and the Chief Executive of TWC (Mr Cassels). However, there was no evidence that the two delegated officers who made the decision were influenced by or even aware of such correspondence. There was no allegation by the applicant that either of the delegated officials had any personal conflict of interest that resulted in them being biased.

Council's financial interest

[105] The applicant asserted that this case was analogous to the decision in *Anderton v Auckland City Council* where Mahon J found that the Auckland City Council had become so closely associated with a company's attempts to secure planning permission preceding the hearing of the company's application that the Council had surrendered its powers of independent judgment as a tribunal and had determined in advance to allow the application.[51] The applicant acknowledges that the Judge framed his decision on the basis of a finding of predetermination but referred to the fact that the Court mentioned the financial interest of the Council. The applicant set out a quotation from 689 of the decision where the Court said: "The council clearly had a

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49 At 4.11.
50 Affidavit of Thomas Frank Wutzler, 26 January 2018, at [4].
51 *Anderton v Auckland City Council* [1978] 1 NZLR 657 (SC).

financial interest in the outcome of the application for rezoning, for it owned part of the land proposed to be affected ..."[52]

[106] However, that quote omits the balance of the sentence which read: "... and it entered into the agreement to lease the car park area at $15,000 per annum and the shop sites, when they became available, at $10,000 per annum."

[107] The quotation also omits the immediate following paragraph where the Court said:[53]

> In relation to this matter it should be made clear that this is not, in my opinion, a type of "financial interest" which is one of the conventional grounds for disqualification of a tribunal, for the council owned and administered the land for the benefit of the inhabitants of the city. No member of the council or of the objections committee had any financial interest in his own right. Furthermore, the council was entitled in the due exercise of its statutory powers to employ that land to the best advantage of the inhabitants of that part of the city. If a new use of its own land required an alteration in zoning then the council was clearly entitled to propose a scheme change in order to give effect to the new use. But the changed use of the land would yield increased revenue for the city, and this was the factor to which the applicants drew attention, as on that view of the matter the company and the council were intending to embark on a joint financial venture of long duration

[108] The judgment went on to make it clear that the fact that a Council might lease land to a developer promoting an alteration in the zoning of land was not, of itself a matter which disqualified the Council from considering the application. The Court said:[54]

> Here again, the council was in law entitled to lease its land on favorable terms to the owner of adjoining land for the purpose of a commercial development which would embrace both areas of land. This is only a variation of a not uncommon procedure whereby a local authority decides to alter the use of its own land for the financial benefit of the community in general.

[109] There were a number of factors in *Anderton* which clearly influenced the conclusion that Mahon J came to which are not present in this case. Most significant seems to be an agreement which had been concluded with the applicant. The Court said of this agreement:[55]

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52 At 689.
53 At 689–690.
54 At 690, line 14.
55 At 690, line 22.

> The existence of this agreement, however, made with this proposed developer, is a factor of considerable weight in assessing the cumulative effect of the factors which I am at present considering, for it clearly represented a motive for support by the council of the company's proposal. In addition, it was said that it represented to the council a continuing threat of litigation if the company's project was not eventually approved.

[110] There was also direct personal involvement on the part of some councillors with the applicant company and some unfortunate threats by the Mayor to one of the objectors.

[111] The Court said: "I am satisfied that what must be proved in this case is actual predetermination of the adjudicated question."[56] Unsurprisingly, on the facts, the Court found actual predetermination. This case does not assist the applicant's argument that the fact that WCC was to sell or lease part of the land in question to the applicant meant that it had a disqualifying conflict of interest.

[112] The fact that a council (as opposed to individual councillors or those to whom a statutory power of decision is delegated) may receive some pecuniary benefit as a result of the outcome of the exercise of a statutory power of decision does not vitiate the decision.

[113] The Court in *Friends of Turitea* cited with approval observations in the leading administrative law textbook De Smith, Woolf and Jowell that:[57]

> 12-049 In some situations it will even be perfectly proper for a public body to make a particular decision for its own pecuniary advantage (as distinct from the pecuniary advantage of individual members or officers) ... the courts will not lightly interfere with a planning decision made on the basis of a pre-determined policy so long as the authority gives genuine consideration to the application.

[114] In oral submissions, Mr Smith, counsel for the applicant, went so far as to suggest that the fact that WCC would increase its rating take from granting this application created an unacceptable conflict of interest. That submission is untenable. If it were otherwise, then WCC, in relation to every subdivision application where a

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56 At 696, line 40.

57 *Friends of Turitea*, above n 30, at [96] quoting De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th ed 1995, Sweet & Maxwell Ltd, London).

development levy is imposed or which increased WCC's rating take would not be able to process the application.

[115] The respondents in their submissions were at pains to emphasise that no concluded agreement has yet been entered into by WCC. That of itself would also distinguish this case from *Anderton*.

[116] Neither is there anything that assists the applicant in relation to the fact that a number WCC officers liaised closely with the applicant in relation to the preparation and submission of its application. It is inherent in the structure of HASHAA that there will be a significant degree of cooperation between an applicant and a local authority in relation to an SHA.[58]

[117] The applicant points to the fact that one of WCC officials who provided information to the delegated decision-makers was a Chad McMan, WCC's Urban Design Advisor, who had also been a member of the separate WCC Shelly Bay Project Team which had been responsible for negotiating and agreeing at least some of the early commercial terms on which WCC might support the development. The applicant's submission on this point was:

> At the very least, there is a perception in these circumstances that his views in support of the Application were influenced by information he had received, and positions he was aware of, through his participation on the "*Shelly Bay Project*" team.

[118] Mr McMan was one of some 11 WCC advisors who were provided with a copy of the application by the delegated decision-makers and asked to provide input. The emails sent by Mr McMan to the applicant's advisors and his Urban Design Assessment of 7 February 2017 were appended as exhibits to the affidavit of Nathan Keenan.

[119] Mr McMan's report of 7 February 2017 is not a work of advocacy for the application but appears to be a dispassionate analysis of it consistent with Mr McMan

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58 The Act makes it clear that a council is not expected to remain neutral as to either the concept generally or the designation of a particular site. Specifically, s 10 anticipates that a council will enter into a housing accord with the Minister and s 16(4)(a)(i) anticipates that it will recommend the establishing of an SHA to the Minister.

exercising his expertise in the area of design. It is not a document which taints the decision. I also note that not all of Mr McMan's recommendations were adopted by the delegated decision-makers.[59] They obviously felt free to accept or reject his recommendations.

[120] The applicant also was critical of the Council's Chief Traffic Advisor, Steve Spence, claiming that he "softened his view on roading requirements following intervention from members of the commercial team ... ." It was also claimed that WCC's CEO was involved in "conversations that led to the softening of position".[60] Both Mr Lavery and Mr Spence filed affidavits, as did Mr Chick, the Chief City Planner for WCC whose email had been referred to by the applicant as supporting the contention that there had been some sort of inappropriate pressure brought to bear on Mr Spence which resulted in him "softening" his position.

[121] Mr Lavery deposed that he had never spoken with Mr Chick about specific road widths on Shelly Bay Road.[61] Mr Chick confirmed that there had never been a situation where he had spoken together with Andrew MacLeod of TWC and Mr Lavery. He confirmed that he had had high level discussions with Mr Lavery about the development proposal and that Mr Lavery had advised him to ensure that WCC's transport and other advisors focused on the outcomes necessary to service the proposed development.[62]

[122] Mr Spence explained that at the time he expressed an initial view as to the desirable width of the carriageway and shared pedestrian/cycleway he wasn't aware of the exact details of the proposed works and was simply commenting on what he would expect to see the applicant consider as part of the proposal.

[123] He explains that when he was subsequently asked to provide expert transport input into the process for determining the resource consent application once it had been received, he reviewed a variety of documents and asked for further information about traffic volumes. He also explains how he formed the view that it would not be

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59 See agreed bundle of documents at 2744; Decision Report [10.2.8].
60 Submissions of Applicant at 104.10.
61 Affirmation of Kevin Gregory Lavery, dated 2 February 2018 at 4.3.
62 Affirmation of David Robert Chick, dated 2 February 2018 at 4.5.

appropriate to impose the standard set out in the WCC's Code of Practice in relation to this proposal. He states:[63]

> The advice I gave during the preapplication process and the discussions I was part of during that time did not influence my opinion or prevent me from exercising independent judgement when I came to provide a report to the decision-maker on the eventual resource consent application.

[124] In light of this evidence, I conclude that there is no basis for a suggestion that Mr Spence was prevailed upon to alter his original opinion by other WCC officers as alleged by the applicant.

Delegation to independent commissioners

[125] The applicant advanced the proposition that because of what it said was WCCs apparent bias and conflicts of interest it should have appointed an independent hearing commissioner or an ATA Panel to be the decision-maker rather than delegating the decision-making role to WCC officers.

[126] This contention was supported by affidavits from Robert Charles Nixon, a planner of Queenstown, and Yvonne Mary Legarth, a Planning Consultant of Wellington.

[127] Mr Nixon in his affidavit of 23 January 2018 says:[64]

> ... it is my opinion that an independent commissioner should have been appointed by the Council to consider and decide the application for resource consents in issue, given the Council's ownership of affected land.

[128] Mr Nixon refers to the practice of other territorial local authorities that he is familiar with and says that there is a discernible practice amongst those authorities to use commissioners where there is a perceived or actual conflict of interest or potential for a perception of bias.

[129] Ms Legarth expressed similar views and referred specifically to WCC ownership of land being affected by the application and WCC's public support for the

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63 Affidavit of Robert Stephen Spence, dated 7 February 2018 at 4.10.
64 Affidavit of Robert Charles Nixon, dated 23 January 2018 at [8].

development of Shelly Bay as resulting in WCC not being seen as an independent decision-maker. She stated this would justify a requirement that an independent panel of one or more commissioners or a combined panel of councillors and independents chaired by an independent commissioner should have been used.

[130] She noted that WCC had appointed an independent commissioner to consider and hear another application under HASHAA for resource consent, namely the application by the Mary Potter Hospice Foundation.[65]

[131] Mr Nixon acknowledged that there was no mandatory requirement for WCC to appoint an independent commissioner or panel of commissioners and that it had a discretion to do so. Mr Nixon claimed that the purpose of appointing independent commissioners was to uphold public confidence in the impartiality of the decision-making process and to ensure that WCC is not perceived as using its position to give itself an advantage through the consenting processes.[66]

The discretion given in s 76(2)(d) of HASHAA

[132] Section 76(2)(d) specifically incorporates s 34A of the RMA and authorises a council to delegate powers and functions to employees and other persons.

[133] HASHAA also has a provision for the establishment of Accord Territorial Authority ("ATA") panels. These panels have no direct parallel in the Resource Management Act.

[134] Section 89 says that each ATA panel must comprise no fewer than three members, one of whom is a member of the relevant local authority and the remainder of whom are persons who collectively have knowledge of and expertise in relation to planning, design, and engineering, and appropriate knowledge and experience relating to the Treaty of Waitangi and Tikanga Māori.

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65 Affidavit of Yvonne Mary Legarth, dated 26 January 2018 at [38].
66 Affidavit of Robert Charles Nixon, dated 23 January 2018 at [21].

[135] Section 90 of HASHAA provides:

> An accord territorial authority may delegate its functions and powers as an authorised agency under this Act to an ATA panel, including its functions and powers under subpart 3 of this Part.

[136] One of the principal points of contention between the parties was whether or not s 34A of the RMA was a "recusal" provision or whether it was a provision focusing on the ability of territorial local authorities to appoint people with a particular subject matter expertise lacking within the council or to address the situation where a council did not have sufficient internal resources to be able to undertake lengthy hearings.

Analysis

[137] The purpose of s 34A of the Resource Management Act was considered by MacKenzie J in *Wakatu Inc v Tasman District Council.*[67] This case involved an application for a judicial review in relation to a decision to reject an application by the applicant to take water from the Motueka River on the grounds that it was incomplete under s 88(3) of the RMA and then subsequently to accept as complete an application from the Council to take 200,000 cubic metres of ground water per day from the Mouteka River. The applicant had alleged that the Council's decisions were affected by apparent bias and that the Council had a conflict of interest in terms of its role both as the applicant and decision-maker. It said that in these circumstances the power of decision should have been delegated pursuant to s 34A to a suitably qualified independent person.

[138] MacKenzie J noted that the decision exercised by the Council to accept its own application was "wholly administrative in character" and that it had no elements of a quasi-judicial nature.[68]

[139] The Court also then focused on the statutory scheme which anticipated the dual role of a council in this context. The Court said:[69]

> The first question ... is whether the scheme of the legislation contemplates a potential conflict of interest. The decision is one for the consent authority to

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67 *Wakatu Inc v Tasman District Council* [2008] NZRMA 187 (HC).
68 At [24].
69 At [27].

> make, and the statutory framework indicates an expectation that that decision would be taken at an administrative level within the consent authority. There are powers of delegation which [counsel for the applicant] submits, could have been adopted to obtain an independent assessment of the question. However, there is in the legislation no indication of an intention that those powers should be invoked in respect of all administrative decisions in which the Council may be perceived as having a potential interest.

[140] There is some support in the wording of s 34A of the RMA for the position adopted by the respondents that the power to delegate contained in s 34A is primarily directed at addressing resource constraints that the Council might otherwise have.

[141] Section 34A(1) specifically refers to delegations to "an employee, or hearings commissioner." The use of the word "hearings commissioner" anticipates that a commissioner might be required in circumstances where there is to be a hearing. A requirement to undertake a hearing of a resource consent application could well stretch the resources of a local authority so as to justify appointing someone as a hearings commissioner who was not an employee or member of the local authority.

[142] The purpose of allowing a council access to resources it doesn't have in house is consistent with the requirements of s 34A(1A) which provides that if a local authority is considering appointing "1 or more hearings commissioners to exercise a delegated power to conduct a hearing under Part 1 or 5 of Schedule 1" then the local authority must consult tangata whenua through relevant iwi authorities on whether it is appropriate to appoint a commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū.

[143] Significantly, the word "independent" does not appear anywhere in s 34A. The reference is to "hearings commissioners".

[144] The planning witnesses for the respondents (Nathan Keenan and Halley Wiseman) both challenged the evidence of the applicant's planners that there was any consistent practice among local authorities as to the circumstances in which a hearings commissioner under s 34A would be appointed. Mr Keenan says that WCC

has not adopted such a practice and that he has processed a number of resource consents for WCC where the Council had an interest.[70]

[145] Ms Wiseman's evidence was that, at WCC, resource consent applications were allocated to hearings commissioners when a hearing of the application was required and she explained that is why the application under HASHAA in relation to Mary Potter Hospice was referred to a hearings commissioner. She referred to a number of recent examples where WCC had delegated power to an employee notwithstanding the fact that it could be said that WCC had an interest in the application.[71]

[146] It is also useful to check whether there is anything in the structure of the HASHAA that might support a conclusion that the discretion provided by s 76 is intended to be used for the purposes of recusal. It is clear that HASHAA anticipates that a council will play an active role in the process of identifying an SHA and cooperating with an applicant to process a consent application. However, notwithstanding that, Parliament has not provided any indication that hearings commissioners should be used when a council has had an involvement in identifying or promoting an SHA. To that extent, the comments of MacKenzie J in *Wakatu Inc* that there was no indication of an intention, in relation to RMA powers, that s 34A of that Act should be invoked where a council may be perceived as having a potential interest, apply equally to s 76 of HASHAA.[72]

[147] As submitted in [121] of TWC's submissions, "[t]he Minister of Housing in his 'approval for Introduction' of the HASHAA Bill, noted that it was envisaged that applicants for resource consents under HASHAA may 'have established relationships with councils as part of a pre-application process'."[73]

[148] Accordingly, I conclude that the power to appoint a hearings commissioner is permissive and designed to assist councils obtaining additional resources rather than

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70 Affidavit of Nathan John Keenan, dated 1 February 2018 at 5.2.
71 Affidavit of Halley Wiseman, dated 2 February 2018 at 4.9.
72 *Wakatu Inc*, above n 67, at [27].
73 Cabinet Legislation Committee "Housing Accords and Special Housing Areas Bill" approval for introduction, 7 May 2013.

being designed to be a recusal mechanism. WCC was not under any obligation to appoint an independent commissioner instead of delegating its powers to employees. I note that appointment of an ATA to process the application would be of little value if it were done because of concerns about a conflict of interest. That is because under s 89 of HASHAA one of the ATA panel members must be "a member of the relevant local authority, community board or local board".[74] Normally, if one member of a decision making panel is biased, that bias infects the decision of the group as a whole.

Combined effect

[149] The applicant also argued that, even if it was found that none of the alleged procedural failings were, of themselves, sufficient to justify any intervention by way of judicial review, the combined effect of them all meant that the decisions should be set aside.

[150] Perhaps unsurprisingly, the response by the respondents was to say five times nothing still equals nothing. In other words, if none of the individual grounds justify judicial review, then aggregating them will not do so either.

[151] However, there have been cases where the Courts have held that an aggregation or accumulation of factors taken together justify a conclusion that a decision was ultra vires.[75]

[152] In the case of *Moxon v Casino Control Authority*, Fisher J distinguished between allegations of bias in relation to judges and allegations in relation to decision-makers where there may be policy content in the decision-making or the decision-maker might draw on their own prior views, experience or expertise and/or the opportunity to be heard is limited or informal.[76] Fisher J said:[77]

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74 HASHAA, s 89(2)(a).

75 See *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA) at 149; *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 367; *Manukau Urban Māori Authority v Treaty of Waitangi Fisheries Commission* (HC) Auckland CP122/95, 28 November 2003 at [96]; *Leigh Fishermen's Association v Minister of Fisheries* HC Wellington CP 266/95, 11 June 1997 at 32.

76 *Moxon v Casino Control Authority* HC Hamilton M324/99, 24 May 2000.

77 At [49].

> In such cases intervention for bias or predetermination will usually be justified only where the decision-maker entered upon the hearing with a closed mind, that is to say the decision-maker was not amenable to proper argument or was unwilling to consider the case on its individual merits.

[153] Even if all of the applicant's grounds are looked at in combination, it cannot be said that the decision-makers approached this matter with closed minds and were unwilling or unable to consider the matter on the merits. Looking at all the applicant's grounds in the aggregate, therefore, does not provide evidence of a reviewable error.

Misconstruction/misapplication of s 34(1)

The second decision

[154] Section 34 of HASHAA is prescriptive as to the considerations that a council processing a resource consent is required to have regard to. Section 34(1) provides:

> An authorised agency, when considering an application for a resource consent under this Act and any submissions received on that application, must have regard to the following matters, giving weight to them (greater to lesser) in the order listed:
>
> (a) the purpose of this Act:
>
> (b) the matters in Part 2 of the Resource Management Act 1991:
>
> (c) any relevant proposed plan:
>
> (d) the other matters that would arise for consideration under—
>
> (i) sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act:
>
> (ii) any other relevant enactment (such as the Waitakere Ranges Heritage Area Act 2008):
>
> (e) the key urban design qualities expressed in the Ministry for the Environment's *New Zealand Urban Design Protocol (2005)* and any subsequent editions of that document.

[155] Section 34(2) is also prescriptive in that it provides:

> An authorised agency must not grant a resource consent that relates to a qualifying development unless it is satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development.

[156] The applicant's case is that, in deciding to grant the resource consent, WCC misconstrued and misapplied s 34 of HASHAA.

[157] The applicant's position is summarised in the submissions of counsel as being: "... a development having the characteristics of the one consented by the Council at Shelly Bay is not envisaged by HASHAA."[78]

[158] The applicant's case was also that WCC did not adopt the correct approach to s 34.

[159] In assessing the applicant's claim that HASHAA did not envisage a development of this sort, it is necessary to identify exactly what HASHAA contemplated by way of development. The answer to this question is found in s 14 where a number of criteria are listed. Not all of the s 14 criteria apply to this application as there is no prescribed minimum number of affordable dwellings designated for this SHA.

[160] The mandatory features or characteristics which HASHAA prescribes are relatively few. These are that the development is "predominantly residential" and that dwellings and other buildings will not be higher than six-storeys or 27 metres.[79]

[161] The concept of what a "predominantly residential" development will involve is defined by s 14(2) as meaning that its primary purpose is to supply dwellings and that any non-residential activities provided for are ancillary to quality residential development. Examples of such appropriate non-residential activities are recreational, mixed use, retail or town centre land use.

[162] It can therefore be seen that once the site is designated as an SHA, beyond a requirement that any development be "predominantly residential" and that structures be not higher than six-storeys or 27 metres, HASHAA does not envisage that a development will have any particular "characteristics". Specifically, there is no expectation that a development will comply with the requirements of any underlining

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78 Applicant's submissions at [80].
79 HASHAA, s 14.

zoning; no expectation that buildings will have any particular design features; no expectation that all or part of the dwellings to be built will be in public or community ownership and (in relation to this SHA) no expectation that all or a proportion of the dwellings to be constructed will be within any particular price range.

[163] There was at least implied criticism in the submissions of the applicant of the fact that TWC was undertaking the development for the purposes of making a profit.[80] However, there is nothing in HASHAA which limits qualifying developments only to those advanced and funded by central or local government or other non-profit making entities.

[164] There is disagreement between the parties as to how s 34 of HASHAA is to be applied.

[165] Section 34(1) lists five mandatory factors to be considered:

> (a) The purpose of this Act:
>
> (b) The matters in Part 2 of the Resource Management Act 1991;
>
> (c) Any relevant proposed plan:
>
> (d) The other matters that would arise for consideration under —
>
> (i) Sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act:
>
> (ii) Any other relevant enactment (such as the Waitakere Ranges Heritage Area Act 2008):
>
> (e) The key urban design qualities expressed in the Ministry for the Environment's *New Zealand Urban Design Protocol (2005)* and any subsequent additions of that document.

[166] However, all of these factors are not equal and a council: "... must have regard to [the factors] giving weight to them (greater to lesser) in the order listed".[81]

[167] While it is clear that the statute requires the greatest weight to be given to its purposes, there is a dispute between the parties as to the extent to which that obligation

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80 See for example Applicant's submissions at [22].
81 Section 34(1).

affects the weight to be given to the other listed factors. The applicant claims that WCC has "double-counted" or overemphasised the purpose of HASHAA when considering the application.

[168] The applicant also alleges that a comment made in s 10.2.5 at 38 of the decision to the effect that: "... the purpose of HASHAA is to maximise housing yield" is wrong and amounts to an error of law vitiating the decision. This is also said to be evidence that the decision-makers misunderstood the purpose of HASHAA.

[169] The applicant further claims that a sentence in the background section of the Decision Report indicated a misunderstanding of HASHAA. The relevant sentence read:[82]

> Particularly relevant aspects of the ODP have been identified and commented on where appropriate but relatively little weight have been given to these provisions due to the weighting specified in the HASHAA.

Misunderstanding of s 34?

[170] If, as alleged by the applicant, the decision-makers have misunderstood the purpose of HASHAA, that is a serious matter. However, evidence of the decision-makers' understanding of the purpose of HASHAA is to be gained from looking at their decision as a whole, not focusing solely on the one phrase highlighted by the applicant.

[171] Section 9.1 of the Decision Report has the heading "**Section 34(1)(A)** [sic] — **the Purpose of the HASHAA**". The following words are used immediately after that heading:[83]

> The purpose of the HASHAA is to enhance housing affordability by facilitating an increase in land and housing supply to certain regions or districts that are identified as having housing supply and affordability issues. Wellington city is such a district.

[172] Having accurately set out the purpose of the Act, the Decision Report then measured the proposal against that purpose saying:[84]

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82 ABD at 2731, Decision Report at 1.1.
83 ABD 5 at 2738, Decision Report s 9.1.
84 ABD 5 at 2738, Decision Report s 9.1.

> The proposal will result in approximately 350 new dwellings being created and made available for occupation. As such, the proposal is considered to be giving effect to the purpose of the HASHAA as defined in s 4 of the Act.

[173] Section 9 of the Decision Report had the heading "Statutory Considerations" and was clearly focused on those issues. The correct formulation of the statutory test in s 9.1 indicates that the decision-makers did understand the analysis that s 34(1) required of them. There are also other places in the decision where the decision-makers correctly set out the purpose of HASHAA such as the passage in 7.2.1 headed "The Consistency of the Proposal with the Purpose of HASHAA".[85]

[174] Seen in the context of the Decision Report having previously set the purpose of HASHAA out accurately, the use of the phrase "the purpose of HASHAA to maximise housing yield" in s 10.2.5 dealing with heritage effects does not establish that the decision-makers misunderstood the purpose of HASHAA. They incorrectly summarised it on one of the several occasions they referred to it

Relatively little weight/lesser weight

[175] Do the words "relatively little weight" used in s 1.1 on p 24 of the Decision Report as opposed to the words "lesser weight" mean that the decision-makers misunderstood the exercise required of them by s 34(1)? The applicant's submission on this point was:[86]

> But there is an important difference between giving operative district plan provisions relatively "*lesser*" weight, to use the language of s 34(1), and giving them relatively "*little*" weight as the Council Officers gave them. "*Little*" connotes small in an absolute sense, whereas "*lesser*" connotes lower in rank or quality. It follows that the Council Officers substitution of "*little*" for "*lesser*" has further skewed the outcome of the s 34(1) analysis, and as such constitutes another material error of law in the second Decision.

[176] In addressing the question of whether the decision-makers misunderstood the weighting required by s 34(1), it is important that the whole of the paragraph in which the wording criticised by the applicant appears is considered. The whole paragraph states:[87]

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85 ABD 5 at 2737; Decision Report s 7.2.1.
86 Submissions of Applicant at [70].
87 ABD 5 at 2731, Decision Report at 1.1.

> The provisions of the Operative District Plan (ODP) are a matter that regard must be had to, under s 34(1)(d)(i) of the HASHAA. However, less weight will be given to those provisions than the matters specified in s 34 as carrying greater weight. Particularly relevant aspects of the ODP have been identified and commented on where appropriate but relatively little weight have been given to these provisions due to the weighting specified in the HASHAA.

[177] Counsel for WCC acknowledged that the word "little" connoted "small in an absolute sense" and that the word "lesser" connotes "lower in rank".[88] However, they point to the fact that the use of the word "relatively" before the word "little" changed the concept from being an absolute term to a relative one. The submission was that there was "... no difference between giving "less" weight to a consideration and giving it "relatively little" weight.[89] I accept this submission. In the context of the paragraph in which the words "relatively little weight" were used, it is clear that they were used in the sense of meaning relatively less weight. There was no material error of law.

Double-counting

[178] The appellant's argument on this point is encapsulated in its submission:[90]

> ... the Council Officers have failed to correctly interpret and apply ss 34(1)(b) to (e) through the application of the purpose of HASHAA to their consideration of the other relevant matters listed in 31(1). This has had the effect of double (or more) counting the purpose of HASHAA in the s 31 analysis, and preventing the officers from conducting a genuine weighting/balancing exercise under s 34(1).

[179] The appellant gave a number of examples of what was said to be double-counting. As the concept is the same in each of the examples, I will address only one.

[180] The applicants submitted that there had been an "improper utilisation of the purpose of HASHAA" in the decision-maker's assessment of the consistency of the proposal with Part 2 of the RMA (required by s 34(1)(b)). Part 2 of the RMA relates to the purposes and principles of that Act. The applicant's submissions set out part of a paragraph in s 7.2.2 of the reasons for decision which says:

> The proposal represents a more efficient use of a natural resource (land) when compared to the current use. While the intensity of the development will change the character of the immediate locality to a degree, the comprehensive

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88 Submissions of Counsel for WCC at 6.1.3.
89 Submissions of Counsel for WCC at 6.1.3.
90 Appellant's submissions at [62].

> nature of the development which will be subject to the proposed Shelly Bay Design Guide (SBDG) ensures that a high quality built development will result **while enabling the purpose of HASHAA by increasing housing yield that would otherwise be limited by District Plan bulk and location regulations**. (bolding in applicant's submission not in decision).[91]

[181] The applicant then submitted that, having correctly noted that the District Plan's bulk and location requirements would "limit the housing yield for a development at Shelly Bay" this was inconsistent with the decision-makers' "... subsequent conclusion that the proposed development is '*not contrary* to' relevant Operative District Plan objectives and policies."

[182] The submissions go on to say:[92]

> The only way in which the Council Officers conceivably could have arrived at this subsequent conclusion is by applying the purpose of HASHAA to their assessments of whether the proposed development complies with the operative planning requirement. This amounts to a further error of law, in *Edwards v Bairstow* terms.

[183] This submission was premised on the false assumption that s 34(1) requires a decision-maker to actually apply, in a literal sense, the matters listed in s 34(1)(b) to (e). The obligation in s 34(1) is that a decision-maker "must have regard to" the matters listed. Having regard to something is fundamentally different to being bound by and required to apply.

[184] As the applicant's counsel expressly acknowledged, a statutory requirement to "have regard to" is generally understood to require a decision-maker "to give the matter genuine attention and thought".[93] However, the applicant's submissions then go on to say that the obligation to have regard to means:[94]

> In practical terms that exercise envisages that relevant operative planning provisions, in terms of s 34(1)(d)(i), should be considered through an assessment that is **uninfluenced** by the purpose of HASHAA.

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91 ABD 5 at 2737; Decision at 7.2.1.

92 Appellants submission at [67].

93 *New Zealand Fishing Association Inc v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA); *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991.

94 Applicant's submissions at [51].

[185] This submission is untenable.

[186] While HASHAA "does not roll out a blank canvas for development" it is clear that an application does not have to comply with the provisions of the RMA or of any Operative District Plan or other relevant planning instrument.[95] HASHAA operates as a code in relation to applications made under it and the RMA only applies to the extent that HASHAA expressly provides.[96]

[187] All of the matters listed in s 34(1)(b) to (e) are subordinate to the purposes of HASHAA and there is no error in the decision-makers having regard to those matters in the context of and informed by the purpose of HASHAA to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts.

[188] Much of the applicant's submissions focused on the fact that what was proposed was inconsistent with instruments/policies like the Shelly Bay Design Guide applicable to the Business 1 zoned land in Shelly Bay, in particular the height guidelines within that policy, to the objectives and policies of the Open Space B zoned land or to the limited provision for residential development within the Business 1 zoned land.

[189] It is inherent in the structure of HASHAA that applications under that Act need not comply with either the provisions of the RMA or the operative planning instruments. While not every application for a consent for a development in an SHA will be granted, inconsistency with aspects of an operative planning instrument in relation to matters such as height limits or inconsistencies with a local design guide do not result in the development being of a type not envisaged by HASHAA.

[190] It is clear from the contents of the decision that the decision-makers "had regard to" all of the matters set out in s 34(1)(b) to (e) in the sense of giving genuine attention and thought to each of the matters. As it happens, the decision-makers went further than that and concluded that the effects of the proposals on things like heritage

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95 *Ayrburn Farm Developments Ltd v Queenstown Lakes District Council* [2016] NZHC 693 at [56].
96 *Save Erskine College Trust v Erskine Developments Ltd* [2017] NZEnvC 59 at [34].

or open space were no more than minor and that the development was not contrary to the objectives and policies in the District Plan. TWC says that this was further than HASHAA required the decision-makers to go and that making these conclusions went well beyond the statutory obligation of "having regard to". There is considerable force in that submission although it is not a matter that need be decided in this case.

Internal weight

[191] The applicant alleged that the decision-makers had made an error of law in failing to consider what it says was the "internal" weight that should be given to the purpose of HASHAA. The exact submission was:[97]

> Implicit in s 34(1), and logically, the faster that new housing supply is introduced to the market as a result of a development consented through HASHAA, and the greater the number of residential units in the proposed development, the more weight that should be given to the purpose of HASHAA in the context of the weighting exercise envisaged by s 34(1).

[192] Essentially, the argument was about what weighting could be given to this particular application given it was for a staged development with the first 50 residential units being required to be completed within four years of the date of the consent; 150 units constructed within six years; 200 units within eight years; 250 units within nine years; 300 units within 11 years; and the entire project within 13 years. The applicant went so far as to describe the timing of a development as being an implied mandatory consideration. The submission was:[98]

> Moreover, this error of law resulted in the Council officers failing to consider mandatory relevant considerations implicit in the text and structure of s 34(1), being how quickly the proposed development would in fact bring new housing supply to the market and, based on that, the nature and extent to which s 4 purpose of HASHAA would in reality be promoted by the proposed development.

[193] Related to this argument was the submission that developments which are for a mixed use and do not maximise the number of residential units should also receive less weight.

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97 Applicant's submissions at [58].
98 Applicant's submissions at [61].

[194] Neither of these propositions is tenable. There is nothing in s 4 of HASHAA or elsewhere in the Act that prioritises so-called ready-to-build developments over staged developments. While the default lapse date for consents is one year, the inclusion of the right to extend that means that longer developments were clearly anticipated.

[195] Some development sites, whether green fields or brown fields will be suitable for immediate development but others will not. A number of the witnesses for the respondent expressed the view that the subject site had been "too difficult" for anyone to develop since 1995. It is also, at least by Wellington standards, a large and ambitious project. However, it is also a project that will clearly result in an increase in land and housing supply of a substantial nature, notwithstanding the fact that it is to be implemented on a graduated basis.

[196] Related to the applicant's submission that the decision-maker should have discounted the weight to have been accorded this particular project because it did not result in an immediate increase in land and housing supply, was a submission that the project was qualitatively inferior to those envisaged by HASHAA because it involved uses other than residential units.

[197] However, s 14(2) of HASHAA specifically contemplates that SHAs will contain recreational, mixed-use, retail or town centre activities. There is no premium in the Act on the creation of purely dormitory developments devoid of the normal features that make a residential area a pleasant place to live.

[198] It is also noted that many of the non-residential uses proposed as part of this development are intended to occur in existing buildings such as the Brewery/Café to be located in the Submarine Mining Depot Barracks, the commercial/community activities to be located in Shed 8 and the Shipwrights building and the boutique hotel to be located in the Officer's Mess. The adaptive reuse of these structures as part of the development will facilitate their preservation and also assist in maintaining the heritage values in the area. There is no warrant for suggesting that a development having these features is less in accordance with the purposes of HASHAA (and

therefore less weight should be given to it when analysing the criteria set out in s 34(1)) than a development which does not have these features.

[199] Allied to its argument that the 13 year timeframe for completion of the project was inconsistent with the purposes of HASHAA, the applicant advanced an argument to the effect that there were considerable uncertainties around the project. This argument implicitly criticised the Masterplan concept but it also went further and claimed that uncertainty was introduced in relation to the need to obtain approval for matters such as design and construction of infrastructure. It said that the need to obtain further consents from Greater Wellington Regional Council "introduces further uncertainty into whether and if so on what terms overall permission to develop the site will be authorised".[99]

[200] The use of a Masterplan of the type encountered here is not unusual in relation to large-scale projects. Neither is the use of extensive conditions inappropriate provided conditions are not used to delegate substantive arbitrative decisions.[100] The certifying by a council officer of compliance with a Masterplan or conditions is different to the council officer acting as arbitrator or decision-maker.[101] There is no basis for asserting that the use of either the Masterplan or extensive conditions results in unacceptable uncertainty.

[201] The fact that the applicant still needs to obtain consent from Greater Wellington Regional Council for some aspects of the development does not make the entire project uncertain. The applicant had the option of a simultaneous joint application but has chosen to pursue sequential applications. That is understandable on the basis that unless the application to WCC was successful there would be no point in expending time and resources on an application to Greater Wellington Regional Council. If the applicant is unable to secure the consents it needs from GWRC then the project will not be able to proceed.

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99 Applicant's submissions at [60].
100 *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA 366.
101 *Turner v Allison* [1971] NZLR 833.

Section 34(2)

[202] The applicant alleged that the decision-makers had made two separate errors of law in relation to s 34(2). Firstly, it was alleged they substituted a different and lower test for s 34(2) than the test in the provision and, secondly, it was alleged that the decision-makers failed to "approach s 34(2) with caution and on the basis that to be '*satisfied*' under s 34(2) they needed to have assurance that the infrastructure required to service the development will be provided."[102]

[203] There is significant overlap between these two propositions.

[204] Section 34(2) provides:

> An authorised agency must not grant a resource consent that relates to a qualifying development unless it is satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development.

[205] The applicant relied on the decision in *Nagra v Registrar of Immigration Advisers* for the proposition that the adjective "satisfied" was generally understood to require a need "for caution and for a degree of conviction" and "assurance".[103]

[206] The comments of Peters J in *Nagra v Registrar of Immigration Advisers* were in fact drawn from the decision of the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*[104] where the Court was considering the meaning of "satisfied" in the context of s 94(2) of the RMA. The various judgments in this case explain why the Supreme Court approached the concept of being "satisfied" in the context of s 96(2) RMA in the manner they did.

[207] Elias CJ saw the scheme of the Act as being important when interpreting what the word "satisfied" meant for the purposes of s 94(2)(a) of the RMA. She noted that what the consent authority in that situation had to be satisfied about involved a departure from a general approach. The general approach was that applications for

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102 Applicant's submissions at [71].

103 *Nagra v Registrar of Immigration Advisers* HC Auckland CIV-2010-404-4045, 11 March 2011 at [41]–[42].

104 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597.

consents of the type involved there would be notified. She specifically agreed with Keith J:[105]

> ... that such determination touched on the scope of the right to be accorded natural justice. The decision not to notify an application is an exception to the general policy of the Act that better substantive decision making results from public participation.

[208] It was for those reasons that she concluded that there was "a requirement of caution" in relation to a concept that the consent authority be "satisfied".[106]

[209] It was in that context Elias CJ said: "It was not sufficient for the consent authority to have before it 'some material of probative value' ...".[107]

[210] Elias CJ said:[108]

> Additional care is required in the circumstances of the Act itself with its policies of public participation and principles of open decision making, opportunity for reconsideration of the merits of a decision by the Environment Court ... and the specific requirement of s 94(2)(a) that the consent authority be carried to the point of satisfaction.

[211] The context of s 34(2) of HASHAA is clearly different to that of s 94(2)(a) of the RMA.

[212] An important consideration for Elias CJ was the fact that, if the resource consent application in that case had been notified, the objectors would have had an opportunity to present countervailing information. She said:[109]

> Many of the principles of natural justice are based on the hard experience that assumptions that cases are open and shut are often disappointed when opposing views are heard.

[213] In relation to s 34(2), there is no opportunity for objectors or entities such as the applicant in these proceedings to present information contradicting the information of the applicant.

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105 At [25].
106 At [25].
107 At [26].
108 At [27].
109 At [27].

[214] It was, therefor,e clearly anticipated by the legislature that the consent authority would make the decision as to whether or not it was "satisfied" solely on the basis of the evidence presented by the applicant. That context should not be overlooked in deciding whether or not the consent authority here could be said to have been satisfied that "sufficient and appropriate infrastructure will be provided to support the qualifying development".

[215] Keith J also emphasised the importance of context in ascribing a meaning to the term "satisfied". He said:[110]

> The word must of course be read in context, in particular in the context of the power in question. It is a power preliminary, first, to the power to decide on the procedure to be followed and, secondly, to the power to decide on the merits and to grant or not a resource consent.

[216] Keith J also distinguished the particular context that court was required to consider from a situation of a court reviewing a council's substantive decision to grant or refuse a resource consent. He said:[111]

> We are not here concerned with the review of a substantive decision taken by the body authorised by statute, where the reviewing Court will not in general be in a position to substitute its assessment for that of the body by making, for instance, a de novo decision.

[217] He also noted that, in the case he was considering, the record did not show how the decision-makers addressed their minds to being satisfied that the information they had was adequate.[112]

[218] All of this is very different to the facts of the present case. The basis upon which the decision-makers "satisfied" themselves is clear from their discussion of the various issues and the experts views on them. Unlike the situation in *Discount Brands* there was no opportunity for a public hearing where the applicant could have tendered evidence contrary to that of the applicant. In the context of this section in HASHAA I find that there was sufficient evidence before the decision-makers so that they could conclude that they were "satisfied" for the purposes of s 34(2).

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110 At [53].
111 At [54].
112 At [55].

[219] The applicant is also critical of some of the language used in the report in relation to infrastructure services, focusing on words such as "possible", "is feasible" and "can be reasonably provided" and "can be adequately serviced". However, the language of the report as a whole must be considered to ascertain whether or not the decision-makers misunderstood what the requirement to be "satisfied" meant.

[220] In the present case, one of the techniques used by the decision-makers in relation to being satisfied that sufficient and appropriate infrastructure would be provided, is to impose conditions. The decision contains a large number of conditions in relation to infrastructure matters.

[221] The decision-makers had before them evidence of subject matter experts on all the infrastructure issues. The conditions imposed reflect the decision-makers analysis of that evidence as to what was required in order to ensure that sufficient and appropriate infrastructure would be provided.

[222] Compliance with the conditions imposed is not optional for TWC. If it wants to be able to exercise the resource consent, it must comply or make a subsequent application for variation of a condition which WCC would only grant if satisfied that the statutory test was met.

[223] WCC, in its written submissions, pointed out that much of the language complained about by the applicant appeared in the section of the decision that addressed infrastructure and servicing effects which was part of the assessment under s 34(1)(d)(i) not s 34(2). That observation is correct.

[224] The applicant's criticism that the decision-makers could not be "satisfied" as required by s 34(2) also involves implicit criticism of the Masterplan aspect of the consent. However, once again, the conditions imposed in the consent address this issue.

[225] HASHAA is not prescriptive about the detail of the infrastructure to be provided, merely requiring that the consent authority be satisfied that sufficient and appropriate infrastructure will be provided. Infrastructure which complies with the conditions imposed in this matter will be "sufficient and appropriate".

[226] Mr Nixon, a planning witness for the applicant, appeared to concede that the use of conditions or management plans was an appropriate way of ensuring that matters proceeded in accordance with expectations in the passage of his evidence where he said:[113]

> ... my experience under the RMA is that a consent authority needs to satisfy itself that the provision of additional new infrastructure can readily be satisfied, with details as to how this is achieved set out in the conditions and/or management plans.

[227] Section 34(3) gives some guidance as to what factors the consent authority must take into account in order to be satisfied that sufficient and appropriate infrastructure will be provided. These are:[114]

> (a) Compatibility of infrastructure proposed as part of a qualifying development with existing infrastructure; and
>
> (b) Compliance of the proposed infrastructure with relevant standards for infrastructure published by relevant local authorities and infrastructure companies; and
>
> (c) The capacity for the infrastructure proposed as part of the qualifying development and any existing infrastructure to support that development.

[228] At s 12 of the decision, the decision-makers expressly considered and applied these provisions referring to the relevant infrastructure experts' reports. When there is nothing illogical, perverse or irrational about this aspect of the decision, it is not for this court on a judicial review application to substitute its own view for the decision-makers conclusions on this point.

[229] Mr Timothy Kelly, a transport expert called for the applicant implied, that the fact that the proposal did not comply with the WCC Code of Practice for Land

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113 Affidavit of Robert Charles Nixon at [27]; ABD 2 at 8.
114 Section 34(3).

Development and Standard NZS 4404: 2010 meant that WCC could not have been satisfied that sufficient and appropriate infrastructure would be provided. However, this matter was addressed by Mr Spence, WCC's transportation expert, who indicated that these standards were applied flexibly in the context of upgrades to existing road networks as opposed to the construction of green fields developments and that the city's topography in locations similar to that of the subject site meant that these standards were not always met.

[230] Accordingly, the applicant's contentions that the decision-makers misunderstood what was involved before they could be "satisfied" or that the mechanism of conditions and a Masterplan did not produce a sufficiently certain outcome for WCC to be satisfied, are unfounded.

Incorrect reliance on s 72(3) of HASHAA

[231] The applicant is critical of the fact that the Decision Report in a number of places refers to s 72(3) of HASHAA. A typical example is the introductory passage of s 2.2 "Proposal". This section reads:[115]

> Sections 5.0 and 5.1 of the applicant's AEE also include a description of the proposal that I adopt as provided for in s 72(3) of HASHAA. The applicant's proposal description should be read in conjunction with this report.

[232] Section 72(3) of HASHAA says, in subs (3): "Section 113 of the Resource Management Act 1991 applies, with all necessary modifications, to the decision given under subsection (1)(a)."

[233] Section 113 of the RMA in subs (3) says:

> A decision prepared under subs (1) may —
>
> (a) Instead of repeating material, cross-refer to all or part of a —
>
> (i) The assessment of environmental effects provided by the applicant concerned ...

[234] However, s 72 of HASHAA only applies to requests for a plan change or variation. It is not relevant in the present case.

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[115] ABD 5 at 2732.

[235] The applicant says that this means that s 72(3) was not available to the council officers in the circumstances and "the use of it constituted a further error of law by the Officers". Clearly, s 72(3) was irrelevant, however, that does not necessarily mean that references in the decision to the contents of documents such as the AEE, rather than setting out the relevant material in full, automatically invalidates the decision.

[236] The decision refers to and adopts part of the AEE in three separate contexts. The first is in s 2.0 "site description and proposal". What is being adopted in s 2.2 is the description of the proposal set out in ss 5.0 and 5.1 of the AEE.

[237] Section 9.2 of the decision addresses the matters covered in Part 2 of the RMA. The decision sets out those parts of s 6 of the RMA that the decision-maker believes are of relevance and then says, "s 9.1 of the applicant's AEE includes an assessment of s 6 that I adopt." The decision does the same thing in the same paragraph in relation to s 7 of the RMA setting out those parts of s 7 which in this case particular regard must be had to and then referring to s 9.2 of the applicant's AEE and adopting the assessment of s 7 set out there. The question must be asked what the effect is of the decision-makers adopting these passages from the AEE instead of repeating the material verbatim.

[238] The important question is whether or not the decision-makers applied their minds to the relevant issues and made their own decision. While s 72(3) of HASHAA is irrelevant, there is no prohibition on a decision-maker in these circumstances electing, as a drafting technique, to refer to things such as the description of a proposal or assessments relevant to ss 6 and 7 of the RMA that are contained in an AEE rather than to set those matters out verbatim and then agree with or adopt them.

[239] There is no detriment to anyone from this course having been followed and the fact that the decision-makers chose to use this drafting technique. While the reference to s 72(3) HASHAA was in error, it does not invalidate the decision.

Acting for improper purposes

[240] As a variation of its argument that this development did not have the "characteristics" anticipated by HASHAA, the applicant developed an argument that

WCC had misinterpreted its powers under HASHAA "... and used them for the improper purpose of authorising a development that is not envisaged by HASHAA."

[241] In support of this proposition, the applicant repackaged arguments dealt with earlier in this decision. It said:[116]

> Enterprise Miramar says that HASHAA is designed for well prepared, ready to-be-built developments that can and will be quickly constructed following a fast-tracked process for the grant of resource consents.

[242] It then went on to say:[117]

> A development that is so significant that it requires a Masterplan to progress is obviously inappropriate for streamlined HASHAA processes.

[243] The applicant also said that the 13 year lapse period was "out of line with RMA practice in general" and concluded "[t]hat evidence confirms that this development should have been considered and consented (if appropriate) through the usual RMA processes, not HASHAA".[118]

[244] For the reasons discussed earlier, it is not possible to say that the only developments contemplated by HASHAA are those that can be built immediately. It is also equally as untenable to submit that this application should have gone through the RMA processes as opposed to those of HASHAA. Such a submission overlooks the fact that the subject site was initially assessed by WCC as being suitable for a SHA and then declared as such by the Minister. The proposal was for a qualifying development. The applicant was entitled to apply under Part 2 of HASHAA and the WCC was obliged to consider the application against that framework.

[245] Part 2 of HASHAA provides an alternative consenting process that is effectively a substitute for the RMA procedures and the statute anticipates that qualifying developments under HASHAA may be successful even though they might not be under the RMA.

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116 Applicant's submissions at [97].
117 At [100].
118 At [101].

[246] The applicant's witnesses don't seem to have accepted that the decision by the Minister to declare the subject site an SHA was unchallenged at the time and is not reviewable in these proceedings.

[247] The witnesses also do not seem to understand or accept that the procedures mandated under HASHAA, particularly in relation to notification and the opportunity for input by entities such as the applicant into the decision-making process, are very different to those under the RMA. A telling example of this is a passage in the evidence of Thomas Wutzler which says:[119]

> Enterprise Miramar has brought this judicial review to seek to overturn the resource consent that has been granted to extensively develop Shelly Bay. We are hoping that the judicial review will roll the consent over, that the process for getting approval to develop Shelly Bay will have to start again, and that that outcome may open the door for others to put forward better development proposals now that the Miramar community is able to have a say on, and that we can ultimately have confidence in the outcome of.

[248] HASHAA simply does not provide for "the Miramar Community" to "have a say" on applications such as this.

[249] The report from the New Zealand Productivity Commission on Housing Affordability, which preceded HASHAA, noted that local authorities' consenting processes were contributing to the perceived housing shortage, as were the procedures of the RMA 1961.[120] It is ironic that this resource consent has not been able to proceed with the speed envisaged by HASHAA as a result, in part, of delays in processing it by WCC and, in part, because of the actions of the applicant in, among other things, attempting to persuade the Court that the application should have been brought under the RMA.

Conclusion

[250] Accordingly, the application for judicial review is dismissed.

[251] I invite the parties to agree costs but, failing agreement, the respondents are to file submissions on costs of no greater than 10 pages each in length within 14 days of

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119 Affidavit of Thomas Frank Wutzler, 26 January 2018 at [3].
120 New Zealand Productivity Commission "Housing Affordability" (March 2012).

the date of this decision with the applicant having 14 days within which to reply with submissions of no greater than 10 pages.

P.B. Churchman J

Churchman J

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