IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA218/2018
[2018] NZCA 541

BETWEEN	ENTERPRISE MIRAMAR PENINSULA INCORPORATED Appellant
AND	WELLINGTON CITY COUNCIL First Respondent
	THE WELLINGTON COMPANY LIMITED Second Respondent

Hearing:	22 August 2018
Court:	Asher, Clifford and Gilbert JJ
Counsel:	D A Laurenson QC and M S Smith for Appellant N M H Whittington and P I C Comrie-Thomson for First Respondent P J Radich QC and T P Refoy-Butler for Second Respondent
Judgment:	3 December 2018 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The first respondent's decision granting resource consents is quashed.

C The second respondent's application for resource consents is remitted to the first respondent for reconsideration. The first respondent should consider whether or not to exercise its power under s 34A of the Resource Management Act 1991 to appoint independent commissioners.

D The respondents are jointly and severally liable to pay the appellant costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

E The High Court costs award made against the appellant is quashed.

F If the parties cannot agree on costs in the High Court, the High Court is to fix costs in that Court in the light of this judgment.

REASONS OF THE COURT

(Given by Asher J)

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Introduction

[1] This appeal arises from a refusal by the High Court to grant judicial review and quash a decision to grant resource consents for the building of a significant development in Shelly Bay, Wellington.[1] The decision to grant the resource consents is challenged on the basis of errors of law, leading in turn to a failure to consider relevant considerations, and apparent bias or conflict of interest.

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1 *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZHC 614, [2018] NZRMA 269.

[2] The appellant, Enterprise Miramar Peninsula Inc (Enterprise), is an incorporated society representing the interests of members of the business community in Miramar. Its objects are to foster and promote the welfare of Miramar, and to advocate for the improvement of utilities, transport services and other infrastructure.[2] The first respondent is the Wellington City Council (the Council), which made the resource consent decisions. The second respondent is The Wellington Company Ltd (TWCL), which is the holder of the resource consents.

[3] The resource consents were issued under the Housing Accords and Special Housing Areas Act 2013 (HASHAA), which creates a streamlined resource consenting process for residential developments in areas identified as having housing supply and affordability issues. The issues arising in the appeal relate in considerable part to the interaction between HASHAA and the existing resource consent regime under the Resource Management Act 1991 (the RMA).

Shelly Bay

[4] Shelly Bay is located on the western side of the Miramar Peninsula. It has a distinctive two-bay form and is a major feature of the Peninsula's coastline. It contains an area of flat land, much of it reclaimed, up to the water's edge and is bounded by a steep vegetated escarpment to the east. The site is about eight kilometres from the Wellington central business district.

[5] European activity at Shelly Bay has been dominated by various military concerns. It was the site of a depot to accommodate torpedo boat and submarine mining operations from 1887. During World War II the Royal New Zealand Navy established a dedicated naval base and armament depot on the site, including accommodation buildings and a wharf and slipway. Following World War II the site was adapted and used by the Royal New Zealand Air Force until 1995, when it was declared surplus to military requirements. Since the area ceased to be actively used for military purposes approximately 25 years ago, there has been little maintenance on the 26 remaining structures on the land, and several are in a state of significant disrepair.

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[2] There was no challenge to Enterprise's standing to seek judicial review.

[6] The Māori name for the Peninsula is Te Motu Kairangi. It has been occupied by various iwi for many centuries. Taranaki Whānui hold mana whenua status. Since 2008 the Port Nicholson Block Settlement Trust (PNBST), the entity that represents Taranaki Whānui, has owned two separate parcels of land at Shelly Bay totalling 5.0445 ha. The land was acquired by PNBST pursuant to its Treaty of Waitangi settlement with the Crown. The other significant land holding is 1.6 ha of land in an irregularly shaped parcel on the waterfront, owned by the Council.

Planning background

[7] Under the District Plan, Shelly Bay is zoned partly Open Space B and partly Business 1. In broad terms, the flat land immediately abutting the coast next to the existing wharf structures is zoned Business 1, and the balance of the land either side of the existing wharf and rising up behind the bay is zoned Open Space B.

[8] The Business 1 zoning was effected through a 1999 Environment Court decision.[3] In that decision the Environment Court stated that:[4]

> The future development and protection of Shelly Bay is, we consider, one of the most significant environmental issues in Wellington as the City goes into the Millennium.

[9] Consistent with that observation, the Court prescribed a Shelly Bay Design Guide (the Design Guide) for development of Business 1 zoned land, which is incorporated into the operative District Plan. The Design Guide expressly recognises Shelly Bay's distinctive environmental character, noting its "coastal location and visually prominent natural setting", in particular its prominence as a "distinct element within the wider panoramic view to the Miramar Headland with a strong contribution to the identity of Wellington Harbour". The purpose of the Design Guide is to "encourage development which recognises and respects the distinctive environmental qualities that give the area its character", which is achieved by imposing significant restrictions on building siting, "massing" (including height limits of 8–12.5 metres), scale and design. In a related decision the Environment Court commented that the height limits "ensure the development will retain a generally low horizontal profile

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3 *Minister of Defence v Wellington City Council* EnvC W85/99, 19 August 1999.
4 At [3].

against the rich backdrop of the hills respecting the site's unique position on the coastal margin".[5] The predominant Business 1 zoning provides for mixed use development in the area including residential development.

[10] In relation to the Open Space B zoning, the District Plan states that:

> Open Space B land is valued for its natural character and informal open spaces. It involves areas that are used for types of recreation that, in the broadest sense, do not involve buildings or structures. The intention is to keep such areas in an unbuilt or natural state. This type of open space encompasses both formal and informal open space elements. It includes walkways, scenic areas and open grassed areas where buildings are inappropriate. Its characteristics are minimal structures, largely undeveloped areas and open expanses of land. Most Open Space B areas are vegetated and often have ecological values or may buffer Conservation Sites.

The Housing Accords and Special Housing Areas Act 2013

Background

[11] Housing affordability has become a major issue in New Zealand. In 2011 the government instructed the Productivity Commission to undertake an inquiry into the factors negatively influencing the affordability of housing and potential solutions. One of the key findings of the Commission was that, although there is a relatively abundant supply of land, policy and planning practices may be constraining its use for residential development.[6] Both the RMA regime and local authorities' consenting processes were identified as obstacles to development.[7] The Commission observed that there is "scope for councils, developers, land owners and builders to collaborate in bringing affordable housing to market" and that territorial authorities should "take a less constrained approach to the identification, consenting, release and development of land for housing in the inner city, suburbs, and city fringe".[8] The Commission ultimately recommended that the government consider the case for a review of planning-related legislation to reduce the costs, complexity and uncertainty associated with the interaction of planning processes.[9]

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5 *Minister of Defence v Wellington City Council* EnvC W66/99, 22 June 1999 at [157].
6 Productivity Commission *Housing Affordability* (March 2012) at 5.
7 At 120.
8 At 102.
9 At 268.

[12] On 15 April 2013 the Ministry of Business, Innovation and Employment released a Regulatory Impact Statement analysing options to increase the supply of land for housing development in the short term, in order to reduce pressure on housing supply in areas experiencing severe housing affordability problems.[10] It recommended a collaborative approach between central and local governments whereby special housing areas would be identified in which local councils would exercise more flexible resource consenting powers for residential developments.[11] It was envisaged that the regime would enable the granting of "consents for large housing developments and redevelopments that might not otherwise proceed under the rules and conditions of existing plans".[12]

[13] On 7 May 2013 the Minister of Housing, Nick Smith, sought the Cabinet Legislation Committee's approval to introduce and commence the first reading of the Housing Accords and Special Housing Areas Bill.[13] The purpose of the Bill was described as being "to enhance housing affordability by facilitating an increase in land and housing supply in regions or districts with housing supply and affordability issues".[14] This would be achieved through five main components: scheduled regions or districts, housing accords, special housing areas, qualifying developments and more permissive resource consenting powers.[15] The usual matters to which a consent authority would be required to have regard in considering an application under the RMA would be subordinated to the purpose of HASHAA, and the RMA would only apply to the extent that its provisions were expressly incorporated into the HASHAA regime.[16] It was stated that "in the case of any inconsistencies or conflicts, the purpose of the HASHA Act will override other considerations".[17]

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10 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Creating Special Housing Areas* (15 April 2013).
11 At 25.
12 At 14.
13 Office of the Minister of Housing *Housing Accords and Special Housing Areas Bill: Approval for Introduction* (7 May 2013).
14 At [2].
15 At [4].
16 At [17].
17 At [18].

[14] In the explanatory note to the Bill it was stated:[18]

> **More permissive resource consent powers**
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> The Bill provides for resource consent applications for qualifying developments to be considered according to more permissive resource consent powers. …
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> In considering an application for a resource consent under this Act, the authorised agency must reach a decision that is consistent with, and gives effect to, the purpose of the Act. The agency must also be satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development and take into account the matters set out in Part 2 and sections 104 to 104E of the Resource Management Act 1991 and the Ministry for the Environment's *New Zealand Urban Design Protocol (2005)*.

The relevant provisions

[15] The purpose of HASHAA is stated at s 4 to be "to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts … identified as having housing supply and affordability issues". The regions or districts to which the Act applies are listed in sch 1.

[16] The permissive consenting regime under HASHAA is only available to an applicant where the proposed activity involves a qualifying development in a special housing area. A number of steps must occur before a site can be established as a special housing area:

(a) The Minister responsible for the administration of the Act and a territorial authority whose district is listed in sch 1 must enter into a housing accord that prescribes targets for residential development.[19] The accord must set out agreed targets for residential development in that district and how the parties will work together to achieve the purpose of the Act.[20]

(b) Once the housing accord is in force, the territorial authority may recommend to the Minister that an area be established as a special

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18 Housing Accords and Special Housing Areas Bill (117-1) (explanatory note).
19 Housing Accords and Special Housing Areas Act 2013, s 10.
20 Section 11.

housing area.[21] In considering that recommendation the Minister must have regard to various matters including the relevant district plan[22] and must be satisfied that there is adequate infrastructure to service qualifying developments in the proposed special housing area.[23]

(c) If the Minister so recommends, the Governor-General may, by Order in Council, declare an area to be a special housing area for the purposes of HASHAA.[24]

[17] Once a special housing area has been established, a person can apply for a resource consent in relation to any qualifying development in that area. Section 14 of HASHAA defines a "qualifying development" as one that will be "predominantly residential" and where dwellings and other buildings will not be higher than six storeys or a maximum of 27 metres.[25] The proposed development must also contain no fewer than the prescribed minimum number of dwellings and the prescribed percentage (if any) of affordable dwellings set when the special housing area was declared (or set subsequently by an Order in Council).[26]

[18] If a person chooses to apply for a resource consent under HASHAA,[27] rather than the RMA, the local authority must give effect to the more permissive resource consenting regime under pt 2 of HASHAA. In a significant departure from the RMA regime, notification and a hearing are prohibited save for certain limited circumstances.[28] The local authority must consider the application in accordance with s 34. Given the importance of this provision to the appeal, we set it out in full:

> **34 Consideration of applications**
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> (1) 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:

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21 Section 17(1).
22 Section 16(2).
23 Section 16(3)(a).
24 Section 16(1).
25 Section 14(1)(a)–(b).
26 Section 14(1)(c)–(d).
27 Section 20.
28 Section 29.

(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.

(2) 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.

(3) For the purposes of subsection (2), in order to be satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development, the matters that the authorised agency must take into account, without limitation, are—

(a) compatibility of infrastructure proposed as part of the 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.

(4) In considering an application for a resource consent under this section, the authorised agency—

(a) may direct an affected infrastructure provider to provide any information that the authorised agency considers to be relevant in the circumstances to its consideration of the application; and

(b) if the authorised agency is the chief executive, may also direct any local authority to provide any information that the authorised agency considers to be relevant in the circumstances to its consideration of the application.

(5) If an authorised agency makes a direction under subsection (4), the infrastructure provider or local authority must provide the information requested as soon as is reasonably practicable.

(6) The Ministry must ensure that a copy of the document referred to in subsection (1)(e), or a link to that document, is on the Ministry's Internet site and that members of the public can easily access the document via that site, free of charge, at all reasonable times.

[19] We also note that, although there are no general appeal provisions,[29] judicial review was not ousted by HASHAA, and was in fact envisaged in the material leading up to the legislation.[30]

[20] The Minister of Housing and the Council entered into a housing accord for Wellington City on 24 June 2014. The Council recommended to the Minister that 2.79 ha, and subsequently a further 7.32 ha, of Shelly Bay be established as a special housing area. The Minister, being satisfied there was likely to be adequate infrastructure and sufficient demand, recommended that designation. Orders in Council were made by the Governor-General on 29 June 2015 and 7 December 2015 declaring Shelly Bay to be a special housing area.

TWCL's application

[21] On 15 September 2016 TWCL applied to the Council for consents to redevelop and subdivide Shelly Bay, and to use a potentially contaminated site (the Application).

[22] The Application proposed the construction of some 350 dwellings made up of 12 multi-level residential apartment buildings containing approximately 280 apartments, 58 townhouses, and 14 individual dwellings. The maximum height of the proposed apartments would be the 27 metres permitted under HASHAA, up to six storeys high. There was provision for a 50-room boutique hotel, and for the 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. There was also provision for adapting

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29 Section 78 provides that there is no right of appeal against a decision by an authorised agency on a resource consent application made under HASHAA except in the limited circumstances provided for in ss 79 and 81.

30 *Regulatory Impact Statement: Creating Special Housing Areas*, above n 10, at 22.

three of the existing buildings for commercial and community activities, with all others to be demolished or relocated off site. TWCL also proposed the development of a village green public open space, and for the realignment of the road through Shelly Bay.

[23] As we have set out above, the Council owns a small portion of the land in the special housing area. TWCL's proposal makes use of that land. Therefore, in order to proceed, TWCL would need to buy or lease the Council-owned land. There was some contest between the parties as to the extent to which agreement on that issue had already been reached between TWCL and the Council. As we understand it, the Council has not yet made any binding agreement with TWCL in that regard, although there is at least an understanding that the Council may sell or grant a 125-year lease to TWCL.

[24] In accordance with s 29 of HASHAA, the Application was neither notified, nor was a hearing held. The Application was considered by the Council's Resource Consents Manager and a Senior Consents Planner acting under delegated authority. The Application was granted subject to conditions on 18 April 2017. Enterprise subsequently filed proceedings in the High Court seeking judicial review of two decisions. The first was the Council's decision not to engage independent commissioners to determine the Application. The second was the Council's decision to grant the resource consents. The application for judicial review was declined by Churchman J on 9 April 2018.[31]

[25] On appeal Enterprise contends that the Council's decision to grant TWCL the resource consents is vitiated on three grounds:

(a) Error of law in the form of misconstruction/misapplication of ss 4 and 34(1) of HASHAA, whereby the purpose of s 4 was misunderstood and improperly used to trump any and all considerations telling against the consents being granted or reduced in scope or scale.

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31 *Enterprise Miramar Peninsula Inc v Wellington City Council*, above n 1.

(b) Error of law in relation to the proper approach to applying s 34(2) of HASHAA, which concerns the adequacy of infrastructure.

(c) Apparent bias or conflict of interest on the part of the Council, as a result of their pecuniary or other interest in the outcome of the Application and their collaboration with TWCL.

[26] We analyse each of these in turn.

Ground one — misinterpretation/misapplication of ss 4 and 34(1) of HASHAA

[27] Enterprise contends that the Council, and Churchman J, made three errors of law in relation to ss 4 and 34(1) of HASHAA:

(a) First, the Judge wrongly concluded that the Council had not misunderstood the purpose of HASHAA as being to "maximise" housing yield.

(b) Second, even if the Council did not misunderstand the purpose of HASHAA, the Judge wrongly upheld the Council's approach to weighting the purpose of the Act in the overall balancing exercise. In particular, the Council failed to consider the extent to which the Application met that purpose, including how long it would take for the proposed development to increase housing supply and aspects of the development that would not be used for residential housing.

(c) Third, the Judge wrongly concluded that the Council did not erroneously use the purpose of HASHAA to effectively neutralise the matters that arise for consideration under s 34(1)(b)–(e), with the result that those matters were not properly acknowledged and weighed.

The purpose of HASHAA

[28] Having described the purpose of HASHAA as set out in s 4 near the beginning of its decision, the Council later stated "the purpose of HASHAA is to maximise

housing yield". The Judge determined that, upon consideration of the Council's decision as a whole, this was an isolated error and the Council had accurately identified the purpose of HASHAA as being to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts, and measured the proposal against that purpose.[32]

[29] Enterprise referred to a number of excerpts from the Council's decision that, in its submission, demonstrated that the Council had erroneously understood HASHAA's purpose to be to "maximise" housing. It noted that the Council adopted TWCL's assessment of relevant planning instruments as "accurate", which in turn relied on a statement in an urban design assessment for the development that "[h]eight limits have been breached to fully utilise the potential of the site to provide housing to give effect to the purpose of the HASHAA". It also referred to a conclusion by the Council that the adverse open space effects of the proposal were no more than minor as they are "limited to what is required to provide housing to meet the intent of HASHAA".

[30] We agree that the Council misstated the purpose of HASHAA when it described it as being to "maximise" housing yield. However, in our view, the other excerpts from the Council's decision relied upon by Enterprise do not go that far and are reconcilable with the correct HASHAA purpose of enhancing housing affordability by facilitating an increase in housing supply. We note other aspects of the decision that indicate that the purpose was properly understood. The purpose of HASHAA was described accurately elsewhere in the Council's decision as "increasing housing yield", "to provide housing to the Wellington Market" and to "increase housing affordability and supply". Overall, we do not consider that the Council erred in its construction of the purpose of HASHAA.

[31] However, as we will set out, the Council's reference to a need to "maximise" housing yield occurred in the context of what we see as a different error of law.[33]

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32 At [174].
33 See [40]–[59] below.

Weighting the purpose of HASHAA

[32] Enterprise submitted that it is implicit in s 34(1) of HASHAA that the weight to be accorded to the purpose of the Act under s 34(1)(a) will vary according to the extent to which the proposed development meets that purpose. For example, the faster that new housing supply is introduced to the market as a result of a proposed development, and the more that the proposed development comprises buildings used for residential rather than commercial purposes, the more the proposal meets the purpose of HASHAA, and the more weight that should be given to that purpose in the weighing exercise that s 34(1) envisages. Enterprise submitted that neither the Council nor the Judge adopted that approach, resulting in an error of law and a failure to consider mandatory relevant considerations. Enterprise noted in particular that the Council failed to take into account that the proposed development would be staged over 13 years, and included significant non-residential aspects, such as a boutique hotel.

[33] We do not consider that a timeframe of 13 years is out of the ordinary given the scale of the development, or that this should be viewed as a matter overlooked by the Council in carrying out a s 34(1) evaluation. There was expert evidence that such timeframes are not uncommon for significant developments. The timeframe does no more than reflect the challenges of the site and the scale of what is to be developed there. In itself we are unable to see this as a factor that the Council was obliged to acknowledge and consider under s 34(1)(a).

[34] The inclusion of the hotel in the proposal was considered by the Council in the context of assessing whether the proposal was a qualifying development under s 14 of HASHAA. The Council expressly mentioned the hotel and acknowledged that the proposed development includes non-residential activities. However, it considered that these were "ancillary to the residential development" and "[t]he primary and dominant use of the site is for residential activity by creating approximately 352 residential dwellings".

[35] We do not consider that the Council was obliged to make a further assessment about the extent to which the proposed development provided housing under s 34(1)(a)

at the resource consent stage. Such matters are assessed at the prior stage of determining whether the proposal is a qualifying development such that an application for consent can be made under HASHAA rather than the RMA. A qualifying development is one that is "predominantly residential".[34] Under s 14(2), a development is "predominantly residential" if:

> (a) the primary purpose of the development is to supply dwellings; and
>
> (b) any non-residential activities provided for are ancillary to quality residential development (such as recreational, mixed use, retail, or town centre land uses).

[36] The Council assessed the proposed development against those criteria and determined they were met. We see no error in that assessment.

[37] In our view, to suggest that the non-residential aspects of a proposed development should be considered again under s 34(1)(a) would be contrary to the scheme of the legislation and the threshold Parliament has set for a qualifying development under s 14.

[38] We also agree with the following conclusion of the Judge:[35]

> [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.

[39] We therefore find that neither the Council nor the Judge made a reviewable error in their weighting of s 34(1)(a).

Section 34(1)(b)–(e)

[40] We have set out how s 34(1) of HASHAA deliberately and explicitly creates a "hierarchy" of matters that must be taken into account when considering an application for resource consent under the Act. The weight given to each factor is greatest for the first, with lesser weight to be applied in descending order down to the fifth and last

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34 Housing Accords and Special Housing Areas Act, s 14(1)(a).

35 *Enterprise Miramar Peninsula Inc v Wellington City Council*, above n 1.

factor. We set out the hierarchy of matters to be taken into account again for ease of reference:

> (1) 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.

[41] The plain words indicate, therefore, that greatest weight is to be placed on the purpose of HASHAA, namely enhancing affordable housing supply in certain districts. That said, other considerations have been deliberately included. Decision-makers must be careful not to rely solely on the purpose of HASHAA at the expense of due consideration of the matters listed in (b)–(e).

[42] Enterprise argued that when considering s 34(1)(d)(i), the Council assessed the environmental effects of the proposal as being "no more than minor" in terms of s 104D of the RMA by balancing those effects against the purpose of HASHAA. Section 104D(1)(a) of the RMA provides that a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that the adverse effects of the activity on the environment will be minor. Enterprise acknowledged that, under HASHAA, s 104D of the RMA does not directly apply, and is relegated to the status of a consideration under s 34(1)(d)(i). Nonetheless, it is a matter that must be taken into account. Enterprise submitted that, by using the purpose of HASHAA, which has already been considered separately under s 34(1)(a), to restrict the weight given to the

matters in s 34(1)(d)(i), the Council "double-counted" the purpose of HASHAA in a way not envisaged by the text or scheme of s 34(1).[36] Moreover, the purpose of HASHAA is not logically relevant to determining whether effects on the environment are more or less than minor.

[43] The Council, after having stated the proposal's consistency with the purpose of HASHAA under s 34(1)(a), went on to consider the other matters set out in s 34(1). In relation to s 34(1)(d)(i) it stated:

> As the proposal is for a Non-Complying Activity the gateway test of section 104D must be considered, namely that whether the adverse effects will be minor or that the proposal is not contrary to the objectives and policies of the Wellington City District Plan.
>
> As will be discussed below, I consider that the adverse effects of the proposal will be no more than minor. Accordingly, the proposal meets this limb of the "gateway tests". I have also assessed the relevant objectives and policies below and consider that the proposal is not contrary to them.

[44] The Council then proceeded to assess the adverse effects of the proposal individually. On heritage effects it stated:

> There are no buildings or structures on the application site that are heritage listed under either the District Plan or by Heritage New Zealand. Notwithstanding that, a number of buildings on the site do hold heritage value …

[45] The Council noted a report from its Senior Heritage Advisor, Ms Tanner, who stated that the proposed destruction and relocation of historic buildings could not be supported from a heritage perspective. She also expressed concerns regarding effects on the archaeological value of the site.

[46] The Council's decision then states:

> While I concur with Ms Tanner's assessment that because a building is not listed it does not mean it does not hold heritage value*, the purpose of HASHAA is to maximise housing yield*. Therefore, a balanced approach is needed in providing much needed housing to the Wellington housing market while [taking] into account the heritage value of the site. In my opinion, the desire for housing to the market which would require the removal of existing buildings onsite outweighs the impact on heritage value.

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[36] We do not consider that the term "double-counting" accurately describes the error, therefore we do not use that terminology in our analysis.

(Emphasis added.)

[47] On that basis, the Council considered the "adverse effects on heritage to be no more than minor".

[48] The Council stated in relation to open space effects:

> Overall, the proposal will result in a change to the Open Space zone but will not significantly affect its wider landscape values *and is limited to what is required to provide housing to meet the intent of HASHAA. As such, I consider Open Space effects to be no more than minor.*
>
> (Emphasis added.)

[49] Finally, it was concluded:

> Overall, for the reasons above, and in the context of the expectation for residential development as identified by the District Plan Business 1 and Open Space B Areas and against the HASHAA provisions, the overall effects from the proposed development are considered to be acceptable and the effects on the environment no more than minor.

[50] Under s 34(1)(d)(i) of HASHAA, the Council was also obliged to have regard to the relevant provisions of any plan or proposed plan under s 104(1)(b)(vi) of the RMA. In doing so, the Council adopted as accurate TWCL's Assessment of Environmental Effects, which itself stated that the Shelly Bay Design Guide building height limits "have been breached to fully utilise the potential of the site to provide housing to give effect to the purpose of the HASHAA".

[51] The Judge found that the Council had made no error in its approach to the factors in s 34(1)(b)–(e):[37]

> [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.

[52] We disagree. We accept the submission for Enterprise that, properly interpreted, s 34(1) required the decision-maker to assess the matters listed in

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[37] *Enterprise Miramar Peninsula Inc v Wellington City Council*, above n 1.

subs (1)(b)–(e) uninfluenced by the purpose of HASHAA before standing back and conducting an overall balancing.

[53] Section 34(1) instructs the decision-maker to "have regard to" the listed matters "giving weight to them (greater or lesser) in the order listed". The scheme and plain text of s 34(1) requires individual assessment of the listed matters prior to the exercise of weighing them in accordance with the prescribed hierarchy. The matters listed in subs (1)(b)–(e) cannot properly be weighed alongside the purpose of HASHAA under subs (1)(a) if that purpose has first been used to effectively neutralise the matters listed in subs (1)(b)–(e).

[54] We accept that, under HASHAA, ss 104–104F of the RMA do not directly apply, therefore a development that could not proceed under those provisions of the RMA could still be consented under s 34 of HASHAA. However, those RMA provisions are still mandatory considerations under s 34(1)(d)(i), and cannot be neutralised by reference to the purpose of HASHAA. We also note the instruction in s 34(1)(d)(i) to consider the matters that arise under ss 104–104F of the RMA "were the application being assessed under that Act". The Council's approach, which considered the matters in ss 104–104F of the RMA by reference to HASHAA, is inconsistent with that instruction.

[55] Moreover, we agree with the submission for Enterprise that the purpose of HASHAA is not logically relevant to an assessment of environmental effects. Environmental effects do not become less than minor simply because of the purposes of HASHAA. What changes under HASHAA is the weight to be placed on those more than minor effects. They may be outweighed by the purpose of enhancing affordable housing supply, or they may not.

[56] Mr Whittington for the Council submitted that there is no meaningful difference between the two approaches. We disagree. The impact of the Council's erroneous approach is that the matters the Council must consider under subs (1)(b)–(e), particularly subs (1)(d)(i), were not properly recognised or acknowledged, or considered in any detail. For example, the Council used the purpose of HASHAA to neutralise open space effects by enabling them to be categorised as no more than

minor. As a consequence, no consideration was given to the extent to which the proposed buildings, some extending to the maximum height limit under HASHAA of 27 m, significantly exceeded the height and extent of development contemplated by the Shelly Bay Design Guide or the Open Space B zoning of the land. As we have set out, the Design Guide sets a height limit of 12.5 m, and Open Space B zoning contemplates "minimal structures". Considered in that light, and although it is a matter for the decision-maker, we note that we have difficulty understanding how the installation of buildings of the height and bulk proposed by TWCL could have a "no more than minor" effect on this open space. That was not necessarily fatal to the Application and, when ultimately weighed against the purpose of HASHAA, may not have prevented the Application being granted. Yet the extent of the proposed development's adverse effect on open space should have been properly acknowledged and weighed.

[57] The error of approach can be also be seen in the Council's treatment of the heritage effects of the proposed development. The Council's assessment of heritage effects is significantly more thorough than its assessment of open space effects. For example, the Council's decision acknowledges Ms Tanner's concerns about the relocation or destruction of existing historic buildings, and notes that TWCL proposed incorporating aspects of the heritage buildings into the development. However, the Council's decision states that the purpose of HASHAA means that any heritage effects are no more than minor. Again, we consider that this prevented the heritage effects of the proposed development from being properly acknowledged and weighed in the overall balancing exercise in s 34(1).

[58] We consider that the Council also gave no substantive consideration to the matters in pt 2 of the RMA. Part 2 of the RMA sets out the purposes and principles of that Act, and is a mandatory consideration under s 34(1)(b) of HASHAA. The preservation of the natural character of the coastal environment and the protection of outstanding natural features and landscapes are matters of national importance under s 6(a)–(b) of the RMA. So too is the protection of historic heritage from inappropriate use and development under s 6(f). The maintenance and enhancement of the quality of the environment is also a matter stated as warranting particular regard under s 7(f). These pt 2 considerations were required to be considered under s 34(1)(b)

of HASHAA, second in weight only to the purpose of HASHAA itself. Whilst the Council's decision refers to the matters in ss 5–7 of the RMA, its analysis is limited to an adoption of TWCL's assessment of those provisions. TWCL's assessment is brief and concludes:

> Overall, the proposed activity will result in a high quality development located in an appropriate location for residential development. Substantial expert analysis has been provided in support of the application. The proposed development will provide much needed housing stock in Wellington while managing external and internal effects. The outcome will be a high quality urban design outcome.
>
> Therefore, it is considered that the proposal is consistent to the purposes and principles of the RMA as defined by Part 2.

[59] The Council's adoption of this conclusion and its reference to "housing stock", and its cursory analysis of the matters arising under pt 2 of the RMA, are a further example of the Council having allowed the purpose of HASHAA to neutralise or minimise the other matters that arise for consideration under s 34(1)(b)–(e). As in relation to s 34(1)(d)(i) discussed above, the consequence is that the matters arising under s 34(1)(b) were not given due consideration and weight. Rather than just treating the purpose of HASHAA as the most important and influential matter to be weighed, the Council used the purpose of HASHAA to eliminate or greatly reduce its consideration and weighing of the other s 34(1) factors. For the reasons we have set out, this was a significant error of law resulting in a failure to take into account relevant considerations. We allow the appeal on that basis.

Ground two — infrastructure

[60] Section 34(2)–(3) of HASHAA provides:

> (2) 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.
>
> (3) For the purposes of subsection (2), in order to be satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development, the matters that the authorised agency must take into account, without limitation, are—
>
> (a) compatibility of infrastructure proposed as part of the 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.

[61] Enterprise argued that the Council erroneously substituted a lower test than that set out in s 34(2) when assessing whether there was sufficient and appropriate infrastructure to support the proposed development. It submitted that the Council had erroneously applied a standard of satisfying itself that appropriate infrastructure "can be supported", "can be provided" and "will be possible". This was said to be a significantly lower standard than that required by s 34(2), which is that sufficient and appropriate infrastructure "will be provided". Enterprise further submitted that the evidence and information relied upon by TWCL, consistent with the conceptual and high-level nature of the proposal, could only show that the necessary infrastructure was feasible or possible. That was insufficient for the Judge to be satisfied under s 34(2).

[62] Given our conclusion that the appeal must be allowed as a result of the Council's error in relation to s 34(1)(b)–(e), we have not considered this submission in as much detail as we otherwise would. Nonetheless, we make the following comments.

[63] We are not persuaded that there has been an error in the Council's approach to infrastructure matters. Although we accept that the Council's decision uses language implying a lesser standard, the decision-makers had before them a large number of reports that contained what we consider to be sufficient detail for the Council to be satisfied under s 34(2). Mr Whittington took us to a number of these throughout his oral submissions. We agree with the submission for the Council and TWCL that to require a higher standard of detail at the pre-consent phase would be costly and impractical.

[64] The Judge observed that one of the techniques used by the Council in order to be satisfied that sufficient and appropriate infrastructure would be provided was to

impose conditions.[38] The Council's decision imposed a large number of conditions in relation to infrastructure matters. Many require TWCL to formulate plans as to infrastructure and submit them to relevant experts for approval before proceeding. For example, in relation to water supply:

> 57. The development must be provided with water supply which meets the specifications of the Wellington City Council Code of Practice for Land Development; at locations approved by the Wellington Water Land Development Team.
>
> 58. Unless an alternative proposal is approved, a new reservoir, water supply pipe work and associated infrastructure works will be required. This will include the removal of existing reservoir and pipe as required. The reservoir and pump station proposal shall be in accordance with the Council's reservoir and pump station rationalisation policy. Calculations are to be provided to confirm that there is sufficient pressure and flow for the development to meet the Code of Practice for Land Development requirements. Upgrading of the existing water infrastructure may be required if the Code's requirements cannot be achieved or if the proposal will have a detrimental effect on existing users. All calculations and designs, including structural elements related to water supply, must be endorsed by an appropriately qualified chartered engineer and submitted with a design statement.

[65] Enterprise submitted that the information as to water and other infrastructure was inadequate and it was inappropriate for the Council to use consent conditions to address this. It submitted the Council's approach would mean that s 34(3) has no practical impact. If infrastructure matters can be dealt with only by the imposition of conditions, there will never be any meaningful assessment of the matters in s 34(3) before a resource consent is granted.

[66] We are unwilling to accept those submissions. We agree with the submission for TWCL that the purpose of the s 34(2) test is to ensure that developments are not consented to when infrastructure cannot be provided. The consent conditions require TWCL to provide what the Council has determined to be sufficient and appropriate infrastructure. If the conditions are not fulfilled, the resource consents will not be able to be exercised. Therefore, as a matter of logic, by attaching the conditions, the Council could properly be satisfied that sufficient and appropriate infrastructure would be provided to support the development.

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[38] At [220].

[67] In the end we have not been satisfied that there was an error in the Council's approach to infrastructure matters.

Ground three — apparent bias and conflict of interest

[68] It was submitted for Enterprise that the Council, after receiving the Application on 15 September 2016, should have appointed independent commissioners to determine the Application because a fair minded and informed lay observer would have had a reasonable apprehension that the Council could not bring an impartial mind to its consideration of the Application. Enterprise submitted that, at the time the Application was lodged, the Council was "interested" in the success of the Application in three ways.

[69] First, it was submitted the Council had a pecuniary interest in the Application. It owned land proposed for the development and TWCL would need to buy or lease that land from the Council after resource consents had been granted. The Council's land could be presumed to have a higher market value should consents be granted, and there was the prospect of a significant improvement in the income from that land. Furthermore, the Council needed to spend significant money to maintain the existing ageing infrastructure at Shelly Bay. That was a liability that could be avoided or offset through development contributions and development agreements and other arrangements, if the development went ahead.

[70] Second, the Council had publicly promoted and supported the development in its 2015 Urban Growth Plan: Implementation Plan, which identified the Shelly Bay redevelopment as a four-year project. Resource consents could be seen as anticipated.

[71] Third, in a related submission, it was argued that the Council had privately promoted and supported the proposed development. It made commitments to PNBST, TWCL's joint venture partner, which included that the Council would work with PNBST "co-operatively to ensure the former Shelly Bay air force base is integrated into a development that will benefit Taranaki whanui ki te Upoko o Te Ika and the citizens of Wellington and visitors to the capital city". Enterprise submitted that the Council had also entered into pre-application agreements with TWCL allowing for a flexible and high-level approach to the Application, and Council staff had provided

advice to report writers for TWCL on what they should assess and conclude in order to improve the Application's prospects of success. Enterprise submitted that, ultimately, the Council adopted an approach whereby declining the consents was not an option, and its consideration of the Application was limited to what conditions to impose.

[72] Enterprise's appeal on this ground can be seen, on an overview, as having two aspects. First, it was submitted that the Council's decision is vitiated by apparent bias or an unacceptable degree of conflict of interest. Second, in light of that apparent bias or conflict of interest, the Council erred in failing to consider whether to appoint independent commissioners to determine the application under s 34A of the RMA, and in ultimately failing to appoint such commissioners.

Analysis

[73] It is a key part of the argument put forward for Enterprise that the test for apparent bias set out in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* applied.[39] That test was formulated in relation to judges, and states that if a fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of a question the judge is required to decide, the judge is disqualified.[40] Enterprise argued that resource consenting is a quasi-judicial process therefore the *Saxmere* test is appropriate. The Council and TWCL strongly resisted that submission, arguing that such a test is unworkable in relation to councils, which perform both regulatory and commercial roles.

[74] In assessing bias the particular circumstances are of supreme importance.[41] The statutory context and the practical reality of the task given by Parliament to the decision-making body will be critical.[42] We do not consider that the test set out in *Saxmere* should be applied to local authority decisions on resource consents. *Saxmere* was concerned with apparent bias by judicial officers. The principles set out in the decision do not set standards that can be appropriately applied in the case of local

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39 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.
40 At [3].
41 *Man O'War Station Ltd v Auckland City Council (No 1)* [2002] 3 NZLR 577 (PC) at [11].
42 *Jeffs v New Zealand Dairy Production Marketing Board* [1967] NZLR 1057 (PC) at 1066.

authorities exercising statutory powers of decision in the RMA and HASHAA context. As Kós J said in *Back Country Helicopters Ltd v Minister of Conservation* in relation to the exercise of powers by a Minister:[43]

> 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.

[75] So here in relation to a council. A council administers its assets and carries out its duties for the benefit of ratepayers. It is controlled by an elected body responsible to ratepayers, and has accountability and standards altogether different from those of a judge.

[76] A council, as part of its duties, may enter into commercial operations within its district which may require consents. The council is also in the position of regulator in making decisions on those consents. Parliament has chosen to vest the resource consent decision-making power in councils in a context where there will always be some sort of notional conflict, if only arising out of a desire to benefit the ratepayers whom it represents. To address that concern, s 39(c) of the Local Government Act 2002 provides, as a governance principle:

> (c) 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 …

[77] The duality of a council's role is particularly pronounced in the HASHAA context, where a council is tasked with establishing and agreeing to certain residential development targets, as well as determining resource consent applications. We consider that the *Saxmere* test of apparent bias would be unworkable in those circumstances. We agree with the submission for TWCL, also accepted by Churchman J, that the more appropriate test is whether the Council approached the decision with a closed mind.[44]

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43 *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474 at [130].

44 *Enterprise Miramar Peninsula Inc v Wellington City Council*, above n 1, at [99] and [152].

[78] The two decision-makers that determined the Application for the Council under delegated authority both deposed that they approached their task with independent minds and were free from pressure. Neither was required for cross-examination. The Senior Consents Planner said:

> I did not experience any pressure from any person within the Council to approve the resource consent application. Commercial negotiations between the Council and [TWCL] 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.

He deposed that he was not aware of any advantage to the Council, pecuniary or otherwise, if the development proceeded.

[79] The Resource Consents Manager emphasised that while the pre-application process may include a great deal of interaction with the applicant:

> 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. We do, however, sometimes give indications or initial opinions about whether the material provided is likely to be considered sufficient, or about the likelihood of success in their application.

[80] She went on to depose:

> 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.

[81] It should also be recorded that no binding legal agreement has been entered between the Council and TWCL, committing the Council to sell the land necessary for TWCL to proceed with the project as proposed. The Council has wisely decided to avoid such obligations at this stage.

[82] As to the Council's public promotion of the development in its 2015 Urban Growth Plan: Implementation Plan, it must be assumed that Parliament, in making councils the consent decision-makers under HASHAA, contemplated that they

would inevitably bring a policy perspective to their determination. In entering into a housing accord under HASHAA, a local authority commits to a policy of enhancing the objectives of the Act. It was stated by this Court in *Turner v Allison*:[45]

> It is not of course enough that the tribunal, or some member of it, has expressed a preconceived opinion, even one strongly held, on the matter to be tried … it must appear that the tribunal intends to adhere to the point of view which has been expressed, uninfluenced by further evidence of argument afterwards addressed to it.

[83] In *CREEDNZ Inc v Governor-General* this Court was responding to a challenge to the validity of an Order in Council, the effect of which was to bypass the usual statutory planning procedures under the National Development Act 1979 and fast-track the approval process for an aluminium smelter.[46] The usual planning procedures were changed, as in this case. It was alleged that the Ministers had determined in advance to advise and consent to approval of the application for the project to be fast-tracked.

[84] Cooke J found that it was a fair inference from newspaper reports that the Government had from an early stage favoured using the National Development Act for the project.[47] Cooke J however observed:

> None of this means, however, that the Government was irretrievably committed to advising the necessary Order in Council. What can properly be inferred is that when the question arose in April 1981 the Government was already clearly in favour of the company's project and highly likely to decide in favour of an Order in Council.
>
> But it is fallacious to regard that as a disqualification. The references in the amended statement of claim to a real probability or suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this governmental level. Projects of the kind for which the National Development Act is intended, whether Government works or private works, are likely to be many months in evolution. They must attract considerable public interest. It would be naive to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.
>
> In relation to decisions under s 3(3) I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable. … No doubt, if Ministers had approached the matter with minds already made up, the inference would

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45 *Turner v Allison* [1971] NZLR 833 (CA) at 847–848.
46 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).
47 At 179.

> readily be drawn that they could not genuinely have considered the statutory criteria when advising the making of the Order in Council. But the newspaper reports fall short of showing closed minds. And the terms of the Order in Council suggest that the minds of the Ministers were not closed. …

The other members of the Court adopted similar positions.[48]

[85] We consider that the same or similar considerations apply in the context of a local authority deciding an application for resource consent under HASHAA. Therefore we do not consider that the Council's incorporation of a proposed development into its planning documents was unusual or necessarily establishes that the Council failed to give genuine open-minded consideration to the Application.

[86] Nor do we consider that the Council's pre-application communication with TWCL, and its joint venture partner PNBST, establishes that it brought a closed mind to its decision on the Application. We note the evidence of one of the decision-makers, the Resource Consents Manager, that it is not unusual for councils to give indications or initial opinions about whether the material provided is likely to be considered sufficient, or about the likelihood of an application proceeding. The courts have drawn a clear distinction between a council's pre-lodgement advisory functions and its quasi-judicial role as a consent authority. Both can be exercised without giving rise to a risk of predetermination or conflict of interest. In *Pring v Wanganui District Council* the Council assisted the land developer to ensure its application for a certificate of compliance was successful.[49] The Court rejected an allegation of predetermination and stated that:[50]

> It is perfectly usual and acceptable practice for District Councils to work with developers to ensure that any proposed development meets district requirements and is thus able to proceed. And it must be accepted that it is in the interests of any community for commercial development to occur in its district.

[87] HASHAA contemplates co-operation between local authorities and developers. The Minister of Housing, Nick Smith, in seeking approval to introduce the Bill, noted that it was envisaged that applicants for resource consents under

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48 At 192–194 per Richardson J and at 214 per McMullin J.
49 *Pring v Wanganui District Council* [1999] NZRMA 449 (HC).
50 At 460.

HASHAA may "have established relationships with councils as part of a pre-application process".[51] Indeed, in the Wellington City Housing Accord that the Council entered into with the government under s 10 of HASHAA, the Council undertook to "increase developer confidence in the Council to encourage a more collaborative approach between the Council and developers that results in a commitment to bring a continuous supply of land and houses to the market over the long term". We consider that the Council's interactions with TWCL are consistent with that purpose.

[88] For the reasons stated, we consider that the Council brought an open mind to its decision-making function under HASHAA.

Section 34A

[89] Section 76 of HASHAA provides that certain provisions of the RMA, including s 34A, apply to a local authority's exercise of its functions under HASHAA. Section 34A relates to the delegation of powers and functions to employees and hearing commissioners. It provides:

> **34A Delegation of powers and functions to employees and other persons**
>
> (1) A local authority may delegate to an employee, or hearings commissioner appointed by the local authority (who may or may not be a member of the local authority), any functions, powers, or duties under this Act except the following:
>
> (a) the approval of a proposed policy statement or plan under clause 17 of Schedule 1:
>
> (b) this power of delegation.
>
> (1A) 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,—
>
> (a) 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; and
>
> (b) if the local authority considers it appropriate, it must appoint at least 1 commissioner with an understanding of tikanga

[51] *Housing Accords and Special Housing Areas Bill: Approval for Introduction*, above n 13, at [30].

Māori and of the perspectives of local iwi or hapū, in consultation with relevant iwi authorities.

(2) A local authority may delegate to any other person any functions, powers, or duties under this Act except the following:

(a) the powers in subsection (1)(a) and (b):

(b) the decision on an application for a resource consent:

(c) the making of a recommendation on a requirement for a designation.

(3) *[Repealed]*

(4) Section 34(7), (8), (9), and (10) applies to a delegation under this section.

(5) Subsection (1) or subsection (2) does not prevent a local authority delegating to any person the power to do anything before a final decision on a matter referred to in those subsections.

[90] There is nothing in either the RMA or HASHAA to indicate the circumstances in which the appointment of commissioners can or should occur.

[91] Enterprise submitted that the Judge erroneously held that s 34A could not be used as a recusal mechanism in a conflict situation, as it was designed only to enable councils to obtain additional resources. We agree with the submissions for the Council and TWCL that this mischaracterises the Judge's finding. As we understand his judgment, the Judge held that, while the power in s 34A *could* be used in a conflict of interest situation, the Council was not *obliged* to use it in that way in the circumstances of this case.[52] It is therefore common ground between the parties that the Council *could* have appointed hearing commissioners to decide the application for resource consents. The contest was as to whether the Council was obliged to consider whether to appoint independent commissioners, and whether it had a duty to appoint such commissioners in the circumstances of this case.

[92] We consider that, if Parliament envisaged that there would be circumstances in which a local authority were obliged to delegate its decision-making function to avoid a conflict of interest, it would have said so. We consider that the observations of

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52 *Enterprise Miramar Peninsula Inc v Wellington City Council*, above n 1, at [148].

MacKenzie J in *Wakatu Inc v Tasman District Council*, in relation to s 34A in the RMA consenting context, to be apposite.[53] He said:[54]

> 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 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 plaintiff] submits, could have been adopted to obtain an independent assessment on 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.

[93] Councils almost inevitably will have an interest in a HASHAA resource consent application. At the very least, the introduction of new housing will result in an increase in ratings revenue. For the reasons given above, we do not consider that the Council can be said to have brought a closed mind to its decision on the Application. In those circumstances, although it would have been legitimate for the Council to consider appointing independent commissioners, there could be no obligation on the Council to do so. This ground of appeal must fail.

General conclusions

[94] We allow the appeal on the basis that the Council erred in law in its consideration of the matters set out in s 34(1)(b)–(e). As we have set out, the Council applied the purpose of HASHAA to effectively neutralise all other considerations and prevent their being given due acknowledgement in the ultimate balancing under s 34.

[95] We do not accept the other grounds of appeal as to the interpretation and application of s 34(1), nor the submission that the Council failed to properly consider whether there was sufficient and appropriate infrastructure under s 34(2). We are also satisfied that the Council brought an open mind to its decision on the Application, and was not obliged to appoint independent commissioners.

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53 *Wakatu Inc v Tasman District Council* [2008] NZRMA 187 (HC).
54 At [27].

Relief

[96] We do not consider that there are any discretionary matters that tell against relief. The error made in adopting the wrong approach to s 34(1)(b)–(e) appears to us to have been significant, and it is possible that there might have been a different outcome to the Application if the correct approach had been adopted. Therefore, the decision of the Council on the Application is set aside on the basis of error of law.

[97] Enterprise submitted that, if the appeal were allowed and the decision remitted back to the Council, this Court should order that the Council appoint independent commissioners to consider the Application. It was submitted that, even if this Court rejected Enterprise's arguments as to apparent bias or conflict of interest at the time the original decision was made, the Council's subsequent defence of its decision in these proceedings would make it difficult for the Council to bring an open mind to any reconsideration of its decision.

[98] We are unwilling to order the Council to exercise its powers under s 34A to appoint independent commissioners to reconsider the Application. However, given the Council's involvement in the present litigation as a party in opposition to Enterprise where Council affairs have been drawn into the dispute and its employees have given evidence, the Council should consider whether or not independent commissioners should be appointed.

Result

[99] The appeal is allowed.

[100] The first respondent's decision granting resource consents is quashed.

[101] The second respondent's application for resource consents is remitted to the first respondent for reconsideration. The first respondent should consider whether or not to exercise its power under s 34A of the RMA to appoint independent commissioners.

[102] Although a number of its arguments have failed, the appellant has been successful and we see no reason to reduce an award of costs in this Court. The respondents are jointly and severally liable to pay the appellant costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

[103] The High Court costs award made against the appellant is quashed.

[104] If the parties cannot agree on costs in the High Court, the High Court is to fix costs in that Court in the light of this judgment. We recognise that there will have been significant time spent by the appellant in the High Court on arguments that have failed on appeal, and this may lead the High Court in its discretion to order less than full costs.

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