

8 July 2019

To
Krystle Leen
Business Support, Resource Consents
Wellington City Council
By email: krystle.leen@wcc.govt.nz

From:
Frances Wedde
David Allen

Dear Krystle

Shelly Bay: Legal advice on procedural questions

We have considered the legal questions from the Commissioners forwarded to us by email on Monday 1 July 2019. Our responses are set out below.

1. Are the Commissioners able to receive and read communications from 'other parties'?

No. The application under consideration by the Commissioners was made under section 25 of the Housing Accords and Special Housing Areas Act 2013 ("**HASHAA**"). This means that the application must not be notified, and a hearing must **not** be held in relation to the application, except as provided for in section 29 of HASHAA.

Neither Sir Peter Jackson/Dame Fran Walsh nor Enterprise Miramar Peninsula Incorporated fall within the categories of persons that may be notified under section 29. Therefore, they have no standing to make submissions or to be heard in relation to the application.

It would therefore be unlawful for the Commissioners to receive and consider communications from these other parties.

The Hansard debates and explanatory note accompanying the Bill on introduction make clear that Parliament's intention in enacting HASHAA was to provide a streamlined RMA consenting process and to limit the situations in which an application should be notified and a hearing held. For example, the Hon Nick Smith commented on introduction of the Bill as follows:

"Within [special housing] areas, qualifying developments will be able to be approved by way of a streamlined process. There is a special limited notification process for only those affected."

2. Should the Commissioners publicly communicate any determination they make on question 1 above, and how should they go about doing that?

We consider the Commissioners should publicly communicate their determination on question 1 by way of a minute on the WCC web site.

It is a fundamental principle of public law that decision makers must be clear and transparent about the information they have (and have not) taken into account in making a decision. Further, section 39 of HASHAA requires decisions to be in writing and include reasons for the decision. When making their decision, the Commissioners will need to ensure that their reasons are only based on information legitimately placed before them in accordance with the provisions of HASHAA.

It is therefore important that Commissioners are clear about the information they have taken into account and this is transparent for the applicant and other parties. The Commissioners' decision will be subject to potential judicial review in the same way that the Council's original decision was. Therefore, the general public as well as the applicant is entitled to know what information the Commissioners have relied on in making their decision.

3. Should the Commissioners publish on the WCC website their minutes, and responses from either the applicant or the Council?

Yes. We consider the Commissioners should publish their minutes and any information requested and/or received from the applicant and/or Council on its web site. This is for the same reason as outlined above - the Commissioners must be clear and transparent about the information they have taken into account (and not taken into account) in making their decision.

4. Should the Commissioners give public notice and/or allow members of the public to attend the "hearing" between the Commissioner, applicant and reporting officer?

We recommend the Commissioners stop referring to this meeting as a "hearing" given that HASHAA specifically prevents a hearing being held on the application. We recommend instead that the Commissioners refer to this meeting as a "question and answer session" or similar.

We do not consider the public has a right to attend such a meeting, and therefore, public notice should not be given. We consider that doing so would raise false (and unlawful) expectations that people can be heard and also moves into the realm of a 'hearing' type process which is specifically not allowed under HASHAA.

However, we consider the Commissioners should ensure that a transcript of the meeting is prepared, which records the questions posed and answers received. This transcript can either be attached to the decision and/or placed on the WCC web site for the same reasons as outlined above - that is, to ensure that the Commissioners are clear and transparent about the information they have taken into account in reaching their decision.

We trust these responses are helpful and would be happy to assist with any further questions on this matter, should the Commissioners have them.

Yours sincerely



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