



Philip Milne
Barrister
Waterside Chambers
Wellington 6243
philip.milne@waterfront.org.nz

Mr Thomas Wutzler
Enterprise Miramar Inc.
By email

29 May 2019

Regarding an Application under HASHAA by The Wellington Company Ltd for development of Shelly Bay: The correct approach to reconsideration of the application

1. You have asked me to consider the scope of inquiry required of the Commissioner Panel appointed to consider the application. You have also asked me to review the approach suggested by the Applicant's solicitors (Gibson Sheat) in a letter dated 9 May.
2. The Wellington Company has requested that the Council reconsider its existing application under HASHAA. The Council has appointed an independent panel to consider and decide on the application.
3. The GS letter suggests that the Applicant has not amended its application. It has however amended the assessment of effects associated with the application (paras 7 to 9 of the Gibson Sheat letter).

Other than the revised section 34 assessment and the updated factual information, the application remains as it was.¹

4. The Gibson Sheat letter contains the following suggestion:

10. In accordance with the decision of the Court of Appeal, it is only the Council's s 34 assessment that needs to be reconsidered. The Court of Appeal's findings on all of the other causes of action in the judicial review proceeding by Enterprise Miramar were in favour of the Council. Accordingly, the hearing commissioners need not reconsider other aspects of the Council's 18 April 2017 decision and can draw support from the fact that the Court of Appeal (and the High Court before it) upheld the Council's findings that:

(a) the staged 13-year development timeframe is in order (paragraph [33] of the Court of Appeal decision);

¹ I understand that traffic projections have increased quite significantly from those originally provided by the Applicant.

(b) the inclusion of a boutique hotel and community, commercial and residential activities is in order under HASHAA (paragraphs [34] to [38] of the Court of Appeal decision); FBC-001067-178-2-1-AYH PAGE 3

(c) the Council was able to be satisfied under section 34(2) that sufficient and appropriate infrastructure will be provided to support the qualifying development (paragraph [63] to [76] of the Court of Appeal decision).

5. In my opinion, the suggestions quoted above are flawed. In summary:
- a) The existing decision granting consent has been quashed by the Court of Appeal.
 - b) All parts of the earlier decision have been quashed and accordingly the Council's officers' prior conclusions under both subsections 1 and 2 have no force.
 - c) Although the Court did not uphold the grounds of review in terms of ss (2) it overturned the whole decision. It did not direct the Council to only reconsider ss (1) matters (nor was that requested of the Court by the Applicant).
 - d) It necessarily follows, that the Panel must reconsider the entire application pursuant to sections 34 to 39 of HASHAA 2013. The Panel must decide whether the unmodified application should be declined, granted as is, or granted on the basis of more stringent conditions.
 - e) This includes consideration against all of section 34 and includes the powers under s 34 (4) (a).
 - f) The Panel must reach its own conclusion in terms of section 34 (1) and (2).
 - g) The Panel must reach its own conclusions in terms of the adequacy and reliability of the information before it and is entitled to seek further information at any time up until it releases its decision.
 - h) Although the Court of Appeal found that the Council had not made an error in applying the purpose of HASHAA, it did not endorse the officers' view that the purpose was to maximise housing opportunities.
 - i) **The Panel must reach its own conclusion as to the extent to which the proposal achieves the purpose of HASHAA and the extent to which various components (such as the boutique hotel and the isolated dwelling on a ridgeline) are appropriate in terms of that purpose.**
 - j) The suggestion by Gibson Sheat that..."it is only the Council's s 34 assessment that needs to be reconsidered" ...is wrong. The Panel is of course required to consider the Council officer's revised section 34 assessment (which has not yet been made available). However, **the Panel must reach its own conclusions** under both sections 34(1) and (2).
 - k) In reaching those conclusions, the Panel must consider the material lodged by the Applicant and the any revised assessments by the Council officers. It may also consider any other information "*relevant and reasonably necessary to determine the application.*" In my view the Council is entitled to put the High Court affidavits before the Panel or the Panel may request to see those.

- l) Contrary to the Gibson Sheat letter, the Panel must consider the staging proposal in the context of both sections 34(1) (environmental effects, including any claimed economic or social benefits) and in terms of the extent to which the proposal achieves the purpose of the HASHAA and section 34(2) - adequacy of infrastructure provision.
- m) The fact that the Court of Appeal did not uphold the argument that the staging proposal took the application outside of the scope of a qualifying development under HASHAA, is irrelevant to the considerations required of the Panel. (The Court could not and did not make any determination of the merits of that or any other aspect of the proposal.)
- n) The suggestion by Gibson Sheat, that Court of Appeal concluded that ...” *the inclusion of a boutique hotel and community, commercial and residential activities is in order under HASHAA*” is wrong. The Court concluded that these aspects did not take the application outside of HASHAA. It could not and did not make any finding in terms of section 34 (1) and in particular, whether these aspects achieved the purpose of HASHAA and/or contributed to traffic and other effects. The Panel must reach its own conclusion as to the effects of these aspects of the proposal and whether these parts of the development are needed in order to provide for the purpose of HASHAA.²
- o) The traffic effects of the proposal in terms of *safety and efficiency* must be considered under both subsections (1) and (2). In terms of the assessment of traffic effects, that assessment must be carried out against the existing and permitted environment. The assessment of traffic effects is separate from the requirement under ss (2).
- p) Although the Court of Appeal concluded that the High Court had not made an error of law in finding that the officers were entitled to be ...”*be satisfied under section 34(2) that sufficient and appropriate infrastructure will be provided to support the qualifying development*”...the Courts could not and did not make any finding in terms of section 34 (2).
- q) Whilst the Panel may take into account the officer’s views, it is required to be : “*satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development.*” In reaching a conclusion on this point the Panel, must undertake its own evaluation.
- r) The Gibson Sheat letter concludes that: “*For the reasons expressed in the Egmont Dixon’s assessment, the application of s 34 in the manner directed by the Court of Appeal is such that the application, when reconsidered, is in order to be granted once more.*” It should go without saying that the statement above is simply advocacy. The Panel must form its own objective views of the adequacy and reliability of the Applicant’s assessment and the officers’ review of that evidence. It must reach its own conclusions under both parts of s34.

Additional points

- s) In my view, the Panel is not entitled to rely on any part of the subsection (1) assessment within the original officers' report. That is because all parts of that assessment are tainted with the error of law confirmed by the Court.
- t) For the purposes of ss (1) the Panel must consider all relevant effects on the existing environment including but not limited to:
- i. landscape and visual impact
 - ii. effects on the natural character of the coastal environment
 - iii. urban form
 - iv. heritage values
 - v. cultural values and kaitiakitanga
 - vi. effects on the road transport system and other road users including SH1, Miramar Road, Shelly Bay Road, and the Miramar Peninsular route.
 - vii. traffic safety considerations relating to the proposed width of Shelly Bay road and other safety considerations.
 - viii. the efficient use and development of natural resources
- u) In relation to the last three matters, these considerations come into both the ss (1) and (2) assessment. The first is about effects the second is about *adequacy*.
- v) The Panel must undertake a consideration against Part 2 of the RMA (this is the second listed matter in terms of weight). The Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA does not preclude that assessment.
- w) The effect of the Court of Appeal in the present case is that Part 2 must still be properly considered and must not be regarded as being "trumped" by the purpose of HASHAA.
- x) There must be a consideration against the relevant planning provisions including the NZCPS, the RPS, the Coastal Plan, the PNRRP and the District Plan.
- y) The effect of the *RJ Davidson* decision and the Supreme Court decision in *EDS v King Salmon*, is that considerable weight must be placed on the operative planning provisions (albeit within the context that plan provisions must be accorded less weight than the other matters).
- z) It is accepted that unlike the RMA, the planning and Part 2 assessments must also be weighed in terms of the purpose of the HASHAA. However, it is clear

from the Court of Appeal decision that the purpose of HASHAA does not trump the other matters. The Panel must decide whether it is appropriate to grant consent and if so, whether the it should impose more stringent controls on building height and location so as to better protect landscape and natural character values.

Adequacy of information.

6. The Panel is entitled to request whatever further information it considers appropriate from Applicant and/or Council officers (see section 28 of HAHSAA).
7. In relation to section 34 (2) the Panel is entitled to request whatever further information it considers appropriate from NZTA or other infrastructure providers such as Wellington Water (section 34 (4)).
8. As I understand it, the Applicant and the Council have not provided any assessment of the effects of the proposal in terms of the efficiency of State Highway and increased delays. This deficiency is discussed in the affidavit of Timothy Kelly before the High Court. In my view the Panel should be seeking comment from NZTA on this matter.
9. As discussed in the affidavit of Timothy Kelly, neither the Applicant or the Council have properly assessed the effects of the proposal in terms of traffic safety and efficiency in relation to Shelly Bay Road, the route around the Miramar Peninsular including Miramar Road and the intersection with Miramar Road. I am unaware as to whether these matters have now been addressed by the Applicant.
10. The Applicant has provided a revised assessment of visual/landscape and urban design matters. I understand that the revised assessment still does not include any simulations comparing the proposed location and maximum heights of buildings as applied for, against the guidelines in the District Plan design guide and the Open Space provisions. Those simulations are available in the affidavit of Mr Chris Morris (which was not contested in the High Court).
11. The Applicant's revised assessment includes an assessment of the proportion of the Open Space with the Miramar Peninsular which would be occupied by proposed buildings. As I understand it however, it still fails to provide a detailed assessment of the proportion of the development which is within Open Space and accordingly, fails to provide an assessment of the proportion of the development which the District Plan considers inappropriate for buildings other than those associated with Open Space. That assessment is also available in the affidavit of Mr Morris.
12. In my view the Panel cannot carry out a proper assessment of the proposal against the Shelly Bay Design Guide and the Open Space provisions without comparing what is proposed with what the District Plan envisages.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Philip Milne', with a long horizontal flourish extending to the right.

Philip Milne Barrister and Independent RMA Commissioner