

8 September 2014

Auckland Unitary Plan Independent Hearings Panel
Private Bag 92300
Victoria Street West
AUCKLAND 1142

**For: Hearings Panel Planning Manager
Phill Reid**

Dear Mr Reid

Housing Accord Special Areas: interpretation of 'area' in s 75 of HASHAA

1. The Independent Hearings Panel (IHP) is charged with hearing submissions on the Proposed Auckland Unitary Plan (PAUP) and making recommendations to Auckland Council. You have identified an interface between the PAUP process and the Housing Accords and Special Housing Areas Act 2013 (HASHAA). HASHAA provides a mechanism whereby applications can be made for a variation of the PAUP concurrently with applications for resource consent, and in practical terms s 75 will mean that the determination of these applications overrides the PAUP process in respect of the area in question.
2. You have sought advice on the meaning of "area" in s 75 of HASHAA. You have asked whether area means the provisions of the PAUP varied under HASHAA, or the special housing area in question, or the site or sites in relation to which the HASHAA application is made, or whether area has some other meaning.
3. We summarise our advice as follows:
 - (a) Section 75 provides a mechanism for resolving conflicts between the HASHAA process and other planning processes, such as the IHP's hearing of submissions on the PAUP.
 - (b) For the purposes of s 75, "area" means the physical site in relation to which the HASHAA application for variation is made.
 - (c) Section 75 requires consideration of both the spatial overlap and the broader planning overlap between the two processes.
4. We will first trace the key legislative provisions and then discuss our analysis of s 75 of HASHAA.

Key aspects of legislation

5. HASHAA is intended to improve housing affordability by increasing the supply of land and of housing in the regions or districts listed in Schedule 1: s 4. HASHAA prescribes a special framework for resource consents and plan changes or variations in respect of “qualifying developments” in “special housing areas”. We trace the application of HASHAA with respect to the PAUP below.¹

6. Section 10 provides for the territorial authority of a district or region listed in Schedule 1 to enter into a housing accord:

10 Minister and territorial authority may enter housing accord

(1) The Minister and a territorial authority whose district is within a scheduled region or district may enter into an agreement to work together to address housing supply and affordability issues in the district of the territorial authority (a **housing accord**).

...

(5) While a housing accord is in force, the territorial authority that is a party to that housing accord is an **accord territorial authority**.

7. A special housing area is “an area declared to be a special housing area under s 16”: s 6(1). Section 16(1) provides as follows:

16 Process for establishing special housing areas

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, declare an area within a scheduled region or district to be a special housing area for the purposes of this Act.

8. Section 14 defines qualifying development in a special housing area:

14 Meaning of qualifying development

(1) In this Act, a qualifying development in a special housing area is a development—

(a) that will be predominantly residential; and

(b) in which the dwellings and other buildings will not be higher than—

(i) 6 storeys (or any lesser number prescribed)²; and

(ii) a maximum calculated height of 27 metres (or any lower maximum calculated height prescribed); and

(c) that will contain not fewer than the prescribed minimum number of dwellings to be built; and

¹ All references in this section are to HASHAA unless otherwise stated.

² The matters to be prescribed in s 14(1) are to be found in the Order in Council declaring the special housing area or in an Order in Council made at a later time: s 14(3).

- (d) that will contain not less than the prescribed percentage (if any) of affordable dwellings.
- (2) For the purposes of subsection (1), 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).
- ...
- 9. Auckland is listed in Schedule 1 of HASHAA. Auckland Council entered into a housing accord in September 2013. Accordingly, Auckland Council is an accord territorial authority. In light of the housing accord, a number of special housing areas within Auckland have been declared by Order in Council pursuant to s 16.
- 10. The relevant powers and functions under HASHAA may only be performed by the “authorised agency”: s 23(1). The authorised agency in relation to a qualifying development in a special housing area is the accord territorial authority: s 23(2). Accordingly, Auckland Council is the authorised agency in relation to qualifying developments in special housing areas in Auckland.
- 11. Applications for resource consent can be made under s 25 HASHAA or s 88 of the Resource Management Act 1991 (RMA). HASHAA also provides for applications for resource consent made in tandem with applications for plan changes or variations to a proposed plan. This is termed a “concurrent application” and is defined as follows (s 6(1)):
 - an application for a resource consent made under section 25 that is made in conjunction with a request for a plan change or a variation to a proposed plan made under section 61—
 - (a) in accordance with a requirement of an accord territorial authority under section 26(1); or
 - (b) of the applicant's own volition
- 12. Section 26(1) permits an accord territorial authority to require an applicant for resource consent to make a concurrent application. A concurrent application can also be made under s 61:
 - 61 Requests for changes to plan or variation to proposed plan**
 - ...
 - (2) A person who has applied for or wishes to apply for a resource consent to undertake an activity to which section 25(2)(c) or (d) applies may request the authorised agency to vary the proposed plan in accordance with sections 62 to 73.
- 13. Section 25(2)(c) and (d) provide:
 - 25 Applications for resource consents may be made to authorised agency**

- ...
- (2) A person may apply under this section for a resource consent for—
- ...
- (c) an activity that is described in the relevant plan as prohibited and in a proposed plan as prohibited; and
- (d) an activity that is described in the relevant plan as permitted, controlled, restricted discretionary, discretionary, or non-complying and in a proposed plan as prohibited; and
- ...

14. Crucially, HASHAA goes on to deal specifically with the interface between the special housing area regime and the PAUP. Sections 124 and 125 of the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA) were designed to provide the only mechanisms for amendments or variations to the PAUP, as set out in s 124(1) LGATPA:

124 Restriction on amendments or variations to Auckland combined plan

- (1) This section and section 125 specify the only ways in which the Auckland combined plan may be amended or varied before the Auckland Council publicly notifies its decisions on the recommendations of the Hearings Panel under section 148(4)(a).

15. However, s 60 of HASHAA provides that a concurrent application can be made under HASHAA in respect of variations to the PAUP:

60 Subpart overrides restriction on amendments or variations to proposed Auckland combined plan

Nothing in sections 124 and 125 of the Local Government (Auckland Transitional Provisions) Act 2010 limits or affects the provisions of this subpart.

16. Where an application for a variation to the PAUP is determined before the PAUP becomes fully operative, s 75 determines that the first in time will prevail over the other process. In practical terms, this will mean that an application for a variation of the PAUP under HASHAA will likely prevail over the PAUP process under the LGATPA, given the streamlined process and timelines under HASHAA. Section 75 provides:

75 Interface between concurrent plan change or variation processes under this Act and Resource Management Act 1991

- (1) This section applies if a request for a ... variation to a proposed plan under this subpart (**process A**) relates to an area in a ... proposed plan that is simultaneously subject to a proposed plan ... process in accordance with ... Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (**process B**).
- (2) From the day after the date on which a ... variation to a proposed plan becomes operative in relation to the area in accordance with

process A, or a proposed plan ... becomes operative in relation to the area in accordance with process B, whichever process first results in a proposed plan, ... or variation becoming operative (the **deciding process**),—

- (a) any of the following that relate to the other process must, insofar as the matters covered in them were considered and determined by the deciding process or are inconsistent with the decision made in the deciding process, be treated as having been withdrawn by the person who made the request or the submission (the submitter) or proposed the plan, plan change, or variation:
 - (i) ... the part of the proposed plan ... that relates to the area in subsection (1); and
 - (ii) any submission or part of a submission that related to that area; and

...

Interpretation of s 75

17. Section 75 applies if a request for a variation to the PAUP under HASHAA (process A) relates to an area in the PAUP which is before the IHP pursuant to the LGATPA (process B). Parts of the PAUP which relate to this area and submissions or parts of submissions that relate to this area are deemed to be withdrawn if inconsistent with the decision under HASHAA: s 75(2).
18. HASHAA does not define "area", and nor does the RMA or the LGATPA. It is therefore necessary to consider the purpose of s 75 in the context of HASHAA.
19. HASHAA creates a planning regime which can conflict with ordinary RMA planning processes or with the PAUP process under the LGATPA. Section 75 is the mechanism for resolving that conflict. It provides that the first completed process will be the deciding process. As noted above, given that HASHAA is a streamlined process designed to fast-track qualifying developments, in most circumstances the HASHAA determination will be the deciding process. As a consequence of the deciding process, inconsistent aspects of the PAUP as notified, or any submissions on the PAUP, are treated as having been withdrawn: s 75(2)(a).
20. We consider that the s 75 process requires two phases of analysis. First, the spatial overlap, and second, the broader planning overlap. Both must be considered in order to determine which matters must be treated as having been withdrawn.
21. For the spatial overlap it is necessary to determine the physical area to which the request for variation of the PAUP under HASHAA (process A) relates. This will be set out in the application for variation. For the purposes of s 75 it is the area affected by the variation under HASHAA that is relevant, not the entirety of the special housing area, nor any other area.
22. Any other approach would give rise to impracticalities. A wider area, for example the entire special housing area within which the request for variation sits, would mean that parts of the PAUP, and submissions on those parts, would be withdrawn, but the variation, which is limited in scope by its own geographic area, would not fill the planning void. Equally, an area smaller than the geographic extent of the area to which the variation relates would mean that the variation would prevail over some

parts of the PAUP, but not the entire geographical extent of the variation, leaving the balance to be determined in the PAUP hearing process, thus defeating the intent of s 75. Accordingly, for the purposes of s 75, area means the physical area to which the variation relates.

23. For the broader planning overlap, it is necessary to determine which matters which were live in the PAUP have been considered and determined by the variation. The starting point is the determination under HASHAA. The next step is to consider the aspects of the PAUP and of submissions on the PAUP which are inconsistent with the variation. This can be broken into three broad categories:
- (a) Aspects of the PAUP itself which are inconsistent with the variation under HASHAA. This category is straightforward. To the extent that the HASHAA determination allows the application for variation of the PAUP, there will be an inconsistency between the variation and the PAUP. The inconsistent aspects of the PAUP will be deemed to have been withdrawn. That may consist of objectives, policies, rules and zoning provisions which relate to the area in question.
 - (b) Submissions or aspects of submissions which are entirely confined to the physical area to which the variation relates. This is not likely to be a large category as there are unlikely to be many submissions on the PAUP which relate only to the area affected by a single concurrent application under HASHAA.
 - (c) Submissions or aspects of submissions which are not confined to the physical area to which the variation relates, but which relate to any of the objectives, policies and rules which were at issue in process A. These submissions may relate to the particular special housing area, or to a particular geographical sub-set of the Auckland district, or may take a territory-wide approach. For example:
 - (i) A submission as to the objectives, policies or rules within two particular special housing areas might be inconsistent with a variation. The submission would be deemed to have been withdrawn in respect to the alteration of those rules under the variation, but would remain on foot in respect of the balance of the two special housing areas.
 - (ii) A submission as to particular objectives, policies or rules under the PAUP without any geographical restriction might be inconsistent with a variation. The submission would be deemed to have been withdrawn in respect of the area to which the variation relates, but would remain live in all other respects.
24. In summary, to the extent that a submission relates to the variation area, it is withdrawn. The submission remains on foot for all other areas to which it relates.

Conclusion

25. We consider that the reference in s 75(1) to “an area in a ... proposed plan” and in s 75(2) to “the area” means the physical site in respect of which the concurrent application under HASHAA is made. Accordingly, the matters which must be treated as having been withdrawn are:

- (a) Aspects of the PAUP which are inconsistent with the variation under HASHAA.
- (b) Submissions as to aspects of the PAUP which are wholly inconsistent with the variation under HASHAA.
- (c) Submissions as to aspects of the PAUP which are partly inconsistent with the variation under HASHAA (to the extent that that they are inconsistent).

26. Should the IHP require any further advice on this point or any other matters we would be happy to assist.

Yours faithfully
TOMPKINS WAKE

A handwritten signature in blue ink, appearing to read 'L F Muldowney/M S Crocket', with a long horizontal flourish extending to the right.

L F Muldowney/M S Crocket
Partner/Associate