IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-230
[2021] NZHC 549

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

Hearing:	16 & 17 November 2020
Appearances:	M S Smith and R I Fletcher for Applicant N M H Whittington and K S Rouch for First Respondent P J Radich QC and L I van Dam for Second Respondent
Judgment:	17 March 2021

JUDGMENT OF GWYN J

Table of contents

Introduction [1]
Background [6]
The grounds of this judicial review [11]
Approach to judicial review [13]
First ground of review: transportation effects finding (s 34(1) of HASHAA) [15]
The legislative framework [16]
Applicant's submissions [19]
Respondents' submissions [29]
Analysis [36]
Could the Panel properly reach its conclusion that the transportation effects were no more than minor, despite the fact no experts used that phrase in their various assessments? [37]
What material did the Panel have before it, in support of its transportation effects finding? [45]
Is the Panel's transportation effects finding so inconsistent with the material that it is insupportable or untenable or unreasonable? [63]
Did the Panel follow the correct approach to the weighing exercise under s 34(1)? [79]
If the Panel did make an error in its transportation effects finding, was that error material? [93]
Are the conditions imposed by the Council ineffective? [96]
Conclusion on first ground of review [99]
Second ground of review: roading infrastructure finding (s 34(2) of HASHAA) [102]
The legislative framework [103]
Applicant's submissions [104]
Respondents' submissions [113]
Analysis [117]
Did the Panel err in its approach to s 34(2), by finding the necessary infrastructure "can be" provided (rather than using the language of "will be")? [118]
Did the Panel err in its approach to s 34(2), by focusing on "minor" impacts (rather than using the language of "sufficient and appropriate")? [121]
Does the material support the Panel's roading infrastructure finding? [123]
Did the Panel err in its application of the Code of Practice, in particular by failing to differentiate between roading within and outside the development site? [128]
Did the Panel fail to consider relevant standards under s 34(3)(b)? [129]
Conclusion on second ground of review [131]
Result [132]

Introduction

[1] This proceeding concerns the grant by Wellington City Council (the Council) of resource consents enabling a mixed-use residential and commercial development by The Wellington Company Limited (the Company), at Shelly Bay on the Miramar Peninsula in Wellington (the development site).

[2] The Company first applied for resource consents to undertake the development, under the Housing Accords and Special Housing Areas Act 2013 (HASHAA), in 2016. The Council granted consent in 2018. The applicant, Enterprise Miramar Peninsula Incorporated (Enterprise Miramar), sought judicial review of that decision (the first judicial review). The application was dismissed in the High Court by Churchman J.[1] The Court of Appeal quashed the consent and directed the Council to reconsider.[2] The Court of Appeal said that, in doing so, the Council should consider whether or not to exercise its power under s 34A of the Resource Management Act 1991 (the RMA) to appoint independent commissioners to undertake the reconsideration of its decision.

[3] The Council appointed a panel of three independent commissioners (the Panel),[3] to reconsider the resource consent application (the consent application) and make a decision on it. The Panel issued its decision on 31 October 2019 (the Panel Decision). The Panel Decision granted resource consents to develop the site at Shelly Bay, subject to a number of stated conditions. The Panel Decision is at law the decision of the Council, and it is the Panel Decision that is the subject of this application for judicial review by Enterprise Miramar.

[4] Enterprise Miramar is an incorporated society, established in December 2013. One of its objectives is to foster and promote generally the welfare of the business

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

2 *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541, [2019] 2 NZLR 501.

3 The Panel members were Gary Rae, an experienced planner, including in the transport sector; Helen Atkins, a lawyer with experience in advising local authorities, infrastructure providers and land developers in environmental, local government and public law; and Ray O’Callaghan, a registered and chartered professional engineer with experience in civil engineering, and in the field of engineering infrastructure services, including roading, earthworks and coastal engineering.

community of Miramar and to advocate for the improvement of utilities, transport, service or other infrastructure for the benefit of Miramar.

[5] Enterprise Miramar challenges the Panel's granting of the resource consents on the basis of errors of law and/or fact, and on the basis that the Panel Decision is unreasonable.

Background

[6] Shelly Bay is located on the western side of the Miramar Peninsula, about mid-way between Miramar Avenue to the south and Point Halswell, the northern tip of the Miramar Peninsula. It contains the largest area of flat land between those two points. As the Court of Appeal observed,[4] Shelly Bay has a distinctive two-bay form and is a major feature of the Peninsula's coastline. The flat land, much of it reclaimed, goes 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.

[7] As Churchman J recorded in the first judicial review, human activity on the Miramar Peninsula goes back to the time of Kupe.[5] The area has been occupied by various iwi over the past 600 or so years, including Ngāti Tara, Ngāti Ira and Ngāti Kahungunu.[6] Since the 1830s, Taranaki Whānui (Ngāti Tama, Ngāti Mutunga and Te Āti Awa) have held mana whenua status.[7] The Māori name for the peninsula is Te Motu Kairangi, which reflects the fact that, at the time of initial Māori occupation, it was an island rather than a peninsula.[8]

[8] The resource consents were issued under HASHAA, which creates a streamlined resource consent process for residential developments in areas identified as having housing supply and affordability issues.[9] HASHAA was enacted on 13 September 2013. Its passage was preceded by a report from the New Zealand Productivity Commission on housing affordability, which had identified both the RMA

4 *Enterprise Miramar Peninsula Inc v Wellington City Council*, above n 2, at [4].
5 *Enterprise Miramar Peninsula Inc v Wellington City Council* above, n 1, at [16].
6 At [17].
7 At [17].
8 At [16].
9 Housing Accords and Special Housing Areas Act 2013, s 4.

and local authority consenting processes as contributing to the perceived house shortage.[10] The Court of Appeal described the consenting regime under HASHAA as follows:[11]

> [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.[12] 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.[13]
>
> (b) Once the housing accord is in force, the territorial authority may recommend to the Minister that an area be established as a special housing area.[14] In considering that recommendation the Minister must have regard to various matters including the relevant district plan[15] and must be satisfied that there is adequate infrastructure to service qualifying developments in the proposed special housing area.[16]
>
> (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.[17]
>
> [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.[18] 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).[19]
>
> [18] If a person chooses to apply for a resource consent under HASHAA,[20] 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

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10 New Zealand Productivity Commission *Housing Affordability* (March 2012).
11 *Enterprise Miramar v Wellington City Council*, above n 2.
12 Housing Accords and Special Housing Areas Act, s 10.
13 Section 11.
14 Section 17(1).
15 Section 16(2).
16 Section 16(3)(a).
17 Section 16(1).
18 Section 14(1)(a)–(b).
19 Section 14(1)(c)–(d).
20 Section 20.

> prohibited save for certain limited circumstances.[21] The local authority must consider the application in accordance with s 34. …

[9] The Council and the Minister responsible for HASHHA signed a housing accord on 24 June 2014. Subsequently the Minister approved a number of special housing areas (SHAs) within the Council's territory, including the development site.

[10] The Council currently owns the development site. It has agreed to enter into an arrangement with the Company to sell part of the land, and enter into a 125 year lease of the balance, to facilitate development of the SHA.

The grounds of this judicial review

[11] Enterprise Miramar's challenge in this proceeding is to two findings in the Panel Decision:

(a) the Panel's conclusion under s 34(1) of HASHAA that the adverse transportation effects of the development will be "no more than minor" (the transportation effects finding); and

(b) the Panel's conclusion that the requirements of s 34(2) of HASHAA, including for sufficient and appropriate roading infrastructure, were satisfied (the roading infrastructure finding).

[12] Enterprise Miramar says both findings are erroneous in law and/or fact, and are unreasonable.

Approach to judicial review

[13] Orthodox principles of judicial review apply to this review of decisions made under HASHAA. In *Pring v Wanganui District Council* the Court of Appeal conveniently summarised those principles in the context of decisions made under the RMA:[22]

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21 Section 29.
22 *Pring v Wanganui District Council* [1999] NZRMA 519 (CA) at [7].

> It is well established that in judicial review [proceedings] the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant considerations were taken into account, and whether the decision was one which, upon the basis of the material available to it, a reasonable decision-maker could have made. Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must have been some material capable of supporting the decision.

[14] Similarly, the High Court in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* summarised the position of the reviewing Court, consistent with the earlier statement from *Pring*:[23]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on notification. … The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

First ground of review: transportation effects finding (s 34(1) of HASHAA)

[15] The first ground of review relates to the transportations effects finding – the Panel's conclusion under s 34(1)(d)(i) of HASHAA (with reference to s 104D(1)(a) of the RMA) that the transportation effects of the development will be no more than minor:

> 118. Overall, the Panel concludes that the adverse transportation effects are no more than minor. Conditions of consent have been included to address timing of roading and infrastructure upgrades, minimum design issues, and expected outcomes. We also comment that in the longer term, if the popularity and vehicle use increase to an extent that safety and functionality are compromised then further improvements or speed restrictions (or both) could be implemented.

The legislative framework

[16] An application under HASHAA in relation to a SHA is dealt with very differently from an application under the RMA. Section 36(1) of HASHAA confers the statutory discretion on which the Panel relied to grant the resource consents to the

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[23] *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163 (footnotes omitted); upheld on appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73.

Company, and s 36(2) enables conditions to be imposed under ss 37 or 38. The exercise of that discretion is in turn conditioned by s 34.

[17] This first ground of review concerns s 34(1) of HASHAA, which sets out the matters the Panel was required to have regard to when considering the consent application:

> **34 Consideration of applications**
>
> (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.

[18] This ground of review relates to s 34(1)(d)(i) in particular, which required the Panel to have regard to the matters that would arise for consideration under the RMA, were the consent application assessed under that Act. Because the land use is a non-complying activity under the District Plan, s 104D would have applied if the consent application were being assessed under the RMA. Section 104D of the RMA is a "gateway" provision, which means that the decision-maker may grant consent only if satisfied of certain things. Enterprise Miramar's arguments relate to s 104D(1)(a) in particular:

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

…

Applicant's submissions

[19] Enterprise Miramar submitted that the Council's transportation effects finding, when considering s 34(1)(d)(i) of HASHAA and s 104D(1)(a) of the RMA, is not supported by probative evidence and is so insupportable – so clearly untenable – as to amount to a judicially reviewable error of law. Enterprise Miramar articulated that error of law in three ways:

(a) First, as an error of law in an *Edwards v Bairstow* sense,[24] in that a conclusion of a fact-finding body can sometimes be so insupportable and clearly untenable as to amount to an error of law because proper application of the law requires a different answer, when the only true and reasonable conclusion contradicts the determination.[25]

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[24] *Edwards v Bairstow* [1956] AC 14 (HL); as applied by analogy in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [64]–[75].

[25] *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 24, at [52].

(b) Second, the Panel's transportation effects finding can only be justified on the basis that the transportation effects were considered through the lens of the purpose of HASHAA, contrary to the Court of Appeal's approach to s 34(1),[26] and is therefore an error of law.

(c) Third, the transportation effects finding is so insupportable as to be unreasonable. Findings by a decision-maker must be supported by probative evidence.[27] Closely related to that requirement, the reasoning by which the decision-maker justifies its findings must not be self-contradictory or otherwise based upon an evident logical fallacy, and its ultimate conclusion must be tenable as a matter of both fact and logic.[28]

[20] Enterprise Miramar pointed to various matters in support of its submission that the Panel's transportation effects finding is untenable.

[21] First, Enterprise Miramar highlighted that none of the experts with specific subject matter expertise in transportation effects went as far as the Panel did and explicitly said that the adverse transportation effects associated with the development will be no more than minor.

[22] Second, Enterprise Miramar submitted the transportation effects finding is inconsistent with the quantitative changes that will occur as a result of the development (specifically, an increase of 180 per cent in daily traffic movements).[29] Enterprise Miramar pointed to the Environment Court's decision in *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council*, where the Court discussed the meaning of "minor", and noted: [30]

> [72] … the concepts of size and importance seem to have both quantitative and qualitative dimensions. Accordingly, whether adverse effects are "minor" or "more than minor" depends on the circumstances and context. …
>
> …

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26 *Enterprise Miramar v Wellington City Council* above n 2, at [52].
27 *Re Erebus Royal Commission* [1983] NZLR 662 (PC) at 681.
28 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [22]–[31].
29 As outlined below at [56].
30 *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135.

> [74] … We hold that any adverse effect which changes the quantity or quality of a resource by under 20 per cent, may, depending on context, be seen as minor.

[23] Enterprise Miramar submitted that the 180 per cent projected quantitative change in daily traffic movements significantly exceeds that Environment Court benchmark, or rule of thumb, which shows the Panel's transportation effects finding is insupportable.

[24] Third, Enterprise Miramar submitted that on a qualitative analysis too, the transportation effects finding is insupportable. Enterprise Miramar said that the Panel's failure to address the five issues discussed below is significant, and points to a conclusion that the transportation effects of the development will be more than minor.

(a) The proposed shared path for cyclists and pedestrians along Shelly Bay Road. Enterprise Miramar said this is significant because it was relied on as a key measure to mitigate adverse traffic effects associated with the proposed development, but in order to do that it had to be fit for its stated purposes and it was not. In particular, Enterprise Miramar pointed to concerns about the width of the path.

(b) The safety and amenity for cyclists on Shelly Bay Road. Enterprise Miramar said that the Panel did not recognise the potential safety issues for users of the shared path. It referred to the possibility that cyclists using the carriageway might be abruptly forced on to the shared path to avoid conflict with another user of the carriageway, the possibility of cyclist numbers increasing, and the general risks posed to cyclists by increased traffic.

(c) Recreational and amenity uses of the coastline along Shelly Bay Road. Enterprise Miramar provided evidence of those who access the beaches and bays along Shelly Bay Road for recreational and amenity purposes, such as beachgoing, diving, and paddle boarding. Enterprise Miramar submitted the Panel failed to assess the extent of the loss of parking in

particular, and the impact this would have on recreational use of the coastline. For example, if recreational users are required to park at Shelly Bay, they may then have to carry equipment several hundred metres along the shared path, which would be an adverse effect.

(d) The intersection of Shelly Bay Road and Miramar Avenue. Enterprise Miramar submitted that the report of the Company's traffic expert, in particular the finding there will only be a minor increase in delay in the right turn out of Shelly Bay Road during the evening peak, was fundamentally flawed because it did not take account of a priority cycleway proposed for the intersection. Enterprise Miramar noted the Panel was advised that the Company should "reassess the future design of the intersection, taking account of the new cycle facility". Enterprise Miramar noted Stantec has not reconsidered and revised its traffic assessment, and it submitted the Panel did not grapple with the impact of such a change.

(e) The traffic effects within the development site. Enterprise Miramar said the Panel's qualitative analysis of traffic effects is deficient in respect of the road layout and provision for pedestrians and cyclists, within the development site itself. In particular, Enterprise Miramar highlighted a difference in opinion between the traffic experts about the appropriate width of the carriageway, and concerns about the width of the shared path.

[25] Fourth, Enterprise Miramar submitted that the quantitative material before the Panel did not support the transportation effects finding, and the finding cannot withstand "commonsense scrutiny". In particular, Enterprise Miramar again pointed to an assessed increase in traffic of 180 per cent on Shelly Bay Road.

[26] Fifth, Enterprise Miramar submitted the transportation effects finding is inconsistent with what it described as a "rider" in the Panel Decision about potential future improvements:

> 118. … in the longer term, if the popularity and vehicle use increase to an extent that safety and functionality are compromised then further improvements or speed restrictions (or both) could be implemented."

[27] Overall, Enterprise Miramar submitted that the Panel's transportation effects finding constitutes a material error. Enterprise Miramar noted the Panel found two other adverse effects that were more than minor. Enterprise Miramar submitted that if traffic had been added as a third more than minor adverse effect, that could have altered the outcome of the Panel's weighing exercise. That was particularly so given Enterprise Miramar said it was legally open to the Panel to consent to a development of a relatively lesser scale than that proposed, or to impose more stringent conditions of consent under HASHAA in order to address more than minor traffic effects.

[28] Enterprise Miramar also submitted that the problems identified in relation to transportation effects are not effectively addressed through the consent conditions imposed by the Panel.

Respondents' submissions

[29] In response to Enterprise Miramar's submission that no traffic expert concluded that the adverse effects would be no more than minor, the respondents submitted, first, that it is the decision-maker (here, the Panel) who must decide whether or not to grant a resource consent and, in doing so, to apply the relevant statutory tests. The decision may be based on the advice of experts, but those experts do not have to frame their advice in the language of the statutory tests.[31] Second, such experts can only advise, and it is for the decision-maker to evaluate the advice and accept or reject it as they see fit.[32]

[30] Both respondents submitted there was sufficient material before the Panel to support is transportation effects finding. In response to the submission that the Panel's finding is insupportable in light of a 180 per cent increase in daily traffic movements, the Council noted that "minor" is not defined in either HASHAA or the RMA. It must be informed by overall context.[33] The Council agreed with Enterprise Miramar that

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31 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086 at [95].
32 At [95].
33 At [93].

"no more than minor" is both a quantitative and qualitative analysis,[34] but rejected Enterprise Miramar's submission that a 180 per cent projected quantitative change in daily traffic movements means that the Panel Decision on this issue is insupportable. The Council said the High Court in *Queenstown Central Ltd v Queenstown Lakes District Council* fundamentally rejected that approach of reducing quantitative changes to percentages without context.[35] The Company also submitted the crucial context in the Panel's decision-making included the fact that the increase in traffic will occur progressively and incrementally, and the road has spare capacity to accommodate the additional traffic.

[31] In relation to the qualitative analysis, the respondents addressed the applicant's submissions as follows:

(a) In terms of the shared path for cyclists and pedestrians, both respondents pointed to evidence that the proposed roading improvements, required as a condition of the resource consent, will provide a more consistent road layout for cycling, and will provide an acceptable minimum level of service.

(b) In terms of recreational and amenity use of the coastline, the Council noted that the Panel expressly acknowledged the loss of existing informal parking on the seaward side of the road, so it was plainly aware of this effect of the proposed development. The Council also noted the development itself will provide improved residential amenity. The Company also pointed to the conditions imposed by the Panel.

(c) As to the intersection at Miramar Avenue, the Council said that the cycleway planned along Miramar Avenue between Shelly Bay Road and Tauhinu Road is being progressed by the Council independently of the Company's consent application. It acknowledged there was a timing issue in that at the time of the Company making its consent

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34 At [31].

35 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, [2013] NZRMA 239.

application, design of the Council's cycleway had not been completed. The Company could not therefore take account of it in its design of the intersection. The Council explained that such timing issues are a reality of the process: things do not stand still between the grant of resource consent and its implementation. The Company also pointed to the conditions imposed by the Panel.

[32] Regarding the process the Panel followed, and its overall balancing, the Council submitted s 34(1) does not require the decision-maker to consider how it would have decided the consent application if it had been proceeding under the RMA. In having regard to matters that would arise for consideration under ss 104 to 104F of the RMA, the Panel found the gateway test under s 104D was not satisfied in two respects, as it had found adverse effects that were more than minor. But, unlike under the RMA, that was not fatal.

[33] The Council also noted that the transportation effects were a fourth-tier consideration. As to weight, the Council said that the Court's role is only to ensure that weight was afforded consistent with the relative weightings specified in s 34(1). Beyond that, how much weight was given to a particular consideration was a matter for the Panel as the decision-maker.

[34] Both respondents rejected Enterprise Miramar's argument that, if this Court finds an error, it was a material error. The Council acknowledged that it was possible that, having found that the consent application did not get through the RMA gateway as a result of two more than minor adverse effects findings, a conclusion that transportation effects too were more than minor might have resulted in the Panel reaching a different conclusion in its weighing exercise. But it said that is unlikely and pointed to the earlier Council finding on transportation effects – that is, two differently constituted decision-making bodies have reached the same conclusion on this issue.

[35] The Council also rejected Enterprise Miramar's submission that it was open to the Panel to consent to a development of a relatively lesser scale than that proposed. The Council said this is not correct, as s 36 of HASHAA and the equivalent provisions

of the RMA provide for decision-makers to "grant or decline" an application. It contains no reference to "in whole or in part" (unlike many other provisions in the RMA) and therefore, on the face of the legislation, there is no power to grant consent to a hypothetical less extensive development.[36]

Analysis

[36] I consider the arguments advanced by Enterprise Miramar in relation to this first ground of review raise the following questions:

(a) Could the Panel properly reach its conclusion that the transportation effects were no more than minor, despite the fact no experts used that phrase in their various assessments?

(b) What material did the Panel have before it, in support of its transportation effects finding?

(c) Is the Panel's transportation effects finding so inconsistent with the material that it is insupportable or untenable or unreasonable?

(d) Did the Panel follow the correct approach to the weighing exercise under s 34(1) (in other words, can the Panel's transportation effects finding be justified only on the basis that the traffic effects were considered through the lens of the purpose of HASHAA)?

(e) If the Panel did make an error in its transportation effects finding, was that error material?

(f) Are the conditions imposed by the Council ineffective?

36 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [63].

Could the Panel properly reach its conclusion that the transportation effects were no more than minor, despite the fact no experts used that phrase in their various assessments?

[37] I turn first to Enterprise Miramar's complaint that no traffic expert (Mr Spence for the Council or Stantec for the Company) explicitly concluded that the adverse traffic effects associated with the proposed development will be no more than minor. Rather, it was only Mr Garnett, a Council officer who prepared a report under s 42A of the RMA in June 2019 (who is not a traffic expert), who concluded that the traffic effects "will be no more than minor".

[38] Mr Spence, the Council's Chief Transport Advisor, prepared a Transportation Assessment for the Council in May 2019. Mr Spence also provided an affidavit in the first judicial review, and in the present proceeding. In his report Mr Spence said "I believe the proposed road layout is acceptable with the following comments: …". On that basis, Mr Spence's report concluded that, subject to his assessment and proposed consent conditions and advice note, he was "able to support the proposal in terms of its transport related effects".

[39] Stantec, the Company's traffic expert, prepared a Transportation Assessment Report for the Company, in April 2019. Stantec's conclusion was framed in a variety of ways, including:

(a) "… the development of this site … can be supported from a transportation perspective, …"; and

(b) "… the increase in traffic arising from the development will not adversely affect the performance on this part of the network, …".

[40] Dealing first with the terminology, I agree with counsel for the Council that while experts may couch their advice in terms of the statutory language, such as "minor" or "no more than minor", that is not essential. It is not those experts who are delegated to make decisions; they only advise. It is for the decision-maker to evaluate the advice and accept or reject it and, in doing so, to have regard to the statutory tests and the statutory language.

[41] Both the Council and the Company pointed to *Gabler v Queenstown Lakes District Council*.[37] There, an experienced noise expert expressed himself in identical language to that used by Mr Spence – that the identified adverse effects were "acceptable". The Council decision-maker concluded, based on that advice, that the effects were less than minor, such that the application did not need to be notified to neighbours under s 95A of the RMA. Nicholas Davidson J considered that there was no reviewable error. He did note that:[38]

> An expert report which is not directed to the statutory test, but instead refers to what *might* be taken as a shorthand for "less than minor" is also not good practice when that statutory test needs to be understood by the reader to have been applied, in particular a neighbour having regard to the effect of a non-notification Decision.

[42] However, earlier in the judgment the Judge said:[39]

> Dr Chiles was, in my view, able to use language that would assist the Council's decision and I consider that he provided advice which was relevant and helped the Council to reach the decision which it did. The Council submits that if there was an *unreasonable* effect that would point to notification, but the Council's express conclusion was that the noise effects would be less than minor. The Council plainly inferred that was what Dr Chiles meant when he used the adjectives "reasonable" and "acceptable", but his advice was just part of the information available. The Council unquestionably did address the correct statutory test, and in doing so brought to account compliance with the noise limits, and Dr Chiles' expressed opinion. It reached a tenable and reasoned conclusion with sufficient relevant information.

[43] Here, the Council submitted that is exactly what the Panel did. Its conclusion that the transportation effects will be no more than minor is consistent with Mr Garnett's report, which was based on his understanding of Mr Spence's report. Both Mr Spence and Stantec concluded that the adverse traffic effects will be appropriately accommodated.

[44] I find the Panel was not precluded from finding the adverse transportation effects will be no more than minor, simply because the traffic experts did not use the exact language "no more than minor".

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37 *Gabler v Queenstown Lakes District Council*, above n 31, at [95].

38 At [110].

39 At [95].

What material did the Panel have before it, in support of its transportation effects finding?

[45] Mr Kelly is a Transportation Planning Consultant, who gave evidence for Enterprise Miramar, in both the first judicial review and in this application. Mr Kelly's conclusion is that the Panel did not have the information available to reach any reliable conclusions regarding the possibilities of adverse traffic effects being no more than minor. He said:

> In my view, the additional development-related traffic will result in very significant increases in traffic demands on Shelly Bay Road. The potential for effects upon other road users in the immediate and wider road environment is high and Shelly Bay Road will require significant upgrading in order to avoid potential adverse efficiency and safety effects on other road users.

[46] In order to determine whether the Panel had sufficient material before it to make its transportation effects finding, I now consider the material before the Panel. Most relevant to this ground of review, the Panel had before it: the Stantec report, Mr Spence's report, and Mr Garnett's report. The Panel also noted in the Panel Decision that it had engaged with the public in order to be as transparent as possible – this included publishing information on the Council website about the development and the Panel process; issuing a series of seven Minutes in the period May-July 2019; and holding a "questions and answers" meeting on 21 August 2019 with representatives from the Council and the Company.

[47] I turn first to the Stantec report. Stantec considered the anticipated increase in traffic as a result of the development. It noted that the development of the site and the associated addition of traffic will occur gradually over time. It anticipated that five to ten per cent of the increased volume will route to and from the development site via Massey Road, and can be readily accommodated within the capacity of the existing roadway.

[48] The balance will route to and from the development site via Shelly Bay Road which, the report notes is – like many similar roads on the Wellington coastline – a winding road bound on one side by the harbour and on the other side by inland hills. Stantec compared Shelly Bay Road to Marine Parade in the Eastern Bays and The Esplanade on the Wellington South Coast, which vary in width through winding

sections from 5.8 to 6.7 metres, and both currently carry approximately 6,000-7,000 vehicles per day (vpd).

[49] Stantec noted that Shelly Bay Road is classified as a local road, and carries an average of 2,000-2,500 vpd in the busier summer months, and historically 1,200-1,500 vpd outside the peak summer months. Stantec recorded that the forecast traffic additions associated with the completed development are for 3,500 vpd, which results in approximately 6,000 vpd at the busiest times of the year. Stantec noted these future traffic flows sit within existing volumes currently accommodated on comparable Wellington roads.

[50] Stantec also noted that Shelly Bay Road is currently used largely for recreational purposes, accommodating some cyclist and pedestrian demands, especially on weekends. However, there are no existing dedicated pedestrian or cyclist facilities along Shelly Bay Road, with the roadway being shared between all modes of travel. Stantec noted the provision of the shared path will support the increase in demand on Shelly Bay Road, commensurate with the improved level of amenity.

[51] Stantec also referred to both a report by Calibre Consulting from 2016, and an Infrastructure Assessment Report by Envelope Engineering from 8 May 2019. Calibre found that a 1-1.5 metre wide shared path could physically be developed alongside the 6 metre wide carriageway. Calibre concluded that, while not fully adhering to the Council's Code of Practice for Land Development (the Code of Practice), the proposed roading infrastructure "will be of a scale and standard that sufficiently and appropriately caters for the development proposal." Envelope Engineering agreed with that assessment. Stantec noted the road cannot be widened further because of physical constraints (the cliff face on one side, and the sea wall on the other) and the desirability of preserving the natural character of the coastal environment.

[52] Stantec noted Shelly Bay Road connects to Miramar Avenue, which is classified as a principal street and has traffic flows of approximately 22,000 vpd. Stantec undertook an assessment of performance at the intersection of Shelly Bay Road and Miramar Avenue, measuring time taken to execute a particular movement at different times of day on different days – termed level of service. It concluded that,

following the improvement works projected under the development, the level of service at the intersection will be the same or better for all scenarios except a Shelly Bay Road right turn onto Miramar Avenue during the evening peak, when it will be diminished by approximately 8-9 seconds.

[53] Stantec's overall conclusion was:

> It has been assessed that with the adoption of proposed upgrade works, which achieve a more efficient layout at the Shelly Bay Road/Miramar Avenue intersection and serve to deliver capacity improvements, the increase in traffic arising from the development will not adversely affect the performance on this part of the network, and will in fact generally serve to reduce overall delay from the level currently experienced during the peak periods today.
>
> The proposed Shelly Bay Road improvement works, which would see the introduction of a shared pedestrian and cycle provision connecting the site and the Miramar Avenue intersection to the south, will serve to benefit not only those active mode users associated with the proposal site, but also the wider recreational demands around the Miramar peninsula. In addition, potential opportunities for improving access to bus and ferry services exist in the future as the development progresses, to deliver more convenient accessibility and travel choice.
>
> Overall, the assessment has examined the traffic-related features and potential effects of the proposal and finds that with the adoption of the Shelly Bay Road improvement works project, and upgrades to the Miramar Avenue intersection as described, development of the site can occur in a manner that ensures an appropriate level of integration, and more particularly within a substantially improved Shelly Bay environment.

[54] I turn next to Mr Spence's report. In the context of the road layout, Mr Spence's report referred to the Council's Code of Practice. In his affidavit, Mr Spence explained that the Code of Practice is a guide for development and subdivision in Wellington, which includes technical standards for the construction of subdivisions, including roading design and construction. He explained the Code of Practice is applied flexibly, particularly in the context of upgrades of existing road networks (rather than the construction of "green fields" developments). This is consistent with the affidavit evidence of Mr Garnett, Mr Dorset (a senior planner at Egmont Dixon Limited, with experience in planning and resource management, who gave evidence for the Company), and Mr Leary (a director at Spencer Homes Limited, with experience in land development, planning, and resource management, who gave evidence for Enterprise Miramar). Mr Spence observed that the Wellington road network on the whole does not comply with the Code of Practice, noting the "city's topography makes these standards unrealistic for many of Wellington's roads and Shelly Bay Road is no exception."

[55] In his report, Mr Spence noted that the "nearest fit" for assessment under the Code of Practice would be a "residential collector road". However, Mr Spence's view was that it would be inappropriate and impractical to impose the Council's Code of Practice for a residential collector road on Shelly Bay Road.

[56] Although the proposed upgrades do not meet the standards in the Code of Practice, Mr Spence was satisfied that the proposed road layout is "acceptable". Mr Spence recorded that a 6-metre carriageway and 1-1.5 metre shared path should be seen as the "minimum acceptable standard", and was satisfied it will "provide adequate vehicular traffic capacity and would provide a good level of safety". However, he also noted a minor widening of the carriageway to 6.5 metres within the development site would be "desirable". Mr Spence calculated that there will be a 180 per cent increase in traffic volume on Shelly Bay Road as a result of the development, based on the figures in the Stantec report.

[57] Mr Spence also concluded that, although more space to accommodate cyclists and pedestrians would be "desirable", the proposed shared path will be an improvement on the existing situation for cyclists and pedestrians. Although some more serious cyclists may continue to use the carriageway rather than the shared path, Mr Spence advised the Panel that a reduction in speed limit from 40 kph to 30 kph would be recommended to the Council for the length of the development site. Stantec's view was that such a reduction in the maximum speed would mean that cyclists on the carriageway would generally be travelling at the same speed as vehicles, removing the need for vehicles to overtake and thus reducing safety risks.

[58] Mr Spence proposed some conditions to address some of the matters raised.

[59] Mr Spence's assessment concluded: "[s]ubject to my above assessment and proposed consent conditions and advice note, I am able to support the proposal in terms of its transport related effects."

[60] Finally, I turn to Mr Garnett's report. Mr Garnett's report contained a section headed "Section 34(1)(d) – Other matters that would arise if the application was being assessed under sections 104 to 104F of the RMA". That included a s 104D assessment,

and Mr Garnett considered the effects of the development under thirteen headings: cultural effects, heritage effects, landscape and visual effects, open space effects, design, subdivision effects, effects on airspace designation, transportation effects, erosion sediment control and stability effects, infrastructure and servicing effects, construction effects, contamination effects, and positive effects.

[61] Mr Garnett concluded that the gateway tests in the RMA were not met, because the adverse effects of the development will be more than minor in two categories (landscape and visual effects, and open space effects) and the development will be contrary to the relevant objectives and policies of the District Plan. In relation to transportation effects Mr Garnett concluded: "[b]ased on the advice of Mr Spence, I consider **that adverse effects in terms of transportation will be no more than minor."**

[62] The Panel was also aware of the evidence which was contrary to the conclusion in Mr Garnett's, including an affidavit from Mr Kelly in the first judicial review.

Is the Panel's transportation effects finding so inconsistent with the material that it is insupportable or untenable or unreasonable?

[63] In considering whether the Panel's finding that the transportation effects will be no more than minor is supported by the material, I note that "minor" is not defined in either the RMA or HASHAA. As both the Council and the Company submitted, its meaning must be informed by overall context, as the High Court said in *Green v Auckland Council*:[40]

> The statutory tests of "minor", "more than minor", and "less than minor" can only be informed by context. One is dealing with degrees of smallness. Where the line might be drawn between the three categories might not be easily determined.

[64] I note that many of Enterprise Miramar's arguments, particularly in relation to the qualitative issues, focused on a comparison between the proposed development, and a hypothetical alternative development which might better accommodate their traffic concerns; in other words, that the adverse effects of the proposed development

[40] *Green v Auckland Council* [2013] NZHC 2364, [2014] NZRMA 1 at [126] (footnotes omitted).

are more than minor, when compared to the effects of alternative developments that would be possible for the development site. However, in the context of s 104D(1)(a), I consider the appropriate approach is to compare the proposed development with the existing environment, to determine whether the adverse effects will be more than minor.

[65] Turning first to Enterprise Miramar's concerns about the quantitative data, I consider whether the Panel's transportation effects finding is inconsistent with the nature and extent of the quantitative change, in particular the estimated 180 per cent increase in daily traffic. I agree with the Council and the Company that a focus only on the percentage increase in traffic volumes without context is not useful. The totality of the information before the Panel must be considered. As the High Court said in *Queenstown Central Ltd v Queenstown Lakes District Council*, there is "no bright line distinction between 'minor' and 'not minor'."[41] The Court rejected the Environment Court's approach in *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council*,[42] relied on by Enterprise Miramar, criticising it for substituting the statutory standard of "minor" with a numerical "20 per cent test".[43]

[66] The context here is that the various reports discussed above found that the improved Shelly Bay Road will be able to accommodate the increased traffic resulting from the development, and Mr Spence concluded that the transportation effects are acceptable. Stantec also noted other comparable roads in Wellington currently carry similar levels of traffic. Here, I find that a 180 per cent projected increase in vpd does not, in and of itself, mean that the Panel could not reasonably have concluded that the traffic effects will be no more than minor.

[67] I also note Enterprise Miramar submitted that Stantec's traffic volume estimations would rise by 8-9 per cent if the aged care units planned for the development did not eventuate (and were instead replaced with residential dwellings). However, the Stantec report records its estimates were made on a conservative basis. Stantec noted that the generation of trips was assessed at the high end, and Stantec's

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41 *Queenstown Central Ltd v Queenstown Lakes District Council*, above n 35, at [95].
42 *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council*, above n 30.
43 *Queenstown Central Ltd v Queenstown Lakes District Council*, above n 35, at [92]-[111].

projected increase of 3,500 vpd remains sufficiently accurate even if the aged care units do not proceed.

[68] Turning now to Enterprise Miramar's concerns about the qualitative data, I first consider the shared path for cyclists and pedestrians, and the associated safety and amenity concerns for cyclists. The Panel expressly considered that the proposed shared path is "undesirably narrow in some locations due to the constraints on available width between the toe of the hillside and the edge of the road platform adjacent to the beach/coastal edge", but found that overall the proposed roading upgrade will provide an acceptable minimum level of service. This is consistent with the conclusions of Stantec and Mr Spence that the proposed road layout is acceptable, and the shared path will be an improvement on the current situation.

[69] In terms of the concerns about the traffic effects within the development itself, I note the proposed layout for the 850 metre length of the development site is a 2 metre footpath, 6 metre carriageway (two 3 metre traffic lanes), a minimum 3.5 metre shared pedestrian/cycle path, and public parking in 90 degree angle parking bays. Enterprise Miramar highlighted that Stantec considered that a carriageway width of 6 metres is appropriate, but Mr Spence recorded in his report that he thought it would be desirable to widen the carriageway to 6.5 metres. Enterprise Miramar also submitted the Panel failed to identify the extent to which the shared path will be continuously 3.5 metres wide, there being no information before it to support a conclusion that there is enough space to locate a 3.5 metre shared path for the entire length of the development site.

[70] The Panel would have been aware that Mr Spence's opinion was that a 6.5 metre carriageway within the development site would be preferable, based on his report. However, the Panel Decision also quoted from Mr Spence's report: "I … believe that the Calibre proposal [a carriageway width of 6 metres and a shared path width of 1-1.5 metres] should be seen as the minimum acceptable standard to be achieved if the development is to proceed." The Panel Decision also records that, at a meeting with the parties, the Panel explored with Mr Spence the width of the carriageway and the shared path:

> … noting that [the proposed] dimensions are well below normal "green field" development roading standards. Mr Spence stated that the majority of roads within Wellington City do not meet the standards and yet provide a satisfactory level of service. We accept his opinion that the proposed upgrade of Shelly Bay Road, between Miramar Avenue and the site, will provide an acceptable minimum level of service for this road.

[71] In terms of the width of the shared path within the development site, I note the Stantec report records this will be 3.5 metres (although this was not specifically addressed by Calibre or Envelope Engineering).

[72] I also note the evidence Enterprise Miramar provided in its present application for judicial review, including affidavits from people who currently cycle (in particular, road cyclists who prefer to cycle on the carriageway, rather than cycle paths) or walk along Shelly Bay Road. While I acknowledge they provide useful perspectives which the Panel did not have access to, it is plain the Panel was aware of the issues they raise. The Panel was aware that the proposed shared path will not meet ideal standards, and will not be an ideal solution for all cyclists and pedestrians. Nevertheless, I find it was open to the Panel to conclude the shared path is, overall, an improvement on the current situation and is appropriate for the development.

[73] In terms of the concerns about recreational and amenity uses of the coastline, I note the Panel acknowledged that the upgrade of Shelly Bay Road will result in the loss of some informal parking on the seaward side of the road. Balanced against that, the Panel also noted the development itself will contain ancillary recreational facilities, and will provide a high standard of residential amenity.

[74] I turn now to the concerns about the intersection of Shelly Bay Road and Miramar Avenue. The Panel Decision refers to the proposed upgrade of the intersection, noting "the conditions require a design approval process, prior to construction, and this process places an obligation on the design to achieve maximum widths where possible." The Panel had regard to the new proposed cycleway interface with the intersection, which was proposed after the consent application. Condition 39 requires the Company, prior to commencing work on the public roads, to provide certain information to the Council for certification. Condition 39(b) requires the Company to provide detailed design plans of the upgrade to the intersection, with

confirmation that the intersection will achieve levels of service no worse than the existing levels detailed in the Stantec report. The advice note to condition 39(b) says:

> **Note:** The Council is proposing to make changes this year, to the existing intersection to enhance cycling facilities, and the consent holder will need to take account of this new intersection layout in its design of the improvements required to accommodate the additional traffic loading resulting from the completed Shelly Bay development.

[75] I also note the Panel commented that the traffic assessments had not included potential effects on the wider roading network, but it was satisfied from Mr Spence's report that the potential effects "will be appropriately managed through changes to the wider transport network."

[76] I do not consider the material available in relation to the shared path, the intersection at Miramar Avenue, or the recreational and amenity uses of the coastline mean the Panel could not reasonably have concluded that the transportation effects will be no more than minor.

[77] Finally, I do not accept Enterprise Miramar's submission that the Panel's comments in relation to long term monitoring of the performance of the road means its transportation effects finding is insupportable.

[78] In conclusion, I do not consider the quantitative or qualitative data shows the Panel's transportation effects finding is insupportable or untenable.

Did the Panel follow the correct approach to the weighing exercise under s 34(1)?

[79] I turn now to the Panel's decision-making process, in light of Enterprise Miramar's submission that it could have made its transportation effects finding only by erroneously viewing the traffic effects through the lens of the purpose of HASHAA. Enterprise Miramar submitted that the material before the Panel does not support its finding the transportation effects of the development will be no more than minor, and therefore it could only justify that finding by an improper focus on the purpose of HASHAA.

[80] HASHAA requires an individual assessment of the matters listed in s 34(1) prior to the exercise of weighing them. As the Court of Appeal explained in the first judicial review:[44]

> … 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 factor.

[81] Although s 104D of the RMA acts as a gateway provision, meaning that the decision-maker may grant consent only if satisfied of certain things, s 34(1)(d)(i) of HASHAA only requires a decision-maker to "have regard to" the matters in s 104D of the RMA. The Court of Appeal in the first judicial review confirmed that, under HASHAA, ss 104-104F of the RMA do not directly apply, and therefore a development that could not proceed under those provisions of the RMA could still be consented under s 34 of HASHAA.[45] But, those RMA provisions are still mandatory considerations under s 34(1) and must be assessed "uninfluenced by the purpose of HASHAA".[46] As the Court of Appeal said, the purpose of HASHAA is not logically relevant to an assessment of environmental effects:[47]

> 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.

[82] In order to make a decision on the Company's consent application, the Panel was therefore required to undertake an individual assessment of each of the matters listed in s 34(1) of HASHAA before "standing back and conducting an overall balancing" of those mandatory considerations,[48] "in accordance with the prescribed hierarchy".[49]

[83] The Panel was plainly aware of the Court of Appeal's decision in the first judicial review. Before setting out its decision-making process, it noted the Court's

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44 *Enterprise Miramar Peninsula Inc v Wellington City Council* above n 2, at [40].
45 At [54].
46 At [52].
47 At [55].
48 At [52].
49 At [53].

decision, observing that the Court had found that the Council had erred in law because it had "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."

[84] The Panel set out the correct approach to s 34, as held by the Court of Appeal, and went on to say:

> The Panel has been guided by the Court of Appeal's ruling and has followed the process set out by it. This process is to assess the matters in subsections (1)(b)-(e) first, before carrying out the weighing exercise required by subsection (1).

[85] Of the 215 paragraphs in the Panel Decision, 103 were devoted to a section titled "Section 34(1)(d) – Assessment under Sections 104 to 104F of the RMA". The Panel noted:

> The proposal is to be assessed as a non-complying activity overall, therefore the gateway test of s 104D must be considered. This means that the Panel needs to assess whether the adverse effects will be minor or that the proposal is not contrary to the objectives and policies of the District Plan.

[86] The Panel then went on to consider each of the 13 relevant categories of actual and potential effects, including both positive and adverse effects. All of the 13 effects were assessed as being no more than minor, except for two categories (visual effects and open space effects) that were assessed as being more than minor.

[87] In its "Effects summary" the Panel said:

> 157. The Panel concludes that with the exception of landscape and visual effects, and effects on the Open Space B Area, all of the other identified adverse effects on the environment of the proposal are no more than minor. We also accept that the proposal has positive effects.
>
> …
>
> 159. Therefore, the effects are finely balanced. Given that, the Panel prefers to take a conservative approach to the assessment of effects, in a similar manner to that of the reporting officer, and has concluded that, overall, the adverse effects of the proposal are more than minor.

[88] In its "Weighing Exercise" the Panel said:

> 191. As noted above, and confirmed by the Court of Appeal, section 34(1) of HASHAA requires an evaluation of the proposal by having regard to the five matters identified and assessed above, giving weight to them (greater to lesser) in the order listed. This means that section 34(1)(a) (the purpose of HASHAA) has greater weight than the remaining matters in sections 34(1)(b)-(e).
>
> 192. … As set out above, when assessed under section 34(1)(d) the proposal has more than minor visual effects, including those effects on the Open Space B zoned land. In addition, the proposal is contrary to one of the objectives in the District Plan….
>
> 193. Section 34(1)(d) is only fourth in the hierarchy of matters set out in the HASHAA. However, as noted by the Court of Appeal sections 104-104F of the RMA are still mandatory considerations which cannot be neutralised by reference to the purpose of HASHAA. We have adopted the approach that the Court of Appeal has mandated. We consider that while this development might not have been able to proceed under those provisions it can and should still be consented under s 34 of HASHAA.
>
> 194. The Panel has reviewed [Mr Garnett's] report which undertook a thorough and proper analysis, and weighing, of the relevant matters. We generally agree with that assessment and the weighing that was carried out. The overriding factor is that the purpose of HASHAA is given the most weight in the list of relevant matters under section 34(1).
>
> 195. In carrying out an overall weighing of these matters, the Panel finds it agrees with Mr Garnett that "… *the benefit of providing a considerable supply of new housing to the market for private occupation or rent outweighs the impact of the proposal in relation to landscape and visual effects."* The proposal will deliver 352 new dwellings. This clearly meets the purpose of HASHAA …
>
> 196. As well as providing a significant total number of dwellings, the proposal will also provide choice for the consumer with varied types and sizes of dwellings …
>
> 197. So, whilst we have concluded that the proposal may not meet either of the 'gateway tests' in section 104D, the Panel considers that when the relevant matters are weighed in the order set out in section 34(1) of HASHAA, the Application should be approved.

[89] In essence, Enterprise Miramar's case is that its experts would have weighed the relevant factors differently, so as to arrive at a different conclusion as to the adverse transportation effects from that reached by the Panel, and it asks the Court to prefer that view.

[90] In *Just One Life Ltd v Queenstown Lakes District Council*, the High Court was also required to scrutinise a decision-maker's assessment of effects.[50] On the question of weight to be given by the decision-maker to particular matters, the Court said:[51]

> Although that assessment [that there were no adverse effects that were more than minor] is not accepted by [the applicant], nor by some of the experts who

[50] *Just One Life Ltd v Queenstown Lakes District Council* (2003) 9 ELRNZ 210.
[51] At [85].

> have sworn affidavits in this proceeding, to my mind it represents a view which was properly open to those involved in the decision process. It follows, I think, that the intervention of the Court is sought in relation to the merits, not for the correction of reviewable error. It would be wrong to intervene in such circumstances.

[91] Similar to the case of *Mills v Far North District Council,* what Enterprise Miramar's evidence invites is a "battle of the experts".[52] In the present case, as in *Mills*, what is involved is value judgements and subjective views, and a range of experts could come to a range of conclusions.

[92] What was required of the Panel was that it "have regard to" all of the matters set out in s 34(1)(a)-(e), in the sense of giving genuine attention and thought to each of the matters. I am satisfied that it did so, without undue focus on the purpose of HASHAA.

If the Panel did make an error in its transportation effects finding, was that error material?

[93] Even if I am wrong in my assessment, and the Panel should have determined that the adverse traffic effects would be more than minor, it is not clear that would have been a material error. As this Court said in *Vector Ltd v Utilities Disputes Commissioner,* it is "uncontentious that the Court will not interfere with a tribunal's decision unless the error is material".[53] A material error of law is one that "affected the actual making of the decision, and affected the decision itself."[54]

[94] I note the Panel had already concluded, taking a "conservative approach to the assessment of effects", that the adverse effects of the development on the environment will be more than minor. It weighed that conclusion into its overall assessment of the consent application under s 34 of HASHAA. As the Company submitted, it is unclear how a finding that transportation effects would be more than minor could have impacted on that outcome. I therefore conclude that, even if the Panel was wrong to conclude the transportation effects will be no more than minor, that error would not have been a material one.

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52 *Mills v Far North District Council* [2018] NZHC 2082 at [191].
53 *Vector Ltd v Utilities Disputes Commissioner* [2018] NZHC 3096 at [13].
54 *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 (HC) at [140].

[95] Because I have found that the Panel did have sufficient information before it on which it could properly have reached its decision, it has not been necessary for me to consider whether, as Enterprise Miramar submitted, the Panel could have consented to some lesser development.

Are the conditions imposed by the Council ineffective?

[96] Finally, I turn to Enterprise Miramar's concerns about the effectiveness of the conditions imposed. Relevant to this proceeding, the Panel imposed transportation and access conditions. Condition 39 provides:

> Prior to the commenced of construction works being carried out on the public road between Shelly Bay Road / Miramar Avenue intersection and the development, and the Miramar Avenue / Shelly Bay Road intersection, and within the development site, the consent holder shall provide the following plans and information for certification by [the Council] …
>
> a) Detailed design plans of the road improvement works to be undertaken between the Shelly Bay Road/Miramar Avenue intersection and the development. The improvements must be designed to meet the minimum standard defined in the [Stantec report], being, a 6m carriageway plus a 1-1.5m width for use by pedestrians and cyclists and intersection upgrades as proposed unless otherwise mutually agreed to between [the Company and the Council] …
>
> b) Detailed design plans of the upgrade to the Shelly Bay and Miramar Ave intersection accompanied with confirmation … that the intersection will, achieve typical weekday PM level of service of no worse than the existing levels of service detailed in the [Stantec report] …
>
> …

[97] Enterprise Miramar submitted that logically any reassessment required by the conditions should have been available to the Panel because it will be material to any consideration of the effects of the development. Enterprise Miramar also submitted that condition 39(a) is defeasible because it says "unless otherwise mutually agreed to", and it wrongly assumes a 1-1.5 metre shared path is fit for purpose. Enterprise Miramar also submitted condition 39(b) is inadequate to secure appropriate levels of service at the intersection with Miramar Avenue.

[98] Essentially, Enterprise Miramar submitted that the conditions imposed do not effectively address the outstanding issues it has raised regarding traffic effects. I do not agree. As the Company pointed out, if it fails to meet the conditions imposed in the Panel Decision it will not be able to exercise the resource consent.

Conclusion on first ground of review

[99] I am satisfied that the Panel had regard to all the matters required by s 34(1). I am also satisfied that it had sufficient probative evidence before it, including material which was critical of the consent application, on the basis of which it could have reached the view that the adverse transportation effects are no more than minor. I reiterate that it is not for this Court to set aside the Panel Decision simply on the basis that a different decision was possible.

[100] I am also satisfied that the Panel carried out the overall weighing of the s 34(1) factors in the manner prescribed by the Court of Appeal and reached its assessment of the effects uninfluenced by the purpose of HASHAA, as the Court of Appeal required it to do. It then stood back to conduct an overall balancing, as the Act required.

[101] I conclude there was no error of law in relation to the application of s 34(1) of HASHAA, and the Panel's transportation effects finding was a decision which, upon the basis of the material available to it, a reasonable decision-maker could have made.

Second ground of review: roading infrastructure finding (s 34(2) of HASHAA)

[102] The second ground of review relates to the Panel's conclusion that s 34(2) of HASHAA was satisfied, and in particular that sufficient and appropriate roading infrastructure will be provided to support the development:

> 202. The Council's Chief Transport Advisor has assessed the proposal and considered that through the proposed changes to the road network, the impact on roading infrastructure will be minor. The Panel accepts Mr Spence's assessment and conclusion.
>
> 203. Section 34(2) is therefore deemed to have been satisfied.

The legislative framework

[103] Section 34(2) and (3) of HASHAA provide:

> **34 Consideration of applications**
>
> …
>
> (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.

Applicant's submissions

[104] Similarly to the first ground of review, Enterprise Miramar submitted the Panel's roading infrastructure finding is an error as an:

(a) error of law by misconstruction or misapplication of s 34(2);

(b) error of law in an *Edwards v Bairstow* sense;[55] or

(c) unreasonable finding.

[105] Enterprise Miramar submitted the Panel made four errors of law in its roading infrastructure finding.

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55 *Edwards v Bairstow*, above n 24; see above at [19].

[106] First, Enterprise Miramar submitted the material before the Panel did not support the Panel's roading infrastructure finding. As it did in relation to the first ground of review, Enterprise Miramar highlighted that no traffic expert assessed the impact on roading infrastructure as "minor". Enterprise Miramar submitted the Panel wrongly attributed such a finding to Mr Spence, and accordingly, the Panel erred in law and/or acted unreasonably in proceeding on the basis that Mr Spence had made such assessment.

[107] Enterprise Miramar also pointed to two specific matters that it said go to whether the Panel could, on the information before it, have been satisfied that sufficient and appropriate infrastructure will be provided. Both matters are flagged in Mr Spence's report:

(a) The proposed 6 metre carriageway, plus 1-1.5 metre shared path was "substantially below" the relevant standards recommended in both the Council's Code of Practice and the industry standard NZS 4404:2010.

(b) The proposed shared path "could be argued to fall short" as it would "clearly be desirable" for more space to be available on the seaward side, predominantly to accommodate weekend pedestrian and cycle activity.

[108] Second, Enterprise Miramar submitted that the Panel adopted an unduly narrow approach under s 34(2), in two respects:

(a) Enterprise Miramar said that s 34(2) requires satisfaction that sufficient and appropriate infrastructure "will be" provided. The information that was before the Panel showed only that the roading infrastructure "can be" provided. Enterprise Miramar said that this approach was erroneous in law, as it involves substituting a different and significantly lower test (in other words, "can" for "will") under s 34(2). Enterprise Miramar acknowledged that this argument runs counter to the Court of Appeal's statement in the earlier judicial review, where

Enterprise Miramar advanced essentially the same argument,[56] but said the Court's comments were obiter. As it did in relation to the first ground of review, Enterprise Miramar also submitted that the problems identified were not effectively addressed through the conditions imposed by the Panel.

(b) Enterprise Miramar said that the Panel erred by focusing on whether impacts on roading infrastructure will be "minor", rather than whether the infrastructure will be "sufficient and appropriate". Enterprise Miramar submitted the Council therefore asked itself the wrong question. Enterprise Miramar acknowledged that an assessment of an impact of minor may be relevant to whether the infrastructure is "sufficient". However, Enterprise Miramar submitted the focus on "minor" did not address the "appropriate" requirement, particularly in relation to the qualitative matters discussed at [24] above.

[109] Third, Enterprise Miramar argued that the Panel's roading infrastructure finding is inconsistent with Mr Spence's recommendation that the Council should monitor performance of the road following completion of the development, to determine whether it should develop plans for further road widening. As it did with the first ground of review, Enterprise Miramar argued it is also inconsistent with the following "rider" in the Panel Decision, which Enterprise Miramar said was an acknowledgement the proposed transportation infrastructure was not in fact "sufficient" and/or "appropriate":

> 118. … We also comment that in the longer term, if the popularity and vehicle use increase to an extent that safety and functionality are compromised then further improvements or speed restrictions (or both) could be implemented.

[110] Fourth, Enterprise Miramar submitted the Panel failed to differentiate roading within and outside the development site, when it concluded that it would be impracticable to meet the requirements of the Code of Practice within the development site as well as outside of it.

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56 *Enterprise Miramar Peninsula Inc v Wellington City Council,* above n 2, at [63]-[66].

[111] As with the first ground of review, Enterprise Miramar submitted that the errors in relation to the application of s 34(2) are sufficiently material to justify the Court quashing the Panel Decision.

[112] Finally, Enterprise Miramar also submitted that there are relevant standards for infrastructure under s 34(3)(b) that the Panel does not appear to have considered. In particular, Enterprise Miramar pointed to New Zealand Transport Agency (NZTA) and Austroads guidance for shared paths, and the Council's cycling and walking policies.

Respondents' submissions

[113] In response to the second alleged error of law, the Company submitted the Panel made no error in its approach to s 34(2) by considering what infrastructure "can be" provided. Both the Company and the Council pointed to the Court of Appeal's decision. The Council submitted that, while the Court of Appeal's discussion of "will be" and "can" was necessarily obiter, its opinion is clear and is a correct interpretation of the law. The Company also highlighted the conditions imposed by the Panel.

[114] Also in response to the second alleged error of law, the Company acknowledged that the language used by the Panel (discussing whether the transportation impact is "minor" in the context of s 34(2)) was not relevant. However, both the Council and the Company submitted that it is clear from the Panel Decision as a whole that the Panel applied the correct test.

[115] In response to the fourth alleged error of law, the Council submitted that, as Mr Spence explained in his affidavit, the Code of Practice is applied flexibly.

[116] The Company rejected Enterprise Miramar's submission in relation to relevant standards, and submitted the documents identified do not constitute industry standards that the Panel was required to take into account.

Analysis

[117] I consider the arguments advanced by Enterprise Miramar in relation to this first ground of review raise the following questions:

(a) Did the Panel err in its approach to s 34(2), by finding the necessary infrastructure "can be" provided (rather than using the language of "will be")?

(b) Did the Panel err in its approach to s 34(2), by focusing on "minor" impacts (rather than using the language of "sufficient and appropriate")?

(c) Does the material support the Panel's roading infrastructure finding?

(d) Did the Panel err in its application of the Code of Practice, in particular by failing to differentiate between roading within and outside the development site?

(e) Did the Panel fail to consider relevant standards under s 34(3)(b)?

Did the Panel err in its approach to s 34(2), by finding the necessary infrastructure "can be" provided (rather than using the language of "will be")?

[118] As to the submission that the Panel erroneously applied a "can be" rather than a "will be" test, I repeat what the Court of Appeal said in response to the same submission in the first judicial review:[57]

> [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). [Counsel for the Council] took us to a number of these throughout his oral submissions. We agree with the submission for the Council and [the Company] 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.[58] The Council's decision imposed a large number of conditions in relation to infrastructure matters. Many require [the Company] to formulate plans as to infrastructure and submit them to relevant experts for approval before proceeding. …

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57 *Enterprise Miramar Peninsula Inc v Wellington City Council* above n 2, at [63]-[66].
58 *Enterprise Miramar Peninsular Inc v Wellington City Council*, above n 1, at [220].

> [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 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 [the Company] 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 [the Company] 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.

[119] I respectfully agree with and adopt the Court of Appeal's approach.

[120] The Panel imposed condition 39(a),[59] to ensure that the requisite infrastructure will be provided. As the Council submitted, the Panel's approach was to determine whether sufficient and appropriate infrastructure "could" be provided, and then to impose conditions to ensure that it would ("will") be provided. I accept, as did the Court of Appeal, that that is a proper approach. As the Court of Appeal said, if the Company does not provide a road according to those specifications, it will not be able to exercise the resource consent.[60]

Did the Panel err in its approach to s 34(2), by focusing on "minor" impacts (rather than using the language of "sufficient and appropriate")?

[121] In terms of the submission that the Panel erred by using the word "minor" in its conclusion on roading infrastructure, I agree with the Council and the Company that the Panel asked itself the right question and stated the test in s 34(2) correctly. That is plain from the Panel Decision:

> 198. Resource consent for the proposal cannot be granted under HASHAA unless the Panel is satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development.
>
> 199. In assessing this matter, the Panel is required to consider:

[59] As outlined above at [96].

[60] *Enterprise Miramar Peninsula Inc v Wellington City Council* above n 2, at [66].

(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.

[122] Given the Panel clearly understood the requirements of s 34(2), I do not consider the Panel's use of the word "minor" in its roading infrastructure finding, in and of itself, means the Panel's finding that s 34(2) was satisfied is an error.

Does the material support the Panel's roading infrastructure finding?

[123] Enterprise Miramar submitted the material before the Panel did not support its roading infrastructure finding. Similarly to the first ground of review, I consider Enterprise Miramar's arguments require me to determine whether the Panel's roading infrastructure finding was a decision which, on the material available, a reasonable decision-maker could have made.

[124] Enterprise Miramar's submissions focused primarily on concerns about the width of the roading infrastructure proposed in the consent application (a 6 metre carriageway, and a 1-1.5 metre shared path for cyclists and pedestrians). The Panel had before it evidence of subject matter experts on all the infrastructure issues.[61] In particular, I again highlight Mr Spence's conclusion that the proposed road layout is "acceptable". Both Calibre and Envelope Engineering also considered those widths were acceptable and can be accommodated without significant structural works. I also note that, in relation to infrastructure, Mr Garnett accepted Mr Spence's assessment that there will be sufficient capacity in the road network to accommodate the proposal (this was in conjunction with Mr Garnett's finding, based on Mr Spence's report, that adverse transportation will be "no more than minor").

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61 As outlined above at [47]-[61].

[125] As Churchman J found in the first judicial review, the conditions imposed reflect the decision-maker's analysis of that evidence as to what was required in order to ensure that sufficient and appropriate infrastructure would be provided.[62]

[126] I do not accept Enterprise Miramar's submission that comments by Mr Spence and the Panel in relation to long term monitoring of the performance of the road mean its roading infrastructure finding is unreasonable.

[127] Finally, for completeness, I turn to Enterprise Miramar's submission regarding the language of the experts. I reiterate my findings at [40]-[43], and confirm the fact that no experts used the exact language the Panel did is not, alone, enough to show the roading infrastructure finding amounts to an error of law.

Did the Panel err in its application of the Code of Practice, in particular by failing to differentiate between roading within and outside the development site?

[128] In relation to the Code of Practice, I again note that it is applied flexibly, especially in the context of upgrades to existing infrastructure, and its standards are unrealistic for most Wellington roads.[63] With that in mind, I do not consider the Panel erred in not applying the Code of Practice within the development site.

Did the Panel fail to consider relevant standards under s 34(3)(b)?

[129] In relation to the NZTA and Austroads guidance for shared paths and the Council's cycling and walking policies, the Company said that those policies do not constitute industry standards that the Panel was required to take into account. For example, NZTA describes its cycling network guidance in the following terms:

> This is not an instruction manual. It is a best-practice, principles-based guide to the process of cycling network planning and design, with tools that may help cycle planners and communities. It is not legally binding guidance.

[130] I conclude that the "guidance" documents referred to by Mr Kelly are not "relevant standards for infrastructure" in terms of s 34(3)(b), and the Panel did not err by not referring to them in the Panel Decision.

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62 *Enterprise Miramar Peninsular Inc v Wellington City Council* above n 1, at [221].
63 See above at [54].

Conclusion on second ground of review

[131] I am satisfied that the Panel took the correct approach to s 34(2), and had before it sufficient information from which it could reasonably conclude that there would be sufficient and appropriate roading infrastructure to support the development. I find the Panel's roading infrastructure finding was a decision which, on the material available, a reasonable decision-maker could have made. I also find that, having regard to the Court of Appeal decision,[64] it was proper for the Council to impose conditions on the consent to ensure that the appropriate infrastructure will be provided.

Result

[132] The application for judicial review is dismissed.

[133] I invite the parties to agree costs. Failing agreement, the respondents are each to file submissions on costs of no more than 10 pages in length within 14 days of this decision, and the applicant is to file its submissions of no more than 10 pages in length within a further 14 days.

Gwyn J

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[64] *Enterprise Miramar Peninsula Inc v Wellington City Council* above n 2, at [65] and [66].