

Update on Declaration proceedings addressing the Special Character Areas Overlay and Single House Zone provisions / Change of Practice and Withdrawal of Council's December 2016 Practice Note

As you may be aware, the Council's resource consenting department issued a Practice Note via e-mail in December 2016 (**Practice Note**) which addressed the relationship between the Single House Zone (**SHZ**) and Special Character Areas Overlay – Residential and Business (**SCAR**) provisions.

The Practice Note advised of Council's recommended approach to administering the Auckland Unitary Plan (Operative in Part) (**AUP(OP)**) with the "overlay provisions overriding the zone provisions (where applicable)". As set out in the Practice Note, the implication of that recommended approach was that Council was "unable to consider residential amenity effects for applications where the overall activity status is restricted discretionary under the SCO where amenity is not a relevant matter for discretion or within the assessment criteria".

The Council was aware that members of the planning community had adopted an interpretation and approach to administration of those provisions which differed from Council's own. The resultant uncertainty prompted the Council to prepare and file declaratory proceedings with the Environment Court, to resolve the proper administration of the AUP(OP) and the uncertainty with Council's recommended approach.

An update to the Practice Note was issued via e-mail in August 2017 advising of the Council's application for declarations.

The Interim Decision

Council's application was heard on 13 and 14 December 2017. On 19 December the Environment Court issued an Interim Decision which declined the Council's declarations and held that the Council's recommended practice is "not defensible in statutory interpretation terms or as a proper exercise of the Council's RMA functions" (at paragraph [76]).

The Court went on to note that the Practice Note should be "immediately withdrawn and all recipients of it should be given a copy of this decision explaining why the Council is taking the step to withdraw it". A copy of the Interim Decision is **attached**.

The Court will be issuing a final decision in the New Year and has indicated that it will make an alternative declaration, possibly expand on the reasons given in its Interim Decision, and possibly make associated directions to provide the Council with follow up guidance on this matter. A further update will be prepared and circulated by email following receipt of the Court's final decision.

Reasoning supporting the Interim Decision

The Interim Decision preferred the interpretation advanced by the other parties to the proceeding over that advanced by Council. The interpretation advanced by the other parties was to the effect that "the SCAR does not nullify performance standards set out in the SHZ rules but rather that all rules relevant to an activity or activities must be applied as directed by s 9(3) RMA" (at paragraph [18]).

The Court found, at paragraph [55](a), that the General Rules of the AUP(OP) apply to the consideration of both the SCAR and SHZ, as Rule C1.1(1) specifies that:

“Rule C1.1(2), in codifying s 9(3) RMA, makes clear that no person may undertake an activity that contravenes an AUP rule unless expressly allows by a national environmental standard, resource consent or RMA existing use right. It does not allow an approach of treating the SCAR’s performance standards as a ‘replacement package’ such as to treat the SHZ’s performance standards as nullified.”

Further, at paragraph [58](a), where a proposal takes place on a site which is partially affected by the SCAR then the proposal “must comply with the SCAR, SHZ and precinct rules applying to the particular part of the site in which the relevant part of the proposal is located (C1.4(c))”. And, at paragraph [58](b), “when considering an application for resource consent for an activity that is classed as a restricted discretionary activity, the consent authority will consider all relevant SCAR, SHZ, Auckland-wide and precinct objectives and policies that apply to the activity or to the site or sites where that activity will occur (C1.8(1))”.

Next steps

Council’s resource consenting and legal services departments are continuing to review the Interim Decision and its implications for the processing of live consent applications that relate to sites within the SCAR. A further update addressing the administration of these provisions will issue in due course, as will a further update after the issue of the Court’s final decision. **In the meantime, for the avoidance of any doubt, the December 2016 Practice Note is withdrawn.**