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Leon Da–Silva
Da-Silva Builders Limited

C/ Barker & Associates
by email

Attention: Rachel Morgan

Dear Rachel

96 Beach Haven Road and 13 Cresta Avenue, Beach Haven - New legislation implications

1. I have been instructed to comment on the proposed development at 96 Beach Haven Road and 13 Cresta Avenue, Beach Haven (**Site**) and implications of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**HSAA**) for assessment of the proposed application for resource consent.

The Project

2. I do not summarise the Beach Haven project in detail. Relevantly, the proposal is:

   (a) Construction of 81 residential units and unit title subdivision.

   (b) The Site is currently zoned Single House Zone (**SHZ**) and is 7,147m^2 in size.

   (c) The development broadly aligns with the development standards which apply in the Mixed Housing Urban zone and those of the Medium Density Residential Standards (**MDRS**) (as finalised in the HSAA[1]).

[1] HSAA, Schedule 3A.

(d) No qualifying matters as defined in HSAA[2] apply to the Site.

(e) The Site is within 200m of the centre of the Beach Haven Business - Local Centre Zone.

Speeding up the changes already required by the NPS-UD

3. In general terms the HSAA speeds up the changes already required by the National Policy Statement on Urban Development 2020 (**NPS-UD**).

4. The NPS-UD as currently worded required councils to free up their planning rules. It set stronger, more prescriptive density requirements on Tier 1 urban areas including, in its Policy 3, the requirement that RMA plans (specifically regional policy statements and district plans) be changed to enable:

(a) building heights and urban density to realise as much development capacity as possible in city centre zones; and

(b) building heights of at least 6 storeys (except in limited cases where specified "qualifying matters" justify more stringent standards) in metropolitan centre zones and in areas, including residential areas, that are within a walkable catchment of the edge of city centre and metropolitan centre zones; and in areas within a walkable catchment of existing and planned rapid transit stops (wherever they may be located); and

(c) generally greater density elsewhere in Tier One urban areas (particularly around areas such as suburban and local centres with commercial and community facilities and public transport options). [emphasis mine]

Significant changes for SHZ land

5. However, the HSAA also significantly changes the zoning position for residential zoned land more generally within Auckland.

6. The HSAA requires new permitted activity and restricted discretionary activity rules and new MDRS.

[2] **qualifying matter** means a matter referred to in section 77I or 77O

Timing

7. The process to be used will be through an intensification planning instrument (**IPI**)[3] advanced using the intensification streamlined planning process (**ISPP**).[4] For Auckland, an IPI must be notified on or before 20 August 2022.

8. Under the current RMA, most rules – with some exceptions – take legal effect from the date that the plan change becomes operative. This can take several years. In contrast the MDRS will in almost all circumstances have immediate legal effect from the date of notification.[5] Thus, the HSAA brings forward the enabling nature of the intensification plan changes by several years. This means they will be in effect within about 6 months of the time of writing, except where a "qualifying matter" applies (see below) or where a council happens to propose even more permissive standards.

Changes to standards and qualifying matters

9. The ISPP will put the MDRS in place. Every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.[6]

10. The MDRS are set out in the HSAA. They are detailed – they include provisions relating to height, HIRB, outlook spaces and yards. It is in effect a prescribed up-zoning for more intensity.

11. From the perspective of development standards, the MDRS will align well with the proposed development.

12. The Council will also be required to put in place specified objectives and policies in the District Plan which are supportive of 3-storey attached and detached dwellings, and low-rise apartments.[7]

13. The Council must apply the MDRS in Auckland to all existing residential areas, except for areas zoned as large lot residential (which is not relevant to the Site) or areas where "qualifying matters" apply.

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[3] HSAA, s80E(1):
[4] HSAA, planning process set out in subpart 5A of Part 5 and Part 6 of Schedule 1.
[5] HSAA, s86BA.
[6] HSAA, s77G(1).
[7] HSAA, Schedule 1 (New Schedule 3A), cl 6.

14. In summary, qualifying matters (which is defined) is a reference to characteristics which mean the full liberalisation of the MDRS is not applied.

15. Qualifying matters for applying the MDRS are as follows:[8]

Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones

A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:

(a) a matter of national importance that decision makers are required to recognise and provide for under section 6:

(b) a matter required in order to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010:

(c) a matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River:

(d) a matter required to give effect to the Hauraki Gulf Marine Park Act 2000 or the Waitakere Ranges Heritage Area Act 2008:

(e) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:

(f) open space provided for public use, but only in relation to land that is open space:

(g) the need to give effect to a designation or heritage order, but only in relation to land that is subject to the designation or heritage order:

(h) a matter necessary to implement, or to ensure consistency with, iwi participation legislation:

(i) the requirement in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand:

(j) any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied.

16. Councils have to evaluate and justify on a site-specific basis where it proposes standards that are less enabling than the MDRS, and the characteristics sought to be protected have to be considered in light of the national significance of urban development and the objectives of the NPS-UD.

17. The justification has to be site-specific to avoid "blanket rules" such as neighbourhood-wide or city-wide rules, such as tree protection or broad-based character rules, being imposed to resist change.

[8] HSAA, s77I.

18. I am advised there is nothing in relation to the Site, either identified in the AUP or physically existing onsite, which would come within the definition of qualifying matter. In that regard, I note that leaving to one side whether special character may properly come within the ambit of a qualifying matter, the Site is not subject to a 'special character' overlay.

19. Based on the above, new and significantly more enabling rules will apply with legal force to the Site by the end of August 2022 unless there is a specific characteristic of the site which means it is not appropriate to do so (refer NPS-UD clause 3.32(1)(h) and 3.33(3)).[9] You have advised there are no such specific characteristics.

Assessment of Applications in interim

20. In effect the Council must impose an up-zoned outcome on the Site by the end of August, applying the MDRS as a minimum.

21. Prior to the end of August, the current AUP provisions applying to the Site will essentially be a dead man walking – but they will still have legal effect for the Site. In addition, s77M(9) of the HSAA states:

> (9) To avoid doubt, the MDRS are irrelevant to the consideration of a new application unless and until the MDRS are notified in the relevant IPI.

22. Thus, this proposal cannot directly rely upon the MDRS if lodged prior to notification of the MDRS in the IPI.

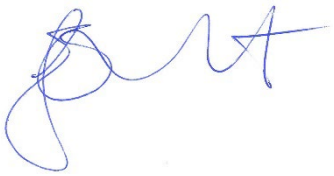
23. I am advised that in the assessment of Barker & Associates there are compelling reasons which justify the grant of consent to the proposed development as a non-complying activity. Based on my initial review of the proposal that appears to be the case. In that context reliance on the impending changes to be wrought by the HSAA is not required.

24. However, in my opinion any assessment of the proposed application (as a non-complying activity) could and should take account of the impending change to plan provisions in the context of considerations of plan integrity. It could not be said that plan integrity was at issue as a result of the proposed development in circumstances where the HSAA directs significant up-zoning of the Site in 6 months time.

[9] That might be something like severe topography, or unresolvable access issues.

25. The requirement that the Site be up-zoned in August 2021 might also be a relevant "other matter" in the context of s104(1)(c) even if the specific MDRS provisions cannot be taken into account.

Yours faithfully



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