Housing Discord: A Case for the Protection of Natural Justice Provisions in Fast-Track Housing Legislation

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This article argues for the protection of natural justice provisions in fast-track housing legislation. New Zealand's ongoing housing affordability and supply issues precipitated the introduction of the Housing Accords and Special Housing Areas Act 2013 (HASHAA). The Act provided a fast-track alternative to the existing Resource Management Act 1991 consenting process. However, the HASHAA's absence of effective notification, objection and appeal provisions for proposed land developments has had significant implications for natural justice. Such provisions cannot be justifiably excluded from fast-track housing legislation, notwithstanding housing crisis concerns. Sound consultation with all stakeholders ensures better developments in the long-term and fosters community acceptance of housing projects. The inclusion of natural justice provisions also need not discourage development, but rather allow for tempered pragmatism. Further, the HASHAA's shortfalls disproportionately prejudice Māori and other affected community groups' interests. Without such natural justice requirements, profit-oriented developers are unlikely to consult sufficiently with Māori and other relevant community groups. The Ihumātao land dispute is a prime example of the legislation's real-life consequences. This article asserts that the distinct Māori and Western philosophies on land use can be harmonised by aligning future housing legislation with the "third law" of Aotearoa. Accommodating different views ensures that one cultural account does not dominate the decision-making process. After critically examining the

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HASHAA's shortfalls, this article demonstrates how future fast-track housing legislation may be susceptible to the same problems and recommends how these issues can be prevented. It also outlines some interim measures to preserve natural justice until any such legislation materialises.

I INTRODUCTION

Housing affordability is a major issue in New Zealand. Current housing supply does not meet New Zealanders' needs.[1] House prices are rising considerably faster than incomes.[2] Home ownership has long been considered a key route to personal financial security,[3] yet is increasingly beyond many New Zealanders' reach. The Government has attempted to alleviate these issues by passing under urgency the Housing Accords and Special Housing Areas Act 2013 (HASHAA).[4] The HASHAA provided a fast-track alternative to the Resource Management Act 1991 (RMA) resource consenting process.[5] To do so, the HASHAA limits notification, consultation and objection provisions. These limitations remove the opportunity for communities to influence nearby developments and for developers to recognise local values.

I argue that, in the future, the legislature must instead use clear natural justice requirements to protect land of significance from inappropriate development. The HASHAA exemplifies what can go wrong when the legislature excludes natural justice provisions from

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1 See, for example, Alan Johnson, Philippa Howden-Chapman and Shamubeel Eaqub *A Stocktake of New Zealand's Housing* (Ministry of Business, Innovation and Employment, February 2018) at 20.

2 At 4.

3 Michael Chapman and Stephen Sinclair *Equity shares in social housing: Literature review* (Centre for Research into Socially Inclusive Services, Office of the Deputy Prime Minister, May 2003) at 49–53.

4 (16 May 2013) 690 NZPD 10052.

5 The Government intends to repeal and replace the Resource Management Act 1991 [RMA]: see David Parker "RMA to be repealed and replaced" (press release, 10 February 2021). A first draft of the Natural and Built Environments Act (NBA), which is the primary replacement for the RMA, was released on 29 June 2021: see David Parker "First look at new law to replace RMA" (press release, 29 June 2021). The Government intends to introduce this draft to Parliament early in 2022.

fast-track housing legislation. In particular, this article assesses how the HASHAA's lack of notification, consultation and appeal provisions beyond the planning stage disproportionately affects tangata whenua (indigenous people) by subjugating te ao Māori (a recognised set of beliefs forming "the Māori world view") to Eurocentric Western values. To avoid similar pitfalls, this article asserts that future fast-track housing legislation should instead align with Joe Williams' "third law" — an amalgamation of both Māori ("first law") and Western ("second law") legal systems that does not privilege one over the other.[6]

The HASHAA's shortfalls are apparent in the Ihumātao land dispute. Here, the Act allowed the Council to consent to a development that may have been more sensitively designed had decision makers adequately considered te ao Māori. Mana whenua — a concept that describes Māori descent groups, both iwi (tribes) and hapū (subtribes), who have historic and territorial rights over land — pursued every avenue to try and stop the development. They feared the land's cultural and spiritual values were at risk of permanent desecration.[7] This dispute highlights a tension between the HASHAA's purpose of enabling rapid construction of affordable housing to alleviate New Zealand's housing crisis and the protection of culturally significant sites from irremediable damage. This article explores this dispute to demonstrate why excluding natural justice provisions from fast-track housing legislation is problematic.

My critique relies on the idea that the HASHAA privileges a Eurocentric, capitalist perspective on the use of land. Central to te ao Māori is kaitiakitanga.[8] Kaitiakitanga (stewardship, guardianship) is a system of reciprocal rights and responsibilities that stems from the relationship between people and the environment.[9] Humans manage and protect land so that the land can provide for human needs. This view does not inherently oppose land development. Rather, it allows

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6 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 12.

7 Sally Blundell "What Ihumātao reveals about NZ's protection of Māori heritage sites" The New Zealand Listener (online ed, Auckland, 30 January 2019).

8 Nin Tomas "Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights" in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability* (Martinus Nijhoff Publishers, Boston, 2011) vol 11 219.

9 Garth R Harmsworth and Shaun Awatere "Indigenous Māori Knowledge and Perspectives of Ecosystems" in JR Dymond (ed) *Ecosystem Services in New Zealand – Conditions and Trends* (Manaaki Whenua Press, Lincoln (NZ)) 274 at 275.

for tempered pragmatism.[10] People are subjects of the environment, rather than its masters and are part of an interrelated, living whole.[11] Meanwhile, from a Eurocentric, capitalist world view, land serves human needs and, therefore, may be exploited for the public good.[12] There is no reciprocal obligation to care for and protect the land. HASHAA processes reflect this latter world view.

Of course, not all Māori subscribe to te ao Māori. For example, iwi-led corporations, as with any business, may lean into capitalist ideologies. Likewise, not all non-Māori have a strictly Eurocentric, capitalist perspective on land use. There is a spectrum of different views on culture and land use in New Zealand today, even within these two ideologies.[13]

In any case, the Treaty of Waitangi envisages a partnership between Māori and the Crown, and, arguably, equality between Māori and Western world views in the law.[14] Sections 5–8 of the RMA attempt to reflect a tempered world view, whereby decision makers must consider the well-being of all people in regulating land use. However, this does not mean there is always equality between Māori and Western world views in the application of the rules.[15] This article compares the two ideologies to argue that the HASHAA represents a retreat away from a tempered middle-ground and instead leans into a framework that fails to account adequately for minority perspectives on land use.

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10 Robert Joseph "Maori Values and Tikanga Consultation under the RMA 1991 and the Local Government Bill – Possible Ways Forward" (paper presented to the Inaugural Maori Legal Forum Conference Te Papa Tongarewa, Wellington, 9–10 October 2002) at 5.

11 Tomas, above n 8, at 226.

12 See John Locke *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (Richard H Cox (ed), Harlan Davidson, Wheeling (Illinois), 1982) at 18; and William Blackstone *Commentaries on the Laws of England* (William Carey Jones (ed), Bancroft-Whitney, San Francisco, 1916) at 707.

13 See Law Commission *Māori Customs and Values in New Zealand Law* (NZLC SP9, 2001) at [125]; and Robert Joseph "Unsettling Treaty Settlements: Contemporary Māori Identity and Representation Challenges" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2016) 151 at 152 and 165.

14 See Margaret Mutu and Moana Jackson *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation* (The Working Group on Constitutional Transformation, 25 January 2016) at 50.

15 See generally James Tully "The negotiation of reconciliation" in *Public Philosophy in a New Key — Volume 1: Democracy and Civil Freedom* (Cambridge University Press, Cambridge (UK), 2008) 223.

Part II explains the HASHAA framework and highlights its exclusion of natural justice. Part III explains why this shortfall is problematic, particularly for tangata whenua. Part IV uses the Ihumātao land dispute to demonstrate the impact of the HASHAA's shortfalls. Finally, Part V warns that these issues may resurface in future fast-track housing legislation and recommends ways for the Government to avoid such shortfalls.

II THE HASHAA

Process Overview

The HASHAA fast-tracked the resource consenting process to increase housing supply and, therefore, affordability.[16] The Government introduced the Housing Accords and Special Housing Areas Bill 2013 following a Productivity Commission finding that the RMA's slow, traditional consenting process was contributing to Auckland's housing shortage and the unaffordability of existing housing.[17] The Commission recommended that the Government streamline housing consenting processes.[18] The Government intended the HASHAA to be an interim measure while it developed longer-term solutions.[19]

The HASHAA sought to achieve its purpose by providing for the establishment of "special housing areas" (SHAs).[20] The Minister of Housing could recommend an SHA to the territorial authority or declare an SHA themselves.[21] This power has since been repealed, meaning no further SHAs can be established.[22] To allow an SHA, the Minister needed only to be satisfied there was evidence of demand for housing in that area and adequate infrastructure to support increased development.[23] The legislation did not require the Minister to consider the impact of an SHA on tangata whenua, nor was any such

16 Housing Accords and Special Housing Areas Bill 2013 (117–2) (select committee report) at 2.

17 New Zealand Productivity Commission *Housing affordability inquiry* (March 2012) at 10 as cited in (16 May 2013) 690 NZPD 10053.

18 At 121.

19 (16 May 2013) 690 NZPD 10055.

20 Housing Accords and Special Housing Areas Act 2013 [HASHAA], s 16.

21 Section 16(4).

22 Section 3(1).

23 Section 16(3).

requirement discussed during select committee or regulatory impact assessment processes.[24]

Within SHAs, the HASHAA provides for "qualifying developments". These are developments that are predominantly residential and meet minimum density requirements.[25] The HASHAA allows these developments to pass through a more streamlined and permissive consenting process than under the RMA.[26] These efficiency measures encourage construction and allow for much quicker progress.[27] The developer-friendly legislation favours consent being granted.[28]

However, recognition of te ao Māori and any role for local iwi in achieving the HASHAA's purpose is notably absent.

Natural Justice Shortfalls

Parliament excluded natural justice protections beyond the planning stage to allow for a more condensed process. The HASHAA restricts notification, consultation and appeal rights for some stakeholders. It also imposes short processing timeframes.

Under the HASHAA, an authorised agency must not publicly notify a resource consent application.[29] Instead, the council *may* notify only limited parties, like adjacent landowners and regional and district authorities, but not broader affected parties.[30]

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24 Housing Accords and Special Housing Areas Bill 2013 (117–2); and Ministry of Business, Innovation and Employment *Creating Special Housing Areas — Regulatory Impact Statement* (17 May 2013). While the HASHAA was enacted with Māori Party support, the Mana Party, which also claimed to represent Māori interests, did not support the Bill: (5 September 2013) 693 NZPD 13328.

25 Section 14(1).

26 Section 14; and *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541, [2019] 2 NZLR 501 at [3].

27 Elizabeth Wells *Outside the RMA comfort zone – Learnings from implementing the Housing Accords and Special Housing Areas Act 2013* (Housing Project Office, Auckland Council, 15 April 2015) at 5.

28 Tim McCreanor, Frances Hancock and Nicola Short "The Mounting Crisis at Ihumaatao: A High Cost Special Housing Area or a Cultural Heritage Landscape for Future Generations?" (2018) 6 Counterfutures 139 at 139.

29 Section 29(1). Public notification means the council must advise the public of an application and call for submissions: Ministry for the Environment Applying for a resource consent. An everyday guide to the Resource Management Act: 2.1. (February 2021) at 11.

30 Section 29(3)(a). In contrast, the version of the RMA that existed just prior to the HASHAA's introduction required notification when a development may have "more than minor" adverse

Further, the HASHAA has no requirements to consult with any community groups, let alone local iwi. Under s 29(7), only notified parties may submit on an application. Section 53 explicitly excludes public submissions.

The HASHAA also limits objection rights to those who have been notified (that is, adjacent owners rather than other affected parties).[31] The authorised agency must decide on the application on a basis that gives effect to the HASHAA's purpose of facilitating housing supply.[32] Unlike the RMA, the HASHAA does not allow appeals against decisions on objections.[33] It also diminishes appeal rights against approved developments.[34] Only proposed developments that are four storeys or higher can be appealed to the Environment Court, and only by notified persons.[35] These restrictions prevent wide appeals that may obstruct the development process and discourage developers.[36]

Compared to the RMA, the HASHAA also shortens processing timeframes. Under the RMA, a hearing for a publicly notified application must be completed within 75 days after submissions close (or within 45 days for an application with limited notification).[37] The HASHAA, meanwhile, requires the council to complete a hearing within 30 days after submissions close.[38]

It is important to acknowledge that, in practice, the HASHAA process has fast-tracked developments in areas already zoned for urban uses. Earlier planning stages provided full participation opportunities to iwi, like the chance to influence zoning and the recognition of land features of value to Māori in the preparation of regional and district plans.[39] Effective community participation at that stage relies on local people being proactive. However, many

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effects on a person or the environment: s 95A. Numerous submissions on the Housing Accords and Special Housing Areas Bill suggested amending "adjacent" to "affected" and "may" to "must" to ensure more comprehensive notification: see New Zealand Parliament "Housing Accords and Special Housing Areas Bill — Submissions & Advice" (2013) <www.parliament.nz>. Nevertheless, the Government retained the original wording.

31 Section 78.

32 Section 34(1)(a).

33 Section 84. Compare RMA, s 358(1).

34 HASHAA, s 78.

35 Section 79.

36 Wells, above n 27, at 6.

37 RMA, s 103A.

38 HASHAA, s 31.

39 RMA, sch 1 cls 3(1)(d) and 3B.

individuals do not realise the effects of an urban development designation until actual developments are proposed. A recent example is the opposition to a housing development in Opua.[40] Developers argued the community had every opportunity to have their say, with the initial consent application publicised in local media. There were no submissions in response. However, representatives from local iwi Ngāti Hine were frustrated that they were not consulted directly about the project. Subsequent opposition demonstrates how, although administrative systems provide for submissions or consultation, these processes may fail.

Further, any heritage sites listed under the Heritage New Zealand Pouhere Taonga Act 2014 (the Heritage Act) or in district plans must be considered in any decision making. Additional opportunities to submit on significant features were, therefore, not considered necessary under the HASHAA as, under the Heritage Act, developers cannot destroy archaeological sites without authority.[41] This process is fallible, though. Developers recently destroyed culturally significant rua (food pits) while starting work on a Waikato subdivision. Heritage New Zealand had approved archaeological consent for the development. However, due to an "administrative error", local hapū Ngāti Tamainupō was not notified properly as mana whenua, nor provided an opportunity to appeal the decision.[42] The complex history of Māori groups in the area mean the rua vary in significance to different groups, with them being less important to the iwi and hapū that were consulted.[43] Following protests, developers suspended work until broader discussions could take place.[44]

Of course, the process must also balance the interests and legitimate expectations of developers and private land owners. While natural justice may mean providing opportunities for input into decision-making, such opportunities must not function as veto rights.[45] Policy considerations and competing merits mean submitters' wishes will not always prevail.

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40 Meriana Johnsen "Hapū, residents weigh legal action over Opua development" The New Zealand Herald (online ed, Auckland, 9 June 2020).

41 Heritage New Zealand Pouhere Taonga Act 2014, ss 6 and 42(1).

42 Charlotte Muru-Lanning "The fight to save Ngāruawāhia's historic food pits" The Spinoff (online ed, Auckland, 14 June 2020).

43 Muru-Lanning, above n 42.

44 Ellen O'Dwyer "Hapū protest in Ngāruawāhia over historic pits at development site" Stuff News (online ed, New Zealand, 11 May 2020).

45 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 295.

True balance consists of encouraging meaningful consultation with affected groups throughout the process, rather than relegating affected groups to the role of objectors. Local governments, along with developers, must be proactive in seeking out these groups to explain adverse consequences.[46] This would also protect the expectations of developers who could design projects with local interests in mind, rather than amending designs reactively as new information arises during submission or objection processes.

Instead, once the fast-track HASHAA process is initiated, the authority only notifies adjacent landowners of proposed developments. Accordingly, any non-adjacent parties who may nevertheless be interested or affected do not have an opportunity to object. While it may be inevitable that a particular site is used for urban development, without further opportunities for input, affected groups no longer can influence the appropriateness of particular projects within those areas.

Rationale

The Ministry of Business, Innovation and Employment (MBIE) acknowledged that:[47]

> The main cost of establishing SHAs is that it reduces the ability for communities and existing residents to influence the scale and design of what gets built in their neighbourhoods.

However, the public benefits of additional or accelerated housing supply "outweigh [this] marginal cost".[48] The legislature enacted the HASHAA to limit opposition by existing property owners to the detriment of people who cannot currently afford housing. By improving housing affordability, more New Zealanders can own homes and can spend more income on productive investments, which will benefit all New Zealanders, regardless of socioeconomic status.[49]

Conclusion

The Government clearly considered natural justice provisions as secondary concerns worth abandoning. It, therefore, excluded such

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46 Local Government Act 2002, s 81.

47 Melanie Harding-Shaw *Regulatory Impact Statement — Establishing special housing areas in Queenstown (third tranche)* (Ministry of Business, Innovation and Employment, 2016) at [38].

48 At [38].

49 Melanie Brebner "Auckland's Housing Affordability Problem" (2014) 18 NZJEL 207 at 211.

provisions in favour of developer-friendly, streamlined processes. The HASHAA highlights how during crises governments may value a narrow set of goals, including simplicity and efficiency. Part V details why such short-term thinking is inappropriate when it comes to housing legislation. Such thinking can result in insensitively designed developments and the destruction of significant sites. The purpose of housing legislation should not solely be to incentivise developers to provide housing rapidly. Broader considerations, like ensuring developments accord with the local environment from different perspectives, are crucial.

III PROBLEMS WITH EXCLUDING NATURAL JUSTICE PROVISIONS FROM HOUSING LEGISLATION

The Government introduced the HASHAA as short-term legislation in response to a genuine crisis. The Act is, therefore, "outcome focused rather than process focused".[50] Most problematically, nothing in the HASHAA requires authorities to notify or consult with Māori during the consenting process. Excluding natural justice protections and centralising decision-making disproportionately affects tangata whenua by excluding any consideration of te ao Māori. Also, excluding natural justice provisions in the short-term may allow developments to be consented that are a poor fit for the local environment in the long-term. I focus here on the inappropriateness of the scale and design of developments as a whole, rather than the design of specific housing units.

Lack of Public Participation

The Ministry of Justice found that the Housing Accords and Special Housing Areas Bill did not breach natural justice requirements under s 27(1) of the New Zealand Bill of Rights Act 1990.[51] The Ministry found that those who might be directly affected by a resource consent application had sufficient opportunity to make submissions and attend a hearing on the application.[52] However, this finding is based on a narrow definition of who would be "directly affected". Only adjacent

50 Wells, above n 27, at 5.

51 Office of Legal Counsel *Consistency with the New Zealand Bill of Rights Act 1990: Housing Supply Accords and Special Housing Areas Bill* (Ministry of Justice, 6 May 2013) at [13].

52 At [10].

landowners can submit and be heard on an application, despite the inevitably wide-reaching effects of a significant development on the community.[53] In particular, this limitation leaves no room for Māori consultation. Mandating consultation with *affected* parties would allow communities to shape their local environments. Local submitters may raise concerns that developers and consenting authorities may not otherwise consider, but that would affect a development's success.[54]

In deciding whether or not to grant resource consent under the HASHAA, the decision maker must have some regard to pt 2 of the RMA.[55] This includes providing for "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [(sacred sites)], and other taonga [(treasures)]"[56], as well as having regard to kaitiakitanga[57] and the Treaty of Waitangi.[58]

Under s 34, however, the decision maker is to accord less weight to these pt 2 provisions than to the overall purpose of enhancing housing affordability and increasing land and housing supply.[59] A decision maker would be hesitant to decline many applications when placing the most weight on this overall purpose.

Lack of Māori Input

My position is that the HASHAA's s 34 weighting represents the legislature's problematic prioritisation of Eurocentric, capitalist values over recognising te ao Māori. Even the RMA planning and consenting systems face considerable criticism for sidelining te ao Māori values in favour of a Eurocentric, pro-development ethos,[60] despite attempting to bring together all perspectives.[61] While the RMA, for example, recognises the importance of Māori whenua (land) and the need to protect heritage sites,[62] these considerations do not

53 See HASHAA, ss 29(3)(a) and 78.

54 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [49] per Elias CJ.

55 HASHAA, s 34(1)(b).

56 RMA, s 6(e).

57 Section 7(a).

58 Section 8.

59 HASHAA, s 34(1). See also *Enterprise Miramar Peninsula*, above n 26, at [40].

60 See, for example, Joseph, above n 10, at 6; and Andrew Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand" (2017) 27 NZULR 715 at 725.

61 See RMA, ss 5–8.

62 See Part 2.

automatically outweigh other needs in a sustainable development. The HASHAA exacerbates the issue by limiting even the redeeming features of the RMA. A lack of notification and consultation, coupled with limited appeal rights, gives tangata whenua few avenues to oppose problematic developments. Natural justice principles require that affected persons are given a fair hearing.[63] Fair hearings cannot occur if consenting decision makers have insufficient information about Māori concerns.[64]

The only reference to tikanga Māori (Māori customary values and practices) in the HASHAA is in s 89.[65] This section provides a merely discretionary power for the Council to appoint an "accord territorial authority panel".[66] Each panel must include people who collectively have knowledge of the Treaty of Waitangi and tikanga Māori, along with other planning and design knowledge.[67] The Council may delegate functions to the panel, like the power to decide on resource consents.[68] The section sheds no light on how this knowledge should be implemented, nor does it create any positive obligation to adhere to Treaty principles. The HASHAA ultimately placed even less emphasis on the Treaty than the RMA does. As a result, developments can be consented without any regard to te ao Māori. While there is a need to facilitate affordable housing, this should not come at the expense of important cultural sites.

Centralised Decision-Making

The HASHAA also allowed the Minister of Housing to establish SHAs, even if the local council disagreed.[69] Again, such a move comes at a price. The Act allowed the central government to override plans that reflected local views and had been developed through democratic consultation with local communities. Such provisions do not respect local democracy and may overlook that local bodies are better placed to understand the needs of local communities.

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63 *Ridge v Baldwin* [1963] UKHL 2, [1964] AC 40.

64 HASHAA, s 89(1). These issues are demonstrated in Part IV of this article, which discusses the Ihumātao land dispute.

65 Section 89(1).

66 Section 89(1).

67 Section 89(2)(b).

68 Section 90.

69 Section 16.

Conclusion

The HASHAA has not adequately balanced efficiency and natural justice rights, given the implication of poorly-planned developments on the community and environment. It largely reflects Eurocentric, capitalist trends — privileging expedient private home builds over cultural values. The Act affords limited opportunities for the public to be notified about or involved in decision-making about their communities. It reduces Māori influence and centralises decision-making power. With no requirements to notify or consult with tangata whenua and limited appeal rights, the HASHAA disproportionately affects tangata whenua. Accelerating the consenting process should not mean excluding basic natural justice rights for wider parties. Although consultation regarding a particular site may have occurred during the planning stage, affected parties cannot shape the design of particular projects in their area. Sound notification and, therefore, consultation during the consenting stage often ensures better developments in the long-term and wider community acceptance.

IV WHEN FAST-TRACK LEGISLATION GOES WRONG: THE IHUMĀTAO LAND DISPUTE

The Ihumātao land dispute is an example of what can go wrong when the legislature excludes natural justice provisions from housing legislation. Here, a housing development was consented under the HASHAA. That development may have been designed more sensitively had decision makers properly considered te ao Māori. This consenting of an inappropriate development could have led to disastrous consequences for many tangata whenua.

Background and Timeline

Ihumātao is adjacent to Mangere's Ōtuataua Stonefields Historic Reserve. Tangata whenua argued the disputed land was an inseparable part of the Stonefields, which became legally protected in 2001.[70] From historical, archaeological and cultural perspectives, the land is significant. The site hosted New Zealand's earliest market gardens

70 SOUL: Save Our Unique Landscape "Land Issues and Disputes at Ihumātao" <www.protectihumatao.com>.

and local hapū and iwi consider it wāhi tapu.[71] Stone walls used by Māori remain on the land today.[72] In the mid-19th century, the Crown confiscated the land and eventually sold it to Pākehā (European) settlers, where it was held as a privately-owned farm.[73]

1 The Gavin decision

The 2012 decision of *Gavin H Wallace Ltd v Auckland Council* then designated the land for urban development.[74] In *Gavin*, landowners challenged the proposal to designate their land as a public historical reserve. All parties agreed the land was culturally and historically significant.[75] However, the landowners were concerned the designation would lower the land value. This case turned on a disagreement about the extent to which acknowledged cultural values should prevent development.[76] Local iwi groups opposed any urban development on the land, indicating that the numerous and great significance of the wāhi tapu sites on the land meant they regarded the whole area as wāhi tapu.[77] Any development would sever the connection between the land and the adjacent Stonefields. Meanwhile, the landowners contended it was possible to protect the land's sensitive characteristics through careful development.[78]

The Environment Court found the witnesses for the Council and iwi groups focused too narrowly on the "land's heritage, cultural, archaeological and landscape values".[79] The Council had not adequately considered the possibility of sensitive development during the original decision-making process.[80] Upon hearing all evidence, the Court considered it was possible to provide for te ao Māori through sensitive development.[81] In fact, the Court found that allowing a

71 Shannon Haunui-Thompson "Explainer: Why Ihumātao is being occupied by 'protectors'" Radio New Zealand (online ed, New Zealand, 24 July 2019).

72 Kymberlee Fernandes "Report: rock walls prove 'historic Maori farming' practices" Stuff News (online ed, New Zealand, 8 December 2016).

73 Editorial "Dave Veart on Ihumātao: 'the legislation is failing us'" Radio New Zealand (online ed, New Zealand, 27 July 2019).

74 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [209].

75 At [8].

76 At [70].

77 At [51]–[52].

78 At [72].

79 At [110].

80 At [110].

81 At [80].

degree of sensitive development rather than an overall restraint on development would better give effect to the RMA's purpose.[82] The Court reiterated that the RMA only protects land from *inappropriate* development, not from any development whatsoever.[83]

Further, the Court held that the protection of Māori relationships in the area under s 6(e) of the RMA was already largely provided for by the adjacent Stonefields reserve.[84] Evidence demonstrated that the majority of identified archaeological and Māori spiritual sites were on the Stonefields reserve.[85] Any sites on the disputed land were more widely dispersed and instead could be protected by sensitive development.

The Court ultimately favoured the landowners and allowed the land to be zoned for future urban development. It held that the land's wāhi tapu status had to be considered in the context of the land being a living landscape.[86] The use of the land at the time was uneconomic and not designating the land for development would affect its value considerably, to the detriment of the landowners. Therefore, allowing for sensitive development would better balance all parties' rights. Unlike a total development exclusion, this balancing approach would provide for the landowners' social and economic well-being in accordance with s 5 of the RMA. The Court concluded that:[87]

> To lock the land up might indeed provide for Maori and heritage values. But it would not provide for the economic needs and well-being of the owners. By allowing sensitive constrained development, heritage and landscape characteristics can be protected while at the same time allowing the owners to provide for their economic well-being [in accordance with the RMA].

The decision demonstrates the Court's reluctance to uphold a restrictive regime that interferes with the wishes of private landowners. Such thinking reflects an entrenched Western ideal that private landowners should have complete control over their property.

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82 At [89].

83 At [83].

84 At [85].

85 At [85].

86 At [80].

87 At [128].

1 Comparing the Gavin decision to the Self decision

Self Family Trust v Auckland Council considered similar issues to *Gavin*, although in a different context.[88] After hearing evidence from local iwi that opposed development on the relevant land, the Environment Court decided the land should remain rural.[89] The Court distinguished *Gavin*, both on the facts and in relation to the applicable statutory provisions.[90] For example, in *Gavin*, the Council wished to "lock up" the land.[91] Here, however, no taking of land was proposed. Further, in relation to cultural and archaeological values, the Court had to consider a different set of objectives and policies in an updated Regional Policy Statement. We can see how the different weighting of values in *Self*, as compared to *Gavin*, is reflected in the opposing outcomes of the two cases.

In *Gavin*, the Court held that sensitive sites on the land were dispersed and, therefore, could be protected by careful development.[92] Meanwhile, in *Self*, the Court accepted anthropological evidence that the area's importance lay in the land as a whole.[93] The Court found that "maintaining the status quo ... is essential for sustaining the existing quality of naturalness, and thereby the mauri" of the land.[94] Any development, even sensitive development, would overlook the need to consider the area holistically, which was an important cultural component to the local iwi, Te Ākitai Waiohua (Te Ākitai). Cultural values are not assigned to specific sites. Rather, sites and places come together to form a landscape. No parts of the area could be carved off to accommodate development.[95] Development would instead fragment that land further, which would undermine Te Ākitai's holistic world view. The Court gave significant weight to evidence that the landscape's value lay not only in physical features but in its cultural and spiritual dimensions.

Like in *Gavin*, the Court considered the effect of its decision on the land's value. However, weighing the landowners' economic rights against the substantial reduction in non-use values to Te Ākitai, the Court found that disallowing urban development altogether would

88 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [536].

89 At [538].

90 At [434]–[437].

91 *Gavin*, above n 74, at [128].

92 At [85].

93 *Self*, above n 88, at [237].

94 At [532].

95 At [246].

best balance all parties' rights. Although the free market would allow the land to be used for more profitable purposes like development, the land was still viable for farming.[96] The Court also considered how preventing development on the land would affect housing supply. The Court concluded that its decision would have minimal social costs as other land could be supplied.[97]

The Court placed particular emphasis on Te Ākitai's wishes, finding it was for tangata whenua or a mana whenua group to decide how their kaitiakitanga should be exercised.[98] If tangata whenua consider the mauri of an area requires maintaining the land as an undeveloped space, it was not for the Council or the Court to contradict them.[99] Here, the Court held it was clear that Te Ākitai considered that guardianship required maintaining the status quo.

On appeal to the High Court in *Gock v Auckland Council*, the Court also considered kaitiakitanga and upheld the Environment Court's decision in *Self*.[100] The Court held that while kaitiaki (trustees, guardians) do not have veto power, [101] they are in the best position to determine cultural norms.[102] Iwi cultural opposition was, therefore, a ground for declining to allow the land to be rezoned for urban development.

In comparison to *Gavin*, where the Court favoured allowing development, iwi evidence in *Self* about the land's significance was much stronger. The different decisions in these two cases highlight how the onus is on iwi to defend the significance of a piece of land in consenting processes. This allocation of burden is particularly problematic given the issues surrounding access to justice that some iwi face in comparison to well-resourced entities like local governments or private corporations.

In *Gavin*, the Court attempted to balance broader considerations by directing the Council to prepare a structure plan that would enable sensitive development.[103] Instead, Auckland Council later declared the land an SHA, without public consultation. This designation cemented the Court's reasoning and fast-tracked the development process from there onward. This fast-tracking prevented

96 At [427].

97 At [221].

98 At [531].

99 At [531].

100 *Gock v Auckland Council* [2019] NZHC 276 at [202].

101 At [177].

102 At [180].

103 At [209].

opportunity for further intervention and left no room for proper consultation with Māori around how the land could be sensitively developed. Although this decision earmarked the land for development even without the application of an SHA, subsequent consultation could have meant development plans were far more sensitive to te ao Māori.

Intervention by SOUL

In 2015, protestors formed Save Our Unique Landscape (SOUL) to stop development on the land at Ihumātao. SOUL called on the Government to ensure all affected Māori were adequately consulted and to protect the land for future generations.[104] SOUL contended that the land needed protection from development given its cultural and environmental significance.[105] SOUL also applied to the Waitangi Tribunal to contest the SHA designation.[106] However, the Tribunal declined the application on the basis that it was not empowered to make orders against the developers or the Council. Only the Crown may remove the SHA.[107]

In 2016, a property development company bought the land for a subdivision of 480 houses.[108]

In 2018, following the land's SHA designation, members of SOUL challenged the viability of heritage protections on the land in

104 McCreanor, Hancock and Short, above n 28, at 144.

105 Haunui-Thompson, above n 71.

106 SOUL argued that the Crown had breached the Treaty principle of partnership, by failing to consult with Māori, and the principle of active protection, by disrupting the ability of mana whenua to exercise kaitiaki responsibilities in relation to the area: Waitangi Tribunal *The Special Housing Areas Act (Ihumātao) Claim* (Wai 2547, 2016) at [107]. In 2017, SOUL took its case to the United Nations: see Committee on the Elimination of Racial Discrimination *Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand* CERD/C/NZL/CO/21-22 (22 September 2017). The United Nations Committee on the Elimination of Racial Discrimination (CERD) acknowledged that the New Zealand Government had not adequately consulted with, nor sought the consent of mana whenua. It recommended the Government consider the development's compliance with the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples. The Government declined to implement CERD's recommendations, despite the New Zealand Human Rights Commission urging a halt on development: New Zealand Human Rights Commission *International human rights perspectives on Ihumātao* (23 August 2019) at 22.

107 HASHAA, s 18(3).

108 Fletcher Building Limited "Residential Investor Day" (paper presented to residential investors, Auckland, 2 December 2015) at 21.

King v Heritage New Zealand Pouhere Tāonga.[109] After considering the developer's subdivision plan, the Environment Court affirmed Heritage New Zealand's decision to give archaeological consent for the subdivision. This consent gave the developer the authority to modify or destroy Māori and other archaeological sites on the land to make way for residential development. The Court considered that given the safeguards in its subdivision plan, the developer could proceed with development without substantial harm to the minimal archaeological features on the site.[110] The Court particularly acknowledged the buffers the developer had allowed for between the development and the neighbouring Stonefields.[111] In making its decision, the Court focused on individual archaeological features, but, under the Heritage Act, could not consider broader cultural or spiritual values.[112]

In March 2019, SOUL petitioned the government and local council to intervene.[113] Following subsequent protests, the Government ordered a halt to development on the land to allow further discussions to take place. However, the Prime Minister, the Rt Hon Jacinda Ardern, stated that any government intervention would undermine the local iwi, Te Kawerau-a-Maki, who supported the development.[114] This statement overlooked other iwi and hapū groups with connections to the land who opposed the development. SOUL eventually exhausted legal avenues to prevent the development.[115] Marama Davidson MP said the Government must facilitate a conversation covering everyone's interests and bringing people together.[116] She described the protests as an objection to the

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109 *King v Heritage New Zealand Pouhere Tāonga* [2018] NZEnvC 214, [2019] NZRMA 194.

110 At [93].

111 At [93].

112 *Greymouth Petroleum Limited v Heritage New Zealand Pouhere Taonga* [2016] NZEnvC 11, [2016] NZRMA 105 at 106.

113 Kymberlee Fernandes "South Auckland group takes land protest to Parliament" Radio New Zealand (online ed, New Zealand, 12 March 2019) Radio New Zealand <www.rnz.co.nz>.

114 Jason Walls "PM Jacinda Ardern says Government won't intervene in the Ihumātao stoush" The New Zealand Herald (online ed, Auckland, 24 July 2019).

115 Blundell, above n 7.

116 "Ihumātao stand-off: Protesters try to block main road to airport" Radio New Zealand (online ed, New Zealand, 25 July 2019). These comments must be read in light of Davidson's role as co-leader of the Green Party. The Green Party had strong reservations about the lack of natural justice provisions in the Housing Accords and Special Housing Areas Bill: (5 September 2013) 693 NZPD 13337.

"continuation of colonisation" and, therefore, the Crown needed to directly engage with all involved.[117]

Heritage New Zealand Report 2020

In early 2020, Heritage New Zealand released a new report giving the disputed land at Ihumātao the highest level of heritage recognition: Category 1.[118] The new assessment considered wider criteria than were originally used to give Ōtuataua Stonefields (not including the disputed land at Ihumātao) a Category 2 listing in 1991 under old legislation.[119]

The report recognised the land's importance to tangata whenua and its part in the area's unique cultural heritage landscape. Heritage New Zealand considered the area's "importance to tangata whenua for the strength of its connections with ancestral peoples, spiritual meaning and traditional activities - which in many cases are ongoing" and "the extent to which it reflects the historical connections of Māori communities with the land or whenua in New Zealand over many centuries".[120]

While the change in heritage status did not change the status of the SHA or resource consents for the land, had this evidence been available in 2012, the decision in *Gavin* may have been different. The Court may well have accepted this categorisation as significant enough evidence that the land warranted reserve status instead of designating it for development, or at least allowed for more open space on the land.

In late 2020, the Government intervened and agreed with the developer to buy back the disputed land and to establish a steering committee that included ahi kā (the occupiers) to decide on the land's use.[121]

Natural Justice Concerns

The protestors' grievances stemmed largely from inadequate natural justice opportunities under the HASHAA. The development at

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117 "Ihumātao stand-off: Protesters try to block main road to airport", above n 116.

118 Martin Jones *Review Report for a Historic Place Ōtuataua Stonefields, AUCKLAND (List No. 6055, Category 1)* (Heritage New Zealand Pouhere Taonga, 10 February 2020) at 3.

119 See Historic Places Act 1993, s 22.

120 At 97.

121 Jane Patterson "Ihumātao: Deal struck between government and Fletcher Building to buy disputed land" Radio New Zealand (online ed, New Zealand, 17 December 2020).

Ihumātao may have been more sensitively designed had the legislation included enough opportunities for consultation with affected parties and objection rights. Excluding natural justice requirements from legislation places the responsibility for natural justice in the hands of powerful companies. When efficiency is at stake, these companies have no mandate to engage with communities in a meaningful way.

The legislature deliberately excluded Māori (and community) concerns from the HASHAA decision-making process.[122] This further alienated tangata whenua from their land. The developer asserted that SOUL "does not represent mana whenua" and the legitimate mana whenua authority supports the development.[123] The developer made two claims about the development. First, that the development was "sensitively-designed".[124] Secondly, it had designed the development "in partnership with iwi", namely, Te Kawerau Iwi Tribal Authority.[125]

I argue that despite its best intentions, the developer failed to follow through. Large corporations with no natural justice mandate cannot be trusted to get such processes right. Instead, legislation must prescribe natural justice requirements to ensure meaningful opportunities for Māori and the broader community to shape developments.

1 Sensitive Design

Absent a mandate to provide for natural justice, developers inevitably lean into profit-oriented values. Without considering te ao Māori, developments will only be appropriate for the local environment from the dominant cultural perspective. Such discord shows that future legislation must ensure housing provides more for the broader community than simple affordability. Future housing legislation must instead prescribe natural justice requirements to allow a necessary level of Māori and community involvement. This is not to say that iwi should have veto powers over developments that do not satisfy their cultural expectations. Rather, legislation must require a meaningful

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122 See *Harding-Shaw*, above n 47, at [38]. The legislature decided to incur the "marginal cost" of limiting community influence over proposed developments: see Part II(C) of this article.

123 Steve Evans and Te Warena Taua "Joint statement: Fletcher Building and Te Kawerau Iwi Tribal Authority & Settlement Trust." Waatea News (online ed, Auckland, 4 March 2019).

124 Chris Harrowell "Environment Court rules against group battling Auckland housing development" Stuff News (online ed, New Zealand, 12 November 2018).

125 Harrowell, above n 124.

level of engagement and that developers substantively take into account te ao Māori interests where possible in the design process.

The developer emphasised how it had agreed to a buffer zone to protect the neighbouring Stonefields.[126] While the developer would not have built on any sites that, from a Western perspective, are archaeologically significant, SOUL argued that the Stonefields and the disputed land were part of the same, continuous whenua.[127] The land could not be separated into two parts: one to be protected and one not.[128] With adequate consultation, the developer may have been able to recognise and respond to these diverging perspectives. Instead, unilaterally dividing the land into two separate parcels represented a particularly Eurocentric attitude.[129] While not all non-Māori subscribe to a mentality that fails to recognise spirituality in nature and landscapes, large corporations are accountable to their shareholders and, therefore, bound to use land to maximise profits.

From a te ao Māori perspective, whenua is not simply a means to economic ends. Rather, whenua has deeper metaphysical connotations.[130] For example, the developer planned to use the Oruarangi River as a stormwater outlet for the development. SOUL, meanwhile, viewed the awa (river) as a living being that required protection and restoration.[131]

By comparison, the SHA over Ihumātao framed the land in a utilitarian, instrumental light.[132] The outcome of *Gavin*, by which the land was designated for development despite evidence from iwi that this would irreversibly damage the mauri of the land suggests the law is inherently skewed in favour of economic interests.[133] This world

126 *King*, above n 109, at [36].

127 Shane Malva "A Struggle with SOUL: Politics of Land, Housing, and Metaphysics in Ihumātao, Tāmaki Makaurau" (MA Thesis, University of Auckland, 2018) at 51–52.

128 At 51–52.

129 At 51–52.

130 Māori Marsden *The Woven Universe: Selected Writings of Rev Māori Marsden* (The Estate of Rev Māori Marsden, Masterton, 2003).

131 M Mills "Restoring the Mauri of the Oruarangi Creek" (2003) 48(7) Water, Science and Technology 129 at 130.

132 Ilmars Gravis, Károly Németh and Jonathan N Procter "The Role of Cultural and Indigenous Values in Geosite Evaluations on a Quaternary Monogenetic Volcanic Landscape at Ihumātao, Auckland Volcanic Field, New Zealand" (2017) 9(3) Geoheritage 373 at 383.

133 SOUL's case, and any case for respecting indigenous land rights, turns on concepts like mana (authority), tapu (sacred) and mauri. These concepts tend not to register as prominent concerns within New Zealand's legal system, which is grounded in colonial metaphysics: Malva, above n 127, at 160.

view regards land as an inert resource that may be exploited to serve the public good — for example, to alleviate a housing crisis and improve material human well-being. During an archaeological tour of the Ihumātao site, former Auckland Mayor Len Brown said "to me … these are just rocks and holes in the ground".[134] This anecdote demonstrates how different groups relate to land. For many Pākehā, it may be difficult to conceptualise an inert object as having deeper life forces. Coupled with a lack of natural justice provisions, this means te ao Māori has little bearing on developments.

To accommodate these differing views and to ensure one account does not dominate the decision-making process, housing legislation must provide for clear natural justice provisions. These provisions should ensure adequate notification, consultation and appeal rights. Instead, excluding natural justice provisions homogenises decision-making processes, overlooking considerations beyond the dominant account of the situation. This homogenisation leads to developments that fail to accord with all the needs of the local area. Had the HASHAA mandated adequate consultation and allowed Māori input, the developer of the Ihumātao site could have avoided these oversights from the start.

Capitalist corporations, which tend to follow a Eurocentric ethos where profit is the primary motive and human needs trump the needs of nature, are therefore not best-placed to administer natural justice at their discretion. Accordingly, legislation cannot leave corporations to administer natural justice as they see fit. Legislation must instead mandate natural justice requirements to ensure a genuine balancing of world views. Developments should be suitable for the local environment from all perspectives.

Ultimately, natural justice deficits during the consenting process have allowed for a development that is only appropriate for the local environment from a culturally dominant perspective. Whether the developer's design was "sensitive" depends on one's world view. From SOUL's perspective, the developer did not do enough to protect the whenua. Instead of leaving it to profit-driven corporations to ensure their designs are sufficiently sensitive to the local environment, future housing legislation must prescribe natural justice requirements to allow a necessary level of Māori and community involvement.

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134 At 54. Len Brown was the mayor who agreed to Auckland's Housing Accord, formalising the HASHAA's reach: see Ministry of Housing and Urban Development "Auckland Housing Accord" (12 September 2019) <www.hud.govt.nz>.

2 Iwi Partnership

Permitting corporations to decide what level of iwi engagement to allow is also problematic. Without explicit natural justice provisions, it is unlikely these market-driven corporations will engage adequately with differing views across different mana whenua groups. Here, the developer only consulted with those it considered to be the iwi with the most primary connections to the land, overlooking many Māori's nuanced relationships with land.

Moreover, as SOUL points out, iwi consultation was limited.[135] Following the decision affirming archaeological consent for the development, Edward Ashby — an executive of Te Kawerau-a-Maki, the local iwi with which the developer consulted — stated that "these were not the outcomes that iwi wanted, but having occurred, iwi would now work with the developer to seek recognition of and provision for the concerns of iwi".[136] With no appeal rights, the group had little legal ability to object to the development at that point. As Ashby put it, the group recognised that full protection of the land was unlikely. It reasoned it would be better to negotiate with the developer to mitigate the development's effects on the whenua.[137] In fact, it was the Court that acknowledged the outcome was not what tangata whenua wanted but that "in the circumstances it [would be] better to work with [the developer] and obtain such recognition and opportunities as they can".[138] Again, this view means tangata whenua are relegated to the role of objectors in the design process and must rely on successfully negotiating with large corporations to mitigate loss. Mitigating loss does not mean mana whenua supported development.[139]

Further, there were far more iwi connected to the land than just Te Kawerau. As Ashby acknowledged, other iwi could be considered tangata whenua in the area, given Tamaki is a well-populated place.[140] In any case, SOUL's campaign contested the idea that Te Kawerau

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135 Blundell, above n 7.

136 *King*, above n 109, at [86].

137 At [69].

138 At [90].

139 Frances Hancock "The cost of our nation's cultural heritage too high?" Newsroom (online ed, Auckland, 19 November 2018).

140 Te Ākitai, Te Ahiwaru, Te Wai-o-Hua, Waikato-Tainui, Ngāti Whātua, and other iwi, for example, "all have enduring relationships with Ihumaatao": McCreanor, Hancock and Short, above n 28, at 141.

was the only "'legitimate mana whenua authority' in Ihumātao".[141] The creation of SOUL itself shows that members of tangata whenua groups felt excluded.[142]

Without natural justice requirements, corporations are unlikely to take adequate consultation measures as they are driven by other concerns. It is necessary to mandate processes to ensure developers hear and meaningfully incorporate all perspectives into future developments. This approach is preferable to leaving an ad hoc process open to developers in the interests of deregulation and efficiency.

V RECOMMENDATIONS

This Part recommends ways the legislature can avoid similar natural justice shortcomings in future fast-track housing legislation. First, this Part warns that future fast-track housing legislation is vulnerable to the same pitfalls as the HASHAA. Secondly, this Part addresses arguments against protecting natural justice in crises. Thirdly, this Part advocates aligning future fast-track housing legislation with New Zealand's "third law" to ensure long-term, sustainable protection of natural justice. Finally, this Part canvasses interim recommendations.

Vulnerabilities of Future Legislation

The Government introduced the HASHAA as temporary legislation while it considered longer-term solutions, like RMA amendments.[143] It was repealed in September 2021.[144] Although the HASHAA is now phased out, it serves as a cautionary tale. If the Government does not heed the consequences of excluding natural justice provisions, future housing legislation will be equally susceptible to the HASHAA's pitfalls. While providing affordable housing for New Zealanders is important, there is no reason this goal must come at the expense of protecting te ao Māori.

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141 Malva, above n 128, at 69.

142 McCreanor, Hancock and Short, above n 28, at 148.

143 (16 May 2013) 690 NZPD 10053. Longer-term solutions have since been thought out, such as the Government's proposed repeal and replace of the RMA: see David Parker, above n 5.

144 HASHAA, s 3(2).

1 Legacy of the HASHAA

Now that local and central government have experienced the expediency possible under the HASHAA, future fast-track housing legislation is susceptible to similarly limited notification and appeal rights. For example, Auckland Council's Housing Project Office stated that "[t]he implementation of HASHAA has highlighted the fact that there is value in many of its provisions that could be incorporated into RMA reform."[145] The Office recommended a presumption of non-notification for RMA reform.[146] It also described the time and money developers save from avoiding the Environment Court appeal process as the SHA framework's "biggest advantage".[147] Accordingly, future fast-track housing legislation may also feature reduced appeal rights.

In considering RMA reform, the Productivity Commission also recommended drawing from the HASHAA's success.[148] It suggested allowing greater government intervention, including narrower notification requirements and appeal opportunities.[149] The final Resource Legislation Amendment Act 2017 maintained some of the efficiency-focused notification and objection provisions featured in the HASHAA. For example, housing developments are no longer subject to public notification unless they trigger non-complying status.[150]

However, the legislature balanced these provisions with enhanced opportunities for iwi consultation regarding planning processes. Part 5(2) of the RMA — "Mana Whakahono a Rohe: Iwi participation arrangements" — introduces a new process for establishing agreements between tangata whenua, through iwi authorities and councils.[151] This process enables iwi to initiate negotiations, rather than waiting for a council invitation.[152] How well these provisions work in practice is yet to be seen. However, even these new provisions could get excluded in favour of efficiency in

145 Wells, above n 27, at 5.

146 At 5.

147 At 6.

148 New Zealand Productivity Commission *Better urban planning: Final report* (February 2017), at 364–369.

149 At 368.

150 RMA, s 95A.

151 Part 5 subpt 2.

152 Section 58O.

future housing crises. The enduring relevance of these concerns is that future housing legislation must guard against similar problems.

2 Urban Development Act 2020

Another concerning example of housing legislation is the Urban Development Act 2020. This Act represents another significant centralisation of government power. Like the HASHAA, the Act allows for a streamlined development process. However, unlike the HASHAA, rather than leaving it to the market to increase housing supply, the Act streamlines the development process by making Kāinga Ora responsible for authorising and coordinating large-scale developments.[153] These functions are usually carried out by local bodies, not by the central government.

In contrast to the HASHAA, the Act has several notable protections. For example, the Act mandates early engagement with Māori and key stakeholders to ascertain their local needs and aspirations,[154] along with allowing anyone to submit on a project's development plan.[155] In undertaking engagement, Kāinga Ora must consider the needs of those with whom it is engaging and can seek input through various forums like hui meetings and social media.[156] It also requires Kāinga Ora to identify not just the archaeological and historical value of a proposed site, but also the Māori cultural value of the land.[157] Further, no powers in the Act can be used in respect of Māori customary land, Māori reserves and reservations.[158] In making decisions under the Act, Kāinga Ora must seek recommendations from Heritage New Zealand on the protection of heritage values for a proposed project area.[159]

However, the Act also gives Kāinga Ora significant statutory powers in progressing a project. For example, within a project area, Kāinga Ora can overrule district plan provisions, regional policy statements and notification requirements.[160] It also has power to veto or amend resource consent applications or plan changes.[161] Further,

153 Urban Development Act 2020, s 3.

154 Section 33.

155 Section 74.

156 Section 22.

157 Section 32(1)(e).

158 Section 17(2)(e)–17(2)(g).

159 Section 33(4)(c).

160 Section 64.

161 Section 104.

beyond consultation during the planning stage, the public will not be consulted on further changes to a development. If initial consultation is inadequate, there are no further opportunities for public input, meaning there is still potential for Māori voices to be excluded from shaping developments.

Like the HASHAA, the Act also recognises the RMA as a barrier to development and, therefore, allows Kāinga Ora to override or suspend provisions in RMA plans or policy statements.[162] The extent to which Kāinga Ora and the relevant Ministers can ignore local planning frameworks and override local governments represents a sustained centralisation of power. In fact, according to one major law firm, these powers make Kāinga Ora "more powerful than any agency that has preceded it".[163] As with the HASHAA, without adequate consultation, there is a risk of inappropriate urban development that is unsuitable for the local community.

3 Post-COVID-19 RMA reform

Amidst the COVID-19 pandemic, the Government introduced the COVID-19 Recovery (Fast-track Consenting) Act 2020. This Act amends the RMA, allowing certain projects to be fast-tracked in support of the economic rebuild. The Act appears to be a simplified version of the Urban Development Act, which was not enacted until later in the year.

Under the Act, consent applications must include a cultural impact assessment prepared by the relevant iwi or hapū.[164] The Minister must also consult with relevant local authorities and other Ministers.[165] Approved projects are considered by an expert consenting panel.[166] The panel must have a person nominated by the relevant local councils and a person nominated by the relevant iwi.[167] It must hold collective expertise in relevant areas, including resource management, tikanga Māori and mātauranga Māori (Māori knowledge).[168] The panel must invite comment from certain named

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162 See s 5(1)(b), which recognises that amenity values may change.

163 Simpson Grierson "Urban Development Bill 'powers up' Kāinga Ora - Homes and Communities" (11 December 2019) <www.simpsongrierson.com>.

164 COVID-19 Recovery (Fast-track Consenting) Act 2020, sch 6 cls 9(5) and 13(1)(j).

165 Section 21(2).

166 Section 14.

167 Schedule 5 cl 3(2).

168 Schedule 5 cl 8(1).

groups, including iwi.[169] However, the Act omits rights for public notification, submissions and hearings.[170] It provides a right of appeal to the High Court, but only for points of law.[171] The window of time given to issue a decision (25 days, or 50 days for larger projects) is small.[172] The fast-track procedure will remain in place for two years.[173]

The Act appears to make a significant effort to foster Māori participation in the consenting process. Yet the Māori Party still expressed concern "that the fast-tracking significantly reduces the opportunity for hapū, iwi and our wider communities to have a say in the process".[174] The Party stated that the approach needs to be a "genuine partnership" with Māori.[175] Instead, decision-making is placed in the hands of a small, technocratic group. Where initial consultation is inadequate, there are no further opportunities for meaningful democratic participation.

This Act represents yet another legislative privileging of expediency, crowding out cultural opposition. That the panel must include a person nominated by relevant iwi seems merely tokenistic considering the relative absence of any other meaningful objection and appeal rights. This conclusion is supported by a Government press release stating: "[o]nce a project is referred to the Panel there is a high level of certainty the resource consent will be granted."[176] The Minister for the Environment's approval essentially predetermines the issue. The panel becomes less of a meaningful accountability measure to ensure appropriate and sustainable development, and more of a mere sign-off body legitimising the exercise of the Ministerial discretion.

In this Act, we can see the HASHAA's enduring legacy. Future fast-track housing legislation could also be susceptible to procedural failings similar to those that led to the controversy at Ihumātao. Minister for the Environment, the Hon David Parker MP, acknowledges that the Act removes "the rights of individuals to

169 Schedule 6 cls 17(4) and 17(6).

170 Schedule 6 cl 17(1).

171 Schedule 6 cl 44(2).

172 Schedule 6 cl 37.

173 Section 3.

174 The Māori Party "Māori Party Have Serious Concerns With Proposed RMA Reform Bill" (press release, 16 June 2020).

175 The Māori Party, above n 174.

176 David Parker "Fast-track consenting to get shovel-ready projects moving" (press release, 3 May 2020).

participate" and that fast-tracking bypasses robust scrutiny.[177] He agreed that it is "desirable [to] generally have wider rights of participation" but highlighted the need to expedite the process in the face of an economic crisis.[178] Although this Act was introduced during a pandemic — circumstances requiring urgent government action and potentially justifying curtailing natural justice — the next section explains how this Act will have effect during the nation's less pressing recovery period, rather than during the height of the pandemic. Therefore, these natural justice deficits are unjustified.

Responding to Arguments in Favour of Excluding Natural Justice Protections

There is substantial debate over how much tolerance should be shown towards protecting minority interests through natural justice provisions during crises. This section first canvasses literature on when it may be appropriate to exclude natural justice provisions. It then argues that a housing crisis does not present sufficiently pressing circumstances to justify curtailing natural justice.

Some argue that circumventing established natural justice processes is justified during crises, when legislation should privilege a utilitarian conception of the common good.[179] The Hon Nick Smith MP, the Minister of Housing when the HASHAA was introduced, has claimed natural justice issues raised by the HASHAA are outweighed by significant housing affordability problems requiring "a shift in the speed with which land is made available for new housing".[180] However, I argue housing crises lie on the other end of the urgency spectrum.

There is some consensus that natural justice may be restricted in times of sufficient urgency. Broadly, it seems natural justice may be curtailed in the interest of public health and safety or national security.[181] Sascha Mueller argues that powers akin to emergency powers (like ousting democratically elected representatives and

177 Kevin Stent "Fast-tracking projects involves trade-off - Environment Minister" Radio New Zealand (online ed, New Zealand, 16 June 2020).

178 Stent, above n 178.

179 See Luc Boltanski and Laurent Thévenot *On Justification: Economies of Worth* (Catherine Porter (translator), Princeton University Press, Princeton, 2006).

180 Nick Smith Housing Accords and Special Housing Areas Bill: Approval for Introduction (Office of the Minister of Housing, 7 May 2013) at [27].

181 M Gokul Mithun Kumar "The Exemptions of Principles of Natural Justice" (2018) 120 IJPAM 1993 at 2000.

expediting executive functions) should be reserved for recognised states of emergency where "state actors [cannot] deal with the pertinent crisis situation within the ordinary legislative framework":[182]

> In such situations, there is potential for widespread harm or injury to life and property, and organisations and services, which ordinarily do not have to cooperate, must realign and cooperate. They range from armed conflicts to disturbances of the peace and public order, from threats to essential services to natural disasters, from terrorism to dangers to the economy.

These situations have a temporal element that requires government action to be taken within days or weeks. A timely example is the Government's response to the COVID-19 pandemic, which included restricting freedoms of movement and association in a country-wide lockdown. There were no natural justice processes before the Government decided to impose these restrictions — no public consultation nor appeal rights. Meanwhile, referring to the post-COVID-19 RMA reforms, Mr Parker justified the override legislation by stating that a pandemic called for "extraordinary measures".[183] While true, these reforms aim to rebuild the economy *following* the pandemic, not to address the pandemic directly. Housing crises are not temporary, nor transient. Quick-fix approaches will not suffice. Short-term supply increases should not undermine sustainable development, nor ignore environmental and cultural considerations.

Further, in many urgent situations, the disadvantages of any delay in action outweigh the advantages of carrying out natural justice. That is not the case for housing. With housing, a short-sighted attitude can have far-reaching consequences. Absent proper consultation and public input, developments may be inappropriate for an area and will irreversibly change the landscape. Homes tend to have a lifespan of at least 50 years — far longer than the effects of other decisions made in urgent circumstances.[184]

On balance, it is more important to get decisions right the first time around to meet local needs and address the housing crisis sustainably. While New Zealand may need more housing to meet broader economic and social needs, the housing crisis does not justify failing to recognise, and consequently losing, archaeologically and

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182 Sascha Mueller "Turning Emergency Powers Inside Out: Are Extraordinary Powers Creeping into Ordinary Legislation?" (2016) 18 FLJ 295 at 299 (footnotes omitted).

183 Jo Moir "Greens raise concerns about planned law to fast-track resource consents" Radio New Zealand (online ed, New Zealand, 4 May 2020).

184 Building Regulations 1992, sch 1 cl B2.3.1.

culturally significant land. With proper consultation, and by allowing greater public and Māori input, developers and consenting authorities can determine which sites are, and are not, appropriate for development.

Towards the "Third Law" of Aotearoa

Recognising the importance of preserving natural justice, even in fast-track housing legislation, we must examine how exactly to ensure these protections. A new legal environment founded on "third law" values would ensure all relevant concerns are considered in the future. No single set of values would prevail over another. Accordingly, the legislature would no longer view natural justice considerations as mere inefficiencies to cut during crises. Of course, what values the "third law" would recognise remains unsettled at present, given the diverse viewpoints and customs among different Māori groups.

The New Zealand legal system is largely monocultural, based on English common law and parliamentary traditions, with some accommodation for te ao Māori. The HASHAA is an example of legislation that allows the colonial status quo to remain the dominant system, with indigenous interests mere appendages.[185] It frames te ao Māori as a secondary consideration that, as we have seen, is purportedly justifiable to exclude in times of need.

Joe Williams describes the "first law of Aotearoa".[186] This was the system of custom that governed Aotearoa and connected iwi before the arrival of European colonists. Whanaungatanga (kinship), a "defining principle" of this system:[187]

> ... enabled human exploitation of the environment, but ... also emphasised [the reciprocal] human responsibility to nurture and care for it (known ... as kaitiakitanga).

185 Glen Coulthard "Place against Empire: The Dene Nation, Land Claims, and the Politics of Recognition in the North" in Avigail Eisenberg and others (eds) *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (UBC Press, Vancouver, 2014) 147 at 169.

186 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 as cited in Williams, above n 6, at 2.

187 Waitangi Tribunal *Ko Aotearoa Tinei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.

European colonists brought with them a "second law" system. People were considered to have proprietorial relationships with the land and its resources and property was a building block of wealth.[188] The Treaty of Waitangi attempted to bring together both systems.

The "third law" concept is already evolving incrementally, as evidenced by the RMA's Mana Whakahono ā Rohe arrangements.[189] The adoption of co-governance structures in Treaty settlements also provides tangible recognition of this revolution. But New Zealand housing law is at risk of regressing into a "second law" state through fast-track legislation like the HASHAA, in which "first law" principles often remain discretionary in decision-making and may be outweighed by majoritarian concerns. Future legislation should not privilege one world view over the other and should strive to reflect values from both systems equally. The best way to achieve this would be to align future fast-track housing legislation with New Zealand's "third law" — an authentic amalgamation of the two systems. Only then can we properly protect natural justice considerations as primary concerns.

While there are limits to the extent to which te ao Māori and Western knowledge can be integrated, the focus should not be on trying to force together any incompatibilities. Instead, the focus should be on creating a modern alternative to the current situation. The Te Urewera Act 2014[190] and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017[191] each designate legal personality to their respective bodies. They exemplify a model "third law" union. These Acts draw upon both te ao Māori and non-Māori legal systems to create a hybrid framework, previously unknown to both.[192] The Acts take a Western legal precedent (legal personality) and use it to give life to bodies in a way that aligns with te ao Māori that regards these bodies as having distinct life forces. These Acts demonstrate New Zealand law is flexible enough to not only accommodate but to "embrace Māori notions of law, customs and values".[193] Future fast-track housing legislation must similarly strive to reflect values from both systems equally.

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188 See Locke, above n 12.

189 See RMA, pt 5 subpt 2; and see Part V(A)(1) of this article.

190 Section 11.

191 Section 14.

192 Vicki Morrison-Shaw and Nicole Buxeda "A following sea? Legal personhood and the Whanganui River" (2017) 907 LawTalk 30 at 31.

193 Jacinta Ruru "Listening to Papatūānuku: a call to reform water law" (2018) 48 Journal of the Royal Society of New Zealand 215 at 220.

What this amalgamation will look like remains open to discussion given the differing viewpoints and customs among different Māori groups. But once New Zealand's legal system has reached full maturation in this form, protecting te ao Māori and consultation would be automatic. Natural justice values would no longer be under threat when lawmakers design housing legislation in times of crisis.

Protecting Natural Justice in the Interim

While New Zealand's legal system is maturing further to align itself with the "third law", strong natural justice requirements are necessary to protect minority perspectives in the interim.

For example, before the development-planning stage, legislation should include criteria relevant to te ao Māori for selecting and granting approvals for the future equivalents of SHAs or qualifying developments. This opportunity for input would help minimise the risk of damaging culturally significant areas.

Future legislation also should not exclude consultation requirements. However, it is important that consultation provisions do not function as veto rights.[194] To ensure housing gets built, it is important to gratify developers' wishes to some extent. But limiting consultation overlooks valuable contributions whereby the public (the ultimate consumers) can shape developments in which they would like to live.[195]

In particular, consultation processes should be expanded so the role of Māori is no longer limited to merely being able to challenge consenting decisions. The Government and developers should consult with Māori in good faith on projects that may affect Māori. Māori representation on decision-making bodies under future housing legislation would also be useful. Pending further investigation into how well the new RMA Mana Whakahono a Rohe provisions work in practice, these sorts of provisions are key to retain in future fast-track legislation.[196] They should not be among the first considerations forsaken in favour of efficiency.

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194 Michelle Tustin "Legal Interventions to Meaningfully Increase Housing Supply in New Zealand Cities with Housing Shortages" (2017) 48 VULWR 133 at 153.

195 At 147.

196 See RMA, pt 5 subpt 2.

Conclusion on Recommendations

A desirable system is one that does not privilege one world view or set of values over others. Better still is one that does not even pitch two systems against one another. The best way to achieve harmony, and to align housing legislation with New Zealand's "third law", is to temper future laws with provisions mandating iwi consultation and facilitating meaningful iwi participation as initiators, rather than objectors. Moving into a legal environment that recognises and integrates multiple sets of values will help ensure natural justice. Te ao Māori interests and considerations should not be the first concerns to be severed during crises.

VI CONCLUSION

While providing affordable housing is important, this goal should not override the crucial need to protect culturally important sites in New Zealand. The HASHAA and Ihumātao land dispute are key examples of the consequences of excluding natural justice provisions from fast-track housing legislation.

In response to the housing crisis, the HASHAA shortened the consenting process to incentivise developers to supply housing. However, in expediting the process, the HASHAA centralised decision-making power and excluded natural justice protections for many stakeholders. Only landowners adjacent to a development may be notified and, therefore, submit on, or object to, a consent application.[197] Other stakeholders do not have this opportunity. Notably, the Act does not provide for Māori consultation. That the legislature believes this trade-off is justified demonstrates that when it comes to fast-tracking housing legislation, te ao Māori values and interests become secondary concerns worth excluding in favour of efficiency. While there may be other processes in place that attempt to protect significant sites, these processes are fallible.

The Ihumātao land dispute exemplified these concerns. Throughout the decision-making process, including in case law prior to the consenting of the development, decision makers recognised the interests of private landowners and developers above those of objectors.[198] Although the developer might have tried to ensure the

197 HASHAA, s 29(3)(a).

198 See, for example, *Gavin*, above n 74; and *King*, above n 109.

Ihumātao development was sensitively designed in partnership with iwi, profit-driven developers tend to overlook cultural nuances when left to administer natural justice. Future housing legislation must instead effect natural justice by prescribing notification, consultation and appeal requirements.

Despite the HASHAA being phased out, its legacy may mean future fast-track housing legislation is vulnerable to similar pitfalls. We have repeatedly seen the government's tendencies toward deregulation and the centralisation of power during crises. These tendencies are evident in the recent post-COVID-19 RMA amendments and the new Urban Development Act. The government must heed the HASHAA's consequences and ensure future fast-track legislation does not repeat the same mistakes.

To ensure an effective response to certain crises, it may sometimes be justifiable to curtail natural justice. However, this is not true of the housing crisis, which lacks sufficient temporal urgency. The consequences of an inappropriate housing development can last for decades. It is, therefore, crucial to encourage input from local stakeholders to ensure developments meet local needs and to avoid inappropriate fast-tracking as a short-term solution to a long-term problem. The need to adequately consider te ao Māori should not be one of the first considerations jettisoned in favour of housing affordability.

The best way to avoid the HASHAA's shortcomings would be to continue to align future legislation with New Zealand's "third law". This would ensure legislation equally reflects both te ao Māori and Eurocentric world views and governance systems. Equal representation of the two systems would ensure one set of values is not sacrificed during crises. In the future, comparable legislation should have safeguard provisions mandating an assessment of the impact of accelerating resource consenting processes, including consultation with Māori.