

8 February 2022

Patrick Moss  
Senior Planner  
Resource Consents  
Auckland Council  
**AUCKLAND**

By email (patrick.moss@aucklandcouncil.govt.nz)

Dear Mr Moss,

**LUC60134603-A – 15 CREMORNE STREET, HERNE BAY – NOTIFICATION ASSESSMENT**

1. I act for Simon and Paula Herbert in respect of their resource consent variation application LUC60134603-A, relating to their home at 15 Cremorne Street, Herne Bay (**Application**).
2. You have kindly provided my clients an opportunity to review and comment on the notification assessment dated 22 December 2021 you have completed in relation to the Application (**Notification Assessment**), advising that any comments they provide will also be given to the independent commissioner who will consider the assessment and make the notification determination.
3. Your Notification Assessment correctly records that the Application is precluded from public notification at Step 2, because it relates to a residential activity and was lodged before 30 September 2020. This preclusion is significant because it overrides the requirement to consider whether the adverse effects of the Application are likely to be more than minor (under s 95D of the Act). That is, the statutory provisions that apply limit the consideration of effects for notification purposes to directly affected landowners.
4. Despite public notification being precluded however, you have still recommended that the Application should be publicly notified due to special circumstances. In summary, the special circumstances you consider to exist appear to be:
  - a. That a third party has provided a contrary noise assessment of the proposal and that notification would provide them an opportunity to present that assessment and provide further information.

Kitt Littlejohn

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- b. That there is 'public interest' in the application, comprising correspondence received about it.
  - c. That the activity will give rise to adverse amenity effects on the users of Cremorne Reserve and the beach.
5. As you will know from the detailed assessment provided to you by Mr Shearer on 11 May 2021, "special circumstances" are circumstances that are unusual or exceptional.<sup>1</sup> They have also been described as circumstances outside the common run of things which are exceptional, abnormal or unusual, but less than extraordinary or unique; something which makes notification desirable despite the general provisions excluding the need for notification.<sup>2</sup>
6. It is also well settled that any special circumstance must relate to the application being made.<sup>3</sup> This is important, because in this case the application is to change the conditions of an existing resource consent to vary the helicopter flight schedule and type of helicopter able to be operated under the consent, the combined effect of which is to reduce the overall noise generated by exercise of the consent.
7. Against this background, it is surprising that you consider that special circumstances exist, particularly as you accept on page 11 that the Application presents no unusual or controversial chain of circumstances, nor any other factors that might contribute to special circumstances of the type considered potentially relevant in the *Urban Auckland* case.
8. In relation to your three claimed special circumstances:
  - a. The Marshall Day Acoustics report you refer to was provided by neighbours and pre-dates the amendment made to the Application in May 2021 which included an updated acoustic assessment (dated 4 May 2022 (**attached**)).<sup>4</sup> It is therefore out of date and not relevant to the current proposal, and should not form part of any notification assessment, including because it has been supplied by a third party and unable to be queried. More importantly, if Council has any residual issues with the basis upon which Hegley Acoustic Consultants have completed their modelling then the appropriate course is to seek further information about that, not to publicly notify the Application. I note that your assessment makes no mention whatsoever of Council's technical acoustic specialist having any issues with Mr Hegley's assessment and what is proposed.
  - b. Correspondence from neighbours who have 'got wind' of an application for an activity they don't like is commonplace. However, it does not mean that there is 'public interest' in a proposal to the extent giving rise to a special circumstance, otherwise every application about which Council receives correspondence would

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<sup>1</sup> *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529

<sup>2</sup> *Urban Auckland v Auckland Council* [2015] NZHC 1382, at [108]

<sup>3</sup> *Far North District Council v Te Runanga-a-iwi o Ngati Kahu* [2013] NZCA 221 at [37]

<sup>4</sup> The volunteered amendment was to reduce the flights per day by 3 flights (to 2 flights per day), and to reduce the flights per week by 10 flights (to 4 flights per week), while retaining the amendment to condition 12 to require the use of an Airbus H130T2.

have to be notified on this ground. You have not provided copies of all of the correspondence referred to in your report, so it is difficult to know what the basis of the concerns is. From the correspondence you have provided, it is quite clear that the nature of the Application has not been properly understood:

- i. Any concern expressed about the use of my clients' property for helicopter flights is entirely misplaced, as my clients already have approval for that activity, and all they are seeking is to amend its conditions in a way that reduces overall noise effects on the neighbourhood.
- ii. The Application has been further amended since the correspondence in question.

Although you have presented it as a 'special circumstance' issue it is abundantly clear from your identification of the persons from whom you have received correspondence that your true concern here is the threat of a legal challenge being made to any decision not to publicly notify the Application. With respect, to decide to publicly notify a resource consent out of such a concern, where no other lawful grounds exist, would be to take into account an irrelevant matter, inappropriate and itself unlawful.

- c. The fact that the Application will change the effects of the current lawful activity on users of adjoining public reserve land is not a special circumstance arising from the Application that warrants public notification. You claim that notification will allow potential users of the reserve to provide additional information about their views. However, relying on such a factor as a basis for special circumstance notification is only justifiable where the effects of the proposal are likely to be adverse and unable to be properly understood by normal assessment processes. Neither of these grounds exist in this case:
    - i. Overall, the effects of the Application will be less than those created by the existing consent, and in fact positive compared with the consented baseline.
    - ii. The effects of noise and the application generally on amenity values are easily understood and are able to be assessed by competent professionals. Your assessment of this issue does just this. There is no further important information about this issue that would warrant public notification, particularly where the Act precludes it on effects grounds in the circumstances of this Application.
9. The only special circumstance that truly arises on this application is the fact that the holder of this consent wishes to change its conditions in a manner that has overall positive effects on the environment. However, this is a circumstance that justifies non-notification, rather than full notification.
  10. In summary, none of the reasons you have relied on to justify a special circumstance withstand scrutiny. If Council remains concerned with the acoustic assessment provided in support of the Application (as amended), the appropriate course is to seek further

information, not to publicly notify it out of fear of legal proceedings from parties who have written to Council about it.

A handwritten signature in blue ink, appearing to read 'Kitt Littlejohn', with a long horizontal flourish extending to the right.

**Kitt Littlejohn**  
Barrister

4 May 2021

Craig Shearer  
Shearer Consulting Limited  
PO Box 60240  
Titirangi  
Auckland

Dear Craig

**15 CREMORNE STREET**

As requested, I have reviewed the noise effects of a change to the current movements and helicopter type to operate from 15 Cremorne Street.

The existing consent sets the relevant noise conditions at:

- 7. The consent holder shall ensure that the use of the landing area on the site to which this consent applies for helicopter operations shall not exceed a noise limit of  $L_{dn}$  50dBA when measured at or within the boundary of any adjacent dwelling (excluding any dwelling where written approval has been provided);*
- 10. The number of flights per week shall not exceed two (four movements) with no more than one flight (two movements) on any one day;*

It was assumed Condition 10 was included to provide some guidance on flights with a good factor of safety to the noise limits for the helicopter then proposed, as it does not necessarily reflect the expectations of condition 7.

Based on field measurements of the proposed Air Bus H130T2 helicopter, the number of flights to give 50dBA  $L_{dn}$  at or within the boundary of any adjacent dwellings (excluding any dwelling where written approval has been provided) is 14 in any one week. This increase reflects the much shorter start up and shut down times of the modern helicopter than was adopted in the original assessment.

The Air Bus H130T2 is a relatively quiet machine. Advice from a pilot is that the motor on the Air Bus H130T2 can be closed down 30 seconds after landing and the helicopter can take off 30 seconds after start up. This is compared to the earlier models where the time is up to 4 minutes and hence this reduces the total noise received.

To comply with condition 7 the level of noise must not exceed 50dBA  $L_{dn}$ . For the Air Bus H130T2 this equates to 14 flights a week with an average of 2 flights on any day. In accordance with the requirements of clause 4.3 of NZS 6807:1994 *Noise management and land use planning for helicopter landing areas* the noise may be averaged over seven consecutive days providing that for any single day there is no more than double the weekly average (which is 2 flights in this case). That is, up to 4 flights on any one day may be flown providing the total of 14 flights per week is maintained.

To provide for a good factor of safety it is proposed to limit flights to four per week (29% of the flights to satisfy a 50dBA  $L_{dn}$  limit) with a maximum of 2 flights on any one day (50% the number of flights to reach the 50dBA  $L_{dn}$  limit).

The above equates to a similar noise exposure for the neighbours to what is currently experienced. However, this does not take into account the reduced start-up and shut down times for the Air Bus H130T2 which, as set out above, is significant. As a result, the noise exposure for residents will be reduced to below what is currently permitted by the existing consent and considered to be reasonable (50dBA  $L_{dn}$ ).

It is proposed to move the current landing pad that is approximately 10m from the closest neighbour to the immediate east (who has given written approval) to approximately 14m. This is a relatively small movement although is a significant change to the total distance to this receiver (a 40% increase to the distance compared to the current landing pad). Consequentially, this change will reduce the current noise exposure for this resident. This new location for the helipad does bring the helipad nearer to the closest neighbour to the west (who has also given their written consent) although in this case the 4m reduction in the distance to the receiver is only a 10% difference (44m – 40m). The new location for the helipad will not have any noticeable effect to the noise received for the resident to the west.

From the above, the proposed changes by using a more modern helicopter and with the shorter start-up and shut down times this will result in the noise received by all residents in the area to be less than that permitted by the existing consent.

With respect to any concerns regarding the noise amenity effects on the beach, this will be less than currently experienced due to the reduced start-up and shut down times of the helicopter. Although the number of flights a day would increase (offset by the reduced number of days there would be any flying) there would be at least half a day between flights, and generally the whole day, and the same person would not be exposed to the second flight. This is based on it being very unlikely anyone would be on the beach for such an extended period and the change in the tide over that period may force them to leave the beach.

Should you have any questions regarding the above please do not hesitate to contact me.

Yours faithfully  
Hegley Acoustic Consultants



Nevil Hegley