Decision on notification of an application to change/cancel conditions of a resource consent under section 127 of the Resource Management Act 1991

Application number(s):	LUC60134603-A (s9 land use consent)
Applicant:	Simon and Paula Herbert
Original consent number(s):	LUC60134603 (Legacy number R/LUC/2015/940)
Site address:	15 Cremorne Street, Herne Bay, Auckland 1011
Legal description:	Lot 1 DP 208893, Lot 39 DP 2746, Lot 1-2 DP 212064

Proposal:

To change the number of consented helicopter flights from two flights per week to four flights per week with no more than two flights on any one day.

Note: For the avoidance of doubt, any reference in this notification determination to 'vary' or 'variation application' shall be taken to mean an application to change or cancel consent conditions under s127 of the RMA.

This discretionary activity under s127 of the Resource Management Act 1991 (RMA) is for changes to conditions of consent LUC60134603-A involving the following amendments (with strikethrough for deletion, bold underline for insertions):

10. The number of flights per week shall not exceed ~~two (four movements)~~ **four (eight movements)** with no more than ~~one flight (two movements)~~ **two flights (four movements)** on any one day **and 104 flights (208 movements) in any year**.

12. The helipad shall not be used for any helicopter creating noise effects greater than a ~~'Eurocopter 130'~~ **'Airbus H130 T2'** unless it has been demonstrated that the noise will comply with condition 7 above.

For reference condition 7 states:

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).

Decision

I have read the application, supporting documents, and the report and recommendations on the application for variation. I am satisfied that I have sufficient information to consider the matters required by the Resource Management Act 1991 (RMA) and make a decision under delegated authority on notification.

Preliminaries and summary

This application has been referred to an independent commissioner on the basis of comments received from interested parties, and also due to the disagreement arrived at between the Council's processing officer Mr. Moss, and the Applicant's planning consultant Mr. Shearer. I have had no role in the decision to refer the proposal to an independent commissioner or in my specific appointment in that role.

I have read the correspondence received from the interested parties and accept the concerns expressed at face value. I wish to recognise the particular contributions made by Mr. Littlejohn (Counsel for the Applicant), Mr. Harrison QC (information provided to Herne Bay Residents Assn., and passed on to me), and Ms. Francelle Lupis, Greenwood Roche Ltd., (information provided to Niksha Farac and passed onto me)[1]. These are all senior and highly respected legal practitioners and I have taken particular care and additional time to reflect on their specific comments.

For completeness, I have also undertaken a site visit to better understand the lay of the land. This was on 20 February 2022. I did not seek to enter any private property, but to inspect the Site and its neighbours from the street, and also Cremorne Reserve and Beach. I have satisfied myself that without having entered any private properties I properly understand the resource management issues and complexities raised by the Application and the interested parties.

I have read the report and recommendations given to me by the Council's planner Mr. Moss and the acoustic assessment attached and referred to within that by Mr. Gordon. I confirm that the Council's recommendations to me are not binding nor have they had the effect of positioning or setting my mind in favour of or towards any one side of the matter.

In light of the interest that exists surrounding the application, and I surmise also in terms of my decision, there are four key points that I wish to explain at the outset. These have influenced how I have evaluated the information before me and the conclusions I have reached.

First, I accept the Applicant's position that its application qualifies under and can be considered as a s.127 RMA change of consent conditions (the alternative being a resource consent application for a new activity). I sought additional information on this first question from the Council in the form of the original consent and its terms, with an invitation for any relevant commentary from the Applicant. Mr. Littlejohn provided his opinion and reasoning to me in a

[1] Comments were also received from Ms. Charlotte Muggeridge, Harkness Henry Ltd, on behalf of the owner of 9 Cremorne Street, but she did not provide any particular legal analysis of the matters I am to determine.

letter dated 16 February 2022. My interest in this question was to ensure that the variation of conditions proposed would not have the effect of improperly changing the activity to which the underlying consent relates to. I have in this respect interpreted the word “activity” as meaning both a distinguishable category of land use and also the scale, intensity, and overall characteristics of a specific land use. The consented activity would remain a private helipad accommodating helicopter take offs and landings associated with the use of a residential dwelling. The characteristics of the consented activity would change in terms of the maximum number of take offs and landings permitted per week. Retention of the existing maximum annual number of take offs and landings that are permitted (what I find to be a reasonably foreseeable derivative from existing condition 10) has been sufficient to persuade me that overall, the scale, intensity, and character of helipad activity will remain in accordance with what was envisaged in the original consent. I record for completeness that the Council’s planner Mr. Moss was also satisfied that a s.127 RMA application was appropriate and I therefore also accept his position.

Secondly, my evaluation of the application has been limited to the adverse effects that the change in consent conditions would give rise to. The application is not an opportunity to revisit the consented activity’s adverse effects on any other basis.

Thirdly, I accept that I am to make my notification decision on the basis of the provisions of the RMA as it existed at the time that the application was lodged (1 May 2020).

Fourthly, I find that section 9(5) of the RMA (as it was at 1 May 2020) only gives me the ability to consider the adverse effects associated with helicopter take offs and landings, not the general act of “overflying by aircraft”. I have expressed this clarification given how frequently the phrase “helicopter flights” has been used across the information provided to me. Following on from this, I have read the language of the existing condition 10, which refers to “two movements” per “flight”, as permitting a maximum of two helicopter take offs and two landings per week, and one helicopter take off and one landing on any single day. This would accumulate to an annual maximum of one hundred and four helicopter take offs and one hundred and four landings per calendar year.

In my detailed reasons that follow, I will set out why I have agreed with the Applicant that the application should proceed without public notification, but why I have agreed with the Council’s planner Mr. Moss and the interested parties (at least insofar as it relates to adverse effects on persons), that the proposal should proceed with limited notification to the owners and occupiers of at 3 River Terrace, 18 Cremorne Street, 20 Cremorne Street and 8 Wairangi Street.

Lastly, I have for convenience prepared this decision based on Mr. Moss’ recommendation. For the avoidance of any doubt, including where I have adopted some of the text provided by Mr. Moss, this decision is entirely my own.

Public notification

Under section 95A of the RMA, this application shall proceed without public notification, because:

1. I am required to follow the procedure set out in s.95A of the Act in the order given in that section.

2. I find that public notification is not mandatory under step 1, having followed the criteria set out in s.95A(3) and having considered s.95A(2) of the RMA. This requires me to proceed to step 2.

3. In terms of step 2, and having considered the criteria set out in s.95A(5) and s.95A(4) of the RMA, I am persuaded to agree with the Applicant's agents and Mr. Moss' that the helicopter take offs and landings that are subject to the proposed variation can be regarded as a "residential activity" under s.95A(6) RMA. Specifically, I find that the helicopter take offs and landings proposed to be varied are for the purposes of the "use" of the dwellinghouse on the land, which under the Auckland Unitary Plan is intended to be used solely or principally for residential purposes. It is not realistically possible or feasible for dwellinghouses on residential allotments to be "used" as intended without residents travelling on a frequent and generally daily basis (by way of a variety of travel modes) to off-site places for work, education, worship, or to satisfy other reasonable and foreseeable daily needs. I find that the helicopter use consented to and proposed would qualify as part of and contribute to the Applicant's household's travel needs. On this basis, public notification of the application is precluded under step 2. S.95A(4)(a) then requires me to not consider step 3 and instead proceed to step 4.

4. Having considered step 4 (s.95A(9) of the RMA), I find that there are no special circumstances that would make public notification mandatory. This is because:

   a. The proposal involves disputed expert analysis and opinion relating to the noise effects likely to be generated by the helicopter take offs and landings. This is unremarkable in resource management practice and falls short of constituting a special circumstance relating to public notification.

   b. In terms of the argument made by the Council's planner Mr. Moss that public notification in relation to the disputed expert acoustic information would lead to additional relevant information becoming available to an eventual s.104, s.104B and s.127 decision maker, I find that this assertion has not been sufficiently substantiated and cannot be taken further. Mr. Moss has for example not identified what if anything is deficient with the expert acoustic information that is already available to the Council. In any event, if additional assessment from the Applicant (or on behalf of the Council as the consent authority) was deemed necessary to help the Council properly understand the adverse effects or other characteristics of the proposed variation, the statutory mechanism to pursue that would be under s.92 of the RMA. As it stands, the Applicant is aware of and has responded in writing to the Marshall Day Ltd assessment provided by interested parties at 12, 14, 16 and 18 Cremorne Street. It has provided reasons why that information should not be preferred relative to the findings of the Applicant's own expert acoustician Mr. Hegley. I find that there is in totality a sufficient probatively-valuable body of information available to the Council to make a decision on the matter of acoustic effects and including cumulative effects.

   c. In terms of the argument made by the Council's planner Mr. Moss that public notification would be in the public interest, I find this again not well substantiated and ultimately unpersuasive. Any adverse effects on local residents can be properly considered in the context of limited notification. The key limb of Mr. Moss' concerns on this matter was users of Cremorne Beach reserve, whom cannot be readily identified

for the purposes of limited notification. Mr. Moss' approach was that because the maximum noise levels likely to be experienced by a user of the reserve would be similar to that experienced by users of 20 Cremorne Street, it would follow that an equivalent adverse effect would be experienced by such a person. I disagree with this assumption. Adverse effects of the proposal on persons around the Site will be as a result of both the maximum noise levels emitted *and* the frequency and regularity of exposure to the noise of helicopter take offs and landings, taken together. I find it very unlikely that individual beach occupants would experience anything close to the frequency of helicopter take off and landing activities that neighbouring residents will because they will not be occupying the land in the same way or for the same duration (both in terms of the extent of a day and the number of days in total). In summary a reserve user would need to be more-or-less permanently occupying the reserve to be exposed to the same effect that residential neighbours around the Site would. I am satisfied that even individuals who visited the reserve on a daily basis would on the balance of probabilities likely be exposed to a scale of helicopter take offs and landings not discernibly different to the consented environment.

d. Helicopter take off and landings are familiar in Auckland and to the Council in particular. There is nothing about the proposal that would suggest that it is out of the ordinary or beyond the capability of the Council to properly determine without public notification occurring.

<u>Limited notification</u>

Under section 95B of the RMA, this application shall proceed with limited notification because:

1. Having determined that public notification of the application is not required under s.95A of the RMA, I am required to follow the procedure set out in s.95B of the Act in the order given in that section.
2. I find that limited notification is not mandatory under step 1, having considered s.95B(2) and s.95B(3) of the RMA. This requires me to proceed to step 2.
3. I find that limited notification is not precluded under step 2, having considered s.95B(5) and s.95B(6) RMA. This requires me to proceed to step 3.
4. In terms of step 3, having considered s.95B(7) (which does not apply to the proposal), and s.95B(8) of the RMA - in accordance with s.95E of the Act – I find that there are affected persons and the Council is directed by s.95B(9) to notify those persons. My reasons and the persons I find to be affected are:

   a. The key threshold of adverse effects that triggers whether a person is or is not affected is set out in s.95E(1) of the RMA, and is whether the effect is minor or more than minor, but not less than minor.

   b. In terms of the existing environment, this includes the existing consent and relevant noise from other lawfully established activities (in terms of cumulative effects). I find that there is no relevant permitted baseline that should be additionally taken into account.

c. The Applicant's argument is that, in part due to using a superior helicopter technology, it will able to accommodate more take offs and landings per week than the existing condition 10 allows whilst still maintaining overall compliance with the noise limit specified by existing condition 7 (L_{dn} 50dBA). Coupled with retaining the annual overall limit of 104 take off and 104 landing movements that existing condition 10 could allow, the argument is that the overall adverse effects that would result on any person would be no worse than is the case currently (or would be at worst less than minor). I do not accept this, for the following reasons:

   i. Although I accept the practicality of assessing noise in accordance with NZS6807:1994, which has been specifically developed to assess helicopter landing areas, and as the Applicant has done, that approach sits outside of the Auckland Unitary Plan and it is not listed within Appendix 17 of the Unitary Plan (documents incorporated by reference). I see no basis to adopt the 7-continuous-day averaging of noise effects that NZS6807:1994 allows and that the Applicant has relied on. It can at most be an activity-specific guideline to be considered alongside what the Unitary Plan does specify.

   ii. The Unitary Plan in turn does not provide a definition for how noise is to be measured, but NZS6801:2008 does (a 24-hour averaging). The relevance of this is that within Appendix 17 of the Unitary Plan that Standard *has* been incorporated by reference and I find that it is the approach that must be afforded the greater significance in the first instance.

   iii. It follows that because NZS6807:1994 has not been referenced within the existing condition 7, that the condition must also be subject to NZS6801:2008 and be limited to noise averaged over a 24-hour, rather than 7-day, period. In all fairness I wish to record however that on that point, the existing consent itself does refer to the Applicant's use of NZS6807:1994 in the original application and the Council appears to have accepted the results of an assessment undertaken following that (page 10 of the decision). But no reference to that standard or its acceptability as a means of measuring compliance was carried over to the condition that was imposed on the consent.

   iv. To make sense of the uncertainty that exists between the Unitary Plan, NZS6801:2008 and NZS6807:1994, I have resolved to not place a greater emphasis on either a 24-hour or a 7-day noise interval. Instead, I have considered them alongside one another as being equally helpful and relevant to the question of real-world adverse effects on persons.

   v. When considering the effects of noise on persons I find that it is not as straightforward as checking whether or not a maximum noise limit has been exceeded; there are many different types and combinations of noise sources across a 24-hour period (or a 7-day one) that, whilst all complying with the maximum standard, have significantly different characteristics to one another and different effects on persons' amenity values. A quieter sound occurring more frequently and that might 'fade into the background' might not be as offensive to a person as a louder sound of much shorter duration (or vice versa, depending on the person), for example.

v. The proposal will result in a potential doubling of permitted take off and landing movements on a single day (24-hour period) and I am satisfied that this is likely to be very noticeable (or perceptibly very and disruptively loud) to those persons close to the Site. Even when I consider the corresponding reduction in noise effects that will occur on other days and weeks where less take offs or landings would occur (due to the overall annual limit of 104 take offs and 104 landings proposed), there is a sufficient change in noise characteristics proposed that people close to the Site will experience an at least minor effect. I find that this minor effect will be adverse.

vi. I find that other than noise, the adverse effects of the variation of conditions proposed in all other respects including amenity values generally and safety, would be less than minor on any person.

vii. For the above reasons, I am persuaded to agree with the conclusions of Mr. Moss and Mr. Gordon for the Council. I find that the persons residing at 3 River Terrace, 18 Cremorne Street, 20 Cremorne Street and 8 Wairangi Street will be affected by the change in conditions proposed and notice must be served on these persons.

viii. I am satisfied that due to separation distance from the Site and the mitigation that will be provided by intervening buildings blocking and screening sound waves from the Site, that no other persons would be subject to minor or more than minor adverse effects, and would not be classified as affected persons. For completeness, I have previously considered individuals using the adjacent Cremorne Reserve in my consideration of special circumstances for public notification (s.95A) and with reference to that reasoning confirm my finding that there will be no affected persons in relation to that space.

5. Under step 4, and having considered s.95B(10) of the RMA, I find that there are no special circumstances that warrant the application being limited notified to any other persons. This is for the same reasons that I found in relation to s.95A special circumstances and I refer to those comments.

Accordingly, this application shall proceed with **LIMITED NOTIFICATION**. Notice of this application shall be served on the affected persons listed above unless their written approval is otherwise obtained.

Ian Munro

Duty Commissioner

9 March 2022