

Report for an application to change conditions of a resource consent under section 127 of the Resource Management Act 1991



Discretionary activity under section 127(3) for a residential activity

1. Application description

Application number(s):	LUC60134603-A (s9 land use consent)
Applicant:	Simon and Paula Herbert
Original consent number(s):	LUC60134603
Site address:	15 Cremorne Street, Herne Bay, Auckland 1011
Legal description:	Lot 1 DP 208893, Lot 39 DP 2746, Lot 1-2 DP 212064
Site area:	2810m ²

Auckland Unitary Plan (Operative in part)

Zoning and precinct:	Residential - Single House Zone Coastal – General Coastal Marine Zone
Overlays, controls, designations, special features etc:	Coastal Inundation 1 per cent AEP Plus 1m Control - 1m sea level rise Macroinvertebrate Community Index - Urban

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

2. Locality Plan



Source: Auckland Council GIS

3. The proposal, site and locality description

Proposal

The proposal is set out on page 5 of the AEE that accompanies this application and amended as per the subsequent notification assessment “Re: 15 Cremorne Street - s127 Application” (attachment 1) by Craig Shearer, dated 11/05/2021. The proposal is set out briefly below:

Resource consent LUC60134603 (legacy reference R/LUC/2015/940), granted consent under delegated authority on 10/07/2015 to construct a helicopter landing pad and with take-off / landing thereafter.

The application was processed on a non-notified basis with no persons adversely affected. The application was supported by the written approvals of persons at:

- 3 River Terrace
- 11 Cremorne Street
- 12, 14, 16 and 18 Cremorne Street (all one owner)

- 20 Cremorne Street

As part of this, conditions were attached that defined the frequency of flights. No more than two flights were to occur within a one week period, each flight consisting of two helicopter trips – one landing and one take-off. No more than one flight was to occur in any given day (24 hour period). These was described in condition 10 of this consent, and along with other conditions forms the 'consented envelope'.

I note that whilst a total number of flights were not explicitly stated, extrapolating the weekly figure would mean 104 flights could occur within a one year period subject to meeting all other conditions.

The proposal centres on changing the frequency of helicopter flights within any given week. The consent holder therefore wishes to vary the conditions of resource consent LUC60134603 as follows:

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).

The applicant has also offered an additional condition (which would be condition 15) stating that the noise from helicopters using the site shall comply with the requirements of NZS6807:1994 Noise Management and Land Use Planning for Helicopter Landing Areas.

Some of the documentation to be read in conjunction with this application may still refer to the original proposal of a maximum of 3 flights / day and 10 flights / week. The proposal is as outlined above with a maximum of 2 flights a day and 4 flights / week.

Site and surrounding environment description

The site is situated at the end of cul-de-sac and sits atop a cliff, adjoining the Waitemata Harbour to the north.

The site is relative flat, extensively landscaped and contains numerous mature trees.

The helicopter pad is located in front a large two-storey architecturally designed dwelling which spans the breadth of the site on an east-west axis.

Cremorne Reserve consists of a beach and bush walk beach access from the road. The beach adjoins the western boundary of the subject site, being situated below the cliff-top (see locality plan and figure 2 below).

Relevant Consenting Environment (beyond subject site in terms of helicopter flights)

Consent was granted (R/REG/2015/1185) under delegated authority on 18 September 2015 to establish a helipad on the roof of boatshed in the coastal marine area adjacent to 12 Cremorne Street. The consent was also for the operation of 6 domestic helicopter flights in any 7 day period with a maximum of 2 flights in any one day. For reference, helicopter noise was predicted to comply with noise levels at neighbouring sites using *NZS6807:1994*, that being the standard referred to under the relevant regional plan. However, it was noted that helicopter noise did not comply with the L_{AFmax} descriptor.

Consent was granted (R/LUC/2011/1114) under delegated authority on 23 May 2011 for a helicopter landing pad at 64 Sentinel Road and operation of helicopter flights with a limit of 10 per week. The relevant clause relating to helicopter noise of the then District Plan did not impose a standard but there were standards relating to noise limits at the boundaries of residential zoned properties (using the L_{10} descriptor). In assessing the application *NZS6807:1994* was used because it was seen as more relevant to helicopter noise, the L_{10} descriptor producing greater compliance. Noise levels at neighbouring sites (excluding those who had provided written approval) were predicted to comply with *NZS6807:1994*.



Figure 1 - Beach (view west)



Figure 2- Beach (view east) with dwelling on subject site visible through the tree

4. Background

Local Board

The Local Board were briefed on 27 May 2020. Ms Alexandra Bonham replied on behalf of the Local Board on 28 May 2020, urging 'full notification' of the application. The Local Board comments can be found in attachment 2.

Specialist Input

The proposal has been reviewed and assessed by the following specialist:

- Andrew Gordon (noise)

Noise Descriptors

Hegley Acoustic Consultants (HAC) relied on *NZS 6807:1994 Noise Management and Landing Use Planning for Helicopter Landing Areas* to assess the noise effects in the original consent. NZS 6807:1994 allows for averaging over a 7 day period. A similar approach will therefore be taken in this variation.

Correspondence Received

Correspondence has been received from the following person:

- Greenwood Roche Project Lawyers acting on behalf of the owners of 12, 14, 16 and 18 Cremorne Street. Correspondence includes an acoustic assessment from Marshall Day Acoustics (MDA)
- Rhys Harrison QC, representing Herne Bay Residents Association
- Herne Bay Residents Association
- Harkness Henry, lawyers, representing the owners of 9 Cremorne Street
- Niksha Farac of 3 River Terrace

All correspondence is included as part of the file and I recognise they form part of my considerations (as later addressed). Mr. Gordon, as part of his considerations has referenced the MDA report. I do not consider this entirely appropriate given no decisions have been made whether the application should be subject to notification.

5. Status of the application

Application to vary resource consent conditions – LUC60134603

I have had regard to the relevant legal tests for determining whether an application can be processed as a s127 variation. These are twofold:

- Would it result in a fundamentally different activity?
- Would it give rise to materially different adverse effects?

In light that helicopter flights can occur within defined perimeters, the change is not introducing a fundamentally different activity nor will it result in materially different adverse effects (associated with the take-off and landing of helicopters).

To this end, I have considered the following information.

- Helicopter flights will take place within the same daytime hours.
- The adverse effect being assessed remains noise and its associated effects.
- The helicopter will continue to take off and land in the same location.

Following on from this, I consider that the application is appropriately considered under section 127 of the Resource Management Act 1991 (RMA).

As an application for a variation to conditions under s127 of the RMA, it is treated as if it is a discretionary activity.

Sections 88 to 121 apply, though all references to resource consent and activity are replaced with reference to the change or cancellation of the condition, and the resultant effects.

6. Public notification assessment (sections 95A, 95C-95D)

Section 95A specifies the steps the council is to follow to determine whether an application is to be publicly notified. These steps are addressed in the statutory order below.

Step 1: mandatory public notification in certain circumstances

No mandatory notification is required as:

- the applicant has not requested that the application is publicly notified (s95A(3)(a));
- there are no outstanding or refused requests for further information (s95C and s95A(3)(b)); and
- the application does not involve any exchange of recreation reserve land under s15AA of the Reserves Act 1977 (s95A(3)(c)).

Step 2: if not required by step 1, public notification precluded in certain circumstances

Public notification of a resource consent application exclusively involving a residential activity (as defined by s95A(6)) is precluded where the activity status for the application is restricted discretionary or discretionary (ss95A(4) and 95A(5)(b)(ii)), but only where the application was lodged before 30 September 2020.

- the land is zoned as Single House, being a zone intended to be used principally for residential purposes; and
- the activity requiring resource consent is and remains associated with travel to and from a residential dwelling.

As the proposed variation application exclusively involves a residential activity, and the application was lodged before 30 September 2020, it is precluded from being publicly notified unless special circumstances addressed in step 4 below warrant otherwise.

Step 3: if not precluded by step 2, public notification required in certain circumstances

As the application is precluded from public notification by step 2, this step is not applicable.

Step 4: public notification in special circumstances

If an application has not been publicly notified as a result of any of the previous steps, then the council is required to determine whether special circumstances exist that warrant it being publicly notified (s95A(9)).

Special circumstances are those that are:

- exceptional, abnormal or unusual, but something less than extraordinary or unique;
- outside of the common run of applications of this nature; or
- circumstances which make notification desirable.

In considering whether special circumstances exist, I have turned my mind to the following principles.

- Would notification result in the receipt of further relevant information?

In *Urban Auckland v Auckland Council [2015] NZHC 1382*, at [108], Venning J summarised the law regarding special circumstances (citing from *Far North District Council v Te Runanga-a-iwi o Ngati Kahu [2013] NZCA 221* at 37) as “*the special circumstance must relate to the subject application. The local authority has to be satisfied that public notification, as opposed to limited notification to a party or parties, may elicit additional information bearing upon the non-complying aspects of the application*”. See also *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council [2015] NZRMA 113 (HC)*.

- Public Interest
- Is there an unusual or controversial chain of circumstances that are integral to the application?
- Factors arising from the case of *Urban Auckland v Auckland Council [2015] NZHC 1382*

In this case the court considered that the following factors contributed towards special circumstances.

- Public ownership of the applicant;
- Long-standing public knowledge of a proposal to extend an existing facility;
- National significance of the location of the proposal;
- Adverse effects (properly assessed); and
- Significant public interest and controversy surrounding past proposals to extend the existing facility.

Would notification result in the receipt of further relevant information?

Variation in flights

My request for further information dated 20.01.2021 asked the agent to clarify if there would be any seasonal variation in the number of flights, in particular during the summer months (which for example may impact on beach users). The agent replied in his letter dated 24.03.2021 as follows:

“Clearly there will be some variation during the year, as advised in the S92 response. As the application does not seek to vary the total number of flights/year (remaining at 104), the proposal to provide for up to [4 per week and 2 per day] will mean that, if these numbers are reached, then clearly for some weeks there will be few if any flights.”

The applicant is therefore seeking a degree of flexibility and I accept that no further relevant information can be gained in this regard. However, I consider that notification will elicit additional information for the following reasons.

Noise effects

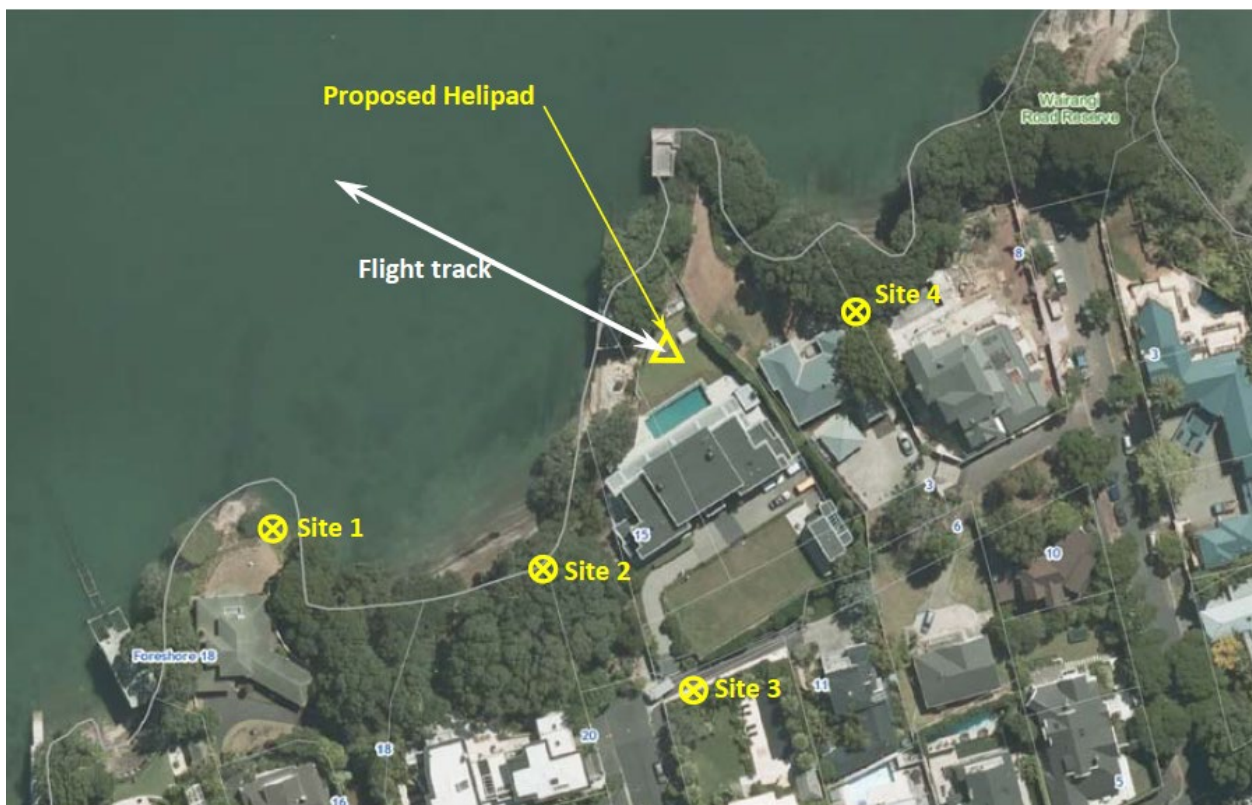
Table 1 below specifies the noise predictions at each measurement site and in particular site 2, which can be used as a proxy for noise levels at the beach (see figure 1 for location of measurement sites), comparing the HAC modelling for the 2015 consent and HAC modelling for the proposed variation. HAC's essentially relies on changes to technology (a different model of helicopter) allowing an increased number of flights to produce the same level of noise. Therefore, there is minimal change in terms of noise levels between HAC modelling for the 2015 consent and HAC modelling for the proposed variation.

However, I recognise that this has been challenged by MDA to the extent that they have identified differences and areas of non-compliance. At this stage of processing, it would be inappropriate to weigh up these differences, but does highlight that notification will both furnish additional information and allow for its appropriate consideration in addressing the effects associated with the change. This, in my opinion, would be coupled with the public interest, which itself will elicit additional information. I therefore consider that notification will elicit further relevant information

Table 1 - Predicted Noise Levels

	Noise level dBA L _{dn} (7 day)	
	HAC modelling (2015 consent)	HAC modelling for variation proposal
Site 1 (18 Cremorne St)	44	43
Site 2 (20 Cremorne St)	47	46
Site 3 (9 Cremorne St)	44	43
Site 4 (8 Wairangi St)	46	45

Figure 1 – Location of Noise Measurement Sites



Public Interest

Correspondence

Correspondence has been received from persons. This in itself does not make the application unusual. Because correspondence has been received, this does not by default warrant public notification or that a person is adversely affected. In *Urban Auckland, v Auckland Council* the High Court stated that “Concern on the part of an interested party could not of itself be said to give rise to special circumstances because if that was so every application would have to be advertised where there was any concern expressed by the people claiming to be affected.” (see *Urban Auckland v Auckland Council [2015] NZHC 1382, [2015] NZRMA 235*). However, I consider that there is public interest for the reasons outlined below that also don’t necessarily fall under or can be considered falls into the category of an (identifiable) person.

Users of Cremorne Reserve

In considering the public interest I am also taking into account effects on users of Cremorne Reserve and in particular the beach. HAC stated in their section 92 response that noise on the beach will be similar to that predicted for site 2 (20 Cremorne St). Site 2 can therefore be used as a proxy for noise effects on the beach. Predicted noise levels on the beach will increase compared to the existing consented noise levels (see table 1 above). Further, the number of flights per day and the number of flights per week may double during certain times of year (the applicant has sought this flexibility). It follows that during some weeks there will be an increased amount of disruption experienced by users of the beach that will detract from the amenity and pleasantness of the beach and reserve.

Noise and its associated effects on amenity

'Amenity Values' are defined under section 2 of the RMA as *'those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes'*.

Cremorne Reserve and the beach are part of the characteristics of the area and contribute to its pleasantness, having particular regard to their recreational attributes. The amenity of the beach and reserve, as well as the neighbourhood, is therefore an important consideration. The change in the intensity / frequency of the activity with the flexibility sought, will have a detrimental effect on the amenity of the beach and the neighbourhood. In particular, helicopter flights are disruptive and the number of flights on a weekly basis will double, noting no change to the number of yearly flights. The increased amount of disruption would therefore interfere with the amenity values of the neighbourhood and detract from the pleasantness experienced by residents and users of the beach.

Is there an unusual or controversial chain of circumstances that are integral to the application?

There is no unusual or controversial chain of circumstances that are integral to the application.

Factors arising from *Urban Auckland v Auckland Council*

In *Urban Auckland v Auckland Council*, the court considered that the following factors contributed towards special circumstances - Public ownership of the applicant; Long-standing public knowledge of a proposal to extend an existing facility; National significance of the location of the proposal; Adverse effects (properly assessed); and Significant public interest and controversy surrounding past proposals to extend the existing facility. None of these factors relate to the case in hand.

Conclusion

In this instance and having turned my mind to the above factors which contribute to special circumstances, I am of the opinion that the application should be publicly notified by reason of special circumstances.

Public notification conclusion

Having undertaken the s95A public notification tests, the following conclusions are reached:

- Under step 1, public notification is not mandatory.
- Under step 2, public notification is precluded as the application is exclusively for a residential activity, and the application was lodged before 30 September 2020.
- Step 3 of the notification tests is not applicable due to the finding of step 2.
- Under step 4, there are special circumstances that warrant the application being publicly notified.

It is therefore recommended that this variation application be processed with public notification.

Notwithstanding the views of the reviewer or the decision maker that may be contrary to the above, I have undertaken an assessment below to determine if there are any adversely affected persons.

7. Limited notification assessment (sections 95B, 95E-95G, s127(4))

If the variation application is not publicly notified under s95A, the council must follow the steps set out in s95B to determine whether to limited notify the application. These steps are addressed in the statutory order below.

Step 1: certain affected protected customary rights groups must be notified

There are no protected customary rights groups or customary marine title groups affected by the proposed activities (s95B(2)).

In addition, the council must determine whether the proposed activities are on or adjacent to, or may affect, land that is subject of a statutory acknowledgement under schedule 11, and whether the person to whom the statutory acknowledgement is made is an affected person (s95B(3)).

Within the Auckland region the following statutory acknowledgements are relevant:

- Te Uri o Hau Claims Settlement Act 2002
- Ngāti Manuhiri Claims Settlement Act 2012
- Ngāti Whātua Ōrākei Claims Settlement Act 2012
- Ngāti Whātua o Kaipara Claims Settlement Act 2013
- Te Kawerau ā Maki Claims Settlement Act 2015
- Ngāti Tamaoho Claims Settlement Act 2018
- Ngāi Tai Ki Tāmaki Claims Settlement Act 2018

In this instance, the proposal is not on or adjacent to and will not affect land that is subject to a statutory acknowledgement and will not result in adversely affected persons in this regard.

Step 2: if not required by step 1, limited notification precluded in certain circumstances

The application is not precluded from limited notification as:

- the application is not for one or more activities that are exclusively subject to a rule or NES which preclude limited notification (s95B(6)(a)); and
- the application is not exclusively for a controlled activity, other than a subdivision, that requires consent under a district plan (s95B(6)(b)).

Step 3: if not precluded by step 2, certain other affected persons must be notified

As this application is not for a boundary activity, there are no affected persons related to that type of activity (s95B(7)).

The following assessment addresses whether there are any affected persons that the application is required to be limited notified to (s95B(8)).

In determining whether a person is an affected person:

- a person is affected if adverse effects on that person are minor or more than minor (but not less than minor);
- adverse effects permitted by a rule in a plan or NES (the permitted baseline) may be disregarded; and
- the adverse effects on those persons who have provided their written approval must be disregarded.

In considering a variation application, the council must also consider in particular every person who made a submission on the original application and who may be affected by the change or cancellation of that consent (s127(4)).

Adversely affected persons assessment (sections 95B(8) and 95E)

Effects that must be disregarded

Any effect on a person who has given written approval to the application

No persons have provided their written approval.

Effects that may be disregarded

Permitted baseline

The permitted baseline refers to the effects of permitted activities on the subject site. As the application involves the variation of conditions of an existing resource consent, the permitted baseline is not considered relevant in determining the adverse effects above and beyond those from the activities undertaken under the original consent.

Assessment

Receiving environment

The receiving environment beyond the subject site includes permitted activities under the relevant plans, lawfully established activities (via existing use rights or resource consent), and any unimplemented resource consents that are likely to be implemented. The effects of any unimplemented consents on the subject site that are likely to be implemented (and which are not being replaced by the current proposal) also form part of this reasonably foreseeable receiving environment. This is the environment within which the adverse effects of this application must be assessed.

As this is an application for a variation to conditions of an existing resource consent, the receiving environment includes the effects of the original consent that is subject to the variation application (as only the effects of the variation can be considered under s127(3)).

In this case, the receiving environment also includes:

- Effects from the surrounding environment as described in section 3 above.
- Effects the operation of domestic helicopter flights from the CMA adjacent to 12 Cremorne Street.
- Effects the operation of domestic helicopter flights from 64 Sentinel Road.

Persons who made a submission on the original application

No persons made a submission on the original application.

Adverse effects

Noise effects

The proposed number of flights means that the number of flights per day and the number of flights per week may double during certain times of year (the applicant has sought this flexibility). Table 1 below specifies the noise predictions at each measurement site (see figure 1 above for location of measurement sites), comparing the HAC modelling for the 2015 consent and HAC modelling for the proposed variation. Noting compliance with the 50 dBA noise level specified in condition 7 of the original consent (see above), the number of flights will nonetheless double during some weeks of the year. It follows that during some weeks of the year, there will be an increased amount of disruption. Given the proposed frequency of flights and the associated effects that come with that, I consider that the adverse effects in light of the change, cannot be considered to be less than minor, as it will be both a noticeable and adverse effect on persons at 3 River Terrace, 18 Cremorne Street, 20 Cremorne Street and 8 Wairangi Street.

Table 2 - Predicted Noise Levels

	Noise level dBA L _{dn} (7 day)	
	HAC modelling (2015 consent)	HAC modelling for variation proposal
Site 1 (18 Cremorne St)	44	43
Site 2 (20 Cremorne St)	47	46
Site 3 (9 Cremorne St)	44	43
Site 4 (8 Wairangi St)	46	45

Conclusion

I therefore consider that the adverse effects experienced by persons at 3 River Terrace, 18 Cremorne Street, 20 Cremorne Street and 8 Wairangi Street would result in these persons being adversely affected.

Step 4: further notification in special circumstances

In addition to the findings of the previous steps, the council is also required to determine whether special circumstances exist in relation to the variation application that warrant it being notified to any other persons not already determined as eligible for limited notification (excluding persons assessed under section 95E as not being affected persons).

Special circumstances are those that are:

- Exceptional, abnormal or unusual, but something less than extraordinary or unique;
- outside of the common run of applications of this nature; or
- circumstances which make limited notification to any other person desirable, notwithstanding the conclusion that no other person has been considered eligible.

In this instance I have turned my mind specifically to the existence of any special circumstances under s95B(10) and conclude that there is nothing exceptional or unusual about the variation application, and that the proposal has nothing out of the ordinary run of things to suggest that notification to any other persons should occur.

Limited notification conclusion

Having undertaken the s95B limited notification tests, the following conclusions are reached:

- Under step 1, limited notification is not mandatory.
- Under step 2, there is no rule or NES that specifically precludes limited notification of the variation application, and the application is for activities other than that specified in s95B(6)(b).
- Under step 3, on the basis of the above analysis, notice of these applications should be served on the following persons:

Table 3 - Adversely Affected Persons

Address	Legal description	Owner and / or occupier
3 River Terrace	Lot 1 DP 39761, Sec 3 SO 409229	Whiskey Securities Ltd
18 Cremorne Street	Lot 2 DP 77228	Prospect Private Custodian Ltd
20 Cremorne Street	Lot 3 DP 77228	LT Grant & SG Lockwood & JR Lockwood & LS Lockwood

Address	Legal description	Owner and / or occupier
8 Wairangi Street	Lot 2 DP 39761	Ilowa Ltd

- Under step 4, there are no special circumstances that warrant the variation application being limited notified to any other persons.

It is therefore recommended that this variation application be processed without limited notification.

8. Notification recommendation

Non-notification

For the above reasons under section 95A, I recommend that this application is processed with public notification.



Patrick Moss
Senior Planner
Resource Consents

Date: 22 December 2021

Approved for Release

Sections 95A, 95B and 127(4) recommendation approved for release to the duty commissioner for determination.



Matthew Wright
Team Leader
Resource Consents

Date: 20 December 2021

