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·· Strategy ·· Policy ·· Planning ··

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Dear Patrick and Matthew

Re: 15 Cremorne Street - s127 Application

Thanks for meeting with me and Kitt Littlejohn on 20 April 2021.

At the meeting we agreed that I would prepare a detailed RMA notification assessment and forward it to you both, to assist you when you prepare your notification report.

Since the meeting we have also had the opportunity to discuss the application further with our clients. They have decided that they wish to amend the application by reducing the requested number of flight movements to 2 flights per day, 4 per week, and 104 per year. This is a reduction from the 3 flights per day, 10 per week, and 104 per year requested in the application. Therefore, the proposed amended conditions are as follows:

10. The number of flights per week shall not exceed four (eight movements) with no more than 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 an 'AirBus H130T2' unless it has been demonstrated that the level of noise will comply with condition 7 above;

Our acoustic consultant, Neville Hegley of Hegley Acoustic Consultants has carried out an acoustic assessment of this revised proposal on the surrounding area. His assessment is included as an attachment.

1. Assessment of Effects

The assessment undertaken by Hegley Acoustic Consultants (see letter attachment) is that up to 14 flights per week, 2 per day, would be possible using the AirBus H130T2 helicopter, and still be

within the consented 50dBAL$_{dn}$ standard in the consent. This is due to this helicopter being quieter than the helicopter assessed for the original consent, and the fact that the turbine of the AirBus can be shut down and started up in a much shorter time than the helicopter authorised in the existing consent. With the proposal now being amended to just 2 flights per day and 4 per week, the Hegley report has determined that the noise exposure for residents from helicopter movements will be reduced to be less than what is currently permitted by the existing consent and thus considered to be reasonable.

The Hegley report concludes that the proposed changes, through using a more modern helicopter and with the shorter start-up and shut down times, will result in the noise received by all residents in the area being less than that permitted by the existing consent.

The noise amenity effects on the beach were also assessed as being less than currently experienced for the same reasons. Although the number of flights per day would increase, that change would be offset by the reduced number of days there would be any flights. Also, there would be at least half a day between fights, and generally the whole day, and so the same person on the beach would not be exposed to the second flight. It is 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.

2. Notification Assessment

As the application was lodged on 1 May 2020, the following notification assessment was undertaken based on the notification provisions of the RMA at that time; that is before the 2020 RMA amendments came into force on 30 September 2020.

My notification assessment is as follows.

Under section 127(3) of the RMA, sections 88 to 121 of the RMA apply to the application as if references to "a resource consent" are references to "the change or cancellation of a condition" and references to "the activity" are references to "the effects of the change or cancellation". Accordingly, sections 95 to 95G of the RMA apply to the application and will need to be considered.

3. Public Notification

Under section 95A(3) of the RMA, and as a first step, an application is required to be publicly notified if:

- the applicant requests public notification;
- public notification is required under section 95C; and
- the application is made jointly with an application to exchange recreation reserve land.

None of these provisions apply in this case - i.e., the applicants do not request public notification; public notification is not required under section 95C; and there is no concurrent proposal to include an exchange of recreation reserve land.

As a second step, under section 95A(5), an application cannot be publicly notified if:

- a rule or national environmental standard ("**NES**") precludes notification;
- the application is for:
  - a controlled activity;
  - a restricted discretionary activity or discretionary activity for a subdivision or a residential activity (as defined by section 95A(6));
  - a boundary activity (as defined by section 87AAB); or
  - an activity prescribed in regulations.

In this case, the proposal is a discretionary activity, and a "residential activity".

"Residential activity" is defined in section 95A(6) and *"means an activity that requires resource consent under a regional or district plan and that is associated with the construction, alteration, or use of 1 or more dwellinghouses on land that, under a district plan, is intended to be used solely or principally for residential purposes.*

The use of the helicopter is associated with the use of a dwellinghouse on the applicants' land.

Therefore, the application cannot be publicly notified.

4. Public Notification - Certain Circumstances

"Step 3" of section 95A sets out criteria for public notification. As set out in section 3 above, under s95(A)(5) a residential activity cannot be publicly notified.

The assessment of effects in section 1 and the assessment provided by the attached Hegley Acoustics letter confirms that the effects of the proposed change to the conditions are less than consented, and therefore positive.

5. Public Notification - Special Circumstances

As a fourth step, as public notification is not required under steps 2 and 3 in this case, the consent authority must still determine "whether special circumstances exist in relation to the application [to change or cancel conditions] that warrant the application being publicly notified" in accordance with section 95A(9). The particular factors relevant to the consideration of the existence or otherwise of special circumstances requires an analysis of the relevant caselaw.

"Special circumstances" have been defined by the Court of Appeal as those that are unusual or exceptional, but they may be less than extraordinary or unique (*Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529).

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 36-37) as:

… A "special circumstance" is something, as White J accepted, outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique. A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification. As Elias J noted in Murray v Whakatane District Council*:*

> *… the policy evident in those subsections seems to be based upon an assumption that the consent authority does not require the additional information which notification may provide because the principles to be applied in the decision are clear and non-contentious (as they will generally be if settled by district plan) or the adverse effects are minor. Where a consent does not fit within that general policy, it may be seen to be unusual.*

[37] … 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. We repeat that Carrington's application to construct and use dwelling houses was, as White J accepted, a permitted activity in the Rural Production Zone. FNDC's discretion when determining the application was accordingly restricted by s 94B to those aspects of the activity which specifically remained for its consideration-compliance with the traffic intensity and vehicle access standards.

(footnotes omitted)

The High Court also affirmed a submission that special circumstances must be unusual and would only arise where public notification would have information gathering value "despite the general provisions excluding the need" for it, and they are unlikely to exist where the principles to be applied are clear and non-contentious (in the sense they are settled by an operative plan) or the adverse effects are minor. An essential question is whether notification would result in receipt of further relevant information: *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2015] NZRMA 113 (HC).

Section 95A must be read subject to section 127(3), so the assessment of whether special circumstances may exist is to be made in relation to the application to change the conditions of the consent already held by the applicants to operate a domestic helicopter from an established helicopter landing pad with the number of flights per week not exceeding two with no more than one flight on any one day.

There is nothing unusual in consent holders' varying consents they hold to ensure the consents accommodate changes in circumstances since the consent was applied for or granted. Reliance on the process in section 127 therefore could not be considered a special circumstance. Section 127 accepts that the conditions of consent may need to be changed and exists for that purpose, providing a less onerous route to make such changes (i.e., avoiding the need to 'start again'). The scope of the assessment (for both notification and substantive purposes) is limited to the effects of the change (not the approved activity) for this reason.

The substantive assessment of the effects on the environment of the changes proposed by the applicants to their consent conditions concludes that those effects, considered by reference to the overall effects authorised by the consent, will be less than minor. Since the application was lodged, the applicants have now agreed to reducing the number of flights applied for from 3 per day to two per day and 10 per week to 4 per week. The assessment carried out by Hegley Acoustic (attached) concludes, for a number if reasons, that the effects will be less than those

created by the existing consent, and in fact they will be positive compared with the consented baseline.

The existence of positive effects on the environment arising from an application could not be considered a special circumstance. Minor effects already are a prerequisite under section 95A(8) to avoid public notification, and less than minor effects a prerequisite for avoiding limited notification under 95B (via 95E). If the effects are legally acceptable, then they cannot drive a special circumstances decision.[1]

In *Urban Auckland* the Court addressed the argument that various factors constituted special circumstances that warranted the public notification of the controlled activity consent under challenge in that case. The factors argued were:

- 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.

The High Court found in *Urban Auckland* that special circumstances did exist, based on a combination of an error of law in the using the activity status to determine notification, the public ownership of the applicant, the impact of the application on future developments and significant public interest and controversy.

In the case of the current application to vary conditions, it is considered that no similar special circumstances exist. It should be noted that there have been no public interest and controversy over past proposals to extend the existing facility. The original application in 2015 was not publicly or limited notified, as the effects were considered to be less than minor. Any neighbours considered to be "affected effects" provided written approval for the project, so the effects upon those parties in effect creates the consented baseline of effects. Nevertheless, only one property is assessed as having effects that exceed 50dBAL$_{dn}$, and the owners of that property provided approval for such exceedance in October 2014. Importantly, the effects of the proposed changed activity sought by this section 127 application will be less than the consented proposal due to the movement of the landing pad and the different helicopter to be utilised. The effects are therefore positive – see the attached assessment by Hegley Acoustics. There can be no significant public interest in a section 127 application when the original consent was not notified, and where the effects of the section 127 application are positive.

I understand Auckland Council has received correspondence regarding the application. That that alone is not uncommon, but cannot constitute a special circumstance absent other factors going to that test. The way to ensure those parties views are considered is to ensure they are included in and analyzed by the s95 assessment, as I have done in this letter.

In conclusion on section 95A(9), it is considered that the proposed change to conditions does not to give rise to special circumstances that would warrant the application being publicly

[1] *Urban Auckland v Auckland Council* [2015] NZHC 1382, at [138].

notified. The assessment of the substantive merits of the variation concludes that, overall, the changes result in a positive benefit compared to the existing consented baseline, and that there is a sound basis for the discretionary application to vary the consent being approved.

6. Public Notification - Conclusion

In summary, the proposed change of conditions will result in effects on the environment that are positive. Section 95(A)(5) precludes public notification and the proposal does not give rise to special circumstances. It therefore meets the various tests under section 95A and 95B of the RMA, such that public notification of the application is not required.

7. Limited Notification

Section 95B of the RMA requires that if a consent authority does not publicly notify an application, it must decide (in terms of sections 95E and 95F) if there are any affected persons in relation to the activity. Again, the activity being considered is the proposed change of conditions and the effects of those changes on persons.

8. Limited Notification Required or Excluded

Section 95B(2) provides that, as a first step, if the consent authority determines that certain people or groups are affected, these persons/groups must be given limited notification:

(a) Affected protected customary rights groups;
(b) Affected customary marine title groups (in the case of an application for an accommodated activity); and
(c) An affected person under section 95E to whom a statutory acknowledgement is made (if the proposed activity is on or adjacent to, or may affect, land that is the subject of a statutory acknowledgement).

None of the above provisions apply in this case.

Where limited notification is not required under section 95B(2), limited notification is further precluded where:

- A rule or NES precludes limited notification of the application;
- The application is for either or both of the following:
  - A controlled land use activity under a district plan; and/or
  - An activity prescribed by regulations.

There are no relevant exclusion provisions in this regard.

The third step under section 95B(7) determines the following persons to be affected persons:

- in the case of a boundary activity, an owner of an allotment with an infringed boundary; and

- in the case of any activity prescribed under section 360H(1)(b), a prescribed person in respect of the proposed activity.

Neither of these provisions are relevant or applicable in this case.

Because limited notification is not required under section 95B(2), nor excluded under section 95B(7), it is necessary to determine whether there are affected persons under section 95B(8), as discussed below.

9. Limited Notification - Affected Persons

Section 95B(8) provides that "*In the case of any other activity, determine whether a person is an affected person in accordance with section 95E*". Section 95E states that:

> *(1) For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section 95B(4) and (9) (as applicable), a person is an affected person if the consent authority decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor).*
> *(2) The consent authority, in assessing an activity's adverse effects on a person for the purpose of this section,—*
> *(a) may disregard an adverse effect of the activity on the person if a rule or a national environmental standard permits an activity with that effect; and*
> *(b) must, if the activity is a controlled activity or a restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule or a national environmental standard reserves control or restricts discretion; and*
> *(c) must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11.*
> *(3) A person is not an affected person in relation to an application for a resource consent for an activity if—*
> *(a) the person has given, and not withdrawn, approval for the proposed activity in a written notice received by the consent authority before the authority has decided whether there are any affected persons; or*
> *(b) the consent authority is satisfied that it is unreasonable in the circumstances for the applicant to seek the person's written approval.*
> *(4) Subsection (3) prevails over subsection (1).*

When the original application was granted, the following owner/occupiers provided written approval:

- 3 River Terrace
- 12 Cremorne Street
- 14 Cremorne Street
- 16 Cremorne Street
- 18 Cremorne Street
- 20 Cremorne Street
- 11 Cremorne Street

Therefore, the consented baseline includes the effects on any of these properties, although, with the exception of 3 River Terrace, the acoustic assessment when the consent was granted was that the effects at the boundary on all the above properties falls at or below the Ldn 50dBA standard set by the consent.

Section 127(4) also requires that, for the purposes of determining who is adversely affected by such a change or cancellation, the consent authority must consider, in particular, every person who:

(a) made a submission on the original application; and

(b) may be affected by the change or cancellation of condition.

In this regard, it is noted that the original application was considered on a non-notified basis. There were no submissions and so this additional requirement is not engaged.

10. Limited Notification – s95E Assessment of Effects

Regardless of the outcome set out in section 9 above, Section 95E of the RMA requires resource consent applications to be served on "affected persons". For the purposes of that section, a person will be an "affected person" if "*the activity's adverse effects on the person are minor or more than minor (but are not less than minor)*".

Even though an activity may affect a person, it does not follow from section 95E that they will be an "affected person" for the purposes of the RMA. For a person to be affected in the sense contemplated by section 95E, the effects of the activity on them will have to be adverse. Even if they are adverse, they still need to be minor or more than minor, to make that person an "affected person". In the case of an application under section 127 as well, it is only adverse effects that are likely to arise from the change of conditions proposed that are relevant for consideration.

In summary, the original application was not notified therefore there are no persons making a submission to the original application/and may be affected by the change of conditions, and the proposed changes will have positive effects on persons. Accordingly limited notification in terms of section 95E is not required.

11. <u>Limited Notification - Special Circumstances</u>

Section 95B(10) also requires a consent authority to determine whether special circumstances exist that warrant limited notification of the application to any other persons not already determined to be eligible for limited notification. Should such special circumstances exist, the consent authority must give limited notification to those persons.

The comments at section 5 above (with respect to section 95A(9) of the RMA) are also considered to be applicable to section 95B(10), such that no special circumstances exist in relation to the application that would warrant notification of the application to any other persons not already considered in terms of limited notification generally. Limited notification in this regard is therefore not required. The written approvals provided by the persons listed above remain valid and cannot be withdrawn, condition X of the consent having been written in

reliance on them. Any effect on these persons must be assessed by reference to the effects that they originally agreed to accept and on which the consent is based.

Notably, in *Urban Auckland* the High Court accepted that there was limited scope for judicial review of a decision as to whether there are special circumstances because it involves the exercise of a discretion based on the Council's assessment of the factual position and use of its expertise and judgment.[2] It went on to find 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.*"

In this regard, and having regard to the assessment of the special circumstances tests under section 95A(9) at section 5 of this report, it is considered that there is nothing exceptional or unusual about the proposed changes that would suggest that notification to any persons should occur. Indeed, the changes result in an overall improvement of noise effects from the operation of the helipad for all neighbouring properties.

12. Conclusion – Limited Notification

In summary, the proposed changes to conditions will result in positive effects on persons. It is also considered that the proposal does not give rise to special circumstances in terms of section 95B(10). It therefore meets the various tests under section 95B of the RMA, such that limited notification of the application is not required.

13. Overall Conclusion

As a result of the above assessment, it is concluded that the application to charge the conditions of consent is able to be processed on a non-notified basis, without the requirement for public notification to the wider community, or limited notification to any person, because the proposed change to the conditions of the approved activity and use of a helipad:

- will have positive effects on the surrounding environment in terms of noise and amenity effects;
- will not give rise to minor or more than minor adverse effects on any persons; and
- does not give rise to any special circumstances that would require public or limited notification.

Yours sincerely

Craig Shearer

[2] *S&M Property Holdings Ltd v Wellington City Council* [2003] NZRMA 193 (HC) at [48].