



**DATE:** 12 April 2023

**TO:** Rebecca Perrett (Acting Manager, Fast-track Consenting Team)

**FROM:** Philip Brown (Director, Campbell Brown Planning Limited) and Michelle Kemp (Principal Planner, Campbell Brown Planning Limited)

**SUBJECT:** **FURTHER INFORMATION RESPONSE – WHENUAPAI BUSINESS PARK EXTENSION PROJECT**

Dear Rebecca,

I refer to your email detailing a request for further information received 28<sup>th</sup> March 2023.

This letter serves as a response to those requests, and is supported by the following accompanying documents, which should be read in conjunction with this letter:

Name	Author
OIO Variation Application email - update	Deirdre Norris, Partner, Glaister Ennor
43315-DR-PLN-1210-B - Scheme	Cato Bolam

Our responses in reply to the comments in your letter are as follows:

- 1. In the application, you anticipate Overseas Investment Office (OIO) variation consent will be approved in the near future. Could you provide the status of this application and the estimated timing of decision from the OIO?*

NCL's purchase of 73 Trig Road was settled in May 2022 and was made under Overseas Investment Office Standing Consent 201900072. The purchase of 155-157 Brigham Creek Road (Lots 200 & 300) was made under OIO Consent 201900410 and settled in October 2020. However, under the OIO Consent 201900410, Lots 200 & 300 were intended to be developed for residential purposes.

An application was submitted to the Overseas Investment Office on 25 January 2023 for a variation to the consent to enable the land to be used for the proposed light industry purposes. The application has been accepted as being complete. We understand that there has been some delay with processing the application due to staff turnover and a change in case officer. Glaister Ennor received an update on the application on 3 April 2023 (see attached OIO Variation Application email - update). The new case officer anticipated that the variation will be processed this month and the next step will be issuing the draft conditions. As such, the variation consent will not inhibit the proposed development taking place on the site.

2. *A land covenant is registered on the title of 155-157 Brigham Creek Road in favour of Spark New Zealand Trading Limited and we understand that you are seeking this land covenant to be removed from the title. Will the covenant being in place potentially impact timing or delivery of the project?*

The land covenant registered on the title of 155-157 Brigham Creek Road is in favour of Spark New Zealand Trading Limited. The land covenant imposes five obligations on the owner of 155-157 Brigham Creek Road (Lot 2 DP 334953). These obligations are reproduced below from the covenant document:

- 1.1 **THAT** the Transferee will not object to any application which the Transferor may make under any Act (including the Resource Management Act 1991 or any substituted enactment), Regulation or bylaw with respect to any proposed use or development of the dominant land so long as such use or development is for the purposes of telecommunication or any use related to or touching upon its use for telecommunication.
- 1.2 **THAT** the Transferee will not take any steps to enforce in any way, whether by Court proceedings or otherwise howsoever, any cause of action or other right or remedy which the Transferee might have arising from the use of the dominant land by the Transferor in terms of the acknowledgement and agreement set out above.
- 1.3 **THAT** the Transferee will not grant any lease, licence or easement with respect to any part of the servient land or any building erected on it to any other party which authorises the operation of any equipment which causes interference (as defined in s2 of the Radiocommunications Act 1989) with the operation of the Transferor's telecommunication equipment on the dominant land.
- 1.4 **THAT** the Transferee will not operate any equipment on the servient land or any building erected on it which causes interference (as defined in s2 of the Radiocommunications Act 1989) with the operation of the Transferor's telecommunication equipment on the dominant land.
- 1.5 **THAT** the Transferee will not grow or permit to be grown any tree, shrubs or bushes of any description or build any structure on the servient land which will interfere with the operation of the Transferors telecommunication equipment on the dominant land.

Clause 1.1 above is simply a 'no complaints' covenant, intended to prevent any objections to applications that provide for use or development of the Spark site for telecommunications purposes. Clause 1.2 is similar, preventing any enforcement action being taken against Spark for using the site for its telecommunications purpose.

Clauses 1.3 and 1.4 prevent the owner of 155-157 Brigham Creek Road from using its site in a way that causes interference with Spark's telecommunications equipment. In the context of this clause, the term 'interference' (as defined in the Radiocommunications Act 1989) means interference by radio waves rather than any broader meaning.

Clause 1.5 prevents the owners of 155-157 Brigham Creek Road from growing trees or establishing buildings that will interfere with the operation of Spark's telecommunications equipment.

None of these restrictions will prevent the establishment of industrial buildings and development on the applicant's land, and there is no need to cancel or remove the covenant in order to allow that to happen.

However, the land covenant will need to be *partially* surrendered for just that part of 155-157 Brigham Creek Road that is to contain the new public road. That is because the Auckland Council will not accept

road to vest that is subject to any covenant or other interest. The Council's position accords with sections 238 and 239 of the RMA and is consistent with section 224(b)(i) of that Act.

The applicant has been liaising with Spark throughout the FTCA process to keep its representatives informed of what is proposed. Spark has advised the applicant (in response to the Whenuapai Business Park referred project) that it will agree to surrender the covenant from the proposed road to vest:

*"If the project proceeds, and the road as shown on Drawing 44315-DR-PLN-1250-G dates April 2021 'Scheme Plan Rev G' to the East of Lot(s) 20 & 200, and to the West of Lot(s) 1-8 & 300 is constructed and vested via s238 of the Resource Management Act to the Territorial Authority ("Parcel"), Spark can confirm the land covenant referred to above could be removed from the Parcel."*

Spark's agreement in this regard is not unexpected because the use of the road cannot give rise to any of the constraints on the use of the Spark site that the covenant is intended to prevent.

In the highly unlikely event that Spark altered its view and subsequently opposed removing the covenant from the area to be vested as road, NCL would have recourse to seek amendment of the covenant through the High Court. NCL has recently had a covenant on land in Trig Road modified by an order of the High Court. The Court ordered that the covenant be modified in exactly the same manner as would be required to enable the road to be vested on 155-157 Brigham Creek Road (please refer to **attached** Court order). For the reasons set out above, it is considered that the Spark land covenant is not a barrier to referral of the project.

3. *Auckland Transport has lodged a Notice of Requirement (NoR) with Auckland Council for a new designation to upgrade the Brigham Creek Road corridor. The NoR affects a small part of the frontage of 155-157 Brigham Creek Road. Would the NoR have any impact on the scope, timing and delivery of your project? Confirm if there is any overlap between the NoR application and the proposed development at 155-157 Brigham Creek Road.*

Substantial consultation was undertaken with Te Tupu Ngātahi Supporting Growth and Auckland Transport regarding the Brigham Creek widening and its intersection with the proposed roads associated with the Whenuapai Business Park application. Consultation has been ongoing since 2019.

We note that the indicated timeframe for construction of the Brigham Creek Road widening and upgrade project is in the next 10 to 30 years.

The Lot boundaries of Lot 200 and 300 have been adjusted to reflect the Brigham Creek Road (NoR W3) Notice of Requirement lodged with Auckland Council. The boundaries were recently adjusted in response to comments on the Whenuapai Business Park application. See **attached** drawing 43315-DR-PLN-1210-B Scheme which includes adjustments to reflect NoR W3. We note this includes an additional area to allow for the construction and vesting of raingardens on Brigham Creek Road.

The proposed transport network for the WBP subdivision has been developed to align with Te Tupu Ngātahi Supporting Growth's North West Indicative Strategic Transport Network plan (April 2022). The internal transport network allows for surrounding development to occur and achieve these transport network goals.

The NoR will not have any impact on the scope, timing, and delivery of the project, nor is there any overlap between the NoR application and the proposed development that would have any material impact on the delivery of the project.

I trust that this information is sufficient to address the above issues. We are happy to discuss further if necessary.

Yours sincerely,



**Philip Brown**  
Director / BTP/ MNZPI  
Campbell Brown Planning Limited



**Michelle Kemp**  
Principal Planner / BSocSc (Hons) MEP / MNZPI  
Campbell Brown Planning Limited