

DATE: 13 November 2021
TO: Sarah Frame (Manager, Fast-track Consenting Team)
FROM: Philip Brown (Director, Campbell Brown Planning Limited)
SUBJECT: **FURTHER INFORMATION RESPONSE – WHENUAPAI BUSINESS PARK**

I refer to your written request for further information under section 22 of the COVID-19 Recovery (Fast-track Consenting) Act 2020. Responses to the particular further information requests are set out below. I have also reproduced each request for clarity, numbered and in italics.

1. How do you propose to protect the riparian margins within the site?

The riparian margins on the site will be protected through consent notices attached to the titles of the affected lots under s221 of the RMA. The proposal includes revegetation of the riparian margins in accordance with the standards that would apply under PC5. Land comprised in the riparian margins will continue to be privately owned, but the consent notices would impose ongoing obligations to maintain the planted vegetation cover.

2. How much time do you expect to save by using the FTCA process?

The Auckland Council's statutory process to urbanise land at Whenuapai has been very slow. PC5 was publicly notified on 21 September 2017 and the plan change process is still far from complete. Attached are two updates from the Council suggesting that public notification of Variation 1 to PC5 would occur in May 2021, and subsequently changed to July 2021. Notification is yet to occur and the timing of that remains unclear in the absence of any further updates from the Council. It now seems unlikely that Variation 1 will be notified before the end of the year.

I have attached a letter from counsel for NCL to the PC5 Independent Hearing Commissioners setting out its frustrations with the delays, together with a copy of the resultant direction from the PC5 Independent Hearing Commissioners that established a timeframe for the Council to advance the process. The Commissioners' direction expressed disappointment that PC5 had been delayed for so long, noting that the need for housing and urban development areas in Auckland is a national priority. Despite that, the Council has failed to achieve the Commissioners' timeframe.

Attached also is a determination from the Council doubling the two-year statutory timeframe for PC5 under s37 of the RMA, although the extended four-year period has now also been exceeded.

The best-case scenario for advancement of PC5 to an operative date relies on Variation 1 being publicly notified in the first few months of 2022. Allowing for the submission and further submission periods, and time to enable preparation for the matter to be brought to a hearing, that would suggest the hearing being reconvened in the second half of 2022 with a decision released by the fourth quarter. Assuming no appeals, PC5 might be operative by the end of 2022 at the earliest. A resource consent application would follow that, meaning a consent might be obtained by early or mid-2023.

However, that timeframe is not consistent with the speed of the process experienced to date and NCL has no confidence that the operative date for PC5 might not be well into 2023 or even subsequent years if there are appeals that hold up the plan change being made operative.

Conversely, NCL considers that a resource consent for the project is achievable by the middle of 2022 under the FTCA. As a minimum, that would save 9-12 months of time. However, it is likely that the FTCA process would save at least 18 months and possibly much longer. More importantly to NCL, the FTCA provides the necessary certainty in terms of process and timeframes that is required by developers in order to plan and execute substantial projects of this nature.

3. How will the project contribute to social and cultural wellbeing?

The project's primary contribution to social and cultural wellbeing will be through the provision of employment and business opportunities, and particularly in a location close to substantial residential growth areas and freight networks.

The proposal will add more jobs to the economy. Those jobs will make a small but worthwhile contribution to lowering unemployment rates and increasing employment choices. Stable employment is generally acknowledged as a factor in an individual's feeling of worth and purpose, and provides income to fund essential personal and family living costs and to broaden lifestyle options and opportunities. Consumer spending that is activated by employment income will flow through into business growth and economic prosperity.

Perhaps most importantly, from a social perspective, is the proximity of the employment land to the current and future residential area in Whenuapai. The provision of job opportunities close to the existing and proposed Whenuapai residential area will allow some of the labour force in the Whenuapai Business Park to benefit from a short commute to and from work. The benefits of that are many, but primarily it enables working parents to spend greater time with family or in their community rather than being separated by the time invested in a substantial commute.

Furthermore, the location of the site close to the SH18 freight network will enable the efficient movement of goods to retailers or to the end consumer and will obviate the need for heavy goods vehicles to pass through the surrounding residential community.

4. How you received written approval from the New Zealand Defence Force, as required by Auckland Council designation 4311?

Written approval is not required from the New Zealand Defence Force under Designation 4311. The designation only requires approval from NZDF for land use and subdivision directly within the lower part of the runway approach paths, generally within 1km of the runway. The requirement is illustrated in Drawing No. 9B-2, which is included in **Figure 1** below, and the site is outside of the identified area.



Figure 1 – Land use and subdivision subject to NZDF approval (Designation 4311, AUP)

The relevant condition on Designation 4311 is as follows:

1. The approval in writing of the New Zealand Defence Force is required prior to the erection of any building, change in use of any land or building, or any subdivision of land, and prior to any building or resource consent application for such works/activities, within the areas of the designation shown on the planning maps as 'land use and subdivision subject to NZDF approval'. These areas are generally within 1,000 metres of the runways.

5. Will the consent notices on the titles need to be cancelled to enable the residential component of the project to progress? If these consent notices are not cancelled do you consider that the residential public benefits will be realised?

There is a consent notice on the title of 155-157 Brigham Creek Road (Lot 2 DP 334953). The consent notice was placed on the land in 2004 through a subdivision consent.

The consent notice also applies to 153 Brigham Creek Road (Lot 1 DP 334953), which is the land adjacent to the site that is owned by Spark and operated as a telecommunications facility. The consent notice prevents any residential building being established on 153 Brigham Creek Road.

The consent notice does not prevent residential buildings being established on NCL's site at 155-157 Brigham Creek Road. With regard to that site, the consent notice states that the owner shall not:

Place, erect, construct or permit to remain on any part of the land described in the Third Schedule hereto any residential building without first providing to the Waitakere City Council an acoustic engineer's report showing that the District Plan noise controls and/or any approved New Zealand noise control standard adopted by the Waitakere City Council will be met at any point of measurement within the proposed residential building and that such residential building is constructed in accordance with such report to the satisfaction of the Waitakere City Council.

The consent notice therefore simply imposes a requirement for any residential buildings to be acoustically insulated to ensure that environmental noise received within the building meets Council's noise standards. This restriction is intended to mitigate noise generated by the NZDF airbase operations and mirrors expectations that apply to the land through the AUP Aircraft Noise Overlay and the proposed engine testing noise contours under PC5/Variation 1.

The consent notice restriction will therefore not prevent residential development of the site. It is entirely consistent with the applicant's understanding of its obligations to acoustically insulate future dwellings on the site.

6. Do you anticipate that the covenant in favour of Spark New Zealand Trading Limited may present a barrier to project referral? Will this covenant need to be cancelled before the project can be referred?

The land covenant in favour of Spark New Zealand Trading Limited 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 residential dwellings 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 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. A copy of recent correspondence regarding the partial surrender of the covenant is attached for information. The applicant is confident that Spark will agree to surrender the covenant from the proposed road to vest 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 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 covenant is not a barrier to referral of the project.

I trust that this further information is of assistance. Please contact me if any additional clarification is required.

Philip Brown
Director
Campbell Brown Planning Limited

Glaister Ennor

Barristers | Solicitors | Notary Public

21 December 2020

For Email Transmission

Email s 9(2)(a)

Independent Hearing Commissioners for Plan Change 5 (Whenuapai)
C/- Julie McKee - Hearings Manager
Auckland Council
Private Bag 92300
Victoria Street West
Auckland 1142

For: Robert Scott, Juliane Chetham, Gavin Lister and Councillor Chris Darby

Norfolk House
18 High Street
PO Box 63
Shortland Street
Auckland 1140
New Zealand
DX CX 10236

T +64 9 356 8243
F +64 9 356 8244
www.glaister.co.nz

Plan Change 5 (Whenuapai) to Auckland Unitary Plan Operative in Part

- 1 Glaister Ennor and Russell Bartlett QC act for Neil Construction Limited, a submitter on Plan Change 5 (Whenuapai) to the Auckland Unitary Plan Operative in Part.
- 2 Under section 34A of the Resource Management Act 1991 (**RMA**), the Auckland Council appointed a panel of independent hearing commissioners, Robert Scott (Chair), Juliane Chetham, Gavin Lister and Councillor Chris Darby, to hear and determine submissions to Plan Change 5.
- 3 The Panel has therefore been delegated authority to:
 - (a) hold a hearing into submissions on Plan Change 5 (RMA, clause 8B of schedule 1); and
 - (b) give a decision on the provisions of Plan Change 5 and matters raised in submissions on Plan Change 5 (RMA, clause 10 of schedule 1).
- 4 Under clause 10(4) of schedule 1 of the RMA the Panel is required to give its decision no later than 2 years after the Plan Change 5 was notified. Plan Change 5 was notified on 21 September 2017. The deadline for giving a decision expired on 21 September 2019 – more than 15 months ago.
- 5 Our client is increasingly concerned that Plan Change 5 has been left part-heard since May 2018, with no discernible change in circumstances for more than 2.5 years. We are confident that other submitters on Plan Change 5 share our client's position on this matter.
- 6 While the Council's Planning Committee expressed a preference in July 2020 of having a proposed but not yet notified variation to Plan Change 5 heard and determined with Plan Change 5 to enable one integrated decision to be issued, the Council's preference does not bind the independent

248184-3778 2196281v1

hearing commissioners. The publicly available minutes of the Planning Committee's meetings do not disclose the scope or purpose of the proposed variation, and Council officers have also not been forthcoming on that either. It is for the Panel to determine procedural issues relating to the hearing of Plan Change 5, not the Council.

- 7 The Panel was appointed and delegated the necessary authority to hear and determine Plan Change 5.
- 8 Detailed expert evidence and submissions from submitters have been heard and the scope of submissions is sufficient to make a decision.
- 9 We request that the Panel reconvene the hearing on Plan Change 5 for the purpose of seeking updating or status reports from the Council and all submitters as to their readiness to proceed with the hearing and set a timetable for the resumption of the hearing.
- 10 We also request that the Panel form a view as to the justification, if any, for a further or continuing adjournment, given the clear finding by the Environment Court on 16 September 2019 that condition 1 of Designation 4310 applies to all noise generated from aircraft operations at Whenuapai Airbase including noise from engine testing (see *Neil Construction Limited v Auckland Council* [2019] NZEnvC 154) which supports our client's submission and other submitters' submissions on the effect of the existing designation.
- 11 Our client looks forward to receiving the Panel's advice of the resumption of the hearing.

Yours faithfully
Glaister Ennor

Per:

Vicki Toan

Partner

s 9(2)(a)

DDI +64 9 914 3501

s 9(2)(a)

CC **By Email**

Russell Bartlett QC, Shortland Chambers, Auckland

Proposed Plan Change 5 Whenuapai

Resource Management Act 1991 (RMA) - Section 37 extension of time limit for Proposed Plan Change 5 - Auckland Unitary Plan Operative in part.

Council publicly notified Proposed Plan Change 5 on 21 September 2017. In May 2018 the hearing of submissions was adjourned to enable further technical work to be undertaken. This technical work was interrupted in 2019 by an Environment Court declaration process relating to engine testing noise at Whenuapai Airbase. The technical work was subsequently completed in March 2021. This technical work will result in proposed planning provisions and zoning applying to land within the Proposed Plan Change area that was not reasonably anticipated when Proposed Plan Change 5 was publicly notified. Consequently a variation is required to enable all those affected to make a submission on the proposed planning provisions and zoning. These two events have meant that the requirements of Clause 10(4)(a) to issue the decision on Proposed Plan Change 5 within two years of the notification date has passed.

As Proposed Plan Change 5 was publicly notified before Clause 10A of the First Schedule of the Resource Management Act came into force, Clause 10A does not apply. Consequently the Minister for the Environment was not required to approve an extension of time in this instance.

Section 37(A) of the RMA gives a local authority the power to double the time period specified, whether or not the time period has expired. In deciding to double the time frame, the council has to consider the interests of directly affected persons (the landowners and submitters), the interests of the community in being able to see an adequate assessment of effects (in due course), and the duty to avoid unreasonable delay.

In this case further time is required to enable the Hearing Commissioners to have all relevant technical material available to them. Submissions may be received from the public in response to the proposed planning provisions and zoning, allowing those affected by the variation to represent their interests. Due to the Council's current financial constraints, the Council and Auckland Transport also have concerns about infrastructure funding implications to the Council and its Council Controlled Organisations arising from the implementation of Proposed Plan Change 5. Council wants to be sure that these matters have been appropriately assessed.

Determination

I hereby exercise the Council's power to extend the time period under sections 37 and 37A of the RMA by doubling the two year time limit for making a decision on a proposed plan change. The original deadline of 21 September 2019 becomes 21 September 2021.

This power is exercised under delegated authority in accordance with section 34A of the RMA and the delegations set out in the document "Auckland Council Delegations: Resource Management Act 1991 and Local Government (Rating) Act 2002" Schedule 2A (updated February 2017).

In exercising this power, the matters set out in Section 37A(1)(a-c) of the RMA have been taken into account. Auckland Council has considered the interests of land owners and the public and in particular the need for the public to have a comprehensive understanding and assessment of the effects of the Proposed Plan Change, and also Council's duty under section 21 of the RMA.



Warren MacLennan
Manager, Regional, North, West and Islands Planning
Plans and Places
Chief Planning Office

Date: 21 June 2021

Released under the provision of
the Official Information Act 1982

IN THE MATTER

of the Resource Management Act
1991

AND

PLAN CHANGE 5

Whenuapai Plan Change to Auckland
Unitary Plan Operative in part

DIRECTION 5 OF THE HEARING PANEL OF COMMISSIONERS: PLAN CHANGE 5

1. The Auckland Council (the Council) has appointed Independent Hearing Commissioners Robert Scott (Chair), Juliane Chetham, Gavin Lister and Councillor Chris Darby pursuant to section 34A of the Resource Management Act 1991 (RMA), to hear and determine submissions to Plan Change 5 (**PC5**).
2. A hearing was held in May 2018 and was adjourned to enable officers to provide more information on several matters including infrastructure funding mechanisms, aircraft engine noise testing, and any implications of a reported planned relocation of the Orion squadron to Ōhakea (Directions 2 and 3). The hearing was scheduled to resume on 24 August 2018 to receive this information and Council officers' closing statement.
3. On 10 August 2018 the scheduled hearing to hear the Council officer's response to our questions and their closing statement on evidence presented at the hearing, as set out in our Direction 2 (June 2018) was deferred and the hearing adjourned to allow for additional time to model noise data received from the New Zealand Defence Force (**NZDF**) (Direction 4). Since this time there has also been declaration proceedings before the Environment Court regarding the issue of whether engine testing by NZDF aircraft at RNZAF Base Whenuapai constituted "aircraft operations" as set out in Condition 1 of Designation 4310, and a subsequent issuing of a certificate under section 4 of the RMA by the Minister of Defence exempting such engine testing noise from the RMA. During the adjournment we were also advised that the Council was progressing a variation to PC5 to address issues arising since the adjournment including new noise contours for aircraft engine testing which had implications for the zoning as initially proposed in PC5.
4. On 21 December 2020 the Commissioners received correspondence from Neil Construction Limited (submitter 46 to PC5) raising concerns regarding the progress of PC5 since the August 2018 adjournment. In response Mr. Eryn Shields - Team Leader, Regional, North, West and Islands Planning, Plans and Places provided a memorandum dated 22 January 2021 summarising the events since the last adjournment and advising that Council proposed to progress a variation and requested a reconvened hearing to present information to assist the Commissioners.

5. The Commissioners agreed that a hearing should be convened as soon as possible to update the Commissioners and a hearing was held on Tuesday 16 March 2021. Evidence was also pre-circulated by Todd Oliver Elder – Policy Planner on behalf of Auckland Council. The statement by Mr. Elder addressed the following matters:
 - a. A brief discussion on the chronology of events since the adjournment of the PC5 hearing in May 2018;
 - b. An outline of the process options available to the Panel in 2021, and the procedure for the Council's reply;
 - c. Discussion on two matters for which there is previously incomplete evidence before the Panel, being:
 - i. the funding and financing of infrastructure; and
 - ii. the management of the effects of aircraft engine testing noise at RNZAF Whenuapai Airbase; and
 - d. A discussion on the content of a variation to PC5 and the timeframe for a variation, including a draft timetable for the notification of a variation to PC5.
6. Mr Elder's evidence was supported by recent noise modelling data and assessment prepared by Tonkin and Taylor Limited on engine testing noise at RNZAF Base Whenuapai which we understand will help inform the preparation of the variation.
7. All persons that made submissions were invited to attend and were given an opportunity to speak following the statement by Mr. Elder.
8. Mr Bartlett QC, who is Counsel for several of the affected landowners, informed us that the new noise contours may raise a jurisdictional issue in proceeding with PC5 in its current form. We were also informed by Mr Elder that information on infrastructure funding (including the new Long-Term Plan and Auckland Transport Alignment Project funding) should be available to the Panel by July 2021.
9. At the hearing all submitters in attendance stated that they supported the preparation of a variation and indicated that the draft timetable, being one that was formulated on a tight adherence to the statutory timeframes, was appropriate. We acknowledge that Neil Construction Limited requested the opportunity to view the draft variation and provide comment to the Council within the timelines of the draft timetable and that Council officers have offered to accommodate this. That said, in the interests of fairness, we consider that any consultation on the draft variation should be made available to all submitters
10. Following a brief adjournment, we confirmed to the parties that we were in favour of continuing the adjournment to allow a variation of PC5 to proceed based on the draft timetable and this direction serves to confirm that finding. We also confirm the following timeline for preparation, submissions and hearing of the variation to PC5:

TIMELINE	
Date	Action
April 2021	Provide Iwi and Local Boards with a copy of the draft PC5 Variation 1 Proposal and draft section 32 evaluation report.
By 30 April 2021	Amend draft proposed Variation and section 32 report to reflect feedback received from iwi authorities and local boards. Engage with submitters on draft provisions.
27 May 2021	Public Notification (20 Working Days) of Plan Change 5 Variation 1
25 June 2021	Submission period closes
22 July 2021	Summary of Decisions Requested are notified for 10 Working Days
5 August 2021	Summary of Decisions Requested further submission period closes
12 August 2021	Hearing dates for variation 1 to PC5 are set by the Panel

11. The Commissioners are disappointed that this matter has been delayed for this length of time, especially since the need for housing and urban development areas in Auckland is a national priority. However, we acknowledge that the issues with this particular plan change are complex and it is important to proceed with the best possible information available to make a robust decision that meets the purpose of the Resource Management Act 1991.

12. If the parties have any questions, please direct these to the HPanel through the hearing advisor – Julie McKee, Hearings Advisor, julie.mckee@aucklandcouncil.govt.nz.


 Robert Scott
 for the Hearing Commissioners

22 March 2021

Memorandum

25 May 2021

To: Commissioners
Robert Scott, Juliane Chetham, Gavin Lister and Councillor Chris Darby

From: Eryn Shields
Team Leader, Regional, North, West and Islands Planning, Plans and Places

Subject: Proposed Plan Change 5 (Whenuapai Plan Change) – Variation 1 Update

1. The purpose of this Memorandum is to update the Panel on the progress that has been made to prepare Variation 1 to Proposed Plan Change 5 – Whenuapai 3 Precinct (PC5) and advise that further time is required to complete the preparation of the Variation.
2. On 22 March 2021 the Panel issued Direction 5 for the matter of (PC5). This followed the reconvening of the hearing to receive an update from Auckland Council and to hear from submitters.
3. The hearing was re-adjourned and the Council has proceeded to prepare a draft Variation to PC5. This was issued on 20 April 2021, and feedback closed on 13 May 2021. Council received 16 items of comprehensive feedback. A list of those that supplied feedback is attached as Appendix 1, and the feedback will be posted on the Council website following approval for this action from the feedback providers. The feedback includes comments on amendments proposed in the draft Variation, requests for additions to the Variation when it is notified, restatements of matters that were previously addressed in original submissions, and feedback on matters unrelated to the draft Variation. Council has also met with a number of those that provided feedback, with the latest of those meetings occurring on Friday 21 May.
4. The feedback on amendments contained within the draft Variation and new requests for amendments will require the Council to undertake a substantial amount of further technical work (mostly related to transport matters) and some advice on some legal matters associated with possible open space zonings. In addition, the matter of the required transport funding for the PC5 area will not be clear until July 2021, following the completion of the Council's Long-Term Plan.
5. These matters are not able to be appropriately addressed in the short amount of time between the closing of the feedback period (13 May) and the notification date (27 May 2021) that was suggested to the Panel on the 16 March 2021.
6. To investigate the matters raised (in particular the transport and legal issues raised) and then produce the outputs of those processes may take more than one month, when combined with Council internal review and sign off processes.
7. I consider that it is appropriate to reset the notification date to late July 2021. I ask patience of the Panel, submitters and other interested parties as we work to address the matters raised. Council may, in some cases, undertake further meetings with the providers of feedback during this time to clarify, confirm and agree matters where possible before notification of the Variation occurs.

Nāku noa, nā



Eryn Shields

APPENDIX 1

List of those that provided feedback

- 1) Herald Island Environmental Group
- 2) Upper Harbour Ecology Network
- 3) Waka Kotahi
- 4) CDL Land New Zealand Limited
- 5) GRP Holdings Limited
- 6) Lee, Lin, Chen
- 7) Queens Home
- 8) Ockleston Family Trust
- 9) Auckland Transport
- 10) Austino
- 11) Spark
- 12) Trig Road Investment Limited & Lichun (Leo) Gao
- 13) Northwest Development Limited
- 14) New Zealand Defence Force
- 15) The Neil Group (feedback #1)
- 16) The Neil Group (feedback #2)

Released under the provision of
the Official Information Act 1982

Memorandum

3 August 2021

To: Commissioners
Robert Scott, Juliane Chetham, Gavin Lister and Councillor Chris Darby

From: Eryn Shields
Team Leader, Regional, North, West and Islands Planning, Plans and Places

Subject: Proposed Plan Change 5 (Whenuapai Plan Change) – Variation 1 Update #2

1. The purpose of this Memorandum is to update the Panel on progress on the development of Variation 1 to Proposed Plan Change 5 Whenuapai.
2. In the Memo to the Panel on 25 May 2021, I provided the following update
The feedback on amendments contained within the draft Variation and new requests for amendments will require the Council to undertake a substantial amount of further technical work (mostly related to transport matters) and some advice on some legal matters associated with possible open space zonings. In addition, the matter of the required transport funding for the PC5 area will not be clear until July 2021, following the completion of the Council's Long-Term Plan.
3. This further technical work continues, but is not completed. This now includes consideration of the implications of the 8 June 2021 Environment Court decision (NZEnvC 082) relating to the implementation of the National Policy Statement on Urban Development. This means that the notification of variation 1 will be further delayed, as Council seeks to resolve those matters.
4. I will update the Panel as soon as I can confirm the notification date for the Variation. Council may, in some cases, undertake further meetings with the providers of feedback during this time to clarify, confirm and agree matters where possible before notification of the Variation occurs.



Nāku noa, nā

Eryn Shields

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE

CIV-2021-404-1499

DUPLICATE

Under Part 19 of the High Court Rules and Sections 316 and 317 of the
Property Law Act 2007

In the matter of the modification of Land Covenant in Transfer C877701.4

Between **Ideal Properties Limited**, a duly incorporated company
having its registered office at 26 Marco Polo Avenue,
Lynfield, Auckland

Applicant

And **Auckland Council**, a territorial authority with its offices at 135
Albert Street, Auckland Central, Auckland

First Respondent

And **Peng Li and Others**

Second Respondents

ORDERS OF DOWNS J

Dated 14 October 2021



Glaister Ennor

Barristers | Solicitors | Notary Public
PO Box 63, Auckland 1140

DX: CX 10236

Phone: (09) 356 8243

Solicitors acting: M Singh / P S Kim

s 9(2)(a)

s 9(2)(a)

ORDERS OF DOWNS J

Before the Honourable Justice Downs, 14 October 2021

After reading the originating application dated 26 July 2021, the affidavit of Trevor David Canty dated 12 July 2021, the affidavit of Philip Michael Brown sworn 14 July 2021, memorandum of counsel for the applicant in support dated 26 July 2021, the joint memorandum of counsel for the applicant and first respondent dated 11 August 2021, the affidavit of service of Georgina Mary Catherine Bayly affirmed 7 October 2021, and the memorandum of counsel for the applicant dated 8 October 2021, and after hearing from M Singh for the applicant, this Court orders:

- (a) The Land Covenant created by Transfer Instrument Number C877701.4 (**Land Covenant**) registered against the land at 94 Trig Road, Whenuapai, Auckland, being Section 2 Survey Office Plan 528987 in Record of Title 869349 (**Burdened Land**) shall be modified by adding the following:

The covenants and agreements set out in this Transfer Instrument:

- (a) *do not in any way apply to any part of the Land that is to be vested, dedicated or otherwise transferred to a local authority as roads or reserves under a resource consent to subdivide the Land; and*
- (b) *shall be deemed to be discharged and of no effect upon registration of any vesting, dedication or other transfer to a local authority under a resource consent to subdivide the Land.*

- (b) The Registrar-General of Land shall, within 5 working days of service of the Court's orders:

- (i) Note against the Record of Title for the Burdened Land that the Covenant has been modified by order (a) of this Court; and
- (ii) Otherwise take all steps to give effect to the Court's orders.

- (c) The applicant has leave to apply by interlocutory application in this proceeding for further orders:

- (i) Should there be technical or administrative difficulties in perfecting matters of title arising from these orders; and/or
- (ii) As may be necessary or appropriate for this or subsequent stages of the subdivision.

Sealed on this 14th day of October 2021

SIONE F.V. FIFITA
DEPUTY REGISTRAR

.....
(Deputy) Registrar of the High Court of New Zealand



LAND COVENANT CORRESPONDENCE – NCL AND SPARK

From: Brendon Ng s 9(2)(a)
Date: 9 November 2021 at 8:11:37 AM NZDT
To: Trevor Canty s 9(2)(a)
Subject: Re: Brigham Creek Road - Whenuapai

Hi Trevor,

Further to correspondence between our external counsel, Spark would be keen for further explanation or basis for the requested surrender of covenant as it relates to the specific areas.

What times would have available at the end of this week, early next week? If you could give a selection of times Friday, Monday and Tuesday, then I can see what could work with our internal team.

Thanks and Regards
Brendon



Brendon Ng
Legal Business Partner (Property)
Spark New Zealand Trading Limited
T +64 9 358 6252 (extn 96252)
s 9(2)(a)
s 9(2)(a)

Level 4 Yellow, Spark City
167 Victoria Street West
Private Bag 92028, Auckland 1010
www.spark.co.nz

From: Anthea Coombes s 9(2)(a)

Date: 13 October 2021 at 2:07:54 PM NZDT

To: Trevor Canty s 9(2)(a)

Subject: RE: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GREE-DMS.FID172306] [GE-DMS.248184.4306.FID1868230]

Hi Trevor,

Yes I would assume so I will confirm with their Solicitor when I send your details to her.

Regards

Anthea Coombes

Partner

s 9(2)(a)

DDI +64 9 356 8249

s 9(2)(a)

F +64 9 356 8244

— Est.1907 —

T +64 9 356 8243 | F +64 9 356 8244 | www.glaister.co.nz

Norfolk House | 18 High Street | PO Box 63, Shortland Street, Auckland 1140, New Zealand | DX CX 10236

From: Trevor Canty s 9(2)(a)

Sent: Wednesday, 13 October 2021 2:06 PM

To: Anthea Coombes s 9(2)(a)

Subject: RE: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GREE-DMS.FID172306] [GE-DMS.248184.4306.FID1868230]

Hi Anthea

I would be very happy to meet with Spark.

I presume that's online.

Trevor Canty
Senior Development Manager
The Neil Group Limited

Level 3, Building B, 8 Nugent Street, Grafton, 1023, Auckland, New Zealand

PO Box 8751, Symonds Street, 1150, Auckland. New Zealand

s 9(2)(a) O: +64 9 918-6565 | W: neilgroup.co.nz

The information transmitted, including attachments, is intended only for the person(s) or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and destroy any copies of this information.

From: Anthea Coombes s 9(2)(a)

Sent: Wednesday, 13 October 2021 11:59 am

To: Trevor Canty s 9(2)(a)

Subject: FW: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GREE-DMS.FID172306] [GE-DMS.248184.4306.FID1868230]

Hi Trevor,

Please see below email I have received from Spark's Solicitor requesting some clarification.

You will note they are happy to meet with you to discuss this.

Would you be agreeable to this and if so are you happy for me to forward on your contact details?

Regards

Anthea Coombes

Partner

s 9(2)(a)

DDI +64 9 356 8249

s 9(2)(a)

F +64 9 356 8244

— Est.1907 —

T +64 9 356 8243 | F +64 9 356 8244 | www.glaister.co.nz

Norfolk House | 18 High Street | PO Box 63, Shortland Street, Auckland 1140, New Zealand | DX CX 10236

From: Beth McAuley s 9(2)(a)
Sent: Wednesday, 13 October 2021 11:31 AM
To: Anthea Coombes s 9(2)(a)
Cc: Doran Wyatt s 9(2)(a)
Subject: RE: Bringham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GE-DMS.248184.4306.FID1868230] [GREE-DMS.FID172306]

Hi Anthea,

Further to the below, Spark have queried whether your client is able to provide any further explanation or basis for the requested surrender of the covenant as it relates to the specific areas.

Our client's operational team have also indicated that they would be happy to meet with your client to discuss the matter directly, if that would be helpful. If so, please let me know your client's contact details and I will pass them on to Spark.

Kind Regards,

Beth McAuley | Senior Associate

DDI +64 4 494 8845 | s 9(2)(a) www.greenwoodroche.com

This email is confidential and may be subject to legal privilege. If you are not the intended recipient of this email, please notify us immediately and then delete this email. We do not accept any responsibility for any computer viruses.

From: Beth McAuley

Sent: Tuesday, 12 October 2021 9:22 AM

To: 'Anthea Coombes' s 9(2)(a)

Subject: RE: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GE-DMS.248184.4306.FID1868230] [GEE-DMS.FID172306]

Hi Anthea,

Not as yet – I have followed up with our client this morning to request an update.

Kind Regards,

Beth McAuley | Senior Associate

DDI +64 4 494 8845 | s 9(2)(a) | www.greenwoodroche.com

This email is confidential and may be subject to legal privilege. If you are not the intended recipient of this email, please notify us immediately and then delete this email. We do not accept any responsibility for any computer viruses.

From: Anthea Coombes s 9(2)(a)

Sent: Tuesday, 12 October 2021 9:04 AM

To: Beth McAuley s 9(2)(a)

Subject: RE: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GREE-DMS.FID172306] [GE-DMS.248184.4306.FID1868230]

Hi Beth,

Have you been able to obtain any instructions from your client as yet?

Regards

Anthea Coombes

Partner

s 9(2)(a)

DDI +64 9 356 8249

s 9(2)(a)

F +64 9 356 8244

— Est.1907 —

T +64 9 356 8243 | F +64 9 356 8244 | www.glaister.co.nz

Norfolk House | 18 High Street | PO Box 63, Shortland Street, Auckland 1140, New Zealand | DX CX 10236

From: Beth McAuley s 9(2)(a)

Sent: Tuesday, 5 October 2021 12:44 PM

To: Anthea Coombes s 9(2)(a)

Cc: Doran Wyatt s 9(2)(a)

Subject: RE: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GE-DMS.248184.4306.FID1868230] [GREE-DMS.FID172306]

Thanks Anthea, we have passed that information on to our client, and we'll be in touch.

Kind Regards,

Beth McAuley | Senior Associate

DDI +64 4 494 8845 | s 9(2)(a) | www.greenwoodroche.com

This email is confidential and may be subject to legal privilege. If you are not the intended recipient of this email, please notify us immediately and then delete this email. We do not accept any responsibility for any computer viruses.

From: Anthea Coombes

Sent: Tuesday, 5 October 2021 11:05 AM

To: Beth McAuley

Cc: Doran Wyatt

Subject: RE: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GREE-DMS.FID172306] [GE-DMS.248184.4306.FID1868230]

Hi Beth,

Please see our clients comments below in red in respect of your queries.

Let me know if you require any further information.

Regards

Anthea Coombes

Partner

s 9(2)(a)

DDI +64 9 356 8249

s 9(2)(a)

F +64 9 356 8244

___ Est.1907 ___

T +64 9 356 8243 | F +64 9 356 8244 | www.glaister.co.nz

Norfolk House | 18 High Street | PO Box 63, Shortland Street, Auckland 1140, New Zealand | DX CX 10236

From: Beth McAuley s 9(2)(a)
Sent: Monday, 4 October 2021 5:12 PM
To: Anthea Coombes s 9(2)(a)
Cc: Doran Wyatt s 9(2)(a)
Subject: Brigham Creek Road - Whenuapai - Spark New Zealand Trading Limited [GREE-DMS.FID172306]

Hi Anthea,

We act for Spark New Zealand Trading Limited in the above matter, and understand that you act for an adjoining landowner, Neil Construction Limited.

Our client has passed on the scheme plan for your client's proposed subdivision. To enable our client to consider your client's request for the partial surrender of the land covenant in transfer 6085470.1, can you please confirm:

1. what proposed Lot 300 is intended to be used for; Lot 300 is to be developed with housing at a density to be determined after the Variation to Plan Change 5 is notified. At present our expectation is that this will be Single House Zone
2. that the area which appears to be road the scheme plan is intended to vest, rather than be held as a jointly owned accessway or similar Yes this is Road to Vest; and
3. what proposed Lots 400 and 401 are intended to be used for, and whether your client will be seeking a partial surrender of the land covenant as it relates to those lots. We initially proposed that these vest as Reserve but Auckland Council is not willing to acquire them. It's most likely they will be either road reserve or retained as part of Lot 300 (i.e. they are unlikely to get separate titles and would be amalgamated with land on the other side of the stream). They are not permitted to have direct vehicle access off Brigham Creek Rd as that will become an Arterial Road with limited access. It would be expedient for the covenant to be uplifted from all land east of the new "Road to Vest" as the basis of ownership/vesting of the various components (riparian margin and excess land) is still unknown and will be subject to the terms of the eventual resource consent.

We look forward to hearing from you.

Kind Regards,

Beth McAuley | Senior Associate

DDI +64 4 494 8845 | s 9(2)(a) www.greenwoodroche.com

This email is confidential and may be subject to legal privilege. If you are not the intended recipient of this email, please notify us immediately and then delete this email. We do not accept any responsibility for any computer viruses.
