From:	Sean Stirling
To:	Adonica Giborees
Subject:	RE: Summary of issues raised by community in respect of proposed helipad at38 Rawene Avenue, Westmere (LUC60389929)
Date:	Monday, 19 August 2024 12:07:40 pm
Attachments:	image001.gif ATT00001.gif Letter addressing issues raised by public.pdf

Hi Adonica,

Thank you for providing your summary of the key matters raised by community members with respect to the Proposal and the three documents provided to Council by Quiet Sky Waitematā Society Inc (QSW). The Applicant appreciates the opportunity to review this information and provide a response to Council by way of the attached letter prepared by ChanceryGreen.

By way of summary, the response outlines that the AEE and other application material comprehensively address:

1. The correct application of the RMA notification provisions; and

2. All relevant matters relating to the substantive decision on the application under s104 of the Act, including the adverse effects of the Proposal and the applicable planning framework.

With respect to consideration of the applicable planning framework, I note that QSW asserts in Paragraph 26 of their letter that the proposal *"fails to meet the AUP objective E25.3(5)*" which relates to preventing significant noise-generating activities other than roads and railway lines from establishing in or immediately adjoining residential zones. QSW goes on to declare the Applicant's assessment of the relevant objectives of the AUP as "*misleading and disingenuous at best*".

Firstly, it should be clarified that E25.3(5) is not an objective, but rather a policy that seeks (alongside 11 other policies) to achieve the outcomes of the objectives contained in Chapter E25 (Noise and Vibration) of the AUP. The two Noise and Vibration Objectives that are of relevance to the proposal are Objectives E25.2(1) and E25.2(2). These seek to protect people and the amenity values of residential zones from unreasonable levels of noise and have been specifically addressed by the application.

Whilst it is acknowledged that the prevention of *"significant noise-generating activities"* (an undefined term) is a relevant component of the collective policy framework for achieving the noise and vibration objectives of Chapter E25, it must be considered in the context of other relevant policies. This includes for instance, Policy E25.3(1) which directs the plan to "*set appropriate noise and vibration standards to reflect each zone's*

function and permitted activities, while ensuring that the potential adverse effects of noise and vibration are avoided, remedied or mitigated". The application demonstrates compliance with the permitted noise and vibration standards of the AUP for activities in residential zones, clearly establishing that the proposal is consistent with the relevant objectives as identified in the information provided to date.

Overall, we consider that the application documents provide a comprehensive and robust basis for the decision-maker to grant consent for the Proposal on a non-notified basis.

Furthermore, the matters raised in your email on 6 August 2024, including the QSW documents, do not raise any issue constituting a material "gap" in the application or any material issue as to why the necessary resource consents should not be granted on a non-notified basis.

We encourage you to now proceed with a notification determination.

Kind regards,

Sean Stirling

Sean Stirling
Senior Consultant

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www.mitchelldaysh.co.nz

From: Adonica Giborees <adonica.giborees@aucklandcouncil.govt.nz>
Sent: Tuesday, August 6, 2024 5:15 PM
To: Sean Stirling <sean.stirling@mitchelldaysh.co.nz>
Subject: Summary of issues raised by community in respect of proposed helipad at38 Rawene Avenue, Westmere (LUC60389929)

Hi Sean,

Following correspondence with Phil Mitchell, please see below a summary of key matters raised in correspondence received by Council from community members. These will be addressed in the planning report where they are relevant to the resource consent application and resource management matters.

- Refer to **attached** documents in respect of third-party technical reports commissioned by community members.

- Westmere is a ‘tranquil’, ‘peaceful’, ‘quiet’, and ‘suburban’ residential neighbourhood. Private helicopter use will detract from those attributes and is inappropriate within this setting.

- The proposed helipad will be located on a prominent headland, meaning visual and noise effects will be experienced far beyond adjacent sites.

- Acoustic effects on the wider neighbourhood and users of Cox’s Bay and the Reserve will be highly disruptive, also noting the amplifying effect of the enclosed bay landform and tidal mudflats.

- Residents did not expect to be affected by private helicopter use when purchasing properties in this area, would otherwise have bought elsewhere.

- There is a need for peaceful open spaces like Coxs Bay Reserve as Auckland intensifies, noting that Westmere is earmarked for intensification. Helicopter operations will detract from the peacefulness of this environment.

- Non- or limited notification will not uphold natural justice in this situation, noting:
  - The extent of public opposition arising from beyond immediate neighbours (some responses from visitors to Westmere and residents of neighbouring suburbs such as Grey Lynn, Ponsonby and Herne Bay).
  - The likelihood of adverse effects on those beyond immediate neighbours (such as those with properties across Coxs Bay, recreational users of the Bay and Reserve, etc).

- This proposal proposes a highly inequitable distribution of costs and benefits, with a small number of people (the applicant’s family) benefiting to the detriment of many others.

- Helicopter operations in this area poses a safety risk to users of Cox’s Bay and Cox’s Bay Reserve (arising from factors such as downdraft), including the Sea Scout’s Club, kayakers, ‘explorers’, sports activities, and other recreational users.

- Helicopter operations are a substantial risk within a built-up residential area, noting the widespread damage if there were an accident.

- The proposed activity will impose intolerable noise levels/acoustic effects within a quiet residential neighbourhood; these may negatively impact on the mental health of those affected.

- The applicant’s ecology and acoustics reports are flawed/inadequate, downplaying or failing to address the importance of the site to birds and the likely effects of the activity on this habitat, and the severity of acoustic effects.

- Effects on protected/notable trees within/adjacent to the site.

- Effects on birdlife and other fauna, for which Cox’s Bay and Meola Reef (SEA) are a feeding and nesting habitat. These include endangered species. Such effects

mean the proposed activity is inconsistent with the NZCPS.

- Wildlife within Cox's Bay is part of the inner harbour ecosystem, effects on immediate habitat need to be considered within this wider context.

- Significant community work has gone into protecting and promoting birdlife within the area, which will be put at risk by this proposal.

- 'Floodgates' argument: granting this application will encourage further applications for helipads/helicopter operations within neighbouring suburbs and the wider Waitemata Harbour. If granted, it will be difficult for Council to decline subsequent applications. This risks the harbour becoming a 'highway for helicopters'.

- The proposed activity is contrary to Council's Climate Action Plan and other commitments relating to reducing greenhouse gas emissions, fossil fuel use, etc.

- It undermines Council's encouragements that people use public transport, suggesting one rule for some and another for the well-resourced.

- Application should be processed as a Non-Complying activity, not Restricted Discretionary as requested by the applicant.

- AUP should be changed to classify private helipads within the urban area as a prohibited activity.

- No private helicopter landings should be permitted within the urban area, noting that this is the policy of other cities including Sydney.

- Proposed conditions, such as requirement that flights take place two hours either side of low tide, will be difficult to enforce or otherwise monitor compliance, noting 'vagueness' of conditions and Council's resourcing/capacity issues.

- Noise and safety effects arising from helicopter operations may deter people from buying into the suburb, reducing property values for existing residents.

- A private helipad is unnecessary at this location, noting the presence of a designated heliport at Mechanics's Bay, within a relatively short distance of the site.

Kind Regards,

Adonica Giborees | Principal Project Lead
Premium Resource Consents
Auckland Council
Mob +64 27 203 2562
Auckland Council, Auckland House, Level 6, 135 Albert Street
Visit our website: www.aucklandcouncil.govt.nz

Please note I take every second Friday as a scheduled day off. I work from the Albert Street office Monday and Thursday, and from home Tuesday, Wednesday and Friday. I am contactable by phone, email or MS Teams. Thanks!

From: Phil Mitchell <phil.mitchell@mitchelldaysh.co.nz>
Sent: Monday, July 29, 2024 10:37 AM
To: Adonica Giborees <adonica.giborees@aucklandcouncil.govt.nz>
Cc: Sean Stirling <sean.stirling@mitchelldaysh.co.nz>
Subject: RE: Helipad application

Hi Adonica

I'm about to go on leave for 2 months, so can you please now direct all matters related to this application to my colleague Sean Stirling, who I have copied into this email. Sean's phone number is 021 611 377.

Thanks and best regards

Phil Mitchell
Partner

+64 21 966 175 | PO Box 331152, Takapuna, Auckland 0740
www.mitchelldaysh.co.nz

From: Phil Mitchell
Sent: Thursday, July 25, 2024 11:38 PM
To: Adonica Giborees <adonica.giborees@aucklandcouncil.govt.nz>
Subject: Helipad application

Hi Adonica

Confirming our discussion of earlier this week, we would appreciate receiving copies of the communications between community members and Council. Thanks for agreeing to action this.

Re the issue of "special circumstances" our client has sought legal advice on this from Chris Simmons from Chancery Green. I attach that advice for your consideration.

As mentioned on the phone we look forward to receiving your notification decision as soon as possible.

Kind regards

Do you know your flood risk? Check your address and get prepared.

16 August 2024

Attn: Adonica Giborees
Premium Resource Consents, Auckland Council
Private Bag 92300
Victoria Street West
Auckland 1142

BY EMAIL *adonica.giborees@aucklandcouncil.govt.nz*

HELICOPTER APPLICATION AT 38 RAWENE AVE, WESTMERE: ISSUES RAISED BY MEMBERS OF THE PUBLIC

Introduction

1. As you know, we act for the applicants for the resource consent application for helicopter take-offs and landings at 38 Rawene Avenue, Westmere (LUC60389929) (the "Application" and the "Proposal").

2. On 6 August 2024 you provided the Applicants' planners, Mitchell Daysh, with an email summary of issues raised by community members regarding the Proposal, and three documents provided to the Council by Quiet Sky Waitematā Society Inc ("QSW").[1] QSW is a lobby group that *"believes private helipads should not be permitted in the residential suburbs of Auckland City".*[2]

3. The Applicants appreciate the opportunity to provide a response, which we summarise below.

Summary of the Applicants' response

4. The AEE and other application material, including detailed responses to requests for information under s92 of the Resource Management Act 1991 ("RMA"),[3] comprehensively address:

1 QSW letter, *Re: Application for Helipad at 38 Rawene Avenue, Westmere (the Site) (LUC60389929)* (11 June 2024) ("QSW Letter"); Marshall Day Acoustics, *Peer Review of 38 Rawene Avenue Helicopter Landing Area Noise Assessment* (28 May 2024) "Marshall Day Report"); and Alliance Ecology, *Expert Peer Review: Assessment of the Effects of a Proposed Helipad at 38 Rawene Avenue, Westmere, on the Coastal Avifauna* (May 2024) ("Alliance Ecology Report").

2 QSW website.

3 And our legal opinion dated 25 July 2024.

(a) the correct application of the RMA notification provisions in the context of the Application; and

(b) all relevant matters relating to the substantive decision on the Application under s104 of the RMA, including the adverse effects of the Proposal and the applicable planning framework.

5. The Application documents provide a comprehensive and robust basis for the decision-maker to grant consent for the Proposal on a non-notified basis, subject to the conditions proposed by the Applicants.[4]

6. Your email of 6 August 2024, including the QSW documents, does not raise any issue constituting a material "gap" in the Application documents or any material issue why consents should not be granted on a non-notified basis and on the terms sought by the Applicants. All issues raised are adequately addressed in the Application material. For example, our 25 July 2024 legal opinion already addresses the issue of notification, outlining in detail our opinion that non-notification of the Application is appropriate and that that there are no special circumstances in this case, notwithstanding the interest that has been expressed by some members of the public.

7. Considering the above, a line-by-line rebuttal of each matter raised in the correspondence received by the Council is not necessary, and in our view the Council should proceed with its processing of the Application.

8. Notwithstanding the above, we provide a brief response on certain matters below.

Response to Marshall Day and Alliance Ecology reports for QSW

9. The Applicants have provided the Marshall Day Report and the Alliance Ecology Report (prepared for QSW) to their independent acoustic and ecology consultants. Hegley Acoustic Consultants and Bioresearches have confirmed that nothing in the QSW reports demonstrates any material issue with their assessment methodologies or has a material impact on the conclusions in their assessments. Several assertions in the Marshall Day Report and the Alliance Ecology Report are rejected as incorrect or otherwise rebutted by Hegley Acoustic Consultants and Bioresearches.

10. Mr Hegley's opinion is that there is little difference between the Hegley Acoustic Consultants assessment and the Marshall Day Report. This is contrary to the

[4] The information provided is "adequate and reliable": *Bayley v Auckland Council* [2022] NZHC 2632 [115].

"substantial disagreement" characterisation in the QSW Letter.[5] In response to matters raised in the Marshall Day Report, Mr Hegley has confirmed his view that noise effects from the Proposal will be less than minor. In response to comments in the Marshall Day Report that certain calculated noise levels show only marginal compliance, Mr Hegley has made the simple point that marginal compliance is still compliance. With respect to the suggestion that onsite testing of helicopter noise take place, this is both impractical and unnecessary according to Mr Hegley, given the comprehensive acoustic modelling undertaken. Finally, Mr Hegley has identified that parts of the Marshall Day Report stray into aeronautics, outside of the author's expertise.[6]

11. Mr Don has confirmed that there is agreement between his assessment and the Alliance Ecology Report on several key areas; that his assessment conclusions remain unchanged; and that, overall, he considers the Alliance Ecology Report presents a selective/unbalanced summary of the ecology assessment presented with the Application.[7] Mr Don has also confirmed that he rejects any assertion that there were material issues with the bird survey methodology.

Response to the QSW Letter and its description of the legal framework for notification

12. We have serious concerns regarding the QSW Letter's summary of the legal framework for notification. It is unclear whether the letter has been drafted with legal input, and we caution against relying on it. For example:

    (a) A key reason underpinning the position in the QSW Letter that the Application should be publicly notified is that the Proposal is controversial (i.e. subject to opposition from members of the public).[8] Our legal opinion of 25 July 2024 dealt with this matter in detail. In short, the level of asserted 'controversy' regarding an application is not the test for limited or public notification. Nor is the level of opposition to an application by members of the public determinative of notification. The QSW letter is incorrect in stating that non-notification should be reserved for uncontroversial decisions.[9]

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5 Para 21.

6 For example, comments in the Marshall Day Report (page 6, bullet 2) about obstructions near the proposed landing pad and impacts on hover and maneuvering time.

7 With respect to the Alliance Ecology Report's comment that Mr Don has not used the EIANZ Protocol in his assessment, Mr Don has confirmed that the EIANZ Protocol is not mandatory and his assessment – based on basic ecological principles, data, and information – is sound.

8 Refer to the several references in the QSW Letter asserting that the Application should be notified because it is controversial.

9 In support of this proposition the QSW letter refers to the Supreme Court's decision in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, which the QSW Letter acknowledges pre-dates critical RMA notification provision amendments.

(b) The QSW Letter relies heavily on broad notification principles drawn from dated court decisions based on earlier, very different, legislation.[10]

(c) The QSW Letter contains a confusing – and often incorrect – mix of commentary on the notification provisions under s95-95G of the RMA and the decision-maker's substantive decision under s104 of the RMA. For example, the letter states *"[w]e submit that the application fails both legs of the gateway test for notification of non-complying activities."*[11] This conflates the notification decision with s104D's role in the substantive decision (putting aside the fact that the AEE sets out that the Proposal is a restricted discretionary activity, not a non-complying activity to which s104D applies). Overall, many of the issues raised in the QSW Letter relate to the substantive decision, not the Council's notification decision, which is the primary issue for present purposes. There are also material errors relating to the QSW Letter's description of the law relating to the substantive decision.[12]

(d) The QSW Letter mischaracterises the current state of the law when it says *"the existence of proposed conditions is irrelevant to the threshold question of whether notification is appropriate".* This appears to be based on an interpretation of a single decision[13] which has since been clarified by higher courts.[14]

(e) The QSW Letter states that if the Application is processed on a non-notified basis, it *"will likely determine the substantive application for consent".*[15] This is incorrect

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10 For example, contrary to the position in the QSW Letter (para 6(c)(iii)), for many years under the RMA there has been no presumption in favour of notification. The QSW Letter is incorrect where it asserts *"…while the Supreme Court's decision in Discount Brands preceded the 2009 amendment to the notification provision of the RMA, its expression of the guiding principles for deciding an application for non-notified determination remains fully applicable."* (Emphasis added). Several decisions have observed the amendments to the RMA since *Discount Brands* were substantial and had been directed at *"providing greater facility for non-notification"* (for example *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 at [34]). As described in *Norman v Tūpuna Maunga o Tāmaki Authority* [2022] NZCA 30 at [259], the Court in *Coro Mainstreet* held out the possibility that the law articulated in *Discount Brands* might need further evaluation in the revised statutory setting; and at [260] the Court *said "The issue was again discussed in Auckland Council v Wendco, where the Supreme Court referred to what had been said in both Discount Brands and Coro Mainstreet and noted the possibility that subsequent changes to the RMA meant that a less exacting approach to non-notification should be taken…"*

11 At paragraph 25.

12 For example, notwithstanding that the Application sets out why the Proposal is a restricted discretionary activity, the QSW Letter addresses s104D (relating to non-complying activities) and states *"…allowing helicopter activity is specifically against **an** objective in the AUP"* (emphasis added). This is not the relevant legal test for s104D(1)(b) which requires *"a fair appraisal of the objectives and policies read **as a whole**" (emphasis added) (*see *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [79]-[80]).

13 *Kawau Island Action Inc Society v Auckland Council* [2018] NZHC 3306 at [138]-[142].

14 For example, in *Norman v Tūpuna Maunga o Tāmaki Authority* [2022] NZCA 30 at [253] the Court of Appeal refers to the relevant sections of the decision in *Kawau Island* states and states: *"Putting this conclusion more simply, the statutory task under s95A(8) of the RMA is to assess the adverse effects on the environment of implementing the consent. That cannot be done by ignoring some aspects of the proposal which will be highly relevant to the nature and quality of the adverse effects thought to arise. … the contrary approach would ignore the reality of what the actual adverse effects of the activity would be."* See also *Point Chevalier Social Enterprise Trust v Auckland Council* [2023] NZHC 1926.

15 Paragraph 13.

and ignores the separate legal frameworks applying to the notification decision and the substantive decision.

(f) The QSW Letter contains hyperbolic statements supporting QSW's view that the Applications should be notified.[16]

13. The QSW Letter states that a judicial review in the High Court is "inevitable" if the Application is non-notified. The notification decision-maker's role is to even-handedly apply to the statutory tests for notification. Threats of legal challenge should not impact the decision.

Irrelevant and/or incorrect matters raised

14. As you will be aware, many of the issues raised by members of the public, as summarised in your email of 6 August, are not relevant and/or are otherwise incorrect. For example:

(a) Your email outlines that members of the public have stated that the Auckland Unitary Plan should be changed so that private helipads within urban areas are a prohibited activity; or that no private helicopter take-offs or landings should be allowed. While this aligns with QSW policy, it does not reflect the Unitary Plan Policy position under which applications can be made for helicopter movements and such applications must be assessed on their merits. A resource consent application is clearly not the forum for addressing changes to the Unitary Plan.

(b) It is settled law that effects on property values *per se* are not a relevant matter in resource consents decision-making.[17]

(c) Your email outlines that members of the public have stated that a private helipad is not "necessary" at the location of the Proposal. "Necessity" is not the correct legal or policy test.[18]

(d) The Courts have cautioned that the "floodgates" argument (that granting consent could lead to a deluge of applications for similar consents in respect of other

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16 For example, the QSW letter's categorisation of any notification decision other than public notification as being "unconscionable" (para 15(e)).

17 *Foot v Wellington City Council* EnvC W073/98 at [254]. See also *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137 at [56]-[60] and *Wilson v Dunedin City Council* [2011] NZEnvC 164 at [28].

18 *Gulf District Plan Association Inc v Auckland City Council* EnvC A101/03 at [101] where the Environment Court held that the task of the consent authority is to *"consider the potential effects on the environment from granting consent, and not need (or lack of need) for the facility".* See also *Living in Hope Inc v Tasman District Council* [2011] NZEnvC 157 at [24].

properties), which is also raised in the QSW Letter,[19] tends to be overused and needs to be treated with caution because each proposal must be considered on its own merits.[20] The concern that the harbour will become a "highway for helicopters" is hyperbolic.

(e) The enforceability of conditions is no different to that for any other resource consent. In simple terms, persons exercising a resource consent are responsible for ensuring compliance with conditions, or they potentially face enforcement action. We do not agree with the suggestions in the QSW Letter that the proposed conditions "are practically unenforceable" or "are not sufficient to ensure compliance".[21]

Activity status

15. For completeness, the QSW Letter asserts, with limited Plan analysis, that the Proposal is a non-complying activity. For the reasons outlined in detail in the Application material, in our view this is incorrect. Correctly interpreted, the Application is a restricted discretionary activity.

Issues regarding expert independence

16. The QSW Letter raises the importance of experts being seen to be sufficiently independent.[22] We agree. In that respect, it appears that Mr Baber, author of the Alliance Ecology Report, lives at a Westmere Park Avenue address approximately 550m from the Proposal property.[23] This raises questions regarding the independence of Mr Baber, who has not proactively disclosed this in his report.

17. For completeness, QSW also has a range of close links with the immediate locality of the Proposal.[24] The QSW correspondence should be considered in this context.

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19 The QSW Letter frames the issue as one of creating an *"unwelcome precedent"* (page 9).

20 *Endsleigh Cottages Ltd v Hastings District Council* [2020] NZEnvC 64 at [181]-[182]; and *Beacham v Hastings District Council*, W75/2009 at [24].

21 Paragraphs 33-34.

22 Paragraph 8(a).

23 Refer to the Zealand Companies office website identifying a Westmere park Avenue address as Mr Baber's residential address.

24 For example, the residential address of Elena Keith, QSW Officer and signatory to the QSW Letter, is listed as a Rawene Avenue property, approximately 30m from the Proposal property. Michael Edgar, QSW Teasurer and signatory to the QSW Letter, is listed as having a Rawene Avenue address approximately 75m from the Proposal property; and Jeanette Budget, matching the name of the QSW Co Chair and signatory to the QSW Letter, is listed as having a Kotare Avenue (Westmere) address approximately 100m from the Proposal property (refer to the Zealand Companies office website). QSW Co Chair, John Valentine, also lives in Westmere according to media reports.

Conclusion

18. If you have any queries regarding the above, please contact us or the Applicants' planning consultants, Mitchell Daysh.

Yours faithfully
ChanceryGreen

Chris Simmons
Partner
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chris.simmons@chancerygreen.com