BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 29

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 120 of the Act
BETWEEN	CABLE BAY WINES LIMITED & MOTUKAHA INVESTMENTS LIMITED
	(ENV-2018-AKL-000010)
	Appellants
AND	AUCKLAND COUNCIL
	Respondent

Court:	Principal Environment Judge L J Newhook Environment Commissioner I M Buchanan Environment Commissioner J A Hodges
Hearing:	7, 8, 9, 13 and 14 November 2018
Appearances:	R E Bartlett QC for Appellants. S F Quinn and K Rogers for Auckland Council. S J Simons, R K Smith and H E Philip for J Loranger, and L Niemann, M Poland and C Poland, s 274 parties. S and S Edwards for themselves, s 274 parties
Date of Decision:	22 February 2019
Date of Issue:	22 February 2019

SECOND INTERIM DECISION

A: Consent for The Verandah Restaurant cannot yet be granted; conditions of consent yet to be finalised, to inform whether consent can be granted;

B. Similarly, for the alfresco dining adjacent to the original restaurant;

C. Similarly, for the holding of outdoor wedding functions on a delineated area of the lawn; and

D. Refusal of that part of the original application relating to outdoor hospitality, excepting B and C above, is confirmed.

E. Costs remain reserved.

REASONS

Introduction

[1] This appeal was against refusal by Auckland Council of a retrospective resource consent application for unconsented activities on the appellants' (collectively called "Cable Bay") site at 12 Nick Johnstone Drive, Waiheke Island. The activities for which retrospective consents were sought were:

(a) The establishment of an additional enclosed restaurant space and pizza kitchen collectively referred to as The Verandah; and

(b) Use of the lawn for outdoor dining activities and functions.

(c) Installation of an acoustic wall on the boundary with 85 Church Bay Road.

[2] Our first interim decision[1] conveyed to the parties the Court's refusal of part of the application and indication of possible consent to the balance of the application subject to refinement of a satisfactory set of conditions. This second interim decision maintains that possibility, and records our reasoning on matters that were in contention.

[3] The application was limited notified to certain neighbours on 16 August 2017, including Ms Loranger, Ms Niemann, Mr and Mrs Poland and Mr and Mrs Edwards. They became parties under s 274 RMA. Ms Loranger and Ms Niemann are the lessees (from the appellants) of the closest dwelling to the winery and restaurants, being 85 Church Bay Road. Mr and Mrs Poland are the owners of another adjoining property at 20 Nick Johnstone Drive. Mr and Mrs Edwards own a property that also adjoins, at 125 Church Bay Road, their house being approximately 300 m from the Cable Bay buildings.

[4] The Cable Bay site is partly planted in grape vines, contains a large gently-sloping grass area and has buildings containing an original restaurant, winery,

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[1] *Cable Bay Wines Limited & Motukaha Investments Limited v Auckland Council* [2018] NZEnvC 226.

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tasting room, small meeting room, staff facilities and more recently the second restaurant and kitchen. Outdoor facilities included a bar/waiter station, tables and chairs, umbrellas and open-air dining and drinking on bean bags on the lawn. None of these latter facilities are activities that have been the subject of resource consent.

[5] As will be seen from what follows, delays in work on conditions of consent on acoustic matters, and some unresolved disputes among the parties about the detail of others, presently prevent us from moving in the direction of granting consent. Consent remains no more than a possibility; not a probability, let alone a certainty.

The proposal

[6] Some of what follows was set out in our first interim decision, but as this decision contains our reasoning as promised, some will be repeated for ease of reading and flow.

[7] The unconsented new dining area for restaurant and function use (the Verandah) had been constructed adjacent to the southwest side of the existing Cable Bay building.

[8] That area contains a pizza oven and bar area, and seating for approximately 100 patrons. It comprises a steel-framed structure with a permanent canopy roof and PVC plastic roll up sides, and covers approximately 245m^2.

[9] Retrospective consent was also sought for the outdoor seating of restaurant guests in seating bays constructed immediately south of the Verandah. Also, for the use of approximately 7000m^2 of lawn space for informal dining on removable seating including beanbags and blankets, an outdoor bar structure and concrete seating bays. No limit was initially proposed on the numbers of patrons using the facilities or lawn area outside the winery building.

[10] The application also included a proposal to construct an acoustic wall between the outdoor area and the leasehold residence at 85 Church Bay Road to assist with noise attenuation there.

[11] The primary issue acknowledged by the parties was whether the nature and scale of the activities applied for was appropriate for this site, particularly in terms of noise and amenity effects.

[12] For evaluation purposes, we considered this issue in two distinct parts:

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(a) Adverse noise and general amenity effects of hospitality activities on the lawn at the scale applied for; and

(b) Adverse noise effects from the Verandah restaurant.

Consent history

[13] In 2006, resource consent was granted to establish a winery with ancillary restaurant and function facility seating up to 120 patrons. Total building coverage consented was 1477 m^2.

[14] Resource consent to extend the total building coverage to 1648.18 m^2 was granted in 2011, followed in the same year by a variation to extend building coverage to 1767.36 m^2 and to allow temporary activity of up to four events per year for up to 2000 people.

[15] In 2015 resource consent to construct and operate a helipad was granted. The pad has been constructed but is not yet in use pending consent to vary the types of aircraft able to access the facility.

[16] A new discharge consent for wastewater from the Cable Bay facility was granted in 2016.

Existing environment

[17] The lead planners for the parties, Ms W Baverstock (called by Cable Bay), Ms C Trenouth (council) and Ms N Bremner (s 274 parties) considered it appropriate to consider the existing environment as that represented by the lawfully established activities on the site. Logically, the assessment of effects of the new consents applied for should relate to effects beyond those already consented or permitted by the District Plan.

[18] Some dispute arose in submissions by Counsel for Cable Bay as to the scope and constraints on the 2006 consents. Counsel submitted[2] that the 2006 application "was sparse in its description of the scale and extent of alfresco dining and outdoor activity, generally because these activities were unrelated to the elements of the application for which consent was required and was subject only to the overarching effect of the District Plan Noise Controls". In his submission, the consent placed no constraint on the total number of people on the site at any one

[2] Opening submissions at para 7.

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time, whether in the building or not, or where they may go within the site.

[19] When pressed by the Court as to whether he was running an "existing use" argument in relation to the current informal outdoor dining and associated activity on the lawn, Mr Bartlett acknowledged that this was not his intent.

[20] Examination of relevant material accompanying the original application in 2005[3] established to us that a maximum limit of 40 people dining alfresco would require to be observed to maintain compliance with the District Plan Noise Controls in place at that time. Mr Bartlett acknowledged that existing activities related only to those activities confined to the consented buildings and the limited alfresco dining provided for in the 2006 consent. Any additional existing use of the outdoor area of the site was largely confined to the benign activity of walking around to take in the view and take photographs.

[21] Counsel for the s 274 parties examined this issue in some detail, submitting that the activities currently occurring at Cable Bay are "fundamentally different" from those authorised by the 2006 consent.

[22] Counsel for the Council submitted briefly to similar effect, noting that the application for retrospective consents to cover outdoor dining, drinking and functions is an acknowledgement that these activities, at the scale currently occurring, are not consented and therefore not considered part of the existing environment for effects evaluation.

[23] As noted above, the end position submitted by counsel for the Appellant in discussion with the Court was generally consistent with those of other counsel or the advice of the lead planners. As it finally transpired that no contest was evident on this issue, we see no need for detailed evaluation, and accept the planners' joint advice as to what constitutes the existing environment in this case. It comprises the winery and ancillary buildings authorized by the 2006 consents, including the extensions to the building authorized by the 2011 consent and its subsequent variations as described earlier. Outdoor hospitality is confined to limited alfresco dining in described areas adjacent to the building.

Statutory provisions

[24] Consent has been applied for under the Auckland Council District Plan

[3] Hegley Acoustic Consultants response to request for further information 4 March 2005.

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Hauraki Gulf Islands Section - Operative 2013 (District Plan). The site is within an area zoned Rural 2 (western landscape). A single Objective, 10a.20.3, and associated Policies 2 and 4 apply to this land unit, and are the most relevant District Plan provisions for this case.

[25] Other relevant provisions in the District Plan cover building form (Objective 10c.2) and transport (Policy13.4.1.2).

[26] The Rural Environment provisions (Section B9) of the Auckland Unitary Plan apply, as does the New Zealand Coastal Policy Statement, with the site located within the coastal environment of Waiheke Island.

[27] The lead planners agreed the enclosed Verandah restaurant and function facility and the use of the outdoor area for hospitality purposes are not provided for in the Rules Activity Table 10a.20.5 of the District Plan for Land Unit 2 and therefore require consideration as a non-complying activity. Other aspects of the application trigger either discretionary or restricted discretionary consideration. On a bundled basis, the application is to be considered non-complying. Section 104(D) applies.

The Hearing

[28] It was established early in the hearing that there was general agreement from the parties that none of the expert traffic and parking evidence was to be challenged and only limited interest remained in minor issues related to stormwater and landscape. Evidence from traffic engineers, Ms I Dowling for Cable Bay and Mr D Hughes for the s 274 parties was received by the Court, as was evidence on wastewater discharge provisions from wastewater engineers, Mr S Ormiston for Cable Bay and Mr G Williams for the s 274 parties.

[29] Ms Dowling and Mr Hughes prepared a joint witness statement on traffic and parking issues following conferencing.[4] The experts agreed on conditions that would be appropriate to survey and manage parking should consent be granted. These conditions, with some modification to reflect the details of the decision, will be appropriate if consent is forthcoming.

[30] Ms B Gilbert called by Cable Bay and Mr B Coombes for the s 274 parties presented landscape evidence to which only limited challenge occurred during the hearing. Limitations on the use of the site to manage noise effects largely remove

[4] Joint Statement of Transport Planning/Traffic Engineering Witnesses. Dated 18 October 2018.

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any outstanding issues related to landscape, privacy and other general amenity effects as will become evident later in this decision.

[31] Acoustic engineers, Mr D Humpheson (called by the respondent council), Mr P Ibbotson (for Cable Bay) and Mr J Styles (for the s274 parties) ably and constructively assisted the Court throughout the hearing on the key issue of noise effects.

[32] In addition to the three lead planners, Mr B Putt presented evidence on specific issues for the s 274 parties, and Mr M Green similarly for Cable Bay.

[33] During the hearing, we adopted the approach of asking the three acoustic experts to conference on two occasions to address a range of matters raised by us. In both instances, the acoustic experts prepared joint witness statements that proved extremely helpful. These experts were heard and cross-examined separately, and questioned jointly by the Court in a "hot tub" environment to respond to questions raised by the joint witness statements.

[34] On completion of this exercise and after hearing the balance of expert landscape evidence and primary evidence from the s 274 parties, the Court gave an indication to the parties of the likely broad shape of a possible the decision. In doing so, the Court requested the planners to confer to produce a further iteration of possible conditions of consent, recognising where the Court had got to on the key issues.

[35] The final day of the hearing took a more inquisitorial approach in "hot tubbing" the planners to allow examination of the draft conditions while referring to the acoustic experts for comment and advice on technical matters raised by these draft conditions. This process resulted in broad acceptance by the parties on the direction the decision could take as indicated by the Court and the nature of conditions appropriate to manage the effects of the activities now being considered for consent.

Effects

[36] Considering first the effects of providing for outdoor use, including seated and casual dining and bar service on the northeast portion of the lawn, and wedding ceremonies or similar outdoor gatherings on the lawn, we are in the unusual position of having direct evidence of actual effects of these activities as opposed to predicted effects only. The primary evidence from the s274 parties described the activities

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applied for as having been experienced from at least 2014.

[37] Ms Loranger described in some detail the increased activity on the lawn area of Cable Bay since 2014 as generating an increase in noise at 85 Church Bay Road that was having a major impact on her and Ms Niemann's wellbeing. She made particular mention of the low frequency sound emanating from constant playing of amplified music during the day and well into the evening. Ms Loranger also described instances of trespass by patrons of Cable Bay, both from the lawn area and down their driveway as affecting their privacy and security.

[38] Similar sentiments were expressed by Mr and Mrs Poland of 20 Nick Johnstone Drive, confirming the increase in noise experienced at their property from increased activity at Cable Bay following the installation of the pizza kitchen in 2014, expanded use of the covered Verandah and extensive use of the adjacent lawn for casual dining and associated activity. Mr and Mrs Poland believed that the constant stress they experience resulting from the increase in activity and noise at Cable Bay was having a detrimental effect on their health, and was negatively affecting the amenity value in what they considered should be found in a quiet semi-rural-residential neighbourhood.

[39] Mr and Mrs Edwards at 125 Church Bay Road are further away from the Cable Bay site than the other s 274 parties (around 300 metres) but at the same elevation and in direct line of sight of the Cable Bay buildings and lawn. Mr Edwards described the annoyance generated by diners in the Verandah and on the lawn dining areas during the day, and the night-time noise from functions and amplified music.

[40] All the neighbouring parties noted that the noise from patrons at Cable Bay was exacerbated by the constant low-level hum of machinery and plant at the winery and the frequent landing and takeoff of helicopters from the lawn area. Neither of these sources of noise are within this application, but they contribute to the overall noise environment experienced by the neighbours.

[41] In addition to noise effects on the rural-residential amenity described by the neighbours, Mr Edwards cited the increase in use of the lawn for casual dining and drinking with its associated outdoor tables and chairs, umbrellas and scattered bean bags and blankets over much of it, as adversely affecting the visual amenity of the neighbourhood.

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[42] Mr Coombes's expert advice supported Mr Edwards in claiming that the increase in scale and intensity of the use of the lawn area on a day-to-day basis, facilitated by the construction of the new kitchen, extended Verandah coverage and fixed and movable outdoor tables and umbrellas, had established a pattern of use within this rural-residential neighbourhood that impacted on its landscape and character in a manner that was inconsistent with the expectations of residents. Mr Coombes recommended confining outdoor dining to within 20 m of the western side of the building and limiting patron access to other parts of the site using physical and planted barriers and signage, together with further landscape plantings to reduce the visual exposure of the lawn.

[43] Ms Gilbert maintained that access to the lawn by patrons was not restricted by the 2006 consent and therefore the current use of the area by patrons and the effects of this in landscape terms was envisaged by the 1996 District Plan operative at the time and was part of the existing landscape environment. Ms Gilbert maintained this view in cross-examination, but when pressed by Ms Simons on what her view would be if the lawn activity was assumed as unconsented, Ms Gilbert responsibly replied that there would be a need to limit the numbers using the lawn.[5]

Noise

[44] The biggest issue arising from the application is the effective management of noise, including low frequency noise, from the Verandah restaurant and bar area and from activities on the lawn. Since at least 2014, perhaps as early as 2012, the scale and intensity of these activities has increased significantly from what is legally authorised, with increased noise effects near the site that have affected the amenity and health of a number of local residents.

[45] In view of the importance of this issue, we have addressed it in some detail in this decision.

The currently consented noise environment

[46] The basis on which the original (2004) consent applications were assessed is set out in the assessment of noise effects undertaken by Hegley Acoustic Consultants dated July 2004 (the Hegley report). This formed Annexure 6 of the Assessment of Effects on the Environment (AEE) lodged with the present

[5] Transcript, page 192, line 26-27.

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application, noting the proposed activity "shall be carried out in accordance ...".[6] Further guidance is provided in the Noise Management Plan (NMP) prepared by Mr Hegley following the grant of consents and to satisfy the resource consent conditions. We asked the three acoustic experts what noise levels are allowed for by the Hegley report, and they addressed this in section 4 of their third Joint Witness Statement (JWS).

[47] Based on our review of the Hegley report and the NMP and the advice of the acoustic experts, we find that the consented noise environment:

(a) includes the following noise limits:

Monday to Saturday 7am to 10pm and Sunday 9am to 6pm – 45dBA L_{10}

All other times including public holidays (night time) – 35dBA L_{10}

(b) limits the maximum capacity of the restaurant to 120 persons at any one time;
(c) limits the number of patrons outside to 40, who must be dining in the defined alfresco area shown on the original plans;
(d) limits the volume of sound in the alfresco dining area to 45 dBA L_{10} when measured 5m from any loudspeaker;
(e) Limits functions to inside the restaurant building, with no provisions for outside functions;
(f) does not allow for the music in the restaurant and bar area to be amplified to the extent required for dancing or for live music.

Some key relevant plan provisions

[48] The Rural 2 Zone is a typically rural-residential environment. There is one objective and four policies for the Rural 2: Western Landscape land unit. These are -

> Objective 10a.20.3: To provide for and protect the rural-residential style of living while avoiding the adverse effects of activities and buildings on the natural character and landscape values of the land unit.
>
> Policies
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> 1. By providing for rural and residential activities to establish and operate in the land unit.

[6] Condition 30.

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2. By limiting the range of non-rural and non-residential activities that can establish within the land unit to avoid adverse effects on the landscape values and the general amenity of the locality.

3. By requiring new sites to be of a size and nature that ensures that small scale rural activities can occur and which protects the natural character, landscape and amenity values of the land unit.

4. By ensuring that the scale, form, colour and location of new buildings will not have adverse effects on the natural character and landscape values of the land unit.

5. *[Not relevant at Cable Bay location].*

Permitted activities in the zone are limited to one dwelling per site, homestays, horticulture, pastoral farming and visitor accommodation up to 10 people. Noise limits for the Rural 2 Zone under Rule 10c.5.3 are:

- Monday to Saturday 7am to 10pm and Sunday 9am to 6pm – 50dBA $L_{Aeq(15\ min)}$
- All other times including public holidays (night time) – 40dBA $L_{Aeq(15\ min)}$

[49] Later in our decision, we consider the proposal before the Court against the noise rules, the proposal being a non-complying activity involving very different noise characteristics to those permitted in the zone.

The noise effects of activities occurring on the site since 2014

[50] We have reviewed the evidence of the s274 parties carefully, and collectively it provides a clear description of the effects of the increased scale and intensity of the activities at the site since 2014. Rather than traverse it in detail, we reproduce the summary set out by Ms Bremner,[7] (supplemented by some particular features of the neighbours' statements) as follows:

> Noise emanating from the operation of existing and proposed site activities is a primary concern raised by the submitters. The main activity noise of concern is generated from outdoor dining on the lawn, outdoor functions, amplified music, and mechanical sources. The 'chatter' from patrons is a particularly identifiable aspect of outdoor use, and can be exacerbated with larger gatherings such as functions. Night-time noise is also particularly concerning, as it is a time of the day when residents have a low tolerance of noise effects and sleep may be impacted. Further, cumulative noise effects arise from the activity in combination with other noise-generating activities,

[7] EIC at 10.10.

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including helicopters and events within the site.

[51] The following passages of the evidence of the s 274 parties have been particularly relevant to our consideration of noise effects:

(a) Noise issues for the past few years have caused Mrs Edwards considerable stress, anxiety, loss of sleep, loss of enjoyment of her property and loss of amenity.[8]

(b) Mr Edwards finds it impossible to get to sleep with the monotonous thumping of the bass and must wait until the music finishes at midnight before attempting to get to sleep.[9]

(c) Ms Loranger records that since 2014 noise emanating from the building and the lawn has increased considerably and has had a major impact on [their] wellbeing.[10]

(d) Mrs Poland states that "the quiet enjoyment of our property is compromised day and night, especially in the busy season. The continual noise during the day, and the elevated level of noise from functions and helicopters without any warning causes anxiety and stress." She outlines her concerns in more detail through her evidence, including effects on her health.

[52] Mr Humpheson summarised noise effects arising from the site as follows:[11]

> The scale of noise experienced by the local residents in terms of the frequency of events, duration, timing and use of amplified sound (which has been largely unrestricted) has resulted in my opinion to a more than minor adverse noise effect.
>
> There is a history of complaints from the neighbours regarding noise from Cable Bay. Between November 2014 and October 2017 there were 10 excessive noise directions (ENDs) issued by Council to Cable Bay. Information provided to me by Council indicates that during this time there were over 60 noise complaints.
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> The ENDs demonstrate that there were valid reasons why the complaints were justified

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[8] Mrs Edwards, evidence at 1.2.

[9] Evidence at paragraphs 9, 13, 22 and 24.

[10] Evidence at paragraphs at 2.3 and 5.2.

[11] EIC at 36, 29 and 31.

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and that excessive noise was being generated such that the amenity value of the residents' enjoyment of their properties was being adversely affected.

[53] We find that the above evidence is consistent and compelling and demonstrates without doubt, that the noise effects from activities at the site since 2014 are significant, are contrary to the relevant objective and key policies, and are well in excess of what we consider appropriate or acceptable. We were alert to any possible overstatement or unreasonable sensitivity, but detected none. We received no evidence on behalf of the Appellant to dissuade us from this finding, other than Mr Green's rather colourful description of where Waiheke might presently be heading in terms of its socio-economic mix and non-statutory (non-RMA) policy development after the somewhat restrictive relevant zone provisions in the second (current) operative district plan.[12] The appeal concerned an application for resource consent, not a plan change or review, so much of his evidence was beside the point.

The Applicant's future noise management proposals

[54] The Applicant proposed the following noise management measures:

(a) Enhanced sound insulation of the Verandah, including provision to close doors and windows when necessary to limit noise outside the Verandah;

(b) The use of a sound limiting device for all amplified music;

(c) A limit of 30 dB L_{Aeq} on mechanical plant; and

(d) Noise management methods for people on the lawn.

[55] During the hearing, Mr Ibbotson (Cable Bay's acoustic witness) produced[13] a revised proposal on its behalf for the management of noise emanating from the lawn area. This involved different week day and Sunday scenarios and physical demarcation of the lawn into zones where different activities could occur at various

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[12] This is very much a summary of lengthy evidence which we found much less persuasive than the more "first principles" evidence of the 3 main planning witnesses, in respect of which extensive quoting would be laborious, but in which (for example) Mr Green felt the operative plan to be out of date and "frozen in time" compared to the Auckland Unitary Plan – paragraphs 5.53 to 5.55, and out of step with many non-RMA documents, tourism press statements, travel commentaries, and tourism statistics, for example at his paragraphs 6.1 to 7.15.

[13] Exhibits 3 and 4.

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times of the day. A limit of 120 dining seats on the upper lawn area adjacent to the buildings was proposed. A set of management actions required to implement this approach was outlined by this witness. In his opinion, management of noise in the lawn area would maintain noise levels for the neighbours within the limit set by the District Plan.

[56] All acoustic experts supported the "indoor" measures described in paragraph [54] (a) to (c) above, and we consider them to be essential minimum requirements if the appropriate noise limits are to be met for such activities.

[57] We discuss the proposed management controls in our evaluation of the proposal following.

Evaluation

Noise

Appropriate noise limits for the proposed activity that would satisfy the relevant plan objectives and policies

[58] The Applicant's acoustic and planning experts placed considerable emphasis on compliance with the noise limits of the Operative District Plan 2013 as a means of ensuring that noise does not adversely affect amenity values.

[59] Those noise limits, in our view, spring from policy considered appropriate by the council for a rural-residential area with the range of limitations listed in paragraph [47] above. The proposed activities, even with the additional controls in place, could enable a substantially different noise environment to that provided for in the District Plan, in terms of scale, intensity, duration, and characteristics.

[60] Mr Humpheson (the council's acoustic witness) stated in evidence that he agreed with Mr Ibbotson that the limits in the District plan are appropriate, subject to adding a low frequency limit and the use of a Special Audible Characteristics correction.[14]

[61] He then placed significant qualifiers on this, as follows:[15]

> The noise limits themselves do not take into account the scale of the activity

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[14] At paragraph 45.

[15] At paragraphs 47 and 48.

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> (frequency, timing of events, character of noise etc.) As Cable Bay's activities are non-complying, all of the effects, including noise, are subject to re-examination. Due to the scale of the activities, it could be argued that there is justification to adopt less permissive controls. As stated in expert caucusing I consider the noise limits themselves are an appropriate measurement for an individual event but it is the timing, frequency and number of events (apparent constant presence throughout the year and lack of controls) that has resulted in the current situation whereby noise effects are more than minor.

and

> The situation could arise that Cable Bay are able to achieve the day time and night time noise limits, which would be compliant with the permitted activity standards of the District Plan, but the scale and nature of the activity is such that a more than minor adverse effect would occur.

[62] In response to questions from Ms Simons about appropriate noise limits he replied:[16]

> .... if we're looking at preserving the ambient noise environment then a lower limit would probably be appropriate.

[63] Mr Styles (called by the s274 parties) considered that:[17]

> ... the proposal is considerably more intense than the activities that are anticipated and provided for in the zone, the character and duration of the noise and because of the cumulative effect of noise from the Events Consent and the Helicopter Consent.

[64] The acoustic experts jointly considered that in general terms, the background L_{A90} noise levels would be approximately 2 to 3 dB higher with the consented 2006 noise environment for Cable Bay than without it.[18] When considering the noise effects of the proposal now before the Court, the acoustic experts noted that the proposed noise limits are 8 dB higher than the 2006 limits, both during the day and at night. They noted also that a "level increase of 8 dB is substantial, but not quite twice as loud." and that "There would be an increase in low-frequency noise due to functions with amplified music, on the days functions occur (52 proposed)."[19]

[65] They recorded that during the day, the current proposal would allow L_{Aeq}

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[16] Transcript at page 386.

[17] EIC at paragraph 2.6.

[18] Third JWS at 6.4.

[19] Third JWS at 7.3 and 7.4.

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levels to be around 15 to 18 dB above the median background L_{A95} levels, and around 20 dB above the background L_{A95} levels in the evening to 10 p.m.[20] Based on the expert evidence that 8 dB is considered substantial, these increases would be even more substantial. The effects of such increase would be significantly more than minor.

[66] Low frequency noise was identified as a matter of concern to Section 274 parties. The acoustic experts stated that the ambient noise environment in the area does not contain a lot of low frequency noise, due to its remoteness from industry, major roads or other transport infrastructure. This means that the low frequency noise from amplified music at Cable bay has the potential to be annoying and intrusive if not properly controlled. The experts jointly agreed low frequency noise controls that they considered would ensure that on all but the quietest of days and nights, the bass beat of the music would be at or below the ambient/background noise levels.[21] We accept their evidence on this matter, and are grateful for their constructive collaborative approach to these issues.

[67] We note that prior to 2012, when the scale of activities was generally in accordance with the consent, there were very few noise complaints, indicating to us that noise effects were not adversely affecting the amenity of nearby residents to any significant effect.

[68] The objective and policies set out in paragraph [48] above are directive and require that the character and amenity of rural areas are maintained and the rural-residential style of living is provided for and protected while avoiding the adverse effects of an activity. The effective management of noise is a key consideration in these objectives and policies.

[69] We agree with Mr Styles that the plan limits would not achieve the required plan outcomes for an activity of the scale and intensity applied for, while consent limits generally consistent with the existing consent limits would. Accordingly, we find that the limits proposed by Mr Styles should apply. We consider this is particularly the case when cumulative effects are taken into account as discussed later in this decision.

[70] If consent is to be granted, the limits would be as follows:

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[20] Third JWS at 7.9.

[21] Third JWS at section 8.

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Time frame	L_{Aeq} A-weighted	L_{eq} @ 63Hz 1/1 octave band	L_{eq} @ 125Hz 1/1 octave band	L_{Amax}
Day time 7am to 10pm Monday to Saturday, and public holidays other than Christmas Day, Good Friday and Easter Sunday 9am to 6pm Sunday, Christmas Day, Good Friday and Easter Sunday	42 dB	50 dB	50 dB	NA
Night time At all other times	32 dB	40 dB	45 dB	65 dB

[71] In addition, Special Audible Characteristics as defined in NZS 6802:2008 are to be applied to the overall LAeq broadband A-weighted limits, but not the low frequency limits. Mr Ibbotson considers it important that staff are very clear about what types of behaviour will result in the special audible characteristic provisions becoming applicable in relation to human activities. These could include yelling, raucous laughter and swearing, as examples.[22] The applicant would engage a suitably qualified acoustics engineer to develop an indicative list of behaviours of concern and to include them in conditions as behaviours to be specifically identified and controlled by the consent holder by way of effective staff training and controls.

[72] For the avoidance of doubt, the noise limits would apply at or within the notional boundaries of 85 and 125 Church Bay Road and 20 Nick Johnstone Drive, with the actual measurement locations determined by agreement between the three acoustic engineers. The 3 acoustic engineers are presently working on some testing directed by the Court, and are to offer advice as well on the issue of special audible characteristics when they report.

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[22] Transcript at pages 329 and 330.

Outside activities

[73] Mr Ibbotson proposed the use of management plans to control activities on the lawn, as mentioned in paragraph [54] above. This people-management based approach with no overall limits on patron access to the lawn was supported by Cable Bay's planner Ms Baverstock. In her opinion, with these measures in place the adverse effects of noise from the site would be minor. She considered that any overall cap on numbers of people accessing the lawn area for various purposes, including taking in the view, photography, casual dining, drinking and the like would be impracticable to enforce and not needed if the activity zones and management actions were implemented.

[74] Perhaps unsurprisingly, this approach to noise management on the lawn was not supported by the s 274 parties or by the Council. The neighbours cited numerous complaints and compliance actions since the intensification of use of the lawn area in recent years as evidence that reliance on the actions of Cable Bay staff to manage noise levels within the District Plan limits was unacceptable and highly unlikely to be effective.

[75] In this vein, on 8 February, we received memoranda from Mr and Mrs Edwards and Ms Simons documenting allegations of breach of the Court's Order's in the First Interim Decision on the council's application for Enforcement Orders[23]. Management of the premises in ways needed to control adverse effects on the environment in this neighbourhood appears still to be a live issue. The allegations have not of course been tested in Court, and Cable Bay has not yet had the opportunity to respond, but it seems likely a further short hearing will be needed to inform whether consent can be granted, and if so upon what terms. The terms would need to be capable of implementation by Cable Bay management, monitoring and enforcement. This is in addition to the advice we need, yet to come from the acoustic engineers.

[76] Mr Humpheson acknowledged that compliance with the District Plan noise limits was achievable, but he was not confident that noise from people using the lawn area could be managed to a degree that did not give rise to adverse effects on neighbours. He considered that more restrictive controls on the use of the outdoor areas was needed to provide greater certainty that noise would be managed at a reasonable level, as discussed in paragraphs [60] and [61] above. This approach

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[23] Decision [2018] NZEnv C 228

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was supported by Ms Trenouth, and a cap on the numbers of patrons using the lawn at any one time was also an essential element for her.

[77] We carefully considered the methods proposed to manage the effects of noise relying heavily on actions by staff to control potentially large numbers of people spread over large areas of the site and some of whom would expect to be largely unconstrained in their enjoyment of the facilities. We concluded that reliance on such measures, or any variation of them, would be hard to set up, manage, monitor and enforce, to the extent that they would be unworkable. It is likely that the only monitoring option would be by way of complaints, which would be retrospective, and which would provide no certainty that the effects of noise from activities on the lawn would be managed to meet the consent limits and satisfy the relevant directive plan provisions.

[78] We have no difficulty in concluding that the current level of activity, including dining and drinking on the lawn area of Cable Bay vineyards was having an adverse effect on the neighbours. They justifiably believed that these effects were significant and detracted from their expected quiet enjoyment of their properties and lifestyles. In our view, many of the adverse noise effects experienced over the last few years would be highly likely to continue if we were to grant consent for the modified outdoor activities proposed at the hearing.

[79] It therefore remains to determine whether any of the activities proposed for the lawn area can occur without causing adverse effects on the neighbours. The first of these is outdoor dining immediately outside the existing building and the other is outdoor functions.

[80] The 2006 consent provides for a maximum of 40 persons seated in alfresco areas for dining. On the western side of the building these were identified as immediately outside the restaurant and the tasting room. The latter area has since been incorporated into the enclosed Verandah, leaving the area identified outside the restaurant as part of the 2006 consented activity.

[81] Operation of an outdoor dining area limited to seating for no more than 40 patrons in the defined area shown on the Landscape Plan for alfresco dining, adjacent to the original restaurant, was considered by each of the acoustic experts to be able to comply with noise limits proposed by Mr Styles within the neighbouring properties. We accept it is likely that this limited opportunity for outdoor dining can continue without causing unreasonable noise effects. However, this is to be

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demonstrated by physical testing, as previously directed by the Court.[24]

[82] The second opportunity is for limited functions to occur on the lawn. These should be limited to wedding ceremonies with appropriate controls on any amplified sound in place, and confined to a delineated area adjacent to the alfresco dining area as shown on the Landscape Plan. The acoustic experts advise that on this basis, wedding ceremonies, together with a period of no more than 30 minutes after the ceremony for refreshments, can occur without breaching the proposed noise limits. All other aspects of a wedding function must be held indoors and subject to the consent conditions applying to noise within the building.

[83] We have accepted this advice and find that provision for up to a maximum number of 30 outdoor wedding events per year, confined to the delineated lawn area, could be appropriate. Eating and drinking in this area will not be permitted except for that associated with a wedding ceremony as described in the last paragraph. For the avoidance of doubt, outdoor dining associated with weddings will not be authorized in the alfresco dining area. Patrons will not be restricted from otherwise accessing the delineated wedding area for taking in the view, photography or the like, when a function is not occurring.

[84] To provide certainty that unreasonable noise will not be experienced by neighbours, patrons at the site are not to be allowed on the lawn outside of the delineated wedding area. An effective barrier preventing this is required. This may take the form of a hard-physical fence type structure or landscape planting of a type and of sufficient depth and density to prevent access to the lawn. Conditions of consent and appropriate plan(s) will need to be prepared.

[85] We are satisfied that if the restrictions on use of the lawn area as described above are carried into effect, the result would be no more than minor adverse effects on neighbouring properties. We reiterate however that approval will only be forthcoming if the conditions are manageable and capable of reasonable monitoring and enforcement.

Cumulative noise effects

[86] When considering cumulative effects of noise, we considered the different noise sources identified by the acoustic experts, including activities in the dining

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[24] NZEnvC 228 dated 28 November 2018.

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room, Verandah, bar, outside dining and use of the lawn area, traffic and mechanical plant, and the controls proposed on each source. In addition, the acoustics experts agree that the cumulative effects of noise for the site include those from helicopters and the four events per year authorised under separate consents. These latter two noise sources are not matters before the Court, but they have been identified as activities occurring at the site that adversely affect the amenity of neighbours. We agree with the acoustic experts that they are relevant when considering cumulative effects.

[87] The experts did not provide evidence on how the effects should be taken into account, except that Mr Styles and Mr Ibbotson considered the effects to be relevant when setting noise limits for the proposal.[25] We consider the sources to be part of the consented environment, and relevant to our decision on noise limits that should apply to activities that are before the Court, and are reflected in our findings on noise limits as set out above.

Amenity

[88] Ms Trenouth described the amenity value of the Cable Bay area as being its semi-rural character, low ambient noise environment and large areas of open space and pasture, vineyard or regenerating bush. Within this environment, the lawfully established winery/restaurant is considered as ancillary to the primarily horticultural land use on the site and in keeping with the character of the area. She considered that the application as originally promoted introduced a scale and intensity of activity, particularly on the lawn area, that would adversely affect amenity values of neighbouring properties. This was supported by landscape and planning evidence from the s 274 parties, Mr Coombes and Ms Bremner respectively.

[89] Ms Baverstock considered that application of the proposed management practices and methodologies to control noise and the use of outdoor areas, as well as the need to comply with wastewater discharge consent conditions, would protect the general amenity of the area. She considered that, between the proposed landscaping and acoustic mitigation measures, the amenity effects on neighbouring properties would be further mitigated beyond that achieved by the draft conditions of consent proposed at the council hearing.[26]

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[25] JWS 19 October at section 14.

[26] Ms Baverstock EIC at paragraphs 6.18 and 2.24.

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[90] The situation is summarised by the Commissioners' first instance decision where they concluded that the proposal before them "introduces numbers of people and a level of activity that is significantly more intensive than can be reasonably expected in this low density rural environment."[27] We agree with this, particularly as it relates to the outdoor dining and function activity elements of the application.

[91] Regarding the level of amenity effects from the building and indoor activity components, the evidence supports a finding that these will be similar to the existing environment and no more than minor, subject to our ability to impose appropriate mitigation through conditions of consent. The availability of consent for the indoor activities will be informed by suitable conditions being accepted by us.

Planning evaluation

[92] The lead planners agreed that Chapter B2.2 and B9.2 and associated policies in the Auckland Unitary Plan RPS section establish the policy framework for subdivision, use and development generally and rural activities in particular. They also agreed that the District Plan Objective 10a.20.3 and associated Policies 2 and 4, specific to the Rural 2 (western landscape) land unit, were the most relevant planning provisions in this case. As set out earlier in our decision, Objective 10a.20.3 seeks "to provide for and protect the Rural Residential style of living while avoiding the adverse effects of activities and buildings on the natural character and landscape values of the land unit". Policy 2 limits the range of non-rural and non-residential activities to avoid adverse effects on landscape and the general amenity of the area. Policy 4 emphasises the need for buildings to be small scale as a further means of protecting natural character and landscape values within the land unit.

[93] We have examined the effects of extensive use of the lawn area for functions, informal dining, drinking and associated activities. The evidence supports a conclusion that with mitigation that relies largely on management actions, the adverse effects of this use would continue to be significant for the neighbours. It follows from this that the scale and intensity of the outdoor components of the application are outside that anticipated for non-residential and non-rural activities in the land unit.

[94] We have also conditionally found that the extension of the Verandah and its

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[27] LUC 60127798 Auckland Council Decision Report at para 86.

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associated dining and function activity could, subject to further assistance from the acoustic engineers, have no more than minor adverse effects on landscape and amenity values associated with the land unit. This might be particularly dependent on suitable glazed enclosure of the Verandah and the installation of a noise limiter for all amplified sound within the building as part of the revised application. Evidence from the acoustic experts may lead to a conclusion that noise from the building can be effectively managed to maintain a reasonable noise environment as measured at or within the notional boundary of the closest dwelling at 85 Church Bay Road. We have accepted noise limits proposed by Mr Styles constitute a reasonable noise environment, as set out earlier in our decision. These include both low frequency noise from amplified sound as agreed by the three acoustic experts as well as general noise from activities on the site.

Section 104D

[95] Section 104D RMA restricts the granting of resource consent applications for a non-complying activity to those that pass either of the two gateway tests:

(a) The adverse effects of the activity on the environment will be minor; or

(b) The application is for an activity that will not be contrary to the objectives and policies of the relevant plan.

[96] In this case, the relevant plan is the Auckland Council District Plan Hauraki Gulf Section 2018. The most relevant provisions Objective 10a20.3 and implementing policies, are effects based, directing the avoidance of adverse effects on landscape and amenity in the Cable Bay Rural 2 zone. We have established that the scale and intensity of the activities proposed for the general area of the lawn at the site have more than minor adverse effects that are not in keeping with the land unit provisions and therefore are also contrary to Objective 10a.20.3. The proposal without excision of wide use of the lawn would not meet either of the s 104D RMA gateway tests.

[97] The likelihood of the Court maintaining this finding was indicated to the parties during the hearing. Subsequent expert evidence from conferencing of acoustic experts focused on appropriate technical noise standards to meet the applicant's duty to avoid unreasonable noise and the best practicable means of achieving this under s 16 RMA. Once this had been established, the planners focused on a draft suite of conditions of consent limiting outdoor activity on the site



to meet the consent noise limits and the controls on outdoor activities set out earlier in our decision.

[98] General agreement on the draft conditions by the parties indicates support for a much more limited consent than that applied for. We have conditionally accepted the revised parameters for consent as now being what falls for determination. In short, this is the establishment of the Verandah kitchen and dining facility, including enclosure by glazed windows and sound absorbent roof, amplified sound management, outdoor dining restricted to 40 patrons immediately adjacent to the existing restaurant and provision for limited wedding functions in a designated area.

[99] Subject to satisfactory outcomes from the testing and recommendations yet to be put in evidence by the acoustic engineers, the adverse effects of these activities might be capable of being considered minor with implementation of appropriate noise mitigation measures. If so mitigated the more limited activities might be capable of being considered as consistent with the zone provisions. Adverse noise effects on rural lifestyle amenity would then be avoided, subject to confirmation by further testing, and the landscape effects no greater than those of the previously consented building, including the extensions authorised by the 2011 resource consents and subsequent variation. Both s104D gateway tests could then be met by the revised proposal.

Section 104(1)(a) and (b)

[100] Our examination of the key evidence relating to noise, including the appropriate basis for setting noise limits, has been set out earlier in this decision. The experts appear to agree that these noise limits can be achieved by the revised proposal now being considered, subject to the work they have been collaborating on since our last decision.

[101] With those qualifications, the noise environment for the neighbours might be little different from that authorised by the 2006 and 2011 consents.

[102] Restricting the use of the lawn to a small designated area adjacent to the existing restaurant should also avoid any landscape and general amenity effects from large numbers of people on the site and remove any privacy issues previously experienced by the close neighbours at 85 Church Bay Road and 20 Nick Johnstone Drive. We tentatively anticipate being satisfied that the adverse effects

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will be no greater than those experienced in the lawfully existing environment, but this will depend on effectiveness of proposed conditions. We await the further evidence.

[103] The visual effects of the proposed Verandah extension would not be significantly different from those authorised. Any potential adverse effects from the increased dining capacity provided by the Verandah should be fully managed by the noise limits to be met and the measures required to achieve these.

Conditions of consent

[104] These are still in the formative stage.

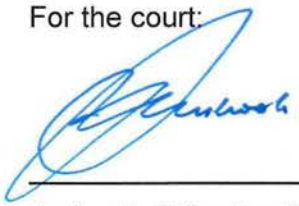
Next steps

[105] We direct that the parties lodge the anticipated report on the collaborative work by the acoustic engineers, by 8 March 2018.

[106] Numbers of matters remain in dispute among the parties. We urge them to reach agreements where possible, but have the sense that a further hearing of about a day might be needed. By 8 March they are to file a report identifying matters agreed, matters remaining in contention, comments on the acoustic engineers' report, and a draft timetable for preparation for any hearing needed.

[107] Costs naturally remain reserved.

For the court:



Judge L J Newhook
Principal Environment Judge

