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

Decision No. [2019] NZEnvC 170

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s120 of the Act
BETWEEN	CABLE BAY WINES LIMITED & MOTUKAHA INVESTMENTS LIMITED
	Appellants
	(ENV-2018-AKL-000010)
AND	AUCKLAND COUNCIL
	Respondent

Court:	Principal Environment Judge L J Newhook Commissioner I M Buchanan Commissioner J A Hodges
Hearing:	29 and 30 August 2019, submissions received up to 20 September 2019
Appearances:	A Webb for Appellants S F Quinn and K Rogers for Auckland Council S J Simons and R K Smith for J Loranger, L Niemann, M Poland and C Poland, s274 parties S and S Edwards for themselves, s274 parties
Date of Decision:	15 October 2019
Date of Issue:	15 October 2019

THIRD INTERIM DECISION OF THE ENVIRONMENT COURT

A: Consent is indicated as possible, subject to finalisation of conditions after any grant of building consents required and resolution of the dispute about ongoing (or not) conditions attaching to the 2006 consent. The outcome of these matters to inform

whether or not consent can be granted.

B: Costs are reserved.

REASONS

Introduction

[1] This is the third of a series of interim decisions relating to a retrospective resource consent application by the Appellants in April 2017 seeking to authorise unconsented facilities and activities at the Cable Bay Vineyard. The first interim decision was issued on 21 November 2018 and the second on 22 February 2019. A first interim decision, making enforcement orders and directions relating to same, was issued on 28 November 2018.

[2] The key issues remaining in dispute among the parties at the start of the reconvened hearing related to landscape and noise. This third interim decision primarily addresses these two issues, but also the following:

(a) Reliance on management options to ensure consent compliance;

(b) Provision of a gate across the access driveway to 85 Church Bay Road;

(c) Removal of concrete seating bays;

(d) Inter-relationship between this resource consent and building consents;

(e) Noise from the Motukaha Room and associated deck;

(f) Amalgamating existing consents and surrendering some or parts of existing consents to provide certainty as to what activities are authorised at the site and on what conditions; and

(g) Conditions of consent.

[3] We record that we carefully read all new evidence and joint witness statements, including the two additional statements of evidence from Mr Styles and Mr Ibbotson relating to unattended monitoring on 29 March 2019. For avoidance of doubt, we placed no reliance on the two additional statements when making our decision.

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Landscape

[4] We received landscape evidence from Mr P Kensington (called by Auckland Council), Ms B Gilbert (Cable Bay) and Mr B Coombs (s274 parties). We also received a joint witness statement of landscape experts dated 13 August 2019.

[5] Three landscape issues remained in dispute:

(a) physical measures to ensure patrons remain within a designated area of lawn near the restaurant;

(b) ensuring the planting of trees at the southern end of the property does not adversely affect the view shaft; and

(c) the overall landscape plan.

We deal with each of these in turn below.

Physical measures to ensure patrons remain within a designated area of lawn near the restaurant

[6] In our second interim decision, we recorded that "*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.*"[1] During that hearing, Mr Coombs provided us with a sketch ("Exhibit 5") that encapsulated what we considered should be the general shape and scale of the designated area, including that the maximum distance from the face of the restaurant to the limit of the designated area should be 15 metres

[7] We confirmed the 15 m requirement at paragraph [10] (i) of our interim decision on enforcement orders and directions, when we directed that, from 19 November 2018, Cable Bay:

[1] At paragraph [102].

Prevent all patron access to the lawn beyond an area that extends 15 m from the South-western facade of the store and original restaurant/function hall which are shown on Attachment A;

[8] The landscape plan and site porosity were discussed during a Judicial Telephone Conference on 28 March 2019, "site porosity" being the potential for patrons to wander around the Cable Bay site near and onto adjacent private property. The subsequent Court minute recorded that landscape architects were asked to bring "Exhibit 5" from the earlier hearing into their thinking. It also recorded that the landscape concept must rely not on management by staff but physical means, and that the numerical dimensions cannot change as the Court had already set them.[2]

[9] Plans attached to Ms Gilbert's evidence dated 5 July 2019 proposed a significant increase in the designated area to include, among other things, a strip in front of the Verandah and the provision of a wooden viewing platform 100 mm above ground level in the centre of the area, extending to 17 m from the front of the restaurant. The strip in front of the Verandah was removed from revised plans presented at the hearing but the viewing platform was retained.

[10] Ms Simons proposed that the width of the designated area in front of the bistro restaurant should be reduced to 13 m to be consistent with the average width indicated on Exhibit 5. The merits of different widths, configurations and practical considerations for the designated area were explored in some detail at the hearing during questioning by the Court and on behalf of the parties.

[11] Having considered the further evidence, we find nothing new has arisen that warrants a change from our earlier direction that the maximum width of the designated area is to be 15m from the front of the bistro restaurant. To ensure the intent of our original direction that the area be physically contained and used only for wedding ceremonies and to allow patrons to take in the westward view, conditions are to achieve the following:

(a) A physical barrier constructed to prevent any access from the area to the lawn and to ensure there is no patron use in front of the Verandah, except as noted in (b) and (f) below;

[2] Minute following conference at paragraphs [6] and [7].

(b) Use of the wooden walkway in front on the Verandah limited to staff use, emergency egress from the Verandah and for mobility access if this is not available at the northern end of the Verandah;

(c) A gate installed, normally locked, at the south-west end of the Verandah to prevent patron access to areas outside the designated area;[3]

(d) A removable 1.2 m high post and vertical batten style fence[4] at the northern edge of the designated area[5] with a pedestrian access gate (with signage on both sides) at the northern end of the existing wooden walkway from the vehicular mobility access area;

(e) The grassed area is retained. Note: No provision is to be made for a raised viewing platform in the designated area;

(f) Provision for temporary access over or through the permanent barrier preventing access to the main lawn, such temporary access for use up to four times a year when special events authorised by a separate consent take place; and

(g) Clearly-visible signage in at least five locations approved by Auckland Council, in addition to those on the gate at the northern end and those in the alfresco area (see paragraph [17] below) advising patrons that access to the wider lawn area is not permitted.

[12] The physical barrier between the designated area and the lawn may take the form of either:

(a) a fence no less than 1.2 m high generally as described in paragraph 4.25 of the Landscape JWS; or

(b) a moat a minimum of 2.5 m wide and 0.5 m deep with planting generally in accordance with the evidence of Ms Gilbert.

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[3] At location 14 on Bridget Gilbert Drawing Number LP.03a, Sheet Number 04, Revision D.
[4] Landscape JWS at paragraph 3.4
[5] At location 13 on Bridget Gilbert Drawing Number LP.03a, Sheet Number 04, Revision D.

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[13] If a moat is used:

(a) Irrigation to be installed to ensure successful and rapid plant establishment[6] and to maintain the vegetation during dry periods; and

(b) A temporary fence is to be provided on the lawn side of the moat during special events to protect the moat and prevent damage to vegetation[7], with details as set out in paragraph 3.24 (b) of Mr Coombs supplementary evidence dated 7 August 2019.

[14] A minimum of three signs are to be provided on the dining side of the alfresco area fence described below stating that no food or drink is to be taken onto the lawn other than provided during wedding events.

Ensure that trees planted at the southern end of the property do not adversely affect the view shaft

[15] Mr Coombs advised that the three large trees shown on Cable Bay's proposed Landscape Plan on the south side of the Verandah are within the view shaft protected by a 2004 Consent Order for the site.[8] To ensure the requirements of the Consent Order are met, any specimen trees planted on the south side of the Verandah are to be of such a size (established by survey means) so as not to result in the view shaft being adversely affected.

Overall landscape plan

[16] A Final Landscape Plan is to be prepared for certification by the Auckland Council to update the Bridget Gilbert Drawing Number LP.01, Sheet Number 01, Revision D. This is to include:

(a) Planting in the area generally shown as 25 on the Plan to ensure screening of the northern side of the Cable Bay buildings consistent with the 2004 Landscape Plan. Three additional specimen trees are to be provided in the area.

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[6] Landscape JWS at paragraph 3.2.
[7] Landscape JWS at paragraph 3.6.
[8] Supplementary Evidence dated 7 August 2019 at paragraph 3.30.

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(b) A note must be added to record that minor earthworks and low-level retaining structures may be required in the vicinity of olive plantings and are authorised by the consent;[9]

(c) A note must be added to record the requirement for irrigation as set out in paragraph [14] (a) above;[10]

(d) A note must be added to record that the view shaft must be protected as set out in paragraph [15] above.

(e) The conditions of consent are to require compliance with the above-mentioned notes.

Noise

[17] We received acoustics evidence from Mr D Humpheson (called by Auckland Council), Mr P Ibbotson (for Cable Bay) and Mr J Styles (for s274 parties). We were encouraged by and appreciative of the constructive approach taken by the acoustic experts in adopting a solutions-focused approach.

[18] We recorded at paragraph [70] of our second interim decision that if consent is to be granted, the noise limits will be as follows:

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	42 dB	50 dB	50 dB	NA

[9] Landscape JWS at paragraph 3.5.
[10] Landscape JWS at paragraph 3.3.

9am to 6pm Sunday, Christmas Day, Good Friday and Easter Sunday				
Night time At all other times	32 dB	40 dB	45 dB	65 dB

[19] The objectives and policies in the District Plan are directive and require that the character and amenity of the area in which Cable Bay is located are maintained and the rural-residential style of living is provided for and protected while avoiding the effects of an activity. The effective management of noise is a key consideration in these objectives and policies.

[20] Based on the evidence at the November hearing, the above noise limits will enable the relevant objectives and policies to be met and satisfy the specific noise provisions of s16 of the Act.[11] On that basis, we are satisfied that, provided the limits are met at all times, any noise effects arising from on-going use of Cable Bay hospitality facilities will be no more than minor. That is not to say that use of the facilities will not be audible at times, because it will. Rather, it means that the noise levels experienced at neighbouring properties will be in accordance with those provided for in the relevant District Plan Zone and satisfy the "avoid reasonable noise" test of s16 of the RMA.

[21] We found Mr Humpheson's reference to research undertaken into the sensitivity of a local community to construction noise associated with the Waterview tunnel project to be relevant to the noise environment at Cable Bay. He explained that "People were sensitised to noise and it took them a long time for them to come back down to what we call a normal community response level."[12] We consider this is likely to be similar for residents who have been exposed to elevated noise levels from Cable Bay over the last five or so years, even though noise levels in the future "will be much improved", in Mr Ibbotson's words, and consistent with the relevant planning provisions.

[22] When considering the adequacy of controls proposed to ensure the above noise limits will be met, we took into account the following information provided since the issue of our second interim decision:

(a) The results of compliance monitoring undertaken by the Council since our earlier interim decisions;

[11] Mr Styles, Transcript page 172; Mr Ibbotson, page 197 and Mr Humpheson, Transcript
[12] Transcript at page 171.

(b) A report entitled "Cable Bay Verandah Testing" dated 4 February 2019, prepared by Mr Ibbotson in response to directions of the Court set out in Attachment B of our first interim decision issuing enforcement orders and directions;

(c) Joint Witness Statement of Acoustic Experts Number 4 (undated), which was written in response to our second interim decision; prepared following a joint site visit on 17 December 2018 to undertake sound insulation testing of the Verandah and to record sound levels at 85 and 125 Church Bay Road and 20 Nick Johnstone Drive;

(d) Responses to a series of questions arising from (a) and (b) and set out in the Court minute following the Judicial Telephone Conference on 28 March 2019. Responses were set out in the evidence presented by the three acoustic experts to the reconvened hearing in August 2019;

(e) Results of acoustic testing of the bistro restaurant and alfresco dining area, included as Appendix F of Mr Ibbotson's evidence dated 5 July 2019;

(f) All new evidence from the acoustics engineers;

(g) Joint Witness Statement of Acoustic Experts Number 5 dated 29 August 2019 responding to questions from the Court earlier in the reconvened hearing and requesting clarification of matters remaining in dispute;

(h) The responses of the acoustics experts to questions at the reconvened hearing, which were led by the Court at the parties' request[13] and followed by questions from the parties during "hot-tubbing".

[23] A significant number of issues must considered when assessing the noise effects and setting controls to ensure limits are met. We address them in turn below.

[13] JWS Acoustics No 5 at paragraph 2.2 (c).

Noise limiter

[24] Concerns were raised in evidence that the noise limiter might not have been operating at times. Mr Ibbotson stated that if the PA system and loud speaker system for wedding ceremonies are plugged into the appropriate outlets in the wall, there is no way the noise limiter can be disabled by staff.[14] There was no disagreement among acoustic experts on this matter, and all noted that for the noise limiter to be disabled, it would have to be unplugged from the wall, which would be obvious. Conditions to explicitly address this issue are to be written.

Management of openings in the Verandah facades to ensure noise limits are met

[25] The experts agreed that all Verandah facades (and the restaurant doors) must be closed when the PA system is being used.[15]

[26] When the PA system is not being used, patron noise will determine if noise limits will be met and the experts agreed that "enthusiastic" behaviour is likely to be the main cause of any exceedance of the limits. We define this as including yelling, raucous laughter, swearing[16], whistling, singing, loud arguments and any other antisocial behaviour that presents a risk of noise limits being exceeded. There was some difference of view between experts on total numbers of patrons and group sizes that could be expected to result in enthusiastic behaviour causing exceedance of the limits.

[27] The experts agreed that the south-west façade must be closed at night to ensure night-time noise limits are met, even with normal dining.[17] They also agreed that where enthusiastic behaviour is anticipated, the north-west façade must also be closed.[18]

[28] Mr Ibbotson stated that for daytime hours the Court needs to be satisfied that episodes of noisy, boisterous singing will be avoided in the future. In that situation, the south-west façade could be open, and the noise limit complied with at all times. He considered that a strict interpretation of NZS 6802:2008 would mean that brief periods of high patron noise levels, even if transient and occurring a handful of times a year, could be deemed to be non-

[14] Transcript at page 156.
[15] Mr Styles, Transcript pages 158 and 161; Mr Ibbotson, Mr Humpheson.
[16] Transcript from the November 2018 hearing at pages 329and 330.
[17] JWS No 4 at 5.16 (c).
[18] JWS No 4 at 6.1 (b) (ii).

complying with a noise control.[19] He stated there is a conservative option that will ensure compliance, which is the closure of the south-west façade during the daytime.[20]

[29] Mr Humpheson referred to the Court's concern about certainty and enforceability and stated that certainty would only come through closing the façade.[21] Mr Styles agreed with Mr Humpheson.[22]

[30] Mr Styles confirmed that the north-west façade can be left open during the day provided the PA system is not being used.[23]

[31] Considering the above and the zoning provisions for the locality, we find that the noise limits will be met by:

(a) All Veranda facades being closed when the PA system is operating;

(b) The south-west façade being closed at all times;

(c) The north-west façade being open during the day except when the PA system is operating or when enthusiastic behaviour is anticipated, and being closed at night. A workable condition must be included to satisfy us that enthusiastic behaviour can be controlled during the day. If we are not satisfied about workability, the façade will need to be closed at all times.

Management of the bistro restaurant façade to ensure noise limits are met

[32] All experts agree that the noise limits will be met during the day with the restaurant doors open.[24]

[33] Mr Ibbotson's view is that façade should be closed at night completely if the Court has any concerns about the ability for Cable Bay to avoid periods of boisterous singing occurring in that area. However, if the Court considers the noise can be controlled through management,

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[19] JWS No 4 at 5.21 (a) (i).
[20] Transcript page 158
[21] Transcript at page 160.
[22] Transcript at page 160.
[23] Transcript at page 161.
[24] Transcript pages 193 and 194.

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then one in three of the bistro doors could be left open.[25] Mr Styles and Mr Humpheson consider the doors need to be closed at night.[26]

[34] Considering the above and the district plan provisions for the locality, we find that the doors can be open during the day but must be closed at night.

Use of the Motukaha Room and associated deck

[35] The experts agreed that:

(a) For pragmatic reasons, the deck must be closed during night-time hours;[27] and

(b) Daytime noise levels from the deck will be sufficiently below the daytime limit as not to contribute appreciably to any other source from the site to the extent that infringement will not arise even if an adjustment for special audible character is included.[28]

[36] As the deck is currently unconsented and potentially outside the scope of the appeal, we will direct that the deck be closed at night as part of a further interim decision relating to the enforcement order. In our final decision on the consent application, assuming the deck can be legally authorised, we will include a condition requiring the deck be closed at night.

Use of the alfresco area

[37] Taking all the expert evidence into account, we find that the noise limits will be met in the alfresco dining area and cumulatively for the site as a whole if:

(a) During daytime, the maximum number of patrons is 40 with a maximum group size of eight;[29]

(b) During evenings after 6 p.m. on Sundays and public holidays, the maximum number of patrons is 20 with a maximum group size of four;[30] and

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[25] Transcript page 159
[26] Mr Styles, Transcript page 194; Mr Humpheson, Transcript
[27] JWS Acoustics No 5 at paragraph 2.7.
[28] JWS Acoustics No 5 at paragraph 2.8
[29] JWS Acoustics No 5 at paragraphs 3.1 (a) and 3.6 in particular.
[30] JWS Acoustics No 5 at paragraph 3.5.

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(c) The area is closed after 10 p.m.[31]

[38] To ensure compliance, all eating and drinking activities are to be undertaken within the delineated alfresco area, there must be no outside bar and all meals and drinks must be served at tables by staff. The delineation of the area is to take the form of robust posts that cannot be removed by patrons, with heavy rope that is difficult to step over between them. During weddings the ropes and posts may be removed by staff but must be reinstated before any subsequent use of the alfresco area for general eating and drinking.

[39] To ensure compliance with noise limits, there is to be no use of the alfresco area after 6 p.m. on Sundays and on defined public holidays, or after 10 p.m. on any day.

Use of the designated area for wedding ceremonies

[40] This area discussed in paragraphs [5] to [16] above can broadly be described as an area extending in a north-westerly direction from the north-west face of the Verandah as far as the area used for vehicular mobility access. It is to be restricted to a maximum distance of 15 m from the face of the bistro restaurant and includes the alfresco area. No patrons are to be allowed any access to the lawn outside this area.

[41] Conditions of use for weddings remain as set out in our second interim decision. In addition, the acoustic experts have discussed an appropriate noise limit for the PA system for weddings as being 37 dB.[32]

[42] Based on the evidence of the acoustics experts[33], we find the noise limits can be met without the need to restrict access to this area by patrons taking in the westerly view during the day. Any such access is subject to a total restriction on eating or drinking by such patrons outside the alfresco area and strict management control to prevent enthusiastic behaviour and to discourage patrons from congregating and spending unduly long periods in the area.

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[31] JWS Acoustics No 5 at paragraph 3.1 (c).
[32] Transcript page 169.
[33] Transcript pages 167 and 168.

Reliance on management options to ensure consent compliance

[43] The evidence of the s274 parties indicates there has been a significant reduction in adverse noise and other adverse amenity effects arising from the activity since mitigation measures required by our interim decisions have been implemented. We strongly infer that this is largely due to the imposition of physical controls on activities and where and when they can occur, and substantially reduced reliance on management controls.

[44] The measures imposed to date, on their own, are insufficient to ensure on a continuous basis that the noise limits set in our second interim decision will be met or that the effects on amenity values will be avoided, as required by the relevant District Plan provisions. To enable us to grant consent, we must be satisfied that appropriate further conditions can be imposed on the consent that will be sufficient to ensure the required outcomes.

[45] We consider that further reinforcing physical controls as directed above should provide clarity on what is required. They should provide certainty of outcome, be fair to all parties and reasonable and practical. Such controls are to be precise to ensure the certainty required to make them enforceable[34]. We do not accept that reliance on management controls could provide the same level of certainty.

[46] For these reasons, consent could be granted on the basis that controls on activities will be primarily by physical means, with additional management control conditions requiring robust protocols and check processes to be in place to ensure the physical controls are effective and give effect to this decision.

Provision of a gate across the access driveway to 85 Church Bay Road

[47] In our first interim decision issuing enforcement orders, we directed that Cable Bay "Install a lockable security gate across the access driveway to 85 Church Bay Road in a location to be agreed with the leaseholders." This was subject to the leaseholders' confirmation that the gate is required, with any dispute about positioning to be resolved by the Court. The directions were made to address a concern about access onto the leaseholders' property by Cable Bay patrons, which we have referred to at times as the "porosity of the site."

[34] As discussed in *Ferguson v Far North District Council [2009] NZRMA 238.*

[48] Despite more than nine months having passed the parties were unable to agree a location and the matter is back before us to decide.

[49] Since our original direction, the circumstances relating to porosity of the site have changed substantially. With the patron access during day-to-day use of Cable Bay now almost entirely limited to an area immediately outside the bistro restaurant, we consider any future effects of patrons using the driveway will be no more than minor, if they occur at all. Control of patrons during the four events a year authorised by a separate resource consent is outside our jurisdiction. We no longer see any justification for requiring the installation of the gate and withdraw our previous direction requiring its installation.

Removal of concrete seating bays

[50] In paragraph [13] (ii) of our interim decision issuing enforcement orders and directions, we directed that before 30 November 2018, Cable Bay "Remove the concrete seating bays shown on Attachment A and marked "To be removed".The seats have been removed but the concrete pads left in place. The pads may have other uses, for instance for food trucks during the 4 events per year separately consented. There is to be a condition however that they are not to host seating or other restaurant or recreational equipment other than during the operation of that other consent.

Inter-relationship between this resource consent and building consents

[51] Mr Quinn identified concerns that could arise between any resource consent we grant and the yet-to-be-determined building consent, and asked specifically: [35]

(a) Can the Council process a building consent or certificate of compliance application for an existing structure?

(b) How can building alterations to provide noise mitigation measures required by this resource consent be addressed in the building consent or certificate of compliance process?

[35] Opening submissions of Mr Quinn, Transcript at page 38.

The uncomfortable consenting interface between the RMA and the Building Act is to be addressed in the following way. Given that the same authority must consider Building Act issues as will be required to monitor and enforce the RMA consents, the Building Act aspects should next be dealt with, after which the RMA conditions will be finalised by the Court. We ask that when entertaining the BA applications, the Council be mindful of the finely balanced RMA aspects the subject of our decisions to date. We are hopeful therefore that when finalising the RMA conditions subsequently, we do not find ourselves having to recast matters before us that are now well advanced. It goes without saying that if difficulties do arise the RMA consents might need to be cut back or attract tighter controls.

Amalgamating existing consents and surrendering some or parts of existing consents (to provide certainty as to what activities are authorised at the site and on what conditions).

[52] After the latest hearing and on direction from the Court, Mr Webb offered his views on what aspects of the existing consents might need to be surrendered or need modifying[36]. He noted at paragraph 8 that "The issue of surrender of modification of existing consents has arisen to ensure there is one set of enforceable conditions covering the Site and in particular to address any overlapping conditions between the current application and the 2006 and the two 2011 consents."

[53] He submitted at paragraph 9 that it is not intended to surrender:

(a) 2002, 2003 and 2016 stormwater and wastewater discharge permits;

(b) 2011 consent allowing up to 4 events per year; and

(c) 2015 consent for helicopter activities.

[54] He submitted there was no need to discuss those consents further, and broadly speaking we agree. We note, however, that when considering noise effects of the proposal before the Court, we had to consider cumulative noise effects, including helicopter noise. We have no jurisdiction to change the noise effects arising specifically from the helicopter consent but record that activities on the site generally are subject to the requirements of s16 of the Act

[36] A Webb memorandum of 11 September 2019.

in the same way that every other occupier of land "*shall adopt the best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level.*"

[55] Mr Webb recorded that it is intended to surrender parts of the 2011 building coverage consents that have either not been implemented or have been overtaken by the current application.

[56] Regarding the 2006 consent, Mr Webb submitted:

(a) Conditions having no effect, and which can be surrendered, are conditions 1, 3, 4, 6, 8, 11, 15, 16, 17, 18, 19, and 20;

(b) Conditions having continuing effect but are "upgraded" or "updated" by the proposed conditions and can be surrendered are conditions 2, 5, 7, 9, 10, 12, 21, 24, and 28; and

(c) Conditions having continuing effect but are not addressed in the proposed conditions and should therefore be retained are conditions 13, 14, 22, 23, and 27. (Reproduced in Appendix A to this decision).

(d) Mr Webb identified one matter he considered not yet resolved as being how to address the noise conditions in the 2006 consent. He submitted that Cable Bay has concerns about the total or partial surrender of those conditions because "they represent the existing consented environment", and are based on a determination that the Site includes the leasehold land at 85 Church Bay Road.

[57] For ease of reference the key 2006 noise condition is:

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Noise Control

25. At all times any activity on the site shall comply with the following noise levels:

The noise level arising from any activity measured 20m from any adjacent dwelling or visitor facility (on another lot) shall not exceed the following limits:

Noise (L_{10} levels) 7am to 10pm Monday to Saturday and Sunday 9am to 6pm	45 dBA
All other times including public holidays ('night time')	35 dBA
The maximum noise level (L_{max}) at 'night time'	65 dBA

[58] In a respectful but not very helpful manner, Mr Webb recorded that he was not certain on the best way forward on the issue. We inferred however that his client would prefer to retain elements of the 2006 conditions on noise because they are less strict. For the council, Mr Quinn submitted that the monitoring and enforcement of twin and potentially conflicting conditions would be impossible, and we agree. He submitted that the 2006 noise conditions should be surrendered, but we have a concern that s138 RMA has a voluntary flavour about it, and that we cannot direct such. Ms Simons submitted that the Court had effectively ruled[37] that 85 Church Bay Road is part of the receiving environment, so it could not be excised just because it is subject to a lease from Cable Bay.

[59] We find that the answer lies somewhere in between these positions. The noise levels in the present matter have been designed by us to reflect the objectives and policies of the plan, and the environment as we have found it to be (including the presence of the occupants of No. 85 as well as the other adjoining parties). Our ability to grant consent in the present proceedings might be hindered by Cable Bay deciding against surrender of the somewhat less restrictive 2006 noise conditions. Our thinking is because the present application involves a substantial expansion of the previously consented activities and the associated cumulative effects on the environment in a complex geographical and acoustic situation carefully considered by all 3 acoustic engineers in their constructive conferencing at all stages.

[37] Referring to a lengthy passage of dialogue between the bench and herself and Cable Bay's then counsel Mr Bartlett recorded at pages 438-440 of the transcript.

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[60] Cable Bay is going to have to make an election. We do not see the point of directing a conference of the planners as urged by Mr Webb, because the disputed point is about acoustics and legal matters.

[61] An election should be made by Cable Bay as just discussed, and if the imbroglio can be resolved to make consenting, monitoring and enforcement clear-cut, additional and/or revised conditions are to be agreed by the parties; or if they cannot be agreed, the Council is to present a set of proposed conditions showing where differences occur. The conditions must reflect the situation that currently exists, be consistent with the findings of this decision and may include other changes agreed by the parties within the parameters of this decision. The Court will then determine what future process should be used to finalise the conditions. This might be on an interim or final basis, remembering that the Building Act consenting processes should ideally come first.

[62] We will need to re-visit the enforcement proceedings when the present s120 proceedings are finalised. The interim orders in the enforcement proceedings remain on foot meantime, minus the requirement concerning a gate at 85 Church Bay Road. Should any interim reconsideration of enforcement matters be needed, leave is granted for the parties or any party to approach the Court.

[63] Costs remain reserved.

For the Court:



L J Newhook

Principal Environment Judge.



Appendix A – 2006 consent conditions submitted to be retained

13. Safe and clear pedestrian access and thoroughfare shall be maintained on all roads adjacent to the site at all times.

14. Temporary protection shall be installed to prevent vehicles damaging drains, vehicle crossings and the road during the site preparation and construction phase of development. Any damage to the drains, vehicle crossings and the road attributable to any vehicle associated with construction activities on the site shall be repaired to the same or similar standard as existed prior to such damage.

Exterior Finish Of Buildings

22. The exterior of the proposed dwelling and visitor accommodation unit shall be finished in colours and materials stated in the application material being:

- Roof - Profiled tray metal roofing 'Dulux Steellite,' colour Metallic Charcoal
- Walls - Vertical cedar timber Resene Lumberside 'Half Tapa'
  Coned basalt tile feature wall
- Windows - Aluminium-Ameron coating 'Antique Iron'
  - Glass - Clear float low reflectivity 8%
  - Cedar Louvers Resene Lumbersider 'Half Tapa'
- Doors - - Aluminium frame Ameron coating 'Antique Iron'
- Glass - Clear float low reflectivity 8%
- Entry Door - Zinc Panel
- Landscape - Natural fair faced concrete steps and retaining walls
  Coned basalt tile entry steps

Any change to the colours outlined above shall be either complementary to the natural surrounding environment and comply with the T Heath report "Colours for Structures within the Landscape". Such change shall be to the satisfaction of the Senior Planner - Hauraki Gulf Islands.

Traffic

23. Ingress and egress of the subject site by truck and trailer units[1] from the existing driveway at Church Bay Road should occur no more than 4 times per annum.

27. Where such monitoring demonstrates non-compliance with the noise limits of the consent, the consent holder shall take immediate action to remedy the non-compliance and advise Council of the remedial action taken.