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15 March 2012

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For: Brent Pizzey

Noble Investments Limited - Judicial Review of Decision Making Process (LEX 10555)

1. We refer to your instructions on 20 February and 6 March 2012 to:

   (a) review the decision making process for, and the notification (**first notification decision**), original (**original decision**) and variation (**first variation decision**) decisions on Noble Investment Limited's original land use and subdivision consents, which were granted by the Council on a non-notified basis in 2009; and

   (b) review the decision making process for, and the notification (**second notification decision**) and substantive decisions (**second variation decision**) on Noble Investment Limited's application for a variation of land use and subdivision consents in 2011.

2. In particular, you have asked us to advise the Council whether there are any aspects of those decision making processes that warrant the Council seeking judicial review of its own decisions.

3. You have also asked us to specifically consider the role of Council officers in the process and identify whether any actions of officers would provide a basis for judicial review. This is particularly in relation to the second notification and second variation decisions.

4. We have been provided with the following information:

   (a) the Council's entire file relating to the original consent application and the first section 127 variation application in 2009;

   (b) section 127 variation application by Noble Investments Limited, dated May 2011;

   (c) the Council's Road Corridor Operation Manager's peer review of the TDG report, dated 12 May 2011;

   (d) consultant planner's report on change or cancellation of conditions, dated 20 June 2011;

   (e) decision whether applications need be notified by Independent Commissioner, dated 12 July 2011;

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(f) decision on applications by Independent Commissioner, dated 29 July 2011;

(g) the Independent Commissioner's entire file; and

(h) various e-mail correspondence from parties expressing concerns about Council processes and the decisions.

5. We note that we have only taken the Council's 2009 file into consideration in our review of the first notification, original and first variation decisions.

Executive summary

2009 decisions

6. Our key conclusions in relation to the first notification, original and first variation decisions are:

(a) the original applications lodged with the Council in 2007 were for a non-complying subdivision consent and a discretionary land use consent. Due to refinements to the proposal during Council processing, the activity status of both the subdivision and land use consents changed to *restricted discretionary*. Therefore the effects on the environment relevant for both the first notification and original decisions are limited to matters relating to the size of the proposed allotments and their locations within that zone;

(b) as the application for the variation to condition 26 is to be considered as if it were an application for a resource consent for a *discretionary activity*, for the first variation decision it is the environmental effects of the proposed change in conditions that are potentially relevant, and along with other section 104(1) matters can be given such weight as the decision maker considers appropriate for the variation decision.

(c) the Council planner was in receipt of adequate information such that he was in a position to make a recommendation (subsequently adopted by the Council) about notification and, given the decision that the applications should not be notified, for the original and variation decisions which followed;

(d) proper and fair procedures were followed for all three decisions, and that it cannot be reasonably asserted that the process by which the three decisions were reached was flawed;

(e) the first notification decision ultimately turns on the conclusion that the effects of the proposal "*are insignificant*". The correct legal test in section 93(1) is "*will be minor*". The use of an incorrect legal test is a reviewable error of law. However, in this instance we do not consider there would be a strong chance of success, given the use of the incorrect terminology is likely in our view to be considered by the Court as merely technical – the planning report poses the correct question "*will the adverse effects of the activity on the environment be minor*" and the report considers and discusses those effects;

(f) the first notification decision does not address whether special circumstances exist under section 94C(2) of the RMA. Although it could potentially be argued that the failure to consider special circumstances is a reviewable error of law, the Council has a discretion under this section, and there is no clear legal authority that suggests it is mandatory for a decision maker to turn their mind to whether special circumstances exist. In any event, it is apparent from

the planning report that no unusual or exceptional factors exist, such that the substance of this issue was considered;

(g) there is nothing overwhelming, perverse, absurd or outrageous in defiance of logic, which would support a finding of unreasonableness in the original decision, nor is there any material failure to have regard to relevant considerations or application of an incorrect legal test by the Council officer;

(h) the first variation decision correctly applies the appropriate legal tests for considering the proposed changes to conditions, has regard to all relevant matters, and the conclusion is one which we consider can reasonably be reached;

(i) even if an error could be shown in any of the three decisions, the significant delay in reviewing these decisions would count strongly against the Court exercising its discretion to grant relief and, depending upon factors such as the degree to which that consent has been exercised, would most likely be fatal for a judicial review application; and

(j) putting to one side our conclusion that there is no basis for a successful judicial review to the High Court on an error of law (or at best, a very low likelihood of success in a judicial review of the first notification decision), it would not be practical nor appropriate for the Council to seek a judicial review of its own decision for the following reasons:

(i) case law supports the view that it is both irregular and unnecessary in equity and at common law to make the same person both plaintiff and defendant in the same proceedings;

(ii) there is a strong prospect that proceedings taken by the Council would be struck out for being an abuse of process, as the Council has made its decision and is *functos officio*, having no on-going powers to re-visit its decision;

(iii) any risks that the Council would assume in taking judicial review would most likely be borne by the Council as we consider it highly unlikely that Council's insurers would support the Council initiating judicial review proceedings against itself;

(iv) public confidence and policy considerations mean that the proceedings would no doubt raise significant concerns amongst members of the public about the ability to rely on the Council's decision making processes, and such concerns may well be considerably more significant than the concerns held by some members of the community about the current decisions;

(v) the Council would need to fund two sets of lawyers to prepare and defend the proceedings, and to provide competing legal arguments;

(vi) an application for judicial review would not of itself prevent or restrain the consent holder from continuing with any work on reliance on the land use and subdivision consents as varied through the Commissioner's decision, and interim orders would need to be sought to prevent the consents being given effect to;

(vii) even if an error could be shown, the High Court would be reluctant to exercise its discretion to grant relief when both the applicant and respondent to the proceedings were the same party, and would also be likely to have regard to matters such as potential abuse of the Court's process and public policy considerations about whether it should enable the Council to challenge its own decisions on behalf of third parties;

(viii) as mentioned above, the delay in taking judicial review proceedings would also be relevant and would most likely count against the Court exercising its discretion to grant relief; and

(ix) even if an error could be shown and the High Court exercised its discretion to grant relief, the High Court would not substitute its own decision for that of the Council. The Court would direct the decision back to the Council.

2011 decisions

7. Our key conclusions in relation to the second notification and the second variation decision are:

(a) the second variation application falls within the ambit of a change to the original consent under section 127 of the RMA (as opposed to a fresh proposal such that it should be considered as a new application under section 88), and the approach taken by the Commissioner in this regard is both reasonable and a correct application of the relevant law;

(b) as the applications for change of conditions are to be considered as if they were applications for a resource consent for a *discretionary activity*, all environment effects are potentially relevant for both decisions, and along with other section 104(1) matters can be given such weight as the decision maker considers appropriate for the second variation decision;

(c) while all effects are potentially relevant, for the purposes of assessment under section 127, it is the effects of the *change of conditions* that are to be considered - that is, the appropriate comparison is between any adverse effects from the activity in its original form, and any adverse effects that would arise from the proposal in its varied form;

(d) the Commissioner appropriately considered all relevant effects and matters in assessing the proposed change of conditions, and the conclusions reached were reasonably open to him;

(e) there is nothing overwhelming, perverse, absurd or outrageous in defiance of logic, which would support a finding of unreasonableness in either the second notification or second variation decisions, nor is there any failure to have regard to relevant considerations or application of an incorrect legal test by the Commissioner that would provide a foundation for judicial review proceedings relating to either decision;

(f) the Commissioner was in receipt of adequate information such that he was in a position to reach a conclusion about notification and, given his decision that the applications should not be notified, for the second variation decision which followed;

(g) any concerns that the decisions were in error due to flawed information (in particular, through traffic volumes) or the provision of the Council's Road Corridor Operations Manager's peer review, would not in our view provide a basis of successful review of the decisions given the Commissioner considered expert reports from both TDG and Opus and it was open to him to reach his preferred view on those expert reports;

(h) that proper and fair procedures were followed, and that it cannot be reasonably asserted that the process by which the Commissioner reached his decisions was flawed;

(i) while the pre-notification meeting procedure is not typical under the RMA, it effectively provided an opportunity for competing views about notification to be put forward and debated, and was consistent with the administrative law principles of fairness and natural justice;

(j) conduct of Council officers during processing of the consent applications is irrelevant to the two decisions made by the Commissioner in terms of a potential judicial review;

(k) the decision not to notify ultimately turns on the Commissioner's conclusion that the activity will not have, nor is likely to have, adverse effects on the environment that are more than minor – we consider this is a conclusion that a reasonable person could have arrived at, there is no error of law on the face of the decision, and nor is there a failure to have regard to relevant matters;

(l) the second variation decision correctly applies the appropriate legal test for considering the proposed changes to conditions, has regard to all relevant matters, and the conclusion is one which we consider can reasonably be reached; and

(m) putting to one side our conclusion that there is no basis for a successful judicial review to the High Court on an error of law for these two decisions, it would not be practical nor appropriate for the Council to seek a judicial review of its own decision for the reasons set out above in paragraph 6(k)(i) – (ix).

Background and context

8. The subject land forms part of the Living G (Yaldhurst) zone of the District Plan. In June 2007, Noble Investments lodged with the Council a:

(a) non-complying subdivision consent for a 342 (revised to 304) lot fee simple title subdivision, and

(b) discretionary activity land use consent to undertake a subdivision that did not accord with the ODP for the Living G (Yaldhurst) zone.

9. After several requests for information and an extensive on-going process whereby the applicant engaged with Council officers, a number of further iterations were made to the applications including amendments to the scheme plan, updated plans and changes to the staging order.

2009 decisions

10. Due to the amendments to the subdivision design, the consents were ultimately assessed as *restricted discretionary* activities to create 292 residential allotments.

11. The Council planner's recommendation that the application be processed on a non-notified basis was made on 25 May 2009, as was the recommendation that it be granted. Both decisions to adopt the Council planner's recommendations and reasons were made by the Council on the same day.

12. We note that the first notification decision is that "*the above recommendation be adopted for the reasons outlined in the report*". Therefore for the purposes of this advice, we need to consider the Council's planning report and the discussion / recommendations in that report. The same applies for the original decision.

13. The original subdivision consent was further amended in August 2009 through a non-notified section 127 application by Noble Investments, consisting of the removal of identification of certain lots as medium density and instead have them indicated by consent notice as High Density B. The second variation decision is also that "*the above recommendation be adopted for the reasons outline in the report*". Therefore we consider the Council's planning report, and the discussion and recommendations in that report for the purposes of this advice.

2011 decisions

14. In terms of the second notification and second variation decisions that we have considered, there has been an on-going process whereby Noble Investments has engaged with Council officers, as have concerned neighbours/landowners. A Commissioner was given delegated authority to make decisions on whether the second set of applications for variation needed to be publicly notified and then to hear and determine the applications to change conditions. A consultant planner was engaged to prepare a recommendation pursuant to section 42A of the RMA.

15. Due to a number of concerns expressed by neighbours, we understand that the Council invited written submissions from parties to address the issue of whether notification was required, and a meeting was attended by the Commissioner, Council officers, the applicant, and a number of the concerned neighbours, as well as legal representatives for the applicant and for the group of neighbours.

16. The Commissioner subsequently issued two decisions. The first, referred to in this advice as the second notification decision, was that the variation applications were not to be publicly notified nor notified on a limited basis. The second variation decision was that the applications were approved pursuant to section 127 of the RMA.

17. Both the second notification and second variation decisions list the information that the Commissioner has "received and perused". This information includes, as an attachment to the legal submissions for the group of neighbours presented at the pre-notification meeting, letters from the group of neighbours setting out their views on the application. It also includes, amongst other information, expert advice from traffic experts and a comprehensive section 42A planning report.

Grounds for judicial review

18. There is no right of appeal from a decision to treat an application as non-notified. Such a decision is, however, reviewable in the High Court. The grounds for a judicial review action against all of the Council's decisions would therefore be based on:

    (a) whether the decision was reasonable;

    (b) the adequacy and sufficiency of information; and

    (c) whether the proper procedures and correct legal tests were followed.

19. The role of the Court in judicial review is well established. The general approach to judicial review as outlined in the Court of Appeal's decision in *Pring v Wanganui District Council* [1999] NZRMA 519 at page 523 is as follows:

> *It is well established that in judicial review [proceedings] the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant considerations were taken into account, and whether the decision was one which, upon the basis of the material available to it, a reasonable decision-maker could have made.*

20. Questions as to the adequacy and sufficiency of information are important matters for the Court to consider. This does not however mean that an applicant for judicial review is entitled to run a case which essentially attacks the merits of the outcome or suggests that a different approach was superior.

21. In carrying out our review of the circumstances and processes in this instance, we have adopted this approach and the generally accepted legal tests set out below.

Test for unreasonableness

22. The well accepted test for judicial review of local authority decisions on the basis of unreasonableness was set out by the Court of Appeal in *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537, at 545:

> *Even though the decision maker has seemingly considered all of the relevant factors and closed its mind to the irrelevant,* ***if the outcome of the exercise of the discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused****.*

23. That test has been adopted in the context of notification in *Fullers Group Ltd v Auckland Regional Council* [1999] NZRMA 439 (CA).

24. The Court in *Woolworths* further accepted that to prove a case of unreasonableness requires "something overwhelming" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 per Lord Greene MR). For an ultimate decision to be invalidated as "unreasonable", the Court held that it must be so "perverse", "absurd" or "outrageous in defiance of logic" that Parliament could not have contemplated such decisions being made by an elected council.

25. The test is essentially whether the decision of the Council was one which, upon the basis of the material before it, a reasonable local authority could have made. These often relate to findings of fact or factual conclusions, and it is a well-accepted principle

that the Court on judicial review is reluctant to substitute its own findings of fact for those of the first-instance decision maker.

26. The *Woolworths* test above has been confirmed as the appropriate test in relation to notification decisions under the RMA in the decisions of the Supreme Court in (*Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17 (***Discount Brands***) and later in the High Court in *Northcote Mainstreet Incorporated v North Shore City Council* [2006] NZRMA 137, Lang J (***Discount Brands II***).

27. It is appropriate to note at this point, that the first notification decision was made under the pre-2009 amendments to the RMA, and the second notification decision was made under the post-2009 amendments to the RMA. The 2009 amendments removed the statutory presumption in favour of publicly notifying consent applications.

28. The cases mentioned above were decided before the 2009 amendments. We therefore consider that, in our consideration of the second notification decision, the authority on the predecessor sections is instructive, but inevitably coloured by the change in the provisions, and in particular the removal of the presumption of notification.

Whether adequate information has been considered

29. A consent authority should be in receipt of sufficient and reliable information such that it is in a position to reach a conclusion under section 95A(2)(a) as to whether an activity will have, or is likely to have, adverse effects on the environment that are more than minor.

30. The Supreme Court in *Discount Brands* discusses what is considered "adequate information" when a local authority is making a non-notification decision.

31. As far as the source of "adequate" information is concerned, Blanchard J at para 107 observed that the information before the consent authority can be supplied by the applicant, gathered by the authority itself or derived from the general experience and specialist knowledge of its officers and decision-makers concerning the district and the plan. But in aggregate, the information must be adequate both for the decision about notification and, if the application is not to be notified, for the variation decision which follows to be taken properly – for the decisions to be informed, and therefore of better quality.

32. What is required to satisfy the requirement that the Council has "adequate information" is that evidence is provided and that the evidence is relevant and reliable. It is not a requirement that a consent authority has to satisfy itself as to every single detail of the information put before it.

Jurisdiction for seeking change to conditions - section 127 of the RMA

33. Section 127 of the RMA is applicable to both the first and second variation decisions, and provides that the holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of consent. Sections 88 to 121 of the RMA apply, with all necessary modifications, as if the application were an application for a resource consent for a discretionary activity, and all references to a resource consent and to the activity, were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

34. This means that, irrespective of how the original consent application was classified (which, in this instance, was a restricted discretionary activity), the application for

change or cancellation of conditions is fully discretionary. This means that all environmental effects are potentially relevant for both decisions, and along with other section 104(1) matters can be given such weight as the decision maker considers appropriate for the variation decisions.

35. We note at the outset that the requirement of subsections 127(3)(a) and (b) are cumulative. So while all effects are potentially relevant, for the purposes of the assessment under section 127 it is the effects of the *change of conditions* that are to be considered (i.e. the difference between the consent as granted and the proposed change to the consent). The appropriate comparison is between any adverse effects from the activity in its original form, and any adverse effects that would arise from the proposal in its varied form. It is also open to the decision maker to consider relevant planning documents and any other relevant matter related to the proposed change of conditions. It is not however an opportunity to re-visit the grant of the earlier consent.

Change of conditions or a fresh application?

36. There is some discussion in the second variation decision on the scope of the applications and the question whether the applications should be considered as a change of conditions under section 127, or whether the application is essentially a fresh proposal such that it should have been considered as a new application under section 88 of the RMA.

37. Whether an application is truly one seeking variation or whether it is in reality seeking consent to a materially different activity, is a question of fact and degree to be determined in the circumstances of each case. The High Court held in *Body Corporate 970101 v Auckland City Council* [2000] NZRMA 202 that where a variation would result in a fundamentally different activity, would have materially different adverse effects, or would extend the original activity, it should be treated as a new activity. This approach was later upheld in the Court of Appeal in *Body Corporate 970101 v Auckland City Council* [2000] 3 NZLR 513.

38. In our view, the decision maker has a discretion (informed by the requirements of section 127 and case law) as to whether it considers an application as being for a change of conditions or, in reality, a fresh application.

The first variation decision – the planning officer's approach to section 127

39. The planning report appropriately addresses section 127, and whether the application should be considered as a change of conditions under 127, or whether the application is essentially a fresh proposal such that it should have been considered as a new application under section 88 of the RMA.

40. We consider that the conclusion reached was reasonable, in that the application did not constitute a fundamentally different activity, would not have had materially different adverse effects, nor would extend the original activity. The change to condition 26 would not materially alter the original consent in terms of intent or effect.

The second variation decision - the Commissioner's approach to section 127

41. The Commissioner, at page 6 of the second variation decision, refers to the analysis set out at page 6 of the section 42A report, comparing the consented activity to the nature of the subdivision and land use if the variation was to be approved. In our view, the Commissioner's conclusion that the applications may correctly be considered under section 127 of the RMA was a reasonable conclusion and one which was available to him. We do not consider that his approach to section 127 reveals any error of law.

42. In that respect, it was a reasonable conclusion that the application for a change of conditions did not constitute a fundamentally different activity, nor would it have materially different adverse effects.

43. It is a question of fact and degree whether the new application would extend the original activity and therefore should be considered as a fresh application – in summary, the original application sought to create a 292 lot mixed used and mixed density subdivision. The changes result in the creation of 292 allotments over the same area of land. The three main changes are to the spine road/cycle land width and location, the relocation and intensification of High Density A sites in areas in the northern stage of the development, and new elements of non-compliance with building development standards.

44. However, the basic elements of the subdivision and development do not change, and the approach set out in the section 42A report's assessment (adopted by the Commissioner) that the new application falls to be considered within the ambit of a change to the original consent under section 127 of the RMA is, in our view, both reasonable and a correct application of the relevant law.

Reliance on and accuracy of information

First notification, original and first variation decisions

45. The planning reports adopted for the first notification, original and first variation decisions do not list the information that was considered by the Council officer making the recommendation. However, the original application is a comprehensive application, containing an assessment of the proposal against the relevant District Plan provisions and an expert engineering report. A number of further information requests were made by the Council and responded to by the applicant. The Council file that we have been provided provides evidence of considerable assessment by various Council officers of the proposal, on areas such as traffic, stormwater, urban design, and consistency with planning documents.

46. Given the information we have been provided on the Council's file, we consider that it cannot reasonably be claimed that the level of information before the Council was insufficient for these three decisions. Any application for judicial review under this ground would be likely to be, in reality, an attempt to challenge the merits of the Council's decisions and could not succeed.

Second notification and second variation decisions

47. The correspondence we have reviewed from concerned neighbours includes concerns:

    (a) that the Commissioner was provided with flawed information, in particular by the Council's traffic engineers providing incorrect traffic volumes; and

(b) that a peer review of TDG's traffic assessment by Council's Road Corridor Operations Manager supporting the application, went to the Commissioner as relevant information when it was specifically referred to as "not a brief of evidence".

48. The Commissioner had before him traffic assessments from both Traffic Design Group (**TDG**) and Opus International Consultants (**Opus**). Therefore he had two distinct expert views before him, and it was open to him to reach his preferred view on those expert reports. Any judicial review claim that the decision was in error due to flawed information, could not in our view be successful given that the Commissioner considered both TDG and Opus' expert reports.

49. The fact that the Council's Road Corridor Operations Manager's peer review of TDG's assessment was provided to the Commissioner (but was "not a brief of evidence") could not in our view establish a reviewable error. As we have concluded directly above, the Commissioner had two distinct expert reports before him, and the fact that the peer review agreed with the conclusions in one of those reports would not be decisive in the Commissioner's conclusions about the merits of the application. In any event, the Commissioner in his decision did not place any conclusive weight on the peer review.

50. In our view, it cannot reasonably be claimed that the level of information before the Commissioner was insufficient. Any application for judicial review under this ground would, in our view, ultimately end up focusing *not* on whether the Commissioner had inadequate information to decide about notification, but whether the Commissioner used the information before him to reach a conclusion that the neighbours do not agree with. Such an argument would, in reality, be an attempt to appeal the merits of the Commissioner's decision and could not succeed.

Whether the proper procedures were followed/role of Council officers

51. Judicial review is process oriented, and this ground for judicial review is therefore linked to the reasonableness and sufficiency of information grounds of review discussed elsewhere in this advice.

First notification, original and first variation decisions

52. Nothing can be seen on the file provided to us or in these decisions that suggests that proper procedures were not followed, or that suggests any procedural impropriety has occurred. It appears from the record that the decisions were processed in an orthodox and impartial manner.

53. Although it did take just under two years between lodgement of the application and the decision to grant the consents, a large amount of this time spent processing the consents was focused on further requests for information, considering information received, and refinements by the applicant to ensure further consistency with the Living G (Yaldhurst) zone provisions and the associated ODP. A lengthy and iterative process is not unusual nor a reflection of any procedural impropriety.

Second notification and second variation decisions

54. We note that the group of neighbours were given an opportunity to express their concerns at a meeting attended by the Commissioner before he made the second notification decision. This group was represented by Ms Amanda Douglas (a Christchurch solicitor), and the applicant by a barrister Ms Pru Steven. Both of these

parties presented legal submissions. The Commissioner also undertook a site visit following this meeting.

55. This opportunity to hear both sides' opposing views was in a meeting format, not a hearing, and as such was not an orthodox, pre-notification process provided for in the RMA. However, we consider it can only add to the level of information that was available to the Commissioner in making his decision that the application should be processed on a non-notified basis. Indeed the process adopted means that it is highly unlikely that an allegation that the Commissioner did not have regard to all relevant considerations could be successfully pursued. He had the opportunity to hear both parties' views on whether notification was necessary and the information that they considered was relevant to that decision.

56. While the procedure adopted by the Commissioner was not typical under the RMA (in effectively providing an opportunity for competing views about notification to be put forward and debated), it was consistent with the administrative law principles of fairness and natural justice. We therefore consider that proper and fair procedures were followed, and that it cannot reasonably be asserted that the process by which the Commissioner reached his decisions was flawed.

Relevance of events preceding Commissioner's decisions/role of Council officers

57. A number of critical comments have been made by various neighbours and other members of the community after the second notification and second variation decisions were made. Concerns have been expressed in their e-mails regarding the conduct of officers and perceived unfairness during the processing of the original consents, the first application to vary the conditions of consent, the appointment of the consultant planner and the independent Commissioner, and the application to vary the subdivision and land use consents that are the subject of this report.

58. These comments include, for example, concerns that Council staff have covered up a "*complete stuff up*", that they have been "*openly biased*" and "*wrongly become co-applicants in the application to have the illegal works retrospectively consented*", and that the Council (through its officers) was locked in to supporting the application due to some unconsented works occurring. Concerns have also been made about Council staff appointing the consultant planner and decision maker to support the application (by "*appointing former Council colleagues to support the mistakes they have made*"). The relevance of the unconsented works and subsequent enforcement is addressed later in this advice.

59. In our view, the conduct of Council officers does not of itself provide a basis for judicial review of the Council's decision, unless it can be shown to have "infected" the decision. There is no evidence that we have seen, nor is it evident from the decision, that the process preceding the delegation of functions to the Commissioner had any influence over the outcome.

60. In addition, there is no evidence whatsoever of bias or impartiality on the part of either the consultant planner who wrote the section 42A report or the Commissioner who made the second notification and second variation decisions. The fact that the consultant planner was once a Council employee does not provide any proper basis for an allegation of bias or impartiality. We are not aware of any role or association that the Commissioner may have had with the Council or its officers, or the developer, such that he would not consider matters with an open mind, nor is there any evidence which supports such an allegation.

61. Indeed, as we have noted earlier, the procedure adopted by the Commissioner actively provided for the principles of fairness and natural justice to be observed. The essence of the complaint appears to be that he did not agree with the views expressed by opponents, but that is an issue on the merits rather than a matter for judicial review.

62. We have therefore concluded that conduct of Council officers during what appears to be a prolonged and challenging processing of the consent applications, is irrelevant to the second notification and second variation decisions made by the Commissioner in terms of a potential judicial review. Both the second notification and second variation decisions were made by an Independent Commissioner who, for the reasons we outline in this advice, has taken into account all relevant considerations, has not taken into account irrelevant considerations, has followed fair and proper procedures, and has made two decisions that a reasonable person could have made in the circumstances. Therefore any perceived unfairness due to the conduct of Council or its officers does not provide any support for the Council (or indeed any other party) initiating a judicial review of its decisions.

The notification provisions under the RMA

First notification decision

63. The original consents were lodged prior to the 2009 amendments to the notification provisions of the RMA, therefore the relevant statutory provisions for this first notification decision are sections 93 to 94D. Under these (now repealed) provisions, the statutory presumption is that consent applications are to be notified, unless the adverse effects of the activity on the environment *are minor*.

64. In summary, the Council could process Noble Investment's original application on a non-notified basis where it was satisfied that the adverse environmental effects were minor and/or all persons who the Council considered were adversely affected by the application had given their written approval. However, even if such approval had been obtained, the Council maintained a discretion to notify the application on the basis of special circumstances. The relevant provisions that applied at the time are provided below.

65. Section 93 sets out when public notification of a consent application is required. It provides that:

> *(1) A consent authority **must notify** an application for a resource consent unless—*
> *(a) the application is for a controlled activity; or*
> *(b) the consent authority is satisfied that the **adverse effects of the activity on the environment will be minor.***
> *(2) If subsection (1) applies, the consent authority must notify the application by—*
> *(a) publicly notifying it in the prescribed form; and*
> *(b) serving notice of it on every person prescribed in regulations.*

66. In determining whether notification is required under section 93(1) the consent authority needed to decide whether the effects were more than minor. Section 94A set out what a consent authority may and must disregard when determining whether adverse effects were minor or more than minor. The relevant parts of section 94A provided that:

> *When forming an opinion, for the purpose of section 93, as to whether the* ***adverse effects of an activity on the environment will be minor or more than minor****, a consent authority—*
> *(a)* ***may disregard an adverse effect*** *of the activity on the environment* ***if the plan permits an activity with that effect****; and*
> *...*
> *(c) must disregard any effect on a person who has given written approval to the application.*

67. In essence, section 94A(a) made the application of the permitted baseline discretionary.

68. Where notification was not required under section 93(1), section 94 provided for limited notification (unless all persons who may be adversely affected had given written approval):

> *(1) If notification is not required under section 93(1), the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority,* ***may be adversely affected by the activity****, even if some of those persons have given their written approval to the activity.*
> *(2) However, a consent authority is not required to serve notice of the application under subsection (1) if all persons who, in the opinion of the consent authority, may be adversely affected by the activity have given their written approval to the activity.*

69. When a consent authority was forming an opinion as to who may be adversely affected, the consent authority had to do so in accordance with section 94B, the relevant parts of which provide:

> *(1) Subsections (2) to (4) apply when a consent authority is forming an opinion, for the purpose of section 94(1), as to who may be* ***adversely affected*** *by the activity.*
> *...*
> *(3) A person—*
> *(a)* ***may*** *be treated as not being adversely affected if, in relation to the adverse effects of the activity on the person,* ***the plan permits an activity with that effect****; or*
> *...*
> *(c) must not be treated as being adversely affected if it is unreasonable in the circumstances to seek the written approval of that person...*

70. Further, despite section 94, a consent authority *may* have notified an application if the consent authority considered that special circumstances existed. Section 94C(2) provided that:

> *If a consent authority considers that special circumstances exist, a consent authority* ***may*** *notify an application for a resource consent by—*
> *(a) publicly notifying it in the prescribed form; and*
> *(b) serving notice of it on every person prescribed in regulations.*

Second notification decision

71. As set out earlier, an application under section 127 of the RMA is to be treated as if it were an application for a discretionary activity. Accordingly, for notification purposes for the second notification decision, the post-2009 amended notification provisions,

sections 95 to 95F of the RMA, apply. A fundamental change to the RMA's notification regime in 2009 was that the statutory presumption in favour of notification was removed, and replaced with a "neutral" starting point, and therefore the case law authority set out earlier needs to be read with that change in statutory presumption in mind.

72. In summary, public notification is required when:

(a) the activity will have or is likely to have adverse effects on the environment that are more than minor (section 95A(2)(a));

(b) the applicant requests notification (section 95A(2)(b));

(c) notification is required by a rule or a national environmental standard (section 95A(2)(c));

(d) there are special circumstances and the consent authority, in its discretion, decides to notify an application (section 95A(4)); and

(e) further information has been requested or the applicant has been advised that the consent authority wishes to commission a report, and the applicant does not respond before the deadline or refuses to provide the information or agree to the commissioning of a report (section 95C(1)).

73. Whether the second variation application was to be publicly notified, limited notified, or non-notified would depend on whether the application met the criteria in those sections. In identifying who may be adversely affected by an application, section 127(4) directs the consent authority to consider every person who made a submission on the original application and every person who may be affected by the new application.

74. The original application in 2009 was processed on a non-notified basis, therefore no people submitted on it. To determine who may be affected by the second variation application and whether public notification was required, section 95A provides:

> *(1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.*
> *(2) Despite subsection (1), a consent authority **must publicly notify** the application if—*
> *(a) it decides (under section 95D) **that the activity will have or is likely to have adverse effects on the environment that are more than minor**; or*
> *(b) the applicant requests public notification of the application; or*
> *(c) a rule or national environmental standard requires public notification of the application.*
> *(3) Despite subsections (1) and **(2)(a), a consent authority must not publicly notify the application if—***
> *(a) **a rule** or national environmental standard **precludes public notification of the application**; and*
> *(b) subsection (2)(b) does not apply.*
> *(4) Despite subsection (3), a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.*

75. The applicant did not request public notification, and there are no rules or national environmental standards that require public notification. In fact, subdivision Rule Part 14-3.5 provides that "*any application for consent under the subdivision rules (other*

than non-complying subdivision activities) shall not require the written consent of other persons and ***shall be non-notified***". Subsection 95A(3)(a) of the RMA therefore applies in terms of the second application to vary the subdivision consent. Although this rule is mentioned in the section 42A report, it does not appear to have been considered any further by the Commissioner. It has therefore not been relied on by the Commissioner as a licence to dispense with notification, or as a reason not to turn his mind to the relevant statutory tests and information before him.

76. We note in any event that there is no equivalent rule in relation to land use and, as we outlined earlier, the Commissioner has correctly identified and observed the legal approach which applies to applications under section 127 of the RMA.

77. In determining whether notification is required under section 95A, the consent authority must decide if the effects are more than minor. Section 94A sets out what a consent authority may and must disregard when determining whether adverse effects are minor or more than minor.

78. The relevant parts of section 95D provide that:

> *A consent authority that is deciding, for the purpose of section 95A(2)(a), whether an activity will have or is likely to have adverse effects on the environment that are more than minor—*
>
> *(a)* ***must disregard any effects on persons who own or occupy—***
>
> *(i)* ***the land in, on, or over which the activity will occur; or***
>
> *(ii)* ***any land adjacent to that land****; and*
>
> *...*
>
> *(d) must disregard trade competition and the effects of trade competition; and*
>
> *(e) must disregard any effect on a person who has given written approval to the relevant application.*

79. When a consent authority is forming an opinion as to who may be adversely affected, the consent authority must do so in accordance with section 95E, the relevant parts of which provide:

> *(1) A consent authority must decide that a person is an affected person, in relation to an activity,* ***if the activity's adverse effects on the person are minor or more than minor (but are not less than minor)****.*
>
> *(2) The consent authority, in making its decision,—*
>
> *(a) may disregard an adverse effect of the activity on the person if a rule or national environmental standard permits an activity with that effect; and*
>
> *(b) in the case of a controlled or restricted discretionary activity, must disregard an adverse effect of the activity on the person that does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion; and*
>
> *(c) must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11.*
>
> *(3) Despite anything else in this section, the consent authority must decide that a person is not an affected person if—*
>
> *(a) the person has given written approval to the activity and has not withdrawn the approval in a written notice received by the authority before the authority has decided whether there are any affected persons; or*

(b) *it is unreasonable in the circumstances to seek the person's written approval.*

80. Further, despite section 95A(3), a consent authority *may* notify the application if the consent authority considers that special circumstances exist. Section 95A(4) provides that:

> *Despite subsection (3), a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.*

81. We address the application of these provisions below.

The first notification decision – reasonable?

82. Although the planning report does not set out the relevant notification provisions of the RMA in full, it does consider the requirements and tests by asking itself questions for each relevant section of the RMA (with the exception of special circumstances, which is considered further below). Importantly, the planning report recognises that, as a restricted discretionary activity, the Council's assessment of effects is limited to matters relating to the size of the proposed allotments and their locations within that zone.

83. Further, the planning report takes a conservative approach and does not disregard any effects that could be within a possible permitted baseline.

84. The planning report concludes that "*the effects of the proposed non-compliances with minimum and average lot size for high density A sites, average size for high density B lots and the exchange of density band areas within the overall application site* ***are insignificant***". The words "*are insignificant*" are used both during the assessment of the relevant effects on the environment and in the conclusion of the report, rather than the relevant section 93(1) test, "*are minor*". It is a well-accepted principle that the use of an incorrect legal test is a reviewable error of law.

85. We therefore need to consider whether the planning report's use of the words "*are insignificant*" is material to the decision not to notify the application. Would the use of the words "*are insignificant*" constitute a reviewable error of law? Or, in other words, was the use of the words "*are insignificant*" simply technical/an incorrect use of terminology, or were the words material in terms of applying an incorrect legal test. We note after the use of the word *insignificant* in the conclusion, that the Council report continues to state:

> *The development as a whole is generally in accordance with the outline development plan and the intentions for the Living G (Yaldhurst) zone in terms of overall development and with the planning and development of a mixed density and mixed use residential neighbourhood in an integrated and comprehensive way, allowing a flexible response to the treatment of the urban/rural interface.*

86. We acknowledge that the discussion in the Council's planning report uses the incorrect terminology. However, the consideration of the adverse effects of the activity on the environment is specifically located within, and in response to the following question posed in the report – *Pursuant to section 93, is the application for a controlled activity, or will the adverse effects of the activity on the environment* ***be minor****?* Considered as a whole, and in context, we do not consider that the report adopts the incorrect legal test. The correct question is posed by the officer, and we consider that the conclusion reached that effects were "insignificant" can be read as an indication that they were *less* than minor (and hence enabled non-notification).

87. We therefore consider that although the use of incorrect terminology could indicate a reviewable error of law, in this instance there would only be a very low likelihood of success given the overall conclusions about effects ultimately reached in the planning report. In our view, the report does not apply an incorrect legal test.

88. We note that the planning report does not specifically consider special circumstances under section 94C(2) of the RMA. Through section 94C(2), the Council has a discretion to publicly notify the application if special circumstances exist. The Court of Appeal held in *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 (CA) that special circumstances are those that are unusual or exceptional, but they may be less than extraordinary or unique.

89. It could potentially be argued that the failure to consider special circumstances is an error of law. However, there is no clear legal authority that suggests it is mandatory for a decision maker to turn their mind to whether special circumstances exist. In any event, we consider that it is apparent from the planners report that no unusual or exceptional factors exist. Accordingly, irrespective of the specific consideration of special circumstances, it is our view that the planning report addressed the substance of the question in any event.

90. Therefore there would be a very low likelihood of success in a judicial review of the notification decision.

The original decision – reasonable?

91. The planning report appropriately recognises that for a restricted discretionary activity, the appropriate tests are set out in sections 104 and 104C of the RMA.

92. Again the planning report recognises that as a restricted discretionary activity, the Council's assessment of effects is limited to matters relating to the size of the proposed allotments and their locations within the zone. In light of our view that the findings in the planning report for the notification decision regarding effects on the environment were reasonable on their face and open to the Council, and as it appears that the relevant statutory tests have been applied correctly, it is highly likely that the Council has again come to a reasonable conclusion in terms of the likely effects on the environment in the planning report for the original decision.

93. Section 104 provides (relevantly):

> *(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–*
>
> *(a) any actual and potential effects on the environment of allowing the activity; and*
>
> *(b) any relevant provisions of—*
>
> *...*
>
> *(vi) a plan or proposed plan; and*
>
> *...*
>
> *(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.*
>
> *(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.*
>
> *...*

> *(3) A consent authority must not,—*
> *(a) when considering an application, have regard to—*
> *(i) trade competition or the effects of trade competition; or*
> *(ii) any effect on a person who has given written approval to the application:*
> *...*
> *(d) grant a resource consent if the application should have been notified and was not.*
> *...*
> *(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.*
> *(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.*
> *(7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.*

94. As noted earlier, the original application for subdivision consent was expressed to be for a non-complying activity. During processing of the consent, the proposal evolved and was modified. Subsequently both the subdivision and land use consents were for restricted discretionary activities under the Living G (Yaldhurst) zone of the City Plan. Section 104(5) provides that the Council can issue a restricted discretionary activity subdivision consent despite a restricted or non-complying activity consent being applied for, as has been done in this instance. The key point is that it is the activity status of the proposal that is ultimately considered and determined that is critical, rather than the activity status of the proposal at the time it was lodged.

95. We consider that the original decision appropriately had regard to any actual and potential effects on the environment of allowing the activity. The effects to which regard was had were of course limited, given the activity was restricted discretionary, to matters relating to the size of the proposed allotments and their locations within that zone.

96. The planning report briefly addresses Part 2 of the RMA, concluding that the proposal is considered to be consistent with Part 2. This approach is correct, as the High Court has held that when considering a restricted discretionary activity application, a consent authority may have regard to Part 2 matters in determining whether consent should be granted, but not in determining whether consent should be refused (*Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC).

The first variation decision – reasonable?

97. The change sought to condition 26 of the original consent consisted of the removal of identification of certain lots as medium density and instead have them indicated by consent notice as High Density B. The subject lots were all above the required 330m^2 lot size for the High Density B band and at 462m^2 on average, fall within the anticipated range of average lots size of 450 to 500m^2.

98. The changes therefore comply with the density band requirements, but are not located within the area indicated for them on the ODP. However, the District Plan anticipates the relocation of density banded lots where the overall density mix remains consistent

with that required for the Living G zone as a whole (as was the case under the variation application).

99. The planning report concluded that there were no "*effects on the environment associated with the change/cancellation of conditions that are materially different from, or in excess of, those created by the original wording of the consent condition*". We consider that this conclusion is reasonable, and do not consider that there is anything in the variation decision which would support a finding of unreasonableness.

100. Furthermore, from the face of the planning report, there is no apparent failure to have regard to relevant considerations and no application of an incorrect legal test that would provide a foundation for judicial review proceedings relating to the decisions to process the variation on a non-notified basis, and approve the changes.

The second notification decision – reasonable?

101. The statutory tests that the Commissioner was required to follow in the second notification decision are set out earlier in this advice. The decision correctly refers to these tests, referring back to the section 42A report at some points. The Commissioner also states that "*the 2009 amendments to the RMA notification provisions are different in a number of significant respects from the provisions they replace, and it does not appear to me that I am able to take any guidance from the earlier case law which was based on the law as it stood prior to those amendments*".

102. As we have identified earlier, we consider that the case law authority needs to be read subject to the position that the RMA's statutory presumption in favour of notification has changed. The Commissioner has taken a conservative view on this point but, in any event, we do not consider that his view has had any implications for the decision that he has reached in terms of narrowing the range of issues that he was required to consider or otherwise favouring non-notification. The change to the statutory presumption for notification has no effect on the well accepted unreasonableness test as set out in decisions of the Court of Appeal.

103. The decision not to notify ultimately turns on the Commissioner's conclusion that the activity will not have, nor is likely to have, adverse effects on the environment that are more than minor. The Commissioner correctly identifies that he must disregard any effects on persons who own or occupy the subject site or any land adjacent to it (unless special circumstances exist, which is discussed further below). The Commissioner again took a conservative approach and only disregarded effects on the applicant itself as the owner and occupier of the subject site, and not on neighbours that may own land that is adjacent to the site in the strict sense of having contiguous boundaries with it or that are located close by but not with a contiguous boundary.

104. The second notification decision does not disregard any effects that could be within a possible permitted baseline, and correctly identifies that it must only consider, in terms of effects, those that would change compared to the original application.

105. We consider that the Commissioner's conclusion that the adverse effects of the proposed changes would not be more than minor is one that a reasonable person could have arrived at. There is no error of law on the face of the decision, nor is there a failure to have regard to relevant matters.

106. The second notification decision appropriately considers limited notification under section 95B, recognising the statutory changes in 2009. We consider that the Commissioner's conclusion that, for the purposes of section 95B and 95E, there are no

affected persons to whom the application should be notified is reasonable and was open for him to make.

Relevance of plan provisions

107. One consistent theme of the concerns expressed in e-mails from opponents to the second variation application is that the proposal is not consistent with the Living G (Yaldhurst) plan provisions. There is a question as to whether plan provisions are relevant to the decision whether or not to notify an application, given that the notification provisions refer only to environmental effects (except potentially for special circumstances which we address below).

108. Whether or not plan provisions are expressly relevant to the application of the notification provisions, they were considered by the Commissioner in any event when assessing the effects of the proposed change (see pages 7 and 8 of the second notification decision). We therefore do not consider that there is any error or failure to have regard to a relevant consideration in this respect. We also address this issue in more detail with regard to the second variation decision.

Special circumstances

109. The decision also appropriately considers whether special circumstances exist because, if they do, through section 95A(3), the Council may choose to publicly notify the application. While it has not been addressed to date by the Courts, the removal of the statutory presumption of notification in 2009 may have narrowed the scope of instances where special circumstances might be invoked.

110. The Court of Appeal in *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 (CA) held that special circumstances are those that are unusual or exceptional, but they may be less than extraordinary or unique.

111. Relevantly, the High Court has held in *Murray v Whakatane District Council* [1997] NZRMA 433 (HC) that being aware of public opinion stacked against a contentious proposal will not determine whether special circumstances exist, but may be a contributing factor. Therefore the fact that the Commissioner was aware of significant opposition to the proposed change of conditions, particularly through the meeting he held with Ms Douglas representing the group of neighbours, did not constitute special circumstances in itself. We also do not consider that the fact that the Commissioner attended a meeting with the parties, is in itself indicative of special circumstances.

112. There is also no clear legal authority that suggests it is mandatory for a decision maker to turn their mind to whether special circumstances exist, but in any event this was done in this instance and judicial review could not successfully be pursued on the basis that the Commissioner failed to have regard to a mandatory/relevant consideration. In our view, the Commissioner's conclusion that the applications do not give rise to effects or other resource management concerns having any wider implications which would merit being treated as special circumstances under section 95A(4) of the RMA was one which was open to him and does not reveal any error of law.

113. Furthermore, if the question of whether the proposal was contrary to the plan provisions is a matter relevant to the notification provisions (or special circumstances in particular), this question was specifically addressed in the second notification decision in any event at pages 6 to 8.

114. In summary, we consider that there would be no likelihood of success in a judicial review of the second notification decision. The Commissioner has carefully considered

the notification regime and the applications before him, has set out comprehensive reasoning for his conclusions and, as we have concluded earlier, he has apparently considered all of the relevant factors, and closed his mind to the irrelevant. We do not consider that there is anything in the second notification decision that is overwhelming, perverse, absurd or outrageous in defiance of logic (the test from the *Woolworths* decision), that would prove a case of unreasonableness. There is no apparent error of law in the second notification decision through the application of an incorrect legal test.

The second variation decision – reasonable?

115. We have concluded that the Commissioner's findings in the second notification decision, that the proposed changes will not have more than minor effects, were reasonable on their face and were open to him. In light of that position, our conclusion that there is no likelihood of success in a judicial review of the second notification decision, and assuming that the Commissioner has not misapplied the relevant statutory tests for the second variation decision (most importantly, section 104 and 104C), it is highly likely that he has again come to a reasonable conclusion in terms of the likely effects on the environment in the second variation decision.

116. The Commissioner has set out a comprehensive assessment of the changes to the conditions and the principal issues that arise. He has set out the relevant statutory provisions, and addressed the appropriate planning provisions. We again conclude that relevant information has been considered, and all irrelevant information not considered, and that fair and proper procedures have been followed.

117. Specific issues of concern that have been raised by opponents include:

(a) that the decision flies in the face of the City Plan (in particular the *Canterbury Regional Council & Applefields Limited v Christchurch City Council* decisions (C169/02, C061/06 and C105/06) and the Living G Outline Development Plan (**ODP**), including:

(i) lot sizes (too small);

(ii) the amendment to the spine road, and as a consequence the lack of dedicated cycle lanes (in particular safety issues);

(iii) lack of queuing space for residential units on side lanes; and

(iv) various breaches that were not identified as non-compliance by the Commissioner (these matters were raised at the pre-notification meeting).

118. These concerns, including the view that various breaches that were not identified as non-compliances by the Commissioner, are all principally concerned with the degree of compliance with the District Plan and the Living G (Yaldhurst) Zone Outline Development Plan (**ODP**). The Commissioner's decision has correctly identified *all changes* sought to the conditions of consent as discretionary activities, therefore all potential effects are relevant to his assessment. The second variation decision also considers the proposed changes to the conditions on a policy level, through addressing the Living G (Yaldhurst) zone provisions, including the assessment matters for subdivision, and key structuring elements for the ODP. The decision records that the text of the District Plan in relation to this zone clearly contemplates that any particular development proposal is likely to involve at least some elements that do not accord with the particular diagrams and provisions set out in the plan.

119. In our view, the second variation decision also correctly applies the appropriate legal test for considering the effects of the proposed changes. The conclusion that the changes sought will not result in differences in the effects of the proposed residential development or its associated transport network which would justify refusing consent is one which we consider can reasonably be reached.

120. Again we do not consider that there is anything in the second variation decision that is overwhelming, perverse, absurd or outrageous in defiance of logic, which would support a finding of unreasonableness. Furthermore, from the face of the decision, there is no failure to have regard to relevant considerations and no application of an incorrect legal test by the Commissioner that would provide a foundation for judicial review proceedings relating to the second variation decision to approve the changes.

Other issues raised - unconsented works carried out by developer

121. There appears to be some concern from the group of neighbours that Noble Investments Limited has (we assume, prior to the approval of the variation to the subdivision and land use consents in July 2011) carried out works that were in breach of the original subdivision and land use consent or may have crossed onto private land.

122. Although the Commissioner has acknowledged these issues in his second notification and second variation decisions, it is worth clarifying that any compliance or enforcement issues for breach of a consent condition, are not relevant to this advice nor are such issues relevant to the decisions. The Commissioner correctly confirmed that this issue was not taken into account in making his two decisions.

Issues associated with the Council initiating judicial review proceedings

123. Despite our view that there is no basis for a successful judicial review to the High Court on an error of law (or at best, a very low likelihood of success in a judicial review of the first notification decision), we consider it is necessary to briefly address the practicality and appropriateness of the Council seeking a judicial review of its own decision.

High Court Rules / previous authority

124. The High Court Rules provide that the number of persons named or joined as parties to a proceeding must be limited, as far as practicable, to persons whose presence before the court is necessary to justly determine the issues arising (High Court Rule 4.1).

125. Case law supports the view that it is both irregular and unnecessary in equity and at common law to make the same person both plaintiff and defendant (*Goss v Suckling* (1910) 13 GLR 64, at p 65).

126. It is not however completely without precedent. In an appeal to the High Court against a declaration made by the Environment Court regarding the status of a periodic detention centre, the High Court in *Attorney-General v Christchurch City Council* (A.P No 167/97), 18 December 1997, HC Christchurch, Fraser J referred to judicial review proceedings brought by the Council in respect of its own decision regarding the grant of a non-notified resource consent for the periodic detention centre.

127. In those proceedings, the Council had alleged that there were a number of jurisdictional defects as a consequence of which the consent which it had purported to grant was invalid and void. The Council also sought interim orders, which were resisted by the Department of Corrections, seeking to restrain the Department from occupying the premises. By arrangement between the parties, the judicial review proceedings were adjourned shortly after being commenced, and it was agreed that a

declaration would be sought from the Environment Court. The High Court's decision relates to that declaration.

128. In the circumstances, we do not regard the fact that judicial review proceedings were brought by the Council against its own decision as carrying much weight. There are a number of reasons why we caution against this being regarded as a useful precedent:

(a) the High Court did not hear or determine the judicial review proceedings, and in our view the reference to the fact of the existence of the proceedings should not be regarded as an endorsement of their appropriateness or merit;

(b) the agreement to adjourn the proceedings almost immediately after they were lodged and pursue declarations left no opportunity or need for a strike-out to be sought or determined, which we consider would have stood a strong chance of success (see our discussion regarding abuse of process below); and

(c) because neither the interim nor substantive matters were pursued, the High Court did not have the opportunity to consider or exercise its discretion to grant relief.

129. We therefore consider that the mere reference to the existence of such proceedings in the *Attorney-General* case does not provide compelling authority for the view that a Council can bring judicial review proceedings against its own decision, or that such proceedings would be allowed by the Court to advance to hearing and determination.

Abuse of process

130. There is a strong prospect that, even if there was a basis for judicially reviewing the decisions, proceedings taken by the Council would be struck out for being an abuse of process.

131. In that respect, the common law doctrine of *functus officio* applies. The Council has made its decisions (through appropriately delegated decision makers) and is *functus officio*, having no on-going powers to re-visit its decision. Therefore, initiating judicial review proceedings to seek to have its decision set aside would most likely be regarded as an abuse of process and we expect that the consent holder would either apply for a strike out or an injunction to prevent the Council from taking such proceedings. It can, quite reasonably in our view, expect the Council to uphold its decisions and continue to act in reliance on those decisions.

Insurance/risk position

132. We consider it highly unlikely that the Council's insurers, Risk Pool, would support the Council initiating judicial review proceedings against itself. This is especially so given our conclusions as to the appropriateness of the Council's decisions.

133. Therefore, any risks such as a costs and damages award against the Council, that the Council was assuming in taking judicial review (which in our view would be considerable) would most likely be borne by the Council. As noted above, it is our view that the consent holder would have a very strong chance of successfully opposing the Council's proceedings. There is also a very real prospect of damages being awarded against the Council in the circumstances.

134. Such damages would not be limited only to legal expenses incurred, but can extend to economic and financial losses incurred by the consent holder (e.g. cancellation of

contracts, delays, holding costs, loss of opportunity or profit, adverse impacts on land value). Depending upon the level of reliance that has been placed on the varied consent by the consent holder, the Council's exposure could potentially be substantial.

Public confidence / policy considerations

135. While these factors would not act as a legal barrier in this instance, they are in our view important matters for the Council to consider. Apart from the *Attorney-General v Christchurch City Council* case referred to earlier (which we consider to be of limited precedent value), it is highly unusual and virtually unprecedented for a local authority to initiate judicial review proceedings seeking to directly challenge and overturn its own decision. This would no doubt raise significant concerns amongst members of the public about the ability to rely on the Council's decision making processes which may well be considerably more significant than the concerns held by some members of the community about the current circumstances.

Funding of legal representation

136. The Council would have to fund two sets of lawyers to prepare and defend the proceedings, and to provide competing legal arguments. There would also be practical issues as to how the Council would give legal instructions to two separate sets of legal counsel who would be arguing opposing positions, and make decisions on on-going and practical hearing matters (such as interlocutory proceedings) that may arise. We have provided some estimates of potential costs, depending upon different scenarios, at the conclusion of this advice.

Requirement for interim injunction

137. Applying for judicial review of any of the decisions would not of itself prevent the applicant from being able to rely on the varied consents and continue to develop the land in accordance with those varied consents.

138. In order to prevent the consents being relied upon or exercised, interim orders would also need to be sought. Such an application would typically seek an order from the High Court restraining Noble Investments Limited from continuing with any work in reliance on the land use and subdivision consents as amended by the Commissioner's decision until the substantive judicial review application has been decided by the Court. An application for an injunction is typically supported by an affidavit from a representative of the plaintiff (ie, the Council) outlining:

(a) the circumstances which the Council believes justify notification of the resource consent application (ie. the nature and scale of the adverse effects of the proposal); and

(b) the prejudice to the Council if the resource consent was implemented before the judicial review application was determined.

139. We cannot envisage circumstances whereby the Council could establish that interim orders were necessary to prevent prejudice to its position (as distinct from the position of third parties).

140. Further, any application for interim injunction would require an undertaking as to damages by the Council. Given our comments earlier in relation to the position the Council's insurer would be likely to take and the Council's potential exposure, the financial implications of that undertaking would most likely be borne by the Council.

Discretionary factors

141. Finally, even if an error could be shown to exist, relief in judicial review proceedings is discretionary. A plaintiff's delay in taking steps for review, and the extent to which a development may have proceeded will count against the exercise of the Court's jurisdiction to grant relief under the Judicature Amendment Act 1972. The first set of decisions were issued in May and August 2009, and the second set of decisions in July 2011, with over approximately 34, 3 and 8 months now having passed respectively. There does not appear to be any obvious reasons as to why the group of neighbours have not brought judicial review proceedings in their own right. Delay in bringing a judicial review is relevant to the exercise of the Court's discretion and is likely to count against relief being granted.

142. More importantly in this instance, we consider that the Court would be reluctant to exercise its discretion when both the applicant and respondent to the proceedings were the same party. It would also be likely to have regard to the matters identified earlier about potential abuse of the Court's process and public policy considerations about whether it should enable the Council to challenge its own decisions on behalf of third parties.

143. Even if the High Court was to exercise its discretion, it would not substitute its own decision for that of the Council. The Court merely determines whether proper procedures were followed, whether all relevant and no irrelevant considerations were taken into account and whether the decision was reasonably made. If the review is successful, it would direct the decision back to the decision maker (i.e. the Council) to be reconsidered. It would be a question for the Council as to who would be delegated the authority to reconsider the decision. There is nothing however, preventing delegation to the same decision maker in terms of the 2009 decisions, or the same Commissioner in the case of the 2011 decisions.

Estimated legal expenses, costs awards, and possible exposure to damages

144. You have asked for an estimate of legal costs (both in terms of the costs of pursuing/defending proceedings and possible awards of costs), and the possible exposure to damages if the Council was to pursue a judicial review of some or all of the Council's decisions. Given the very unusual nature of such proceedings, the following figures can only be in the nature of very broad estimates. As we have noted earlier, it is difficult to predict how the Court might deal with such proceedings.

145. Given the complexity of the proceedings and the risks involved, we have assumed that relatively senior and specialist counsel would need to be engaged by the Council in both of its roles.

Interim proceedings

146. In the event that the Council (as plaintiff) sought an interim order to restrain the consent holder from giving effect to the decision(s), we have estimated the Council's direct legal expenses of seeking such an order (most likely on a defended basis, with the consent holder as the opponent), as being somewhere between $25,000 and $45,000. We expect that the consent holder would strongly oppose such an application.

147. We have assumed that the Council (as defendant) would not oppose an application for interim orders, and therefore would incur minimal legal expenses by abiding the decision of the Court.

Strike out

148. As we have indicated earlier, any application for judicial review (including applications for interim orders) may well be susceptible to an application for strike out. If such an application was considered by the Court on a stand-alone basis, the Council's estimated legal expenses (as plaintiff) would be likely to be in the order of $10,000 to $15,000.

Substantive proceedings

149. The Council's total legal expenses of performing both roles of applying for and defending a judicial review proceedings (assuming that the proceedings made it to a substantive hearing), could be between $150,000 and $250,000 (i.e. between $75,000 and $125,000 for each side of the argument).

150. These expenses would depend on the complexity of the proceedings, the number of counsel required on each side, the number of interlocutory steps involved, the extent of affidavit evidence, and the length of the substantive hearing.

Costs awards

151. The High Court's ability to award costs against parties, while at the Court's discretion, is guided by Part 14 of the High Court Rules. Rule 14.2(f) provides that an award of costs should not exceed the costs incurred by the party claiming costs.

152. The Council's costs if unsuccessful would presumably involve costs payable to the consent holder (or vice versa), on both the interim and substantive proceedings. It is highly unlikely that the Court would award costs between the Council as both plaintiff and defendant.

153. Costs awarded in accordance with the High Court's scale could be in the vicinity of $25,000 to $50,000. However, an award of costs should also reflect the complexity and significance of the proceedings. Due to the unusual circumstances and the fact that the Council would ultimately be seeking to undermine its own decisions, awards of indemnity costs could be sought by the consent holder particularly in the event that the Council (as plaintiff) was unsuccessful. In those circumstances, costs awards could be as high as our estimates for total expenses incurred in relation to the interim and substantive proceedings above.

154. Even if the Council was successful in its review, it would be highly unorthodox for the Council to seek an award of costs against itself. In such circumstances, we also doubt that the High Court would be inclined to order that the consent holder pay significant costs to the Council (as plaintiff).

Damages

155. It is difficult to speculate about the level of damages that could be claimed if the application for review was unsuccessful. As we noted earlier, there is a risk that, by simply taking judicial review proceedings, the Council could be sued by the consent holder which could include a claim for damages for losses caused by the Council's actions.

156. If the consent holder's claim was successful, the extent of damages that might be awarded would depend, at least in part, on the degree of reliance and financial arrangements that the consent holder has established based on the Council's grant of consent and the economic and financial losses that it might incur as a consequence.

157. We have no knowledge of this type of information, but it is possible that an award of damages could potentially run into the millions. For example, if the applicant has established contracts for development of the site and/or sale of properties, and performance of those contracts could not be completed because of interim orders and/or the outcome of the substantive review proceedings, such losses could be very substantial.

Yours faithfully
SIMPSON GRIERSON

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