

Item 13 Notice of Motion - Briefing note for Devonport-Takapuna Local Board

Resource Consent Applications for 30-38 Hurstmere Road and 40 Anzac Street, Takapuna

Resource consent – background and context

1. Auckland Council has received an application for a subdivision and enabling works for the development of the Takapuna civic square (currently known as the Anzac Street carpark). The site is zoned as 'Business – Metropolitan Centre' (BMC) and lies within the 'Takapuna 1' precinct in the Auckland Unitary Plan: Operative in Part (AUP).
2. A certificate of compliance has been received to establish a civic square on the Anzac Street carpark site, which certifies that a civic square and its associated facilities can be established as a permitted activity. This includes:
 - seating;
 - water features;
 - an informal stage;
 - pataka / whare wananga;
 - landscaping; and
 - service lanes and open-air laneways.
3. The application referenced in the notice of motion (NOM) seeks resource consent for subdivision and minor earthworks that are required to develop the above permitted activities that will comprise the civic square. The activities for which consent is sought are described in detail in the application documentation, however in summary, resource consent is being sought for:
 - i. subdivision of vacant sites (a restricted discretionary activity as outlined in the AUP);
 - ii. subdivision of land within a 1% annual expectance probability (AEP) floodplain (a restricted discretionary activity);
 - iii. earthworks over an area greater than 2,500m² (a restricted discretionary activity);
 - iv. the demolition of the existing toilet block within the site (a controlled activity as outlined in the AUP); and
 - v. the disturbance subdivision and change of use of the site (a restricted discretionary activity under clause 10 of the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health Regulations 2011).

Restricted discretionary vs controlled activities

4. 'Restricted discretionary' activities are the most common activities within the Auckland Unitary Plan. It is an activity type that can be granted or declined, however is rarely refused. Council's assessment of these activities is restricted to only matters already set out within the AUP, and any conditions imposed are limited to these set matters.
5. Consent must be granted for 'controlled' activities, and the control is reserved to only those matters specified in the AUP. Therefore, any conditions imposed must only relate to those matters.

6. In terms of assessment, there is an increasingly higher bar for applications to cross in order to gain consent. The diagramme below outlines this sliding scale in practice:

Assessment threshold	Activity type
 <p>'Low' bar (high likelihood that consent will be granted)</p> <p>'High' bar (low likelihood that consent will be granted)</p>	Permitted
	Controlled
	Restricted discretionary
	Discretionary
	Non-complying
	Prohibited

7. The Resource Management Act (RMA) allows that controlled activities are precluded from public or limited notification. Therefore, council's notification assessment for the Takapuna civic square consent is limited to the proposed earthworks and subdivision only (i.e. activities i) to iii) listed at paragraph 3 above).

Notified vs non-notified applications

8. There are many applications where either the Resource Management Act (RMA) or the Auckland Unitary Plan (AUP) preclude the need for an application to be notified. The RMA contains notification 'tests' to guide consenting authorities in determining whether or not a consent application should be notified:

Resource Management Act (RMA)	Test
Section 95A	Public notification under s95A is required if the activity will have, or is likely to have, 'adverse effects on the environment that are more than minor'. If the consenting authority believes the adverse effects on the environment are more than minor , the application is fully notified .
Section 95B	If the consenting authority determines that the adverse effects on the environment are not more than minor , a second test is applied under s95B. The consenting authority will then identify whether there are any ' persons where the adverse effects on them is more than minor'. If the consenting authority believes the adverse effects on any persons are more than minor, the application is notified on a limited basis .
In the event the consenting authority determines that the application does not have more than minor adverse effects on either the environment or persons , the application may proceed on a non-notified basis .	

When are adverse effects ‘more than minor’?¹

9. The assessment of whether an effect is ‘minor’ is one of fact and degree. It is important to note, however, that the test relates to **adverse effects only**. Therefore, the consenting authority (i.e. council) must not attempt to balance the positive and negative effects when making a notification decision.
10. When determining whether an adverse effect is likely to be more than minor, the consent authority **must disregard**:
 - any effects on people who own or occupy the land on which the activity will occur and any adjacent land;
 - any effect on a person who has given written approval for the undertaking of the activity; and
 - trade competition and the effects of trade competition.
11. When an application is for a restricted discretionary activity, the only effects of the proposal that relate to a matter for which a rule or national environmental standard restricts discretion can be considered in the decision as to whether or not an effect is more than minor. In other words – a consenting authority may disregard an adverse effect if a rule in a plan or environmental standard permits an activity with that effect.
12. If a consenting authority determines that the effect on a person(s) is more than minor, that person(s) is then identified as an ‘affected person(s)’ and is given the opportunity to make a submission on the substance of the proposal in question.

‘Special circumstances’

13. Despite the tests set out in sections 95A and 95B of the RMA, consenting authorities may deem that ‘special circumstances’ exist which make it prudent for an application to be publicly notified. However, such ‘special circumstances’ are not defined within the RMA, meaning that courts have been left to provide guidance to consenting authorities and applicants through judicial decisions and precedent. Special circumstances in the context of public notification of resource consents have been defined by the Court of Appeal as circumstances that are ‘outside the common run of things which is exceptional, abnormal or unusual but may be less than extraordinary or unique’².
14. The courts have determined that it is not appropriate to invoke ‘special circumstances’ arbitrarily or without good reason. The courts have determined that the special circumstance must relate to the subject of the application, i.e. those aspects of the activity which specifically remain for the consulting authority’s consideration³. Furthermore, the ‘special circumstances’ exception is viewed as an enabling power that the consenting authority must consider in cases which are out of the ordinary and may, but is not obliged to, exercise⁴.

¹ Content of this section taken from Environment Foundation website (<http://www.environmentguide.org.nz/rma/resource-consents-and-processes/notification-of-resource-consent-applications/when-are-adverse-effects-more-than-minor/>).

² *Far North District Council v Te Runanga-a-Iwi o Ngati Kahu* [2013] NZCA 221 at [36].

³ *Far North District Council* at [37].

⁴ *Housiaux v Kapiti Coast District Council* (HC Wellington CIV-2003-485-2678, 19 March 2004).

Local board governance role in resource consents

15. The Governing Body, under the Local Government (Auckland Council) Act 2009, has specific statutory decision-making responsibility for a range of matters including the regulatory activities of council, such as consenting and bylaws⁵. Therefore, it is important to note that **local boards have no statutory, allocated or delegated decision-making powers over the consenting activities of Auckland Council.**
16. However, the Governing Body has delegated to local boards the ability to provide input into notification decisions for resource consent applications⁶. The local board role in resource consents is limited to:
- providing local views / feedback on which resource consents should be notified;
 - providing local views / feedback on the substance of an application once it has been notified; and
 - presenting local views / feedback on the substance of a notified consent at a hearing if one is held.
17. **There is no statutory, allocated or delegated responsibility provided to local boards in relation to providing views and feedback on the substance of non-notified applications.** Any comments provided by a local board on the substance of a non-notified consent are highly likely to be treated as *ultra vires*, or beyond the powers of a local board. Therefore, any comments provided by a local board in such instances will be given no weight or authority, as the local board has no authority to provide such views.

⁵ Allocation of Decision-making Responsibility for Non-Regulatory Activities, Auckland Council Long-term Plan (LTP) 2018-2028, Vol. 2 Part 3.

⁶ Allocation of Decision-making Responsibility, p.3/14.