

3 August 2021

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Our Ref. 4078.02

Dear Lindsay, Julie, Mike and Chris

Helicopters, Hauraki Gulf Islands Planning opinion

Thank you for your instructions on this matter. As requested we have undertaken a review of the statutory framework regarding helicopter flights and landing pads in the Waiheke Island context and set out the following planning analysis and opinion.

Rule Framework

1. Section 9(3) of the Resource Management Act 1991 (the RMA) states that no person may use land in a manner that contravenes a district rule unless the use is ... (a) expressly allowed by a resource consent; or (b) is allowed by section 10 [existing use rights]
2. The applicable district rules are contained within the Auckland Council District Plan: Hauraki Gulf Islands 2018 (the District Plan).
3. Clause 1.4 of the District Plan sets out the Structure of the document. This identifies high-level Strategic Management Areas and, in the case of Waiheke, Land Unit classifications (equivalent to zones) that apply to all land other than formed roads. Each land unit classification carries with it a set of issues, objectives, policies and rules.
4. Clause 1.6 of the District Plan sets out Procedural Information including the types of activities that apply, ranging from Permitted, Restricted Discretionary, Discretionary, Non-Complying and Prohibited. The latter is described further in Section 1.6.2.4 as follows -

Non-Complying Activities

A resource consent is required for a non-complying activity. The council may grant or refuse the application and can impose a wide range of conditions. There are extra tests under the RMA which the council must consider when assessing a non-complying activity.

There are two types of non-complying activities in the Plan:

- *Listed activities which are specifically identified as non-complying.*
- *Activities which default to a non-complying status because they are not specifically provided for as permitted, discretionary or restricted discretionary.*

5. Section 4 of the District Plan sets out the General Rules that apply to a range of activities. Clause 4.2 is a catch-all or default rule leading from the second bullet point quoted above –

Activities not otherwise specified

A resource consent for a non-complying activity must be obtained for any activity, including the construction of a building or use of any land or building which is not specifically provided for as a permitted, controlled, restricted discretionary or discretionary activity in the parts of the Plan applying to the location of the activity.

6. Section 4.13 sets out the relationship with rules in other parts of the Plan. This includes Part 4 – General Rules, Part 10a – Land Units, Part 10c – Development Controls and Part 13 – Transport. Part 14 - Definitions is to be referenced for terms used in the plan. Therefore a layering approach is to be applied whereby an activity is to be assessed under multiple relevant Parts of the District Plan in order to determine its ultimate (most onerous) activity status.

Provisions for Helipads and Helicopter Flights

7. The term Helipad is defined in Part 14 as follows –

Helipad means land or buildings used for the take off and landing of helicopters. It does not include facilities for servicing, freight handling or storage hangars.

8. The only location where a Helipad is expressly provided for as an activity in the District Plan is within the Claris Settlement Area, Great Barrier Island (Airport Area) in Activity Table 10b.19.1. (This location also provides for 'Airstrip' which is a separately defined term.) There are no other Settlement Areas or Land Units that provide for a Helipad.¹
9. The absence of this defined term within a row in the activity table for the relevant Land Unit should mean that the activity defaults to Non-Complying under Rule 4.2, according to the District Plan structure which requires the assessment of an activity under all relevant Parts of the District Plan. However it is Council practice that the provisions for Helipads within Part 13 – Transport are applied in substitution of the Land Unit provisions – the only exception being where it involves a 'building' which triggers resource consent in the zone. (Not all helipads involve 'building'.)
10. In our view, not assessing an activity under the relevant Land Unit provisions is procedurally incorrect under the District Plan structure outlined above. Part 13 – Transport is what would typically be described as a 'district-wide' chapter which applies in addition to the Land Unit rules. There is nothing in Part 13 to say that this supersedes or trumps the Land Unit provisions.
11. Further the approach differs from Council's standard practice for assessing other activities. A similar example would be other 'transport' activities such as a carpark facility or park and ride which are assessed as activities in the Land Unit as well as being assessed under Part 13 and other relevant provisions.
12. We would add that the drafting of Rule 13.8 – Rules for Helipads is different from other parts of the Transport chapter in that it references and regulates some helipads and flights depending on location. It should also logically be linked back to the Land Unit provisions. It also treats helipads and flights as the same activity where these are different activities in effects terms. See also the comparison to the AUP-OP provisions in the section below.

¹ Designated sites are a separate matter and are outside of this review.

13. The matters of discretion for restricted discretionary helipads / flights are only very narrow under Clause 13.8.2, being limited to helicopter noise and visual effects of earthworks or retaining structures. An assessment under Land Unit provisions would allow for other, broader effects to be considered including –

- The anticipated and established character of the location, and the appropriateness of the activity in the zone.
- The particular directives of the land unit - such as Rural 2 which includes the high onus of *protecting* rural-residential amenity.
- Site intensity and nature / purpose of the flights including whether private / commercial use.
- Amenity including visual, privacy and overlooking, intrusiveness, nuisance and disturbance.
- Effects on other parts of neighbouring properties not just the notional boundary of 'noise sensitive activities'. This would include consideration of flight paths relative to other parts of neighbouring properties.
- Ecological impacts.
- Landscape and natural character.
- Heritage considerations.
- Other cumulative impacts.
- Other matters such as parking provision, signage should these be relevant.

Background to the provisions

14. We have researched the background to the current helicopter provisions including the version of the District Plan that was publicly notified in 2006, the accompanying Section 32 RMA evaluation report, and Council's hearing and decision reports which considered various primary and further submissions. These Council documents confirmed the original treatment of helipads (outside of a few stated exceptions) as a Discretionary Activity. The settlement of the subsequent Environment Court appeal resulted in the current Restricted Discretionary provisions via consent order.² The decision records that the consent order is made by consent rather than representing a decision or determination on the merits of the provisions.

Comparison to Auckland Unitary Plan (AUP-OP) provisions

15. Under the AUP-OP, different provisions apply to the building of helipad structures compared to helicopter landing and take-off. The building of the helipad is subject to provisions for building activities in the zone, while the landing and take-off is Non-Complying where it is not provided for in the zone. This is consistent with our opinion on how the HGI District Plan provisions should be applied as outlined above, with helipads / landing areas and flights to be assessed as separate activities in our view.

² Environment Court decision 6 August 2012 (relates to appeals ENV-2009-AKL-000313 / 336 / 344)

16. The AUP-OP applies separate noise limits to helicopters under Standard E25.6.32 as follows –

Helicopter noise

E25.6.32 Noise levels for helicopter take-off or landing

(1) The take-off or landing of a helicopter on any site except for emergency services must not exceed L_{dn} 50dB or 85dB L_{AFmax} measured within the boundary or the notional boundary of any adjacent site containing activities sensitive to noise and L_{dn} 60dBA within the boundary of any other site.

17. It is our understanding that this is more restrictive than the HGI District Plan rules in that averaging is not applied over three days, an L_{max} metric limit is applied, and a limit is applied to the boundary with any other site. This type of approach gives greater protection to neighbours whether be they rural or residential, compared to the HGI District Plan provisions. Expert acoustic advice would be appropriate to confirm and elaborate further on these points.
18. Part J1 - Definitions defines the term 'Airport'. This excludes *private helipads used by the occupiers of a property on a non-commercial basis*. Therefore helipads used for or supporting a commercial operation would not be exempt and would be defined as an airport. The HGI District Plan does not distinguish between private and commercial helipads nor is this a matter of discretion when assessing Restricted Discretionary helipads / flights.

Helipad resource consents

19. We have previously expressed our view to Council that when assessing the level of noise effects and whether these are avoided, remedied or mitigated, and acceptable, it is not appropriate to simply demonstrate that the 50 dBA averaging limit is met. Using the rule as a de facto performance standard, as Council has been doing, does not consider the reality of adverse noise effects for the surrounding residential and rural-residential environments. This includes short term noise and amenity effects where peak sound of helicopter landing and take-off is significantly over the 50 dBA level for short durations.
20. The Council has issued a list of helipad resource consents that have been granted. Those we have reviewed have demonstrated compliance with the Restricted Discretionary requirements. Many are located within the Rural 1 and 2 land units which are valued for qualities including their rural and rural-residential amenity. The consents illustrate that an extremely high number of flights per day / per three day average can comply with the 50 dBA requirement. It is our view that the collective number of approved resource consents, coupled with the high frequency of flights approved under each consent, has directly arisen due to the application of the Restricted Discretionary status with its narrow assessment of effects and preclusion from any form of notification.

Duty to Avoid Unreasonable Noise

21. Section 16 RMA requires the adoption of the Best Practicable Option to ensure that the emission of noise does not exceed a reasonable level. In our experience this does not form part of Council's consideration when assessing and granting resource consents for helipad / flights within Waiheke Island.

Options

22. The procedural correctness of the Council's application of the helicopter provisions of the HGI District Plan could be tested by way of an Environment Court Declaration. This could be sought by the Council as it has previously done on matters of interpretation and application of its other statutory documents.
23. If found to be incorrect then a helipad consent holder is at risk that the consent could be cancelled by the High Court if such an application were to be made.
24. A similar situation arose with Council's application of AUP-OP provisions, where it failed to apply the underlying Zone rules in addition to the Special Character Area overlay rules. At the time, the Council immediately corrected its approach to new applications and went on to reassess and reissue some 400 resource consents at its own cost. A subsequent Plan Change was also completed.
25. A Plan Change also could also be advanced by Council in respect of helicopters. This could resolve problematic aspects of the current provisions and align these with the AUP-OP provisions as appropriate. This may be the best course of action to rectify difficulties outlined herein.

Summary

26. According to the structure of the HGI District Plan, helipads and helicopter landing and take-off should be assessed as a Non-Complying Activity in all Land Units where this is not specified in the activity table (including Rural 1 and 2 land units).
27. In granting resource consents for helipads to date, the Council has omitted any assessment of the Land Unit provisions. It has only been applying Part 13 – Transport provisions resulting in helipads and flights being assessed as a Restricted Discretionary Activity on a non-notified basis.
28. It is our experience that the Council applies the Ldn 50dBA 3 day rolling average as a performance standard thus deeming activities at this level to have acceptable noise effects. This approach fails to consider numerous other factors including the peak sound and frequency of helicopter flights and whether the activity is reasonable in the context.
29. There are obvious differences between the HGI District Plan provisions and the AUP-OP provisions. A Plan Change to the HGI District Plan would be warranted to resolve problematic aspects and align these with the AUP-OP as appropriate.

If you require any further information, or wish to discuss any of the above, please do not hesitate to phone 3729266 / 0272046210 or email nicole@planorama.co.nz.

Yours faithfully

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