

BEFORE AN EXPERT CONSENTING PANEL

Under the Covid-19 Recovery (Fast-track Consenting) Act
2020 (**FTCA**)

In the Matter of an application to an expert consenting panel for
resource consent by **P0012 AUCKLAND NZ PTY
LIMITED** for the Federal Street Residences Project, 65-
71 Federal Street, Auckland Central

Memorandum of Counsel on behalf of P00012 Auckland NZ PTY Limited

Dated 28 June 2022

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May it Please the Panel

Introduction

1. This memorandum is presented on behalf of P00012 Auckland NZ PTY Limited (**Applicant**). It responds to:
 - a. Legal matters raised in Minute 4 (**M4**) issued by the Expert Consenting Panel (**Panel**) on 3 May 2022.
 - b. Issues arising out of comments received.

Minute 4 – Instruments registered against adjoining title

2. The Panel have requested the Applicant provide legal advice in relation to the relevance of the instruments registered against the title of adjoining land at 60 Hobson Street.¹

Panel's Request – M4

3. M4 advises the appointment of specialist technical and legal advisors. The Panel has sought independent legal advice on:²

“[t]he appropriateness of the Applicant’s reliance on restrictive covenants and easements against the titles of land parcels of adjacent properties, when assessing the effects of the proposal in accordance with the Auckland Unitary Plan’s outlook requirements for residential units.”

4. In addition to seeking independent advice, the Panel requested the Applicant to:³

“[p]rovide legal submissions on any judicial authority concerning the proposition that the application can rely on the restrictive covenants and easements as identified in the application.”

¹ Lot 3 DP 319720.

² Minute 4, Paragraph 8.

³ Minute 4, Paragraph 9.

5. The Application site is 65-71 Federal Street. A property adjoining to the west (60 Hobson Street) is subject to instruments on the title which have the effect of limiting development on that property.

The AEE – Assessment of Outlook Infringements

6. The AEE prepared in support of the Application records that infringements to City Centre Zone's outlook standards require resource consent under Rule C1.9.(2) of the AUP. As part of the assessment of effects, the AEE expressly considers matters related to residential amenity and quality of design, including outlook.
7. The AEE records that the proposed building (for which consent is sought) infringes the relevant AUP outlook space standards in various locations. Of the 357 proposed dwellings, the overwhelming majority of living areas and bedrooms comply with the outlook requirements. The Application does not comply with the outlook standards with respect to:
 - a. 73 west-facing bedrooms adjoining property at 34 – 36 Kingston Street;
 - b. 73 west-facing living rooms adjoining property at 60 Hobson Street; and
 - c. 47 south facing living rooms.
8. The relevant infringements to the question posed by the Panel are those relating to the 73 west-facing living rooms which overlook land at 60 Hobson Street.
9. Infringements to the outlook space standard are assessed at pages 79 – 84 of the AEE. In relation to the infringement overlooking 60 Hobson Street, the AEE notes that "the property [60 Hobson Street] is subject to a number of restrictive instruments on the Title which limit future development potential."⁴ That statement is correct. The nature of the instruments involved here either restrict or prohibit

⁴ AEE at pg 79.

development which might otherwise occur as of right or as a result of a future resource consent application.

10. The outlook effects of the proposal are considered in the Landscape and Visual Design Assessment. With respect to 60 Hobson Street, the Landscape Assessment notes that the apartments orientated to the west “will retain an outlook over the top of the neighbouring 3-storey building at 60 Hobson Street. I understand that property is subject to a light and air easement in favour of the adjoining building and that this outlook therefore cannot be built out.”⁵ The AEE goes on to state:⁶

“[a]ny future development of the property at 60 Hobson Street is highly constrained by three legal mechanisms that sit on the title to that property. Accordingly, it is my view that outlook over that property is secure (not in favour of 65 – 71 Federal Street, but in a manner that means no development is possible above RL 41.50, which is well below the top of the podium) and can be relied upon.”

11. Accordingly, the AEE relies in part upon the development constraints on 60 Hobson Street to inform the conclusion that infringements to this outlook standard will not result in adverse effects.

Restrictions on Development at 60 Hobson Street

12. In summary the three restrictions on development at 60 Hobson Street are:
 - a. An easement in favour of 66 Hobson St granting rights to light and air over part of the property at the southeast corner of 60 Hobson above one storey from ground level; and
 - b. A covenant restricting any development to a maximum GFA of 871m² (unless otherwise consented in writing by the Council); and
 - c. An easement in favour of the Altitude Apartments at 34-36 Kingston Street granting unrestricted light and air over all of the property at 60 Hobson above RL41.50.
13. A copy of the Record of Title for 60 Hobson Street is included as Attachment S1 to the Application. Copies of the relevant instruments are Attachments S2-

⁵ Attachment C1.

⁶ AEE at [7.4](d).

S4.

Covenant Principles

14. As the Panel will be aware, on a first principles basis a restrictive covenant is an agreement made by a landowner to limit or prevent certain development or use of land.
15. The key principles relating to covenants are:
 - a. There must be a dominant owner (enjoys the benefit of the covenant) and a servient owner (is subject to the burden of the covenant).
 - b. A covenant may be positive (requiring the servient owner to take positive action) or restrictive (preventing the servient owner from using land in a certain way).
 - c. A covenant binds the original parties (privity of contract) but can also bind successors in title.
 - d. The noting of a covenant on a title ensures that a purchaser of land has notice as to the existence and terms of a covenant. Accordingly, a covenant can bind successors in title.
 - e. The benefit of a covenant runs with the land and is enforceable by successors in title to the dominant land.
 - f. Covenants may be modified or extinguished by order of the court. An applicant to modify or extinguish a covenant must establish one or more of the various grounds set out in s 317 of the Property Law Act 2007 (PLA).

Easement Principles

16. The key principles relating to easements are:
 - a. An easement can be as between a dominant owner (enjoys the benefit of the easement) and a servient owner (subject to the

burden of the easement) or can be an easement in gross.

- b. An easement grants a legal right to use another's land in accordance with the express terms of the easement.
- c. An easement does not confer ownership of land or part of land. It confers a legal and enforceable right.
- d. Sections 299 and 300 of the PLA set out statutory requirements for the enforcement of light and air easements. In summary, a right to the access and enjoyment of light and air over the burdened land is enforceable only if it:
 - i. Is granted on or after 24 November 1927;⁷
 - ii. Is granted by a deed or registerable instrument;⁸
 - iii. The area of burdened land subject to the right to access light or air is accurately defined;⁹ and
 - iv. Is duly registered within 12 months of the day of execution.¹⁰
- e. A registered easement binds successors in title. Section 300(2) of the PLA expressly provides that unless otherwise provided, the easement continues for the benefit of the person entitled, even though any buildings erected on the benefited land may be altered or may be destroyed and replaced by other buildings.
- f. Easements may be modified or extinguished by order of the court. An applicant to modify or extinguish a covenant must establish one or more of the various grounds set out in s 317 of the PLA.

⁷ Section 299(2).

⁸ Section 299(3).

⁹ Section 299(4)(a).

¹⁰ Section 299(4)(b).

Implications of instruments on the assessment of environmental effects

17. The Applicant is not the dominant owner of either the covenant or the easements. Thus, it has no ability in law to enforce them, or contest any application to modify or extinguish them.
18. However, the “environment” against which the application and its potential effects must be considered should be assessed adopting a “real world” approach, not an artificial approach, to what the future environment will be.¹¹
19. The “environment” embraces not only the existing environment, but also the future state of the environment as it might be modified by permitted activities and by resource consents which have been granted where it appears likely that those consents will be implemented.¹²
20. The receiving environment does not include effects of resource consents that may be sought in the future, as that is the realm of speculation.
21. Consequent on the above:
 - a. The Site and surrounds form part of the environment, which a decision maker under the RMA and FTA must have regard to.
 - b. Any registered instruments and encumbrances on a title inform or constrain potential development and use of a site.
 - c. The existing environment therefore must take the site and surrounds as they are found and that includes any encumbrances or restrictions placed on that land. To do otherwise would not be a real world assessment of the environment.
 - d. A key purpose of restrictive covenants and easements is to secure an outcome that will endure notwithstanding subsequent changes

¹¹ *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, (2013) 17 ELRNZ 585 at [85].

¹² *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

to the regional and district planning framework.

- e. While it is correct that as a matter of law a covenant or easement may be modified or extinguished in the future (i.e. by way of court order under PLA), speculation as to whether such an application would be made is not appropriate.
- f. In addition, even if applications for removal or amendment were to be speculated about, there are 3 separate instruments each addressing different considerations with 3 separate dominant owners.¹³ Given that position, adopting a real world approach it is unlikely that three formal applications to a Court to remove or modify would be made and succeed.

Use of Fast Track Process

- 22. Comments from Maitre Systems Limited on one interpretation raise concerns with respect to the appropriateness of the Fast Track process in the context of this project.
- 23. The Applicant is acting lawfully in pursuing an available consenting process. The proposal has been the subject of a decision by the Minister for the Environment, who has determined by reference to relevant statutory criteria that the project should be referred to an Expert Consenting Panel.
- 24. The potential effects of the project are the subject of consideration by the Expert Consenting Panel.
- 25. The appropriateness of the process is not a valid matter of dispute before the Expert Consenting Panel.

Financial Compensation

- 26. Comments from Areeb Mirza (1947 Limited), RL Senojak and Jingqi (Jessie)

¹³ In fact, the instrument in favour of the Altitude Apartments relates to a relatively new building with multiple apartments benefiting from the easement. I am advised that the Altitude Apartments at 34 Kingston St are made up of approximately 209 unit titled apartments. The vast majority are individually held unit titles with only a few owners of one or more.

Zhao raise issues of compensation in various ways.

27. Areeb Mirza (1947 Limited) states if there were closures of Federal Street, they should be informed so they "...can shut the restaurant for that day and seek some compensation".
28. Rana Senojak raises the following matters:
 - a. Suggests any legal costs they incur should be borne by the Developer.
 - b. Costs of remediation of potential physical damage caused by the project to Altitude Apartments.
 - c. Costs of reconfiguring light provision for eastern wall apartments, and rent/resale impact.
 - d. Potential loss/reduction of rent resulting from construction disruption for which compensation should be paid.
29. Jingqi (Jessie) Zhao suggests the construction "will create further inconvenience and loss for me. ie. rental or sale of my apartment..."

Response

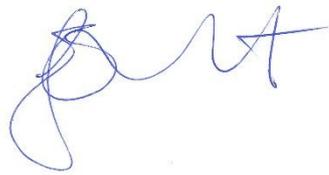
30. A grant of resource consent to the Applicant does not create a related right in the context of the Resource Management Act 1991 for third parties to claim consequential losses relating to the alleged effects of the development proceeding.
31. For applicants, the Panel will be aware that New Zealand planning legislation restricts, without compensation, the right to develop land and requires approval of all subdivisions.¹⁴ Where permission to develop land is refused, with the consequence that it is greatly reduced in value, the courts have treated what has happened as a form of regulation rather than a taking of property.

¹⁴ *Waitakere City Council v Estate Homes Ltd* 2006 NZSC 112, at [47].

32. Turning to third parties, firstly the consent sought does not involve any taking of land from third parties.
33. Secondly, effects on property values are not a relevant consideration in determining whether a resource consent should be granted. Diminution in property values is simply another measure of adverse effects on amenity values.¹⁵
34. The evidence on behalf of the Applicant is that no permanent or long term closures of Federal Street will be required. Any temporary partial closures for a short term activity (such as crane erection/take down) would necessitate legal authority to be obtained from relevant authorities. Access to other properties will be maintained. No prospective liability for compensation due to asserted anticipated financial losses resulting from temporary road disruption can lawfully be assessed now and addressed through conditions of consent. No liability to third parties arises from lawful temporary road access restrictions.
35. Any legal costs for an individual or company taking advice in their own interests with reference to the lawful activity of another applying for a resource consent is a cost for the individual or company to bear.
36. Any remediation and/or financial compensation for physical damage caused by construction of the project is a matter for civil proceedings to resolve. The conditions of consent do require measures such as condition surveys and various monitoring activities (by reference to groundwater and the like) which assist in identifying the potential for damage, enable mitigation measures to be enacted and provide information relevant to managing effects and identifying damage which may have occurred.
37. If the project is determined to be appropriate and deserving of consent, then any decision by neighbouring properties to undertake physical works on their own properties in response is a matter for those third parties to undertake at their cost.

¹⁵ See the summary in *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137, at [57] – [59].

38. Assertions as to potential loss of property value or loss of rental income and the resulting request for compensation is addressed by the principles in case law summarised in *Tram Lease*. In addition, the assertions are entirely prospective and based on assumption. Conditions of consent requiring future financial compensation or purporting to assign liability for possible future loss should not be imposed.



Jeremy Brabant

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Dated 28 June 2022