Before New Plymouth District Council

Independent Commissioner Mark St Clair

IN THE MATTER of an application for resource consents LUC24/48662 and SUB24/50201 1 and 9 Washer Road, Omata

Washer Family Trust Limited
Applicant

30 October 2025

Applicant's further submissions addressing consent notice conditions

Introduction

1. The Applicant refers to Commissioner Mark St Clair's "Minute 5" issued on 7 October 2025. These submissions further address procedural issues raised following the application's hearing on 2 October 2025. The submissions respond to memoranda filed subsequent the hearing from: independent legal advisor, Duncan Laing; New Plymouth District Council's s42a reporting officer Campbell Robinson; and opposing submitters.

2. The Applicant maintains that Lot 31's consent notice does not prohibit the proposed minor boundary adjustment. Alternatively, the Applicant submits that the Commissioner has jurisdiction to vary the consent notice condition within this proceeding, or that the substantive application may be granted subject to a condition precedent requiring the variation. The submissions detail (a) the proper interpretation of the consent notice, (b) the Commissioner's jurisdiction to vary the condition, (c) the Applicant's ability to seek such variation at this stage, and (d) the form and effect of the variation sought.

Further subdivision, Laing opinion

3. The Applicant respectfully disagrees with Mr Laing's opinion regarding the "no further subdivision" issue. The Applicant respectfully retains its submission that "no further subdivision" in Lot 31's consent notice does not prevent a minor boundary adjustment. Presently there are 30 consented

residential lots. After the boundary change, there will still be 30 residential lots. No further subdivision is occurring — at least not within the intent of the consent notice — as no more additional lots are being created.

4. Regarding the "further subdivision" issue, the Applicant respectfully refers the Commissioner to its earlier written submissions — filed on 3 October 2025 ("**first procedural submissions**"), particularly at:

    a. [2.1] – [2.11] submitting: lot 31's record of title does not restrict the boundary adjustment — in light of the consent notice's interpretation; and
    b. [3.1] – [3.12] submitting: judicial interpretation of "subdivision" under the RMA confirms the consent notice does not prohibit the boundary adjustment.

5. The consent notice is intended to prevent additional lots being created at Tapuae, because additional lots allowing residential dwellings would generate effects. This is a natural and ordinary meaning of the consent notice — also reflecting a purposive interpretation. The consent notice was implemented in the context of a series of development stages and sought to avoid additional lots beyond that final stage, as indicated by the words 'no further subdivision'. But the consent notice was not intended to restrict a boundary adjustment such as this, because it is not a 'further' subdivision which would create additional lots, and reading it in this way requires a technical reading.

6. However, if the Commissioner agrees with Mr Laing, the Applicant submits:

    a. The Commissioner has jurisdiction to vary the consent notice condition — of his own volition, as part of the current application.

    b. Alternatively, the Applicant can apply to vary the consent notice conditions, as part of the current application.

i. Variation of the consent notice conditions should proceed on a non-notified basis as there are no "affected" people for the purposes of the RMA.[1]

ii. In addition, the variation of the consent notice would be a consequence of the current consent application process, which was limited notified. All persons who might be considered potentially affected (although the Applicant says they are not) have already had the opportunity to be involved in considering the substance of the activity for which consent is sought. There is no utility in re-running the same arguments again. If the substantive application has acceptable effects, then the modification of the consent notice to allow the activity to occur must also necessarily also be acceptable.

c. Further, the substantive application should still be considered notwithstanding the consent notice condition. The substantive consent can be granted subject to a condition precedent requiring lot 31's consent notice conditions be varied before the substantive consent could be implemented.

7. New Plymouth District Council's s42A reporting officer, Campbell Robinson's further submissions do not conflict with the Applicant's contended approach.

8. The opposing submitters respectfully, are misconceived when they state the application is "premature and cannot lawfully be considered while the consent notice remains in force". The application may be considered while the consent notice remains in force, particularly where, as part of the application, the consent notice is varied by the Commissioner or a condition precedent is included. Requiring the application's declinature on a jurisdictional basis, requiring a fresh substantive application that includes a consent notice variation application would be converse to the Resource Management Act's principles and purposes.

[1] Applicant refers to its first procedural submissions at [5.1] – [5.7].

Commissioner can vary consent notice condition at current stage of proceeding

9. Following from [4.1] – [4.2] and [4.4] – [4.13] of the first procedural submissions, it is orthodox that if during the resource consent process, an additional consent (not sought in the initial application), needs to be obtained for the proposed activity to proceed, it may be obtained as part of the application already underway.[2] Parliament deliberately intended that resource consent applications could be modified this way to achieve the RMA's objectives — in light of submissions.[3]

10. In this situation the consent authority has jurisdiction[4] to add the new or additional consent notice condition to be considered alongside[5] the initially sought consent(s). This is a pragmatic approach reflecting the Act's aim for efficiency.[6]

11. While the consent notice condition is not a type of resource consent under s 87 of the RMA, applications to vary consent notice conditions are assessed as if they were an application for a discretionary activity.[7] Parliament deliberately drafted RMA, s 221(3A) to subject consent condition variations to exactly the same process as resource consents.[8] For a consent authority to include a variation to a consent notice's condition, it can be considered as equivalent to including an initially omitted resource consent which must be later included in an application.

[2] *Haslam v Selwyn District* (1993) 2 NZRMA 628 (PT) at 634. Endorsed by Asher J in *Collins v Northland Regional Council* [2013] NZHC 3039 at [26] and [27]. Also endorsed by Environment Court Justice Stevens and Commissioner Wilkinson in *Kaiuma Farm Limited v Marlborough District Council* [2024] NZEnvC 150 at [65].
[3] *Haslam v Selwyn District* (1993) 2 NZRMA 628 (PT) at 634.
[4] *Shell New Zealand Limited v Porirua City Council* (19 July 2005) CA 57/05 at [7], per Anderson P.
[5] New Plymouth District Council s42A reporting officer, Campbell Robinson — in his further submissions filed 22 October 2025, agrees that variation or cancellation should be considered "in conjunction with the proposed land use and subdivision consent as the matters, based on the advice received, appear to be interrelated".
[6] Resource Management Act 1991, s 221(3)(b): "the territorial authority may review any condition specified in a consent notice and vary or cancel the condition".
[7] *Foster v Rodney District Council* [2010] NZRMA 159 (EnvC)at [10].
[8] Resource Management Act 1991, s 221(3A): "Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted [of consent notice conditions]".

12. Resource consents authorise an activity rather than a breach of a rule.[9] While the breach of a rule in a district plan triggers the requirement for resource consent[10] — consent is not granted to allow specific plan provision breaches, it is granted for the activity as a whole,[11] assessed holistically.[12] Here, amending the consent notice conditions to allow the boundary change is part of the activity as a whole, assessed holistically.[13] An already consented building platform is proposed to be relocated — varying the consent notice terms to allow a minor boundary change is necessarily part of the proposed activity. It is not a new activity, and the Commissioner has been delegated New Plymouth District Council's decision-making power as consent authority to determine this application, as a whole.

13. It is standard practice that Applicants may make "sensible modifications" to resource consent applications without renotification.[14] It would be perverse if a proposal were delayed, until a "fresh" application for variation is made, notified and submitted on — when no environmental effects arise and all possible affected parties have already filed submissions. As Wild J helpfully explains:[15]

> *When Courts speak of "amendment" to a resource consent application, they speak metaphorically or loosely. The Resource Management Act 1991 does not provide for "amendment" of an application. What happens, and the sense in it happening, was described by the Planning Tribunal …*

[9] *Arapata Trust Limited v Auckland Council* [2016] NZEnvC 236 at [35] and [36]. Affirmed in *Cable Bay Wine Limited v Auckland Council* [2021] NZHC 2596 at [105]. Upheld by the Court of Appeal in: *Cable Bay Wine Limited v Auckland Council* [2022] NZCA 189 at [11] and [21].
[10] Resource Management Act 1991, s 87.
[11] *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC) at 377. Affirmed in *Marlborough District Council v Zindia Limited* [2019] NZHC 2765 at [47] and *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 577.
[12] *Cable Bay Wine Limited v Auckland Council* [2022] NZCA 189 at [16], citing, *Marlborough District Council v Zindia Limited* [2019] NZHC 2765 at [67]. Further, see *Arapata*, above n 9, at [37]: if a resource consent were not assessed holistically and granted for the whole activity, but instead only ever for specific plan breaches listed in the consent, every person undertaking an activity pursuant to a resource consent in such terms would require a further resource consent should there be any change to any relevant rule applicable to that activity at any time in the future (e.g. when the District Plan is updated). Such a prospect is untenable.
[13] *Arapata Trust Limited v Auckland Council* [2016] NZEnvC 236 at [41].
[14] *Kaiuma Farm Limited v Marlborough District Council* [2024] NZEnvC 150 at [65]. This has been the law since the Planning Tribunal's decision in *Haslam v Selwyn District Council* (1993) 2 NZRMA 628.
[15] *Atkins v Napier City Council* [2009] NZRMA 429 (HC) at [49], quoting *Haslam v Selwyn District* (1993) 2 NZRMA 628 (PT) at 634.

> *In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions*.

14. Consent authorities have jurisdiction to grant a resource consent which falls within the consent application's scope.[16] When the consent authority assesses what sits within the application's scope, it is the substance or gist of the application that counts.[17] Regard must be had to the circumstances that existed at the time the application was made — relevant also is the basis on which the application was received and dealt with by the consent authority.[18] Here, the substantive application was made for a minor boundary adjustment to provide a sound building platform for a residential dwelling. Varying the consent notice condition to allow the boundary change to occur, is a constituent element of the application's substance. It is within scope.

15. Further, a resource consent application need only describe the proposed activity sufficiently to enable the consent authority to understand the activity's environmental effects and enable a submitter to give reasons for a submission, and state the general nature of conditions sought.[19] The substantive application facilitated this — evidenced by the fact no additional effects are generated by the variation to the consent notice for the submitters to respond to.

16. Whether an amendment or modification falls within an application's ambit is a question of degree[20] and, dependent on the case's facts — including "such environmental impacts as may be rationally perceived by the consent authority".[21] The opposing submitters have not provided evidence

[16] *Shell Oil New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005 at [5]. *Simons Hill Station Limited v Canterbury Regional Council* [2013] NZEnvC 62 at [20] citing *Darroch v Whangarei District Council* PT, A18/93, Judge Sheppard. *Manners-Wood v Queenstown-Lakes District Council* EnvC Wellington W077/07, 12 September 2007, Judge Dwyer at [22].
[17] *Sutton v Moule* (1992) 2 NZRMA 41 (CA) at 47. *Simons Hill Station* Limited, above n 16, at [20]
[18] *Sutton v Moule* (1992) 2 NZRMA 41 (CA) at 48.
[19] *AFFCO New Zealand Ltd v Far North District Council (No 2) [1994] NZRMA 224 (PT) at 14*. Recently affirmed in: *Soroka v Waikato District Council* [2021] NZHC 2191 at [74].
[20] *Kaiuma Farm Limited v Marlborough District Council* [2024] NZEnvC 150 at [66].
[21] *Shell Oil New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005 at [5].

demonstrating the consent notice terms' variance will have adverse environmental effects.

17. The test for falling within scope to amend, is whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified in terms of:[22]

    i. The scale or intensity of the proposed activity; or
    ii. The altered character or effects/impacts of the proposal.

    The condition's variation will not alter the proposed activity's scale or intensity, it will merely allow it to proceed. The Applicant's evidence is that the application does not have any adverse environmental effects. The effects of varying the consent notice condition are less than minor. Even so, the Resource Management Act is not a zero effects statute.[23] Consent may be granted for activities with significant adverse environmental effects — the level of effect is critical to the notification stage. No new opposing submitters could be brought into the matter if the variation proceeds. All Tapuae owners that did not sign APAs have been notified. The question of further submitters' inclusion in the process, is a means of applying the test.[24] But it is not the test itself.[25] There are no other additional landowners at Tapuae that can be engaged in this process.

18. Criteria relevant to varying the condition includes the circumstances in which the condition was imposed, the environmental values it sought to protect, and purposes of the RMA.[26] As detailed at [2.1] – [2.11] of the first procedural submissions, the consent notice condition was intended to address the creation of new residential dwellings, and the associated environmental effects. It was not intended to preclude a boundary

[22] *Atkins v Napier City Council*, above n 15, at [20].
[23] *Discount Brands Limited v Westfield (New Zealand) Limited* [2005] NZRMA 337 (SC) at [23], per Elias CJ: "when a substantive decision is made on the application for resource consent for a discretionary activity under s 105, the consent authority is simply empowered to decide whether or not to grant the consent and on what conditions, after taking into account the considerations identified by the Act and in the context of the district plan".
[24] *Atkins v Napier City Counci*l, above n 15, at [21].
[25] At [21].
[26] *Foster v Rodney District Council* [2010] NZRMA 159 at [9].

adjustment of this nature and so key criteria for varying the condition are met.

19. Ultimately — when determining jurisdiction — while the modification's extent and impact are critical factors — the question of amendment is underpinned by fairness and reasonableness.[27] Amendment of a consent notice condition to allow an already consented activity — to proceed, albeit in a slightly adjacent location to avoid risk — is a reasonable proposition. It would be unfair for the application to founder on a procedural point, when no adverse effects or additional submitter interests turn on the condition's variation.

20. As part of the Washer Family Trust Limited's application, the Commissioner can,[28] having been granted the territorial authority's delegated authority to decide the application as a whole, review any condition in a consent notice and vary the condition. The Applicant respectfully requests the Commissioner so too facilitate this application's amendment by considering whether to vary the consent notice condition. This is consistent with the RMA's purposes and prevents perverse outcomes.

Applicant can apply to have condition varied at current stage of proceeding

21. An application to vary a consent notice condition is subject to the same considerations as to the Commissioner varying the condition following review.[29] Making such an application is open to the Applicant. The condition variation can be considered alongside the substantive application.[30]

22. If, notwithstanding the authorities that confirm the Commissioner has jurisdiction to vary the consent notice, the Commissioner is still disinclined

[27] *Collins v Northland Regional Council* [2013] NZHC 3039 at [27].
[28] *Atkins v Napier City Council* [2009] NZRMA 429 (HC) at [49], *Haslam v Selwyn District* (1993) 2 NZRMA 628 (PT) at 634.
[29] Resource Management Act 1991, s 221(3) and (3A).
[30] First procedural submissions at [4.2], [4.4] – [4.13]; Second procedural submissions, above, at [9] – [13], [15] – [19].

to review the condition independently, the Applicant may file a formal variation application.[31]

23. However, were the Applicant to file such an application, it would be required to provide a new AEE in relation to the condition variation. This new AEE is filed with these submissions. It shows the condition variation would have no adverse effects. As the Commissioner now has all material before him that would have been filed as part of a variation application — the Applicant respectfully requests the condition variation is considered accordingly as part of the current application.

Variation to consent notice sought

24. Should the Commissioner accept that he has jurisdiction to vary the consent notice, then it is necessary to consider what variation should be made, to not impact on the consent notice's integrity and the restriction on (as the Applicant submits) further subdivision creating additional allotments, rather than being a restriction on minor boundary adjustments.

25. For convenience, the text of the current clause of the consent notice is reproduced again as follows:

> *That Lots 31 & 32 shall not be further subdivided and shall not be disposed other than in conjunction with Lots 1-30 inclusive*

26. Given that there has been some debate as to whether the consent notice was intended to avoid minor boundary adjustments (that do not create new allotments) generally, there does not need to be a variation to allow all minor boundary adjustments.

27. There is a specific boundary adjustment that is being sought, and that is all that the variation to the consent notice needs to enable. For example, by varying it as follows:

> *That Lots 31 & 32 shall not be further subdivided and shall not be disposed other than in conjunction with Lots 1-30 inclusive*
>
> ***The above restriction shall not apply to the boundary adjustment and consequent transfer of land enabled by consent application SUB24/50201.***

[31] Such an application should proceed on a non-notified basis — there are no affected parties requiring notification. See: First procedural submissions at [5.1] – [5.7]. Resource Management Act 1991, s 95E.

28. This will enable the substantive consent to be registered with LINZ and for the boundary adjustment and consequent transfer of land to occur.

29. It will not allow any further boundary adjustments (including minor ones).

30. Furthermore, a condition of consent could be for the consent holder to apply to LINZ, following the boundary adjustment and consequent transfer of land being completed to, have the varied text deleted, as the exception would have been utilised and therefore would have "expired". This is envisaged by section 221(5) of the RMA:

> *Where a consent notice has been registered under the Land Transfer Act 2017 and any condition in that notice … has expired, the Registrar-General of Land shall, if he or she is satisfied that any condition in that notice … has expired, make an entry in the register and on any relevant instrument of title noting that the consent notice has … expired, and the condition in the consent notice shall … cease to have any effect… .*

31. While this is a power that the Registrar has, it is understood in practice that the removal of an expired consent notice will only usually occur in practice upon application – despite it being good practice to keep a title clear of expired obligations.

Substantive application can be considered without varying condition — inclusion of condition precedent in resource consent

32. The substantive application may be considered and granted notwithstanding the condition. The granted resource consents can be subject to a condition precedent requiring, that before the resource consent is implemented — Lot 31's consent notice condition must be varied to facilitate the boundary adjustment. Conditions precedent are common in consent conditions[32] — it would be unremarkable to include one in this case.

33. Consent notices when registered are treated as covenants running with the land.[33] A covenant preventing a particular activity does not prevent a

[32] *Westfield (New Zealand) Limited v Hamilton City Council* [2004] NZRMA 556 (HC) at [56], *Grampian Regional Council v City of Aberdeen* (1983) P & CR 633 at 636 (HL).
[33] Resource Management Act 1991, s 221(4)(b). *Waimarino Queenstown Limited (as successor to B Property Group Limited) v Queenstown Lakes District Council* [2024] NZEnvC 176 at [107].

resource consent being granted in relation to that land.[34] Particularly when the covenant may be varied or removed.

Conclusion

34. In summary:

a. The Applicant maintains its position that the application does not amount to a "further subdivision" for the purpose of interpreting and applying the consent notice. That means that there is no breach of the consent notice, and no real or perceived impediment to the grant of the substantive consent application.

b. If the Commissioner is of the opinion that the application involves a subdivision that does fall within the use of the term "further subdivision" in the consent notice, then that is still not an impediment to the grant of consent for the following reasons:

i. Consent was sought for the activity of a minor boundary adjustment. Its extent and purpose was clear (i.e. to enable a slightly relocated building platform, free from geotechnical instability issues). There can be no credible suggestion that those submitters who were limited notified did not understand the nature and extent of the activity for which consent was being sought, and the effects that would arise should the activity be allowed.

ii. In these circumstances, it would be appropriate — if the Commissioner finds the effects of the substantive activity to be less than minor, minor, or otherwise acceptable — for the Commissioner to exercise his powers as consent authority to vary the consent notice to let the boundary adjustment proceed. Doing so would represent an efficient and effective use of resources – as it would prevent a further process (an

[34] *Westfield (New Zealand) Limited v Hamilton City Council*, above n 32, at [55] and [56].

application to vary the consent notice) from having to be undertaken, to implement the substantive consent.

iii. Even if the Commissioner is not prepared to vary the consent notice as part of this process, it can still grant the substantive consent (if necessary, with a condition precedent requiring removal of the consent notice before the consent being exercised). It will then be up to the Applicant to apply to vary the consent notice so that the substantive consent can be given effect to. That may well be granted on a non-notified basis, particularly if the Commissioner finds through this substantive process that the adverse effects of the boundary adjustment will be less than minor. Those decisions would be made through any such subsequent consent notice variation process.

c. The latter position is least attractive for the Applicant – and it is respectfully submitted – for the Council and submitters; as it defers the ability to implement the substantive consent to another process, leaving everyone with ongoing uncertainty as well as a further process that will take time, energy, and cost.

d. With all of this in mind, the Applicant respectfully asks the Commissioner to:

i. As the preferred outcome, grant the substantive consent for the boundary adjustment together with a variation of the consent notice, with the text of the variation as set out above.

ii. In the alternative, grant the substantive consent for the boundary adjustment subject to a condition precedent or clear advice note recording that the consent cannot be exercised unless or until the consent notice is varied to allow its implementation.

Dated 30 October 2025

A Young

Representative of the Applicants