

ORDINARY MEETING 26 MAY 2015	6.5
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NOTICE OF MOTION – CR MELCHERT

MCU (CODE ASSESSABLE DEVELOPMENT) LOT 1 CAPTAIN COOK HIGHWAY,
INTENSIVE ANIMAL HUSBANDRY ETC.

NOTICE OF MOTION

I hereby give Notice of my intention to move the following motion at Council's Ordinary Meeting to be held on Tuesday 26 May 2015:-

*"That Council resolve that in relation to condition 5 of the development approval issued for **MCU (Code Assessable Development) Lot 1 Captain Cook Highway Intensive Animal Husbandry Etc** Council direct that the required report from a qualified Acoustical Consultant be referred for full Council consideration prior any consideration of the issue of a building approval, and affected property owners and the community generally be invited to submit their noise concerns to the consultant."*

BACKGROUND

To address community concerns arising from the noise to be generated by the development.

CEO'S COMMENT:

On 5 May 2015, the Council resolved to grant a development approval for a material change of use for intensive animal husbandry and a caretaker's residence over land described as Lot 1 on RP843595 ("the Development Approval"). The Development Approval was granted subject to conditions, including condition 5 which stated that:

"Facilities that house animals incorporate noise attenuation measures. A report prepared by a qualified Acoustical Consultant must be submitted at the time of lodgement of an application for a Development Permit for Building Work and endorsed by the Chief Executive Officer prior to the issue of the Development Permit for Building Work. The report must indicate design and construction features to be incorporated in the development to ensure that the development is acoustically insulated having regard to the provisions of the Environmental Protection Act 1994, Environmental Protection (Noise) Policy 2008."

Following the Council's meeting on 5 May 2015, a Decision Notice was issued and given to the applicant pursuant to section 334(1) of the Sustainable Planning Act ("SPA"). In accordance with section 335(1) of SPA, the Decision Notice stated:-

- (a) that the Council had approved the development application; and
- (b) the conditions, including condition 5, pursuant to which the Development Approval had been granted.

Cr Melchert's Notice of Motion has the effect of seeking an amendment to the conditions of the Development Approval.

The following advice is provided:

- (a) given the Council has issued a Decision Notice, the conditions of the Development Approval cannot now be amended by Council;
- (b) Council could invite neighbouring property owners and/or the community to make submissions or suggestions to a consultant engaged by the developer to prepare the report required by condition 5 of the Development Approval;
- (c) the consultant engaged by the developer cannot be compelled to consider, or respond to submissions received by adjoining property owners and/or the community in preparing the report required by condition 5 of the Development Approval; and
- (d) if Council considers that the report prepared by a consultant engaged by the developer does not meet the requirements set out in condition 5, it can take enforcement action under SPA.

Cr Melchert's Notice of Motion proposes an amendment to condition 5 of the Development Approval. The amendments fundamentally alter the effect of condition 5 by:-

- (a) requiring the plan prepared by the developer's consultant to be **considered** rather than merely **endorsed**; and
- (b) placing the requirement to consider the plan prepared by the developer's consultant on the Council rather than the Chief Executive Officer.

There is a clear difference between a document being subject to "**full consideration**" and merely being **endorsed** as complying with the stipulations in the condition.

Amending conditions of the Development Approval after issue of Decision Notice

Council is advised that the granting of a development approval pursuant to SPA is a decision which cannot be repealed or amended once it is communicated to the applicant. A development approval is effectively a bundle of rights conferred on the applicant with such rights running with the land. SPA contains its own prescriptive regime for (i) the commencement of appeals to the Planning and Environment Court by the applicant or a submitter; and (ii) the changing of a development approval, including changes to the conditions of a development approval.

If the contrary view was taken and a local government was empowered to repeal or amend a development approval, clear absurdities could result. For instance, a developer who had acted on a development approval could, after some years, suddenly be told that the Council had resolved to repeal the development approval authorizing its use of land. The developer would be deprived of the rights conferred the development approval and would, potentially, face prosecution for carrying out unlawful development. These outcomes are not intended by the regime that SPA creates.

It is clear from Cr Melchert's Notice of Motion that it seeks to amend condition 5 of the Development Approval, however that is not now possible. The Mayor is entitled to rule Cr Melchert's Notice of Motion out of order.

Invite neighbouring properties and community to make submissions/require the consultant to consider those submissions

There is nothing which would prevent the Council from passing a resolution inviting neighbouring property owners and the community to make submissions to the consultant that the developer engages to prepare the report required by condition 5 of the Development Approval.

However, the consultant is not obliged to give consideration to submissions received from neighbouring property owners or the community in preparing the report required by condition 5 of the Development Approval. There is nothing in that condition, or any of the other conditions of the Development Approval, which requires the consultant (or the developer) to consider any submissions of the community.

It is not understood what benefit there is in encouraging the community in this fashion if the community's expectations cannot be legally enforced.

Report being non compliant

If the report submitted to the Chief Executive Officer does not comply with the stipulations in condition 5, Council will have the usual suite of enforcement powers available to it under SPA. Council could, for example, issue an enforcement notice or commence enforcement proceedings in the Planning and Environment Court if the use commences and the condition has not been fully complied with.