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Dear Campbell

Hotel on Moray – bundling

- 1 You have asked for our opinion on whether or not it is appropriate to 'un-bundle' the various activities.

Advice

- 2 Any decision on bundling should be made by the Commissioners after hearing planning evidence. We prefer the bundling approach for this proposal because the various aspects of the application that require consent appear to us to be related, and justify a holistic assessment.

Bundling

- 3 Mr Page's legal submissions quote the *Southpark Corporation Limited v Auckland City Council*¹ 3 step test for determining if an application can be unbundled. We agree that this is the correct test. These steps are:

1. One of the activities is controlled / restricted discretionary;
2. The scope of discretion is confined;
3. Effects would not overlap but be distinct.

We also agree that the first step of that test is met. We note that Ms Semple's legal submissions say that the second component of this test is not met.

- 4 In this case discretion for Rule 13.7.2 relates to the external design and appearance of the building. Ms Semple argues that this "...discretion is expansive and includes matters that are very close in nature to the considerations raised by the non-complying breach."²
- 5 For Rule 9.5.2(ii) discretion relates to height. Again Ms Semple argues that this discretion is wide ranging³.

¹ [2001] NZRMA 350

² Para 17

³ Para 21

- 6 In our opinion the consent relating to height is "*relatively restricted or confined, rather than covering a broad range of factors.*"⁴
- 7 The third step in the test is whether the effects of exercising the consents would not overlap but be distinct. Mr Page argues that "*bundling might make sense if there were some connection between the height breach and the yard / veranda breaches. But there is no such connection.*"⁵ And "*[t]here is no connection between the boundary setback from the side yards exist only because the applicant's design puts the perimeter traffic circulation road external to the building, which is not within the building.*"⁶
- 8 In *Urban Auckland v Auckland Council*⁷ the Court examined the relationship between an application for extension of a wharf, being a controlled activity, and a stormwater consent, being a restricted discretionary activity. The Court considered the two were connected because the discharge of stormwater would be affected by the size of the wharf extension⁸. The Court held that the consents should have been bundled and that this may have changed the "more than minor" test for non-notification.
- 9 The default position in relation to bundling is to bundle. We assess the arguments for and against height being unbundled from the non-complying activities (yards, verandah and signs) based on the third limb of the *Southpark* test.
- 10 The argument for bundling is that height and yard requirements relate to the form / bulk and location of the building. The effects of the building are derived from site coverage, proximity to boundaries and height. The permitted requirements of 11m height and building to the boundary is different to the proposal. The overall effects from the proposed form (higher, and set back from boundaries) will need to be assessed. Assessment matters include bulk and location as well as proximity to a residential area⁹ and these matters are typically considered when assessing a building; as a whole. Bundling is the more conventional approach and is a legally valid option in our assessment.
- 11 Mr Page has argued that there is no connection between the height and the boundary and yard breaches. Whether this is the case needs to be assessed by the Commissioners in light of the evidence.
- 12 While we see some merit in the approach of "unbundling" the height breach we tend not to favour it. This is a single building, on one site and the height, setback, pedestrian facilities and earthworks all tend to be inter-related in our assessment. To try and treat height as somehow unrelated to the rest of the planning issues, and assess it under a different test, is likely artificial. In this case too there are three rules breached making the activity non-complying. While the number of rule breaches is not a determinative consideration, the non-complying aspects are more than a single "technical" non-compliance that ought to be unbundled and considered separately. Overall in our assessment the proposal should be treated as a non-complying activity.

⁴ *Southpark*, para [15]

⁵ Para 23

⁶ Para 25

⁷ [2015] NZHC 1382

⁸ Para [90]

⁹ 9.9

Ultimately though the activity status needs to be determined by the Commissioners considering the application, after hearing from all parties who have a view on that issue.

Yours faithfully
Anderson Lloyd



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