BEFORE HEARING COMMISSIONERS
IN THE WESTERN BAY OF PLENTY DISTRICT

UNDER THE	Resource Management Act 1991 ("**Act**" or "**RMA**")
IN THE MATTER OF	an application for resource consent to authorise four existing industrial activities within part of the Te Puna Business Park structure plan area, for a term of two years
BETWEEN	**TINEX GROUP LIMITED** Applicant
AND	**WESTERN BAY OF BAY OF PLENTY DISTRICT COUNCIL** Consent authority

REPRESENTATIONS ON BEHALF OF THE APPLICANT

Before a Hearing Panel: Rob van Voorthuysen (Chair), James Whetu (Commissioner)

INTRODUCTION AND OVERVIEW

1. I am a Project Manager for the applicant ("**Tinex**"). I file these representations[1] on its behalf.

2. The interest that this application has gathered is – in some respects – surprising, but should not be considered to mean that effects on the

---

[1] Noting that the term "representation" has commonly been adopted by the Environment Court, Boards of Inquiry, etc when non-lawyers are addressing the Court. I have recently made representations in a number of Council-level processes, including: Plan Change 92 to the Western Bay of Plenty District Plan before Greg Carlyon (Chair) and Commissioners Bennett, and Whitney (decision pending); Plan Change 19 to the Central Otago District Plan before Deputy Mayor Gillespie and Councillors McPherson and Cooney (decision pending); "The Clearing" consent application for a subdivision in Amberley before Commissioners Mr Dean Chrystal and Mr Dave Smith (application granted on 16 August 2023); an electronic billboard consent application before Commissioners Bell and Kensington recently determined on 14 April 2023 (LUC60374063) with the decision acknowledging: aspects of what "*Mr Gardner Hopkins opined*" and "*the representations of Mr Gardner-Hopkins*"; and in the 15 November 2022 Decision of Commissioners Ms Gina Sweetman and Ms Jane Taylor in respect of an application (RM 220327) by Cardrona Cattle Company Limited for a storage facility at Victoria Flats in Queenstown, which stated, in respect of a particular issue: "*We are grateful to Mr Gardner-Hopkins for his helpful representations on behalf of the Applicant in this respect*".

environment are more than minor, or that the activities are contrary to the objectives and policies of the District Plan (fairly considered as a whole). As the Environment Court has noted on many occasions, it is not a numbers game to be done by adding up the submissions for and against a proposal.[2] What is required is an objective and dispassionate consideration of the application and its effects against the relevant statutory and planning framework.

3. In that regard, while the activities are accepted as having been unlawfully established, that does not count against the grant of consent to them. The RMA does not apply any penalty to the consideration of applications to consent such activities. Enforcement matters are separate matters, and, in this case, are already subject to separate proceedings. There is no "penalty" to be applied when seeking a "retrospective" resource consent. Strictly speaking, all matters relating to the original unauthorised establishment of the four tenancies to which this application relates are irrelevant. The wider background is only addressed by the applicant because of how the Council (if not other submitters) have approached these matters.

4. On this basis, the applicant's position is that the only matter of relevance arising from the fact that the activities have been established (admittedly without consent[3]), is that their effects can and have been assessed "in the real world"; not just by predictions.

5. It is the case for Tinex that:

   (a) the observed effects are minor only (and observed effects are the best evidence, as compared to the usual case where predictive evidence only is available at the time an application for consent is considered);

   (b) there is no repugnancy to the objectives and policies as a whole (it being important to look at what they are trying to achieve, as well as the effects assessed against those outcomes);

---

[2] As referred to by the Auckland Unitary Plan Independent Hearings Panel, *Report to Auckland Council: Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) [Overview Report] at [20].

[3] Although noting that there is compelling evidence that the Council agreed to accept the activities and/or gave the impression (at least later on) that all the transportation matters for the wider structure plan would be resolved and that the activities would then be lawful.

(c) there is no issue as to plan integrity (there being a consent pathway for such activities to be considered);

(d) there is no adverse precedent effect (and to the extent there is any precedent, it is actually an adverse precedent to developers proceeding without consents, rather than any legitimisation of that approach);

(e) there are significant positive effects of granting the consent (which should be given substantial weight); and

(f) it will better achieve the purpose of the Act to grant consent.

CONTEXT / APPLICATION

6. The application relates to a small part of a larger legal parcel known as 245 Te Puna Station Road, comprising some 12.2 ha in total. The location and spatial extent of the activities to which this consent relates (1.57ha in total, ie 12.9% of the overall site) is shown on the following plan in purple:

7. The activities are described best in the application, but can be summarised as follows:

(a) storage and renovation of relocatable houses, empty skip bins, portable fencing and building materials, in an area of around 0.8ha (operated by A&J Demolition, and its related companies);

(b) storage and renovation of relocatable houses, in an area of around 0.21ha (operated by Total Relocations);

(c) storage of swimming pool shells, in an area of around 0.3ha (operated by Compass Pools); and

(d) storage of large earthmoving machinery tyres, in an area of around 0.26ha (operated by Earthmover Tyres).

8. Importantly, it is these activities only for which consent is sought, and for a 2-year period only. It is not intended for Tinex to be able to substitute any of its current tenants for a new tenant. Any alternative or further use of the site will be addressed through its two other existing consent applications.

9. The above plan also shows the extent of "lawful earthworks" that were undertaken to fill the site, under authority of a regional consent. The balance of the earthworks (which are the cause of some concerns from others in respect of stormwater/ flooding) were undertaken after the surrender of the regional consent, on the understanding that they were actually permitted and no consent was necessary,[4] and have been described as "unlawful". While it does not need to be resolved for these proceedings, there is, however, an argument that the earthworks:

(a) were lawfully established prior to relevant proposed district plan rule in the plan coming into force[5];

(b) were continued in the same or similar character, intensity and scale each year; and

(c) therefore held existing use rights under s10 of the RMA.

10. Should this be the case, any complaint of historical wrong-doing in respect of earthworks evaporates entirely. But, in any event, the applicant's position is that any stormwater/ flooding issues are not an effect of the activities to which *this* application relates, and so are irrelevant to these proceedings.

---

4 The consent requirements under the District Plan only seem to have arisen in 2012, and were unknown until the application was made to allow industrial activities to be undertaken without completion of all of the Structure Plan requirements.

5 Refer Daniel evidence, eg at [9]-[11].

Structure of these representations

11. These representations are structured as follows:

    (a) Key statutory considerations:

        (i) Section 104D

        (ii) Section 104

        (iii) Part 2

    (b) The “environment”.

    (c) No more than minor.

    (d) Evidence – principles.

    (e) Effects of the activities:

        (i) Experts;

        (ii) Stormwater;

        (iii) Noise;

        (iv) Landscape and visual amenity;

        (v) Traffic;

        (vi) Cultural impacts; and

        (vii) Positive effects.

    (f) The objectives and policies gateway:

    (g) Precedent and integrity of the plan.

    (h) Part 2.

KEY STATUTORY CONSIDERATIONS

12. The Panel is experienced and will be well aware of its decision-making framework. Accordingly, key matters only are addressed here, being:

(a) **Section 104D:** Section 104D of the RMA provides that the consent authority may only grant a resource consent for a non-complying activity if it is satisfied that the adverse effects of the activity on the environment will be no more than minor, or that the activity will not be contrary to the objectives or policies of the relevant plan or proposed plan.

(b) **Section 104**: Which requires, if the s104D gateway is passed, that a consent authority must, subject to Part 2, have regard under s104(1) to:

> (a) Any actual and potential effects on the environment of allowing the activity; and
>
> (b) Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
>
> (c) Any relevant provisions of-
>
> (i) a national environmental standard;
>
> (ii) other regulations;
>
> (iii) a national policy statement;
>
> (iv) a New Zealand coastal policy statement;
>
> (v) a regional policy statement or proposed regional policy statement;
>
> (vi) a plan or proposed plan; and
>
> (d) Any other matter the consent authority considers relevant and reasonably necessary to determine the application.

The focus here, in addition to effects and policies, is on plan integrity and precedent (s104(1)(c) matters.

(c) **Part 2:** The Court of Appeal has confirmed the application of Part 2 in the resource consent context, acknowledging it's pre-eminence in resource consent decision-making and reinstating the ability to consult it directly.[6] Importantly, the Court of Appeal also held that s104(1) "plainly contemplate[d]" decision-makers having direct regard to Part 2 of the RMA in appropriate cases. The High Court has also stated, relatively recently, in *Tauranga*

[6] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

Environmental Protection Society Inc v Tauranga City Council & BOP Regional Council CIV 2020-470-31, at [86]:

> … Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust*, a Court will refer to pt 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to pt 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions attempt to confine reference to pt 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

THE "ENVIRONMENT"

13. Effects on the "environment" are relevant to both gateways under s104D, as well as the consideration of effects under s104(1)(a). Understanding what the environment is, is therefore critical. The term "environment" is defined in the RMA as follows:

> **environment** includes—
>
> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

14. This definition includes all ecosystems – including *people and communities*. It also includes "social, economic, aesthetic and cultural conditions" which affect these ecosystems, ie which affect people and communities. The applicant naturally emphasises the place of its business its tenants in the community, and the social and economic conditions that relate to and are generated from their activities.

15. In *Queenstown Central,*[7] the High Court cautioned against applying the *Hawthorn* approach to the environment too strictly.[8] In that case, an application for consent was made in circumstances where:

    (a) the operative plan expressly identified a need for land for urban development; and

---

[7] *Queenstown Central Ltd v QLDC* [2013] NZHC 815, NZRMA 239 (HC).

[8] ie to only consider activities that had been consented as part of the environment where those consents were likely to be given effect to

(b) QLDC had notified a Plan Change to give effect to this objective by rezoning the relevant land as being exclusively for industrial use (but this Plan Change was subject to appeals).

16. The High Court held the assessment of the "environment" *had to take into account* loss of industrial land, despite the Plan Change not yet being operative, stating at [85] (emphasis added):

> Section 104D, and indeed the RMA as a whole, calls for **a "real world" approach to analysis, without artificial assumptions**, creating an artificial future environment.

17. In that regard, the Court observed it would be an "unreal prospect" to suggest that the relevant area would remain undeveloped in the future.[9]

18. A similar approach was taken by the Environment Court in *Drive Holdings*,[10] with reference to *Panuku*,[11] whereby the intensification anticipated within the relevant zones also had to be taken into account when considering an application for resource consent. That formed the framework for assessment in those cases.

19. Accordingly, the real world approach in this application is to accept that the entire site (and entire Business Park) will be developed for industrial purposes in the future. Consideration of effects, and policy matters, needs to be undertaken against that framework.

NO MORE THAN MINOR ADVERSE EFFECTS

20. In terms of what "minor" means, the applicant adopts Dunningham J's approach to the required assessment as stated in *Speargrass* (emphasis added):[12]

> ... [there is] no "absolute yardstick" exists for determining when an effect is "minor", "less than minor" or "more than minor" and those are matters of fact and degree to be informed by context. I accept that a useful explanation of what constitutes "less than minor" was given in *Gabler v Queenstown Lakes District Council*, where Davidson J said it is "that which is insignificant in its effect, in the overall context, that which is so limited that **it is <u>objectively acceptable and reasonable</u> in the receiving environment and to potentially affected persons**".

---

9 *Foodstuffs* at [62].
10 *Drive Holdings Limited v Auckland Council* [2021] NZEnvC 159, at [85].
11 *Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 24.
12 *Speargrass Holdings Ltd v Queenstown Lakes District Council* (2018) 20 ELRNZ 845 at [139], citing *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 20 ELRNA 76 at [94].

21. The High Court has further said that "minor" is:

(a) At the lower end of the scale of major, moderate and minor effect, but it must be something more than de minimis;[13]

(b) … "petty", "comparatively unimportant", "relatively small or unimportant"…";[14]

(c) And:[15]

> Turning to the dictionaries we find that the adjective "minor" is defined in the New Zealand Oxford Dictionary of "lesser or comparatively small in size or importance". According to The Shorter Oxford English Dictionary "minor" means "… lesser … opposite to MAJOR … comparatively small or unimportant". We hold that those meanings are what is intended in s104D(1)(a). The reference to "comparatively" emphasises that what is minor depends on context — and at least all the authorities agree on that.

(d) And:[16]

> However, regard to the scheme and purpose of the Act, and particularly the functioning of s 5, shows there is nothing arbitrary in the term "minor". It is a sensible standard which, understood for its purpose, is designed to give applications which will have only a "minor" adverse effect on the environment but are for other reasons non-complying an opportunity to be approved.

22. These findings all need to be kept in mind when assessing the extent of effects on the environment, particularly for the purposes of the s104D effects threshold test.

EVIDENCE – PRINCIPLES

23. The importance of evidence-based decision making has been highlighted frequently in resource management cases. For example, the Courts have stated:

(a) "We will not rely on general concerns about overall development: those appear to us to be overly susceptible to an affective fallacy in tending to prefer a particular outcome **rather than being an evidence-based analysis** of all realistically possible outcomes in the context of the relevant statutory planning framework."[17]

(b) "The NPS-UDC, however, is clear in its application to urban environments, and clear in its direction that planning decisions should align with the purpose

---

13 *R v Auckland City Council* [2000] NZRMA 145 (HC) at [29] .
14 *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 at [54].
15 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243.
16 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239
17 *Northern Land Property Limited v Thames-Coromandel District* [2021] NZENVC 180, at [146].

and principles of the RMA, as similar language is used. It includes additional direction for **planning to provide in an evidence-based manner for urban environments** where land use, development, development infrastructure and other infrastructure are integrated with each other."[18]

(c) "**The court relies on robust evidence to inform policy**. We suggest evidence-based policy making in this context means that the content of policies and methods is informed by the sciences (including engineering) and mātauranga Māori. …".[19]

(d) "The court's decision-making is **an evidence-based public process**, with its judgments supported by full reasons."[20]

24. While lay witnesses can provide evidence as to fact and observation, they are not entitled to provide opinion evidence. Their views on wider matters, while still potentially *admissible* under s41(1)(b), which imports s4B of the Commissions of Inquiry Act 1908, should be treated with caution. This is clear from the Environment Court's 2023 practice note:

> **8.1. General law applies**
>
> (a) The provisions of the Evidence Act 2006 apply to proceedings in the Environment Court. Attention is drawn to ss 6–9, 23–26 and 53 and 57 of the Evidence Act in particular.
>
> (b) The provision in s 276(2) of the Act, that the Environment Court is not bound by the rules of law about evidence that apply to judicial proceedings, is an enabling provision for the Court and not an exemption for parties, counsel or witnesses.

THE EFFECTS OF THE ACTIVITIES

25. As indicated above, just four activities are occurring on a small part of the site owned by the appellants. The consent sought and its conditions seek to address the effects of their ongoing use, for a limited 2-year period in time (rather than any establishment works).

Experts

26. As set out in the evidence for the applicant, all adverse effects are considered minor or less than minor, as summarised below. The expert witnesses are as follows:

(a) Mr Styles, Acoustic;

(b) Mr Joynes – Flooding modelling;

---

18 *Endsleigh Cottages Ltd v Hastings District Council* [2020] NZENVC 64, at [253].
19 *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265, at [20].
20 *Mainpower Nz Ltd v Hurunui District Council* [2012] NZENVC 56, at [49].

(c) Mr Bos – Stormwater and civil engineering;

(d) Mr May – Landscape & visual;

(e) Mr Harrison – Traffic & transportation; and

(f) Mr Crossan – Planning.

27. While that evidence will speak for itself, it is summarised below.

Stormwater

28. As noted at the outset, any wider stormwater issues are entirely irrelevant to the effects of the existing activities that the abatement notices relate to.[21]

29. Mr Bos' evidence in respect of stormwater quantity and flows from the site, is that the effects are (at [25]):

> are no greater than an undeveloped site and therefore have little to no adverse effect beyond the site.

30. With regard to construction related and earthworks effects, Mr Bos' evidence at [26] is that:

> … these can be effectively mitigated and are not unusual. Traffic management and roading related matters for construction are specifically addressed as part of standard Council procedure when working within the public road reserve.

31. As for any flooding risk arising from the proposal to upgrade the culvert under the entrance-way, the likely physical consequences of this (taking into account future climate change rainfall and sea level rise – so not representing the immediate consequences) have been modelled by Mr Joynes as (at [11]):

(a) in a 10-year storm event, an **11mm** increase in an existing depth of 1.29m, ie a **0.85%** increase;

(b) in 100-year storm event, a **1mm** increase in an existing depth of 1.9m, ie a **0.05%** increase.

---

21 Noting also s7(2) of the Evidence Act 2006: "Evidence that is not relevant is not admissible in a proceeding"; which is to be complied with under clauses 8.1(a) and 8.3(d) of the Environment Court's Practice Note 2023.

32. On this basis, and given that the most affected neighbour, Mr Phillips, has given written approval, it is considered that the adverse effects of the culvert upgrade are no more than minor.

33. In request of water quality:

    (a) As confirmed by Mr Crossan at [135], the tyre storage activity will comply with the relevant NES, and so any of its effects on water quality are considered minor only.

    (b) While water quality sampling has been undertaken (following feedback from the Council/ Panel), there is no suggestion that any water quality issues (if any) arise from the current activities, rather than the historical filling and past activities (eg the now discontinued concrete crushing), and, as Mr Crossan states at [134]:

    > … if quality issues do arise at the discharge location, there are various measures that can be implemented to mitigate water quality, and in my opinion there is a limited risk that any water quality issue will not be able to be mitigated.

34. An update as to the sampling results is expected to be provided before, or at the hearing, in any event.

Noise

35. All noise experts and planners appear to consider the activities able to be managed to meet the relevant permitted noise standards. In that regard, Mr Styles states at [12]:

    > My experience is that compliance with the noise standards for permitted activities is acceptable and reasonable for activities that generate noise at a level and character that is provided for in the zone.

36. In respect of managing activities on site, Mr Styles has prepared a Noise Management Plan ("**NMP**"). Compliance with the NMP, in addition to the relevant noise standards, are to be conditions of consent.

Landscape and visual effects

37. As Mr May explains, at [15]:

    > … The planting and bunding implemented to date in my opinion provide sufficient landscape and visual mitigation to address the current relatively limited existing activities along the Te Puna Road frontage of the site and the

> north-eastern and south-eastern boundaries. However, as I explain below, I can agree that some additional mitigation (eg shade cloths) will further assist in providing mitigation of the pink pool bases in particular, and that sone further planting would assist in achieving fuller compliance with the Structure Plan requirements in the longer term (but will add little or no material mitigation within the 2-year term of the proposed consent).

38. The remaining points of difference appear to be:

    (a) the extent of the shade cloth, Mr May stating, at [28]-[29]:

    > I also disagree that a 6m shade cloth screening of the Compass Pools site is required. As discussed in my memo addressing the effects of the non-compliant LRV finishes to pool shells, a 4.5m shade cloth would more than address effects on an interim basis, rather than trying to replicate final mitigation from planting that should eventually reach 6.0m in height. I do concur that a 70% block-out horticultural shade cloth would be an appropriate screening material in this context.
    >
    > I note that the draft condition 14 as proposed by Ms Perring in her condition set requires the shade cloth to be erected around the perimeter of the Compass Pools site. In my opinion, this is only required along the western and southern perimeter. The eastern perimeter is largely screened from the east by the bund, planting and the intermediary dwellings stored on the other tenancies, whilst the roadside bund and planting screen the site from the north, save for a glimpsed view through the entranceway. I understand Mr Crossan will address this change in his evidence and proposed set of conditions.

    (b) The condition relating to the protection of planting, with Mr May stating, at [33]-[34]:

    > Firstly, I consider that a 3m setback is overly restrictive and would significantly reduce the area available within the existing tenancies. I consider that a 1m setback from planting would adequately protect the planting and suggest that the 3m requirement be amended.
    >
    > Secondly, I do not consider that bollards or barriers are necessary. It is not in the applicant's interest to spend time and money on planting for them to then simply not care for it, it is inherent that they will need to maintain and protect it including advising tenants of their responsibility to protect the landscaping. Any damaged or dead plants will need to be replaced as required

39. On this basis, the landscape and visual effects will be less than minor.

Traffic

40. Mr Harrison, having carefully reviewed the views of WBOPDC’s experts Mr McLean and Ms Wilton, remains of the view, at [60] that:

> … the traffic effects of the existing activities have the traffic effects of the existing activities have less than minor effects on the surrounding environment. This is particularly the case if the mitigation measures, I have recommended are adopted.

41. These measures are:

(a) In respect of **Te Puna/ Te Puna Station Road**, at [32]:

> … the proposed pavement marking alterations to the Te Puna Station Road/Te Puna Road intersection as shown on the Stratum Consultants drawing 423022-CIV-D001 are adequate to cater for the general traffic generated by the site and will in fact improve the existing situation.

Noting the applicant's position that the upgrade to Te Puna/ Te Puna Station Road was undertaken to the Council's requirements already.

And further noting, at [29] that:

> … while the available sight distances are less that what would normally be provided in a green-field situation, I do not consider the lack of a right turn bay to present a significant safety issue. People will have enough time, travelling at 80km/h, to see a vehicle stopped to turn, and to then be able to slow down, and stop. They do this every day, in response to all vehicles waiting to turn into Te Puna Station Road, not just those generated from the existing activities subject to this application.

And also noting at [34]:

> Overall, my opinion remains that the safety of the Te Puna Station Road/Te Puna Road intersection, particularly with the amended pavement markings, will not be materially compromised by the traffic from the current existing site activities. Put another way, the removal of the traffic from the current existing site activities will not appreciably improve the current situation. Or put another way still, if the traffic from the site is assumed to not be occurring, its "introduction" will not appreciably increase risk such that they should be not allowed.

(b) In respect of the **site entrance**, adopting the proposed Diagram D standard (refer [38]-[48]) without the road widening sought by Council as explained at [49]-[52]);

(c) In respect of **sealing into the site**, adopting a length of 30m as explained at [54]; and

(d) In respect of **Clarke Road**, avoiding the use of that road by heavy vehicles accessing the site, as confirmed at [56].[22]

---

[22] I note that this sort of condition is enforceable, as illustrated by *Baxter v Tasman District Council* [2011] EnvCt 4.

Cultural effects

42. To the extent that cultural effects are to be considered, they need to be effects arising from the existing activities in question, rather than any wider effects.

43. Furthermore, the Pirirakau Tribal Authority, through who is understood to be its authorised representative, has supported this application, on the basis of the engagement and offered conditions by the applicant.

Conclusion – adverse effects of the existing activities

44. For all the above reasons, and consistent with the opinion of Mr Crossan, it is Tinex's position that the adverse effects of the existing activities will only have minor, if not less than minor, adverse effects on the surrounding environment.

45. On this basis, the application passes the effects gateway of s104D.

Positive effects

46. While not relevant to s104D, should the application be considered under s104(1)(a), the positive effects are relevant.

47. As Mr Daniel explains, at [37]-[38]:

> … since we commenced with the consent processes in 2019, until present we have spent over $600,000.00 on consultants, planting, and a contribution to council's roading upgrades (including $31,000 on planting and payment to a local contractor recommended by Pirirakau for the planting, and $69,000 roading contributions to Council). This represents a significant commitment towards meeting necessary consent requirements and overall structure plan requirements or suitable alternatives.
>
> … without the income from the existing tenants this progress would not have been possible. That income remains important for completion of the remaining structure plan requirements.

48. This is the real world position: if consent is granted, then the final structure plan requirements (or any wider departure from them that is authorised by the other consent applications) will able to be completed, and the will then be able to be opened up for efficient use as envisaged by the Structure Plan.

49. In reverse, if the consent is declined, then these benefits will be further delayed. While that might be what some submitters want, that is effectively

a fundamental challenge to the zoning, which is not something to be revisited through a resource consent application.

50. Furthermore, while the ongoing activities associated with the tenancies might end, their structures and facilities could remain dormant on-site pending the determination of the other consent applications.[23] In other words, while the very limited traffic effects arising would pause if this consent is declined, the visual and landscape effects might not.

51. In addition, in respect of the tenants, the evidence for each is that allowing the consent will provide significant personal, family, and community benefit, which will not continue and will be lost if consent is declined.

THE OBJECTIVES AND POLICIES GATEWAY

Principles

52. Turning to the objectives and policies gateway of s104D, it is well recognised that:

    (a) a non-complying activity will “rarely, if ever, find direct support in the objectives and policies of a plan”;

    (b) “contrary to”, in the context of section 104D, means “repugnant to” or “opposed to” the objectives and policies considered as a whole.[24];

    (c) in *New Zealand Rail v Marlborough District Council,* the High Court observed on the meaning of “not contrary to”:[25]

    > The Oxford English Dictionary in its definition of "contrary" refers also to **repugnant** and **antagonistic**. The consideration of this question starts from the point that the proposal is already a noncomplying activity but cannot, for that reason alone, be said to be contrary. "Contrary" therefore means something more than just non-complying.

    (d) it is not enough that a proposal does not find direct support among the objectives and policies;

---

[23] This is because there is no power to remove the structures or other things on the sites, the Council having only issued an abatement notice to cease the activities, not to remove them.

[24] Eg see *Monowai Properties Ltd v Rodney District Council* (Environment Court, Auckland A 215/03, 12 December 2003, Judge Thompson).

[25] *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC).

(e) put another way, in the longstanding Court of Appeal authority of *Arrigato Investments Ltd v Auckland Regional Council*, the Court held that the real question in policy terms is whether it is appropriate to allow the activity;[26] and

(f) in *Dye v Auckland Regional Council*, the Court of Appeal held it was sufficient that the Court had carried out a "fair appraisal of the objectives and policies" of the relevant District Plan "read as a whole".[27]

53. *Dye* remains the leading appellate authority on the correct approach under s 104D(1)(b) of the RMA. The Court of Appeal recently reaffirmed the approach taken in *Dye* in *R J Davidson Family Trust v Marlborough District Council*.[28] In that case, the Council had cross-appealed the Environment Court's finding that the activity passed through the s 104D(1)(b) gateway (although this was not stated in the reasons for judgment). In that context, however, when commenting on the s104D(1)(b) test, the Court of Appeal observed:[29]

> What is required is what Tipping J [in Dye] referred to as "a fair appraisal of the objectives and policies read as a whole".

Application

54. In light of the above, and for the reasons given by Mr Crossan at [167] to [178], this limb is met.

PRECEDENT AND INTEGRITY OF THE PLAN

Precedent

55. The leading case on precedent remains the Court of Appeal decision in *Dye*:[30]

> The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have consistency in the application of legal principles, because all resource consent applications must be decided in accordance with a correct understanding of those principles. But a consent authority is not formally bound by a previous decision of the same or another authority. Indeed in factual terms no two applications are ever likely to be the same; albeit one may be similar to another. The most that can be said is that

---

26 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA)
27 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
28 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 (CA).
29 Ibid at [73].
30 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA), at [32].

> the granting of one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities.

56. Precedent (such that it exists) is linked to the concept of integrity of the plan, which was raised in the s42A report. As Cooper J observed in *Rodney District Council v Gould* (emphasis added):[31]

> The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and policies whether under s 104(1)(d) or s 105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the statute strongly suggests that their application in any given case is not mandatory. In my view, **a reasoned decision which held that a particular non-complying activity proposal was not contrary to district plan objectives and policies could not be criticised for legal error simply on the basis that it had omitted reference to district plan coherence, integrity, public confidence in the plan's administration, or even precedent**.

57. This strongly suggests that the focus should be on the statutory tests under s104D, rather than any other "overlays". In that regard, the idea of any requirement that a non-complying activity be an exception is "unhelpful". As recently found in *Gray v Dunedin City Council* [2023] NZEnvC 45, at [222]:

> We do not find it helpful to apply a further non-statutory test of whether the proposal is a true exception.

58. In respect of the activities to which this application relates, the applicant's position is that granting consent will not create a precedent for future applications given the particular circumstances, and effects. If there is any precedent, as Mr Crossan suggests at [191]:

> Rather than being some sort of advert for a way forward, the precedent is a warning to seeking consents in advance or complying with the relevant structure plan conditions.

Integrity of the plan

59. In respect of the activities to which the application relates, to the extent that integrity is relevant (bearing in mind that the focus should be on the statutory tests, as addressed above) it is considered that granting consent will not undermine the integrity of the plan given that:

---

31 *Rodney District Council v Gould* [2006] NZRMA 217 (HC) at [99].

(a) the effects of the "non-compliances" are minor or less, particularly if the conditions accepted by the applicant are imposed;

(b) the scale of the "non-compliances" are also small, in terms of them only involving a small area of the site; and

(c) the consent term sought is also limited (to 2 years' only), not open ended, and so is only temporary. While this is in anticipation of other resource consents being granted, if they are not, then the activities will cease. The wider and long term consent applications are the proper place to address any fundamental integrity of the plan issues of allowing a departure from the structure plan requirements for a longer (indefinite) period.

PART 2

60. As addressed above, in all the circumstances, it is appropriate (if not necessary) to consider Part 2.

61. In that regard, in addition to the "access" to Part 2 question addressed above, the longstanding observation of the Environment Court in *Shirley* remains relevant:[32]

> The purpose of the Act means that in every appeal about the grant of a resource consent there is only one ultimate question to be answered, that is, will the purpose of the Act be fulfilled?

62. As Mr Crossan finds at [215]-[220], granting consent (rather than refusing it) will better achieve the purpose of the Act.

Project Manager for the Applicant
5 October 2023

---

32 *Shirley Primary School & Anor v Christchurch City Council* [1999] NZRMA 66 (EnvC).