

Decision Report

Tinex Group Limited

Application RC13924L
to
Western Bay of Plenty District Council

22 October 2023

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1 Introduction

[001] Tinex Group Limited (TGL or applicant) has sought a retrospective resource consent (reference RC13924L) from the Western Bay of Plenty District Council (WBOPDC or Council) to authorise the use of part of the site at 245 Te Puna Station Road (the Site) for four industrial activities, prior to completing all necessary development and infrastructure works required by the Te Puna Business Park Structure Plan, as follows:

- Tenancy 1 – storage and renovation of relocatable houses, storage of empty skip bins, portable fencing and building materials, over an area of 0.8ha (operated by A&J Demolition and its related companies);
- Tenancy 2 – storage and renovation of relocatable houses, over an area of 0.21ha (operated by Total Relocations);
- Tenancy 3 – storage of swimming pool shells over an area of 0.3ha (operated by Compass Pools); and
- Tenancy 4 – storage of large earthmoving machinery tyres, over an area of 0.26ha (operated by Earthmover Tyres).

[002] The total area of the application Site is 1.56ha.

[003] TGL also confirmed that consent is required for proposed culvert installation and earthworks associated with the proposed upgrade of the accessway to the site¹.

[004] TGL sought a consent duration of two years.

The application is declined for the reasons herein.

2 Appointments

[005] The WBOPDC, acting under s34A of the Resource Management Act 1991, appointed Independent Hearing Commissioners James Whetu² and Rob van Voorthuysen³ to hear and decide the application.

3 Description of the application

[006] The applications are described in TGL's AEE⁴ and the WBOPDC Section 42A Report⁵ that was authored by Heather Perring⁶. We adopt those descriptions, but note some of the more salient matters are:

- TGL initially lodged two resource consent applications relating to the long-term development of the Site (RC12979 and RC13474)⁷. These are to authorise departures from development, staging and infrastructure requirements of the Te Puna Business Park Structure Plan (first application RC12979), and a retrospective application for approximately 40,000m³ of unauthorised fill on site (second application RC13474);
- TGL does not intend to substitute any of the current four tenants for a new tenant. Any alternative or further use of the site will be addressed through consent applications RC12979 and RC13474⁸;
- The Site (RC13924L) is one of three properties zoned Industrial and is located within the Te Puna Business Park Structure Plan (Structure Plan) area. The Structure Plan requires roading upgrades,

¹ We issued a Minute directing TGL to provide the necessary information and assessment of environmental effects prior to the Hearing so the matter could be heard and decided at the same time as the application to authorise the industrial activities.

² Commissioner Whetu is an accredited Commissioner, a Full Member of the New Zealand Planning Institute with professional experience in consents and policy planning, and integration of te ao Māori and tikanga Māori.

³ Commissioner van Voorthuysen is an experienced Independent Commissioner, having sat on over 400 Hearings throughout New Zealand since 1998. He has qualifications in natural resources engineering and public policy. In 2020 he was appointed as a Freshwater Commissioner by the Minister for the Environment.

⁴ Resource Consent for Industrial Activities within the Te Puna Business Park Structure Plan Area, Tinex Group Limited, 245 Te Puna Station Road, Te Puna, Stratum Consultants, 8 February 2023. Section 1.0 "Introduction", Section 2.0 "Site Description", section 3.0 "Proposal Description".

⁵ Section 42A Council Officer's Report, section 4: Proposal, section 5. Site and Locality

⁶ Planning Director/Principal Planner of Kaitiaki Property Services Ltd.

⁷ RC13474 and RC12979 are both non-complying activities.

⁸ EIC Gardner-Hopkins, paragraph 8.

landscaping, stormwater infrastructure and water infrastructure to be established prior to the commencement of activities within the Business Park;

- The four industrial activities listed in section 1.0 above were established on the Site prior to those Structure Plan obligations being met;
- TGL has sought retrospective consent (this application RC13924L) to enable the four activities (or tenancies) listed above to continue to operate on the presumption that resource consent RC12979 will be granted for a waiver of the relevant Structure Plan requirements;
- The site is bordered to the south by the Hakao Stream, and 200m to the east is Pukewhānake Pā, both of which are culturally significant to mana whenua Pirirākau;
- The site is located within the Flood Hazard and Harbour Inundation overlays in the Operative District Plan(ODP) maps; and
- TGL has sought a consent duration of two years.

4 Process Issues

4.1 Written approvals, notification, submissions and pre-hearing meetings

[007] Written approval has been obtained (dated 22 September 2023) from the owners of 177 Te Puna Station Road which is the immediate downstream property to the east of the Site.

[008] The applicant requested public notification on 6 April 2023.

[009] 194 submissions were received⁹. The submissions were summarised in the Section 42A Report¹⁰ and the location of the submitters in the immediate vicinity of the Site was helpfully shown on a map¹¹. We observe that many submitters reside in areas relatively remote from the Site. We adopt Ms Perring's summary of submissions, but do not repeat it here for the sake of brevity. We were provided with copies of all of the original submissions.

[010] As far as we are aware, no pre-hearing meetings were held.

4.2 Officer's recommendation

[011] Ms Perring recommended that the application be declined.

[012] After the Hearing concluded we received a Memorandum from Ms Perring in which she responded to several questions that we posed to her at the Hearing. In that Memorandum she amended her recommendations in relation to financial contributions and stormwater discharges. We discuss that in the body of this Decision.

4.3 Hearing, appearances and site visit

[013] We held a Hearing in the Council's chambers at Greerton, from Monday 9 October 2023 to Wednesday 11 October 2023.

[014] Evidence¹² from the applicant was pre-circulated in general conformance with a procedural Minute that we issued. Mr Gardner-Hopkins pre-circulated 'representation' evidence for TGL on 5 October 2023, but as that evidence is not 'expert evidence' its provision on that date did not breach our Minute 1 directions. Written evidence from some submitters¹³ was tabled at the Hearing. Other submitters provided verbal

⁹ 39 submissions in support, 154 in opposition, and 1 conditional support.

¹⁰ Section 42A Council Officer's Report, section 6. Notification and Submissions, and Attachment 5.

¹¹ Section 42A Council Officer's Report, Figure 3.

¹² James Gardner-Hopkins (representative), Barry Daniel (applicant), Jon Styles (noise), Steven Joynes (flooding), Stephen Bos (stormwater and access upgrade works), Bruce Harrison (transport) and Shae Crossan (planning).

¹³ Beverley Cain, Alison Cowley, Peter Lochhead, Sarah Rice.

presentations¹⁴ and we subsequently received speaking notes from some of them¹⁵. Copies of the written evidence are held by WBOPDC.

[015] We do not separately summarise the matters covered here, but we refer to or quote from that material as appropriate in the remainder of this Decision. We took our own notes of any answers given to verbal questions that we posed to Hearing participants.

[016] Mr Gardner-Hopkins provided verbal Reply representations at the Hearing and written Reply representations¹⁶ dated 18 October 2023. We closed the Hearing on 19 October 2023, having concluded that we required no further information from any of the parties.

[017] We conducted a site visit on the morning of Tuesday 10 October 2023.

4.4 Consent category

[018] As set out in section 4.1 of TGL's AEE, the application for retrospective consent for development that is not in general accordance with a Structure Plan is a Non-Complying Activity under Rule 21.3.12(d) of the ODP¹⁷.

[019] The application also triggers the need for consent under seventeen other ODP rules, as was set out in a table in Ms Perring's Section 42A Report¹⁸. Fourteen of those rules trigger the need for non-complying activity consents and three trigger the need for restricted discretionary activity consents¹⁹. These additional consent requirements derive from the out of sequence use of the Site for industrial activities and non-compliance with the requirements to provide (amongst other things):

- stormwater management reserves and access;
- new roads as shown on the Structure Plan;
- stormwater and wastewater mains;
- stormwater disposal systems being a combination of reticulated pipework, swales or appropriate open channels;
- improvement of stormwater quality;
- management of downstream runoff peaks so they are no greater than those prior to development; and
- exceedance of the reflectivity standards for all buildings/structures (in this case the stored swimming pools).

[020] Notwithstanding the additional consent requirements identified by Ms Perring, under the well accepted principle of 'bundling', it was common ground the application remains to be assessed as a non-complying activity.

4.5 Compliance matters

[021] WBOPDC has issued four abatement notices to TGL relating to the existing activities being undertaken on Site. An appeal against the abatement proceedings was heard at the Environment Court in August 2023. As at the time of writing no decision had been released by the Court.

[022] In his Reply, representations Mr Gardner-Hopkins addressed Mr Daniel's past conduct. We have assigned little if any weight to that matter as we have instead focused on the potential adverse effects of the industrial activities and the relevant District Plan provisions.

¹⁴ Julie Shepard (Pirirākau Tribal Authority), Tawhai Schuster, Drew Cowley, Marty Stevenson, Neville Bidois, Russel Williams, Rosemary Chalmers.

¹⁵ Sarah Rice, Russel Williams, Rosemary Chalmers.

¹⁶ Representations In Reply / Closing On Behalf Of The Applicant, 18 October 2023.

¹⁷ It may also be a non-complying activity under Rule 4A.1.4 for activity that is not otherwise provided for by the ODP. This was disputed by Mr Crossan but nothing really turned on that point.

¹⁸ Section 42A Officers Report, under the heading "Activity Status - Operative District Plan 2012"

¹⁹ Reply Evidence of Heather Perring, 11 October 2023, paragraph 6.

5 Section 104D matters

[023] Before we can proceed to assess the applications under s104 of the RMA, we must first consider the s104D matters. That section provides:

- (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
 - (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
 - (b) the application is for an activity that will not be contrary to the objectives and policies of—
 - (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
 - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
 - (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.
- (2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

[024] Section 104(2) states:

When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

[025] Section 104(2) refers to what is commonly called the 'permitted baseline'. This means that an application can be assessed by comparing it to the development that could take place on the Site as of right, without a resource consent, but excluding any development that is fanciful. In this case we have elected not to apply the permitted baseline, because as noted by Ms Perring, due to the rule framework of the Structure Plan industrial activities cannot operate prior to the pre-requisite development requirements being fulfilled²⁰.

[026] Mr Gardner-Hopkins considered that RMA Part 2, section 5 matters were relevant to our s104D assessment. Counsel for the Council submitted²¹ that she had not been able to locate any cases which stated that one cannot consider Part 2 matters under s104D, but the usual approach appeared to be to consider the s104D gateway tests first, and thereafter the matter falls for full consideration under RMA s104 and Part 2. We prefer Ms Zame's submissions on that matter and observe they accord with our own understanding of what we should consider under s104D.

5.1 Assessment approach

[027] Prior to assessing the effects of the application under s104D(1)(a), we firstly set out our assessment approach.

[028] We are required to assess the adverse effects of the existing activities on the Site, inclusive of any mitigation measures offered by TGL or recommended by Ms Perring. The caveat to that is that we consider the mitigation measures must be capable of being fully implemented early on within the two-year duration sought. However, we do not consider that it is necessary for those mitigation measures to fully implement the requirements of the Structure Plan. Instead, we must decide if the adverse effects (subject to the realistically achievable mitigation measures) are minor or less.

[029] We consider that the existing environment against which we should assess the effects is the physical environment as it exists today, including the earth bunds and associated planting on the Site boundaries, the sparse internal landscape planting, the metalled yard and the roadside drains. In saying that we acknowledge that TGL has sought retrospective ODP consent²² for the Site's bulk earthworks (the filling of

²⁰ Paragraph 95.

²¹ Submissions of Counsel for the Western Bay Of Plenty District Council in Relation to Matters Raised in Applicant's Representations, Rachael Zame, 11 October 2023. Paragraph 30.

²² RC13474 referred to earlier.

the Site) that occurred under the auspices of the now surrendered BOPRC earthworks consent. However, it would not be practical for us to assume that those earthworks had not occurred²³.

5.2 Adverse effects of the activity on the environment

[030] We firstly note that s104D(1)(a) does not enable the consideration of any positive effects that might otherwise offset adverse effects. This was confirmed by Mr Gardner-Hopkins²⁴. In saying that we acknowledge that while there will be some limited positive effects associated with the proposal²⁵, they are simply not relevant to our s104D(1)(a) assessment.

[031] We received representations from Mr Gardner-Hopkins and legal submissions from Ms Zame on what constituted a 'minor' adverse effect. In light of that helpful advice, we note that:

- 'Minor' is not defined in the RMA;
- In the context of s104D it can be understood that 'minor' is very much at the lower end of adverse effects, but it must be something more than de minimis; and
- Our assessment under s104D(1)(a) requires a positive satisfaction on our part that the adverse effects of the activity on the environment in the future will be "minor".

[032] Ms Perring considered the effects of the application under a number of headings including:

- Landscape Character and Visual Effects
- Infrastructure and Servicing
- Noise
- Cultural and Archaeological
- Financial Contributions

[033] Based on TGL's AEE and their subsequent reporting, together with expert peer reviews commissioned by the Council, Ms Perring concluded that the five categories of potential adverse effects listed above were no more than minor. Planning evidence for TGL was provided by Shae Crossan. He agreed with Ms Perring's assessment of these five categories of adverse effects. Notwithstanding that agreement between the planners, we nevertheless address those matters in light of the evidence received at the Hearing.

[034] We then address in more detail the primary area of disagreement between Ms Perring and Mr Crossan which related to traffic safety. We also separately address the effects (downstream flooding and potentially contaminated soils) arising from the proposed culvert replacement associated with the upgrade of the Site accessway.

[035] However, before we do that, we note that a number of submitters who spoke at the Hearing were concerned about effects of the previous filling of the Site and associated matters such as upstream flooding²⁶ and groundwater flows. Other submitters were concerned about the geotechnical stability of the Site and the nature of the fill used to form both the area now occupied by the industrial activities and the perimeter bunds. These matters are associated with the previous Site earthworks and the absence of the overland flow path required by the Structure Plan. They will be addressed in the Council's assessment of resource consent applications RC12979 and RC13474 and therefore fall outside the scope of our considerations.

5.1.1 Landscape Character and Visual Effects

[036] We are not overly concerned about changes to 'landscape character' or 'amenity' as the Site is zoned Industrial and it is anticipated (and ODP enabled) to contain industrial activities, subject to compliance with

²³ Which might normally be the approach taken for retrospective consent applications.

²⁴ EIC Gardner-Hopkins, paragraph 46.

²⁵ These being the private financial benefits accruing to the owners of the Site and the owners and operators of the four unauthorised industrial activities.

²⁶ We were provided with graphic pictures of that flooding by several submitters.

the Structure Plan and wider ODP provisions. Rather our focus is on the visual effects arising of the Site's existing unauthorised industrial activities.

- [037] These effects were assessed for TGL by Oliver May from Boffa Miskell and reviewed for WBOPDC by Dave Mansergh. Mr May produced a 'Landscape Management Plan' (LMP), the latest version of which is dated 11 May 2023. The outcomes²⁷ sought to be achieved by the LMP are:
- Mitigation planting that achieves appropriate screening of on-site activities;
 - Plant species that respect the advice of Pirirākau hapū;
 - Plant species and spacings that will achieve the degree of mitigation required over different time periods; and
 - A maintenance regime that suppresses weed and pest species and ensures the successful establishment of mitigation planting.
- [038] Visual effects evidence for TGL was also provided by Mr May. We understand his main conclusions to be:
- The existing bunding and planting provides sufficient visual mitigation for the existing activities from viewpoints along the Te Puna Road frontage of the Site and it's the north-eastern and south-eastern boundaries. Consequently, the adverse visual effects from viewpoints to the north, east and south of the site are neutral to low;
 - It is not possible to screen the four industrial activities from two elevated properties to the west of the Site (110 and 138 Te Puna Road). However, that was anticipated when the Structure Plan was approved by the Environment Court in 2005 and in any case the magnitude of adverse visual effects arising at those properties is low;
 - A 4.5m high shade screen²⁸ along the western and southern boundaries of the Compass Pools tenancy will adequately mitigate adverse visual effects arising from the pink swimming pool shells. In answer to our questions, Mr May advised that the 4.5m height was based on topographic site line modelling from the dwelling at 110 Te Puna Road;
 - A 1m setback from boundary plantings would adequately protect them from damage; and
 - Damaged or dead plants will be replaced as required.
- [039] We understand that the main additional (or supplementary) landscape mitigation planting now proposed that would shield the Site from external viewing audiences relates to a 738m long portion of the Site's southern boundary adjacent to the Tyre Services and Compass Pools tenancies. Mr May considered that an additional four rows of planting across a 5-6 m planted area would provide the 10m planted buffer screening envisaged by the Structure Plan. However, he advised²⁹ "Given the temporary nature of the consent (2-years), this additional planting will not mitigate the effects of the existing activities further in this period." We asked Mr May what the implications of that were in terms of adverse visual effects. He advised that those effects would continue to be low (or minor in RMA parlance) in the absence of that additional (or supplementary) landscape planting.
- [040] We understand from reading the LMP that some infill planting is also proposed along Te Puna Station Road (comprising 25% of the currently planted area). Within the Site itself 345m of internal boundary planting, 1,300m of roadside planting and 4,580m² of stormwater swale and overland flow path planting is also proposed. The additional mitigation planting will take some time (we understand three years after it is planted) to provide effective screening. Consequently, that 'mitigation' will not be fully effective within the two-year duration sought.

²⁷ LMP page 5.

²⁸ Comprising a 70% block-out horticultural shade cloth.

²⁹ EIC May, paragraph 31.

[041] Nevertheless, Mr Mansergh considered that the residual (or temporary) adverse effects during the two-year duration sought would (in landscape assessment terminology) be 'low'. According to the document Te Tangi a te Manu³⁰ that equates to an RMA minor effect.

[042] There was disagreement between Mr Mansergh and Mr May regarding the necessary height of the shade screen³¹ and the buffer distance from plantings³². Again, referring to our observation in [028] above, we find it is not necessary for the shade cloth to be the same height as fully established screen plantings. What is required is a height that mitigates the visual effects of the swimming pools such that those effects are minor or less.

[043] As part of the s42A team's response at the Hearing, Mr Mansergh advised³³:

A simple cross-section through the site from 110 Te Puna Road suggests that the proposed shade cloth screen would need to be approximately 9m tall to screen a 4m tall object at the rear of the site when viewed from 110 Te Puna Road. I proposed 6m as this is a practical height, consistent with horticultural practices in the surrounding landscape and, in my opinion, is sufficient to reduce the effects to less than minor.

[044] We prefer Mr Mansergh's evidence and find that the shade cloth screen should be 6.0m high.

[045] Another area of disagreement between Mr May and Mr Mansergh related to the necessary buffer distance between mitigation planting. Mr May suggested 1m and Mr Mansergh suggested 3m. We do not consider this to be a significant issue given the agreement between the two experts that any additional planting will not mitigate visual effects during the two-year duration sought. We also observe that only A&J Demolition borders the substantive northern and eastern bund and planting and that planting seems relatively healthy (in our lay opinion). We therefore find that a 1m buffer³⁴ would be sufficient for the two-year duration sought.

[046] Subject to the implementation of the above mitigation measures, we agree with Ms Perring and Mr Crossan and we are satisfied that the visual effects arising during a two-year consent duration would be no more than minor.

5.1.2 Infrastructure and Servicing Effects

[047] We are satisfied that adverse effects relating to water, wastewater and stormwater runoff (stormwater volumes) are no more than minor because:

- Potable water is available by way of a 20mm connection to the 100mm diameter watermain along Te Puna Staton Road;
- The fire risk posed by the stored tyres³⁵ can be adequately managed through a consent condition requiring written confirmation from FENZ that the activity meets the requirements of the latest version of the Firefighting Water Supplies Code of Practice. We also accept Mr Crossan's evidence that his assessment of the Earthmover tyre storage yard against National Environmental Standard for Outdoor Tyre Storage confirmed that the tyre storage operation was fully compliant with the permitted provisions. We heard no qualified evidence to the contrary;
- Portalooos are provided for the tenancies that have staff regularly on site and on-site effluent systems are not practical due to a high groundwater table. We do not share the concerns of some submitters that portalooos are inappropriate or that they might topple over in strong winds;
- The lack of provision of power, telecommunications and internet utility connections is not of concern to us because the tenants can use mobile phones and install solar panels if required; and

³⁰ Aotearoa New Zealand Landscape Assessment Guidelines, July 2022

³¹ Mr Mansergh recommended 6m and Mr May recommended 4.5m.

³² Mr Mansergh recommended 3m and Mr May recommended 1m.

³³ Statement of Evidence of David Mansergh, undated, paragraph 15.

³⁴ The Reply representations (paragraph 24(c)) advised that TGL retained its wish for a 1 m buffer.

³⁵ On our site visit we observed that there are only two relatively small piles of large tyres on the site.

- Stormwater runoff will disperse to ground and may eventually make its way via overland flow to the roadside drain. Importantly, as noted by Stephen Bos³⁶, the existing four industrial activities will generate no more stormwater than would be generated by an equivalent 'empty' metaled area on the Site. We heard no qualified evidence to the contrary.

[048] This leaves the matter of stormwater quality.

[049] Our understanding of the evidence is that the stormwater infrastructure within the Site anticipated by the Structure Plan has not been built. Our site visit revealed that some of the Site stormwater will be collected by shallow vegetated drains and discharge to the roadside drain via a 300mm diameter plastic culvert located next to the Site accessway. Stormwater runoff from the A&J Demolition tenancy will discharge to the road side drain by way of overland flow down the site accessway. The evidence of some submitters was that other Site stormwater discharged to the roadside drain by way of pipes through and under the perimeter bunds. We were unable to confirm if that was the case or not.

[050] TGL contracted BCD Group to sample the discharge from the plastic culvert. Samples were taken on 24 September 2023 at 7am during a rainfall event. The samples were analysed³⁷ for Total Suspended Solids, Total Copper, Dissolved Copper, Total Zinc, Dissolved Zinc and Total Petroleum Hydrocarbons. All of those contaminants were well below the standards for stormwater discharges set in the Council's Katikati comprehensive stormwater discharge consent. While those results are encouraging, we agree with Ms Perring³⁸ that one sample does not equate to a robust and representative sampling programme and does not provide the weight of evidence recommended by the ANZECC freshwater assessment guidelines.

[051] Importantly, the stormwater discharge from the plastic culvert does not capture the runoff from the A&J Demolition tenancy. We heard that tenancy includes an area where concrete crushing previously occurred until it was ceased in response to an abatement notice. Some submitters suggested that the byproducts of demolition could contain contaminants including asbestos. Those submitters suggested that the A&J Demolition tenancy site as a HAIL site and Ms Perring suggested³⁹ the concrete crushing was a HAIL activity. Our review of the "Hazardous Activities and Industries List (HAIL): October 2011" on the Ministry for the Environment website did not reveal 'concrete crushing' to be a listed activity⁴⁰, although the demolition of buildings containing asbestos would qualify⁴¹.

[052] We received no evidence on the quality of stormwater runoff from the A&J Demolition tenancy. Nevertheless, we find that the stormwater from the A&J Demolition tenancy has the potential to entrain concrete rushing residue and possibly asbestos and other demolition derived contaminants and those contaminants could result in an adverse effect on water quality in the roadside drain. That drain enters the Hakao Stream and thereafter the Wairoa River.

[053] In his Reply, representations Mr Gardner-Hopkins advised that TGL now offer an additional water quality condition, proposing a water quality management plan, to better understand, manage, and improve water quality on the site. This was captured in revised Condition 30 and requires a 'Water Quality Management Plan' to be submitted to Council within 40 working days. However, this additional condition provides us with no certainty that all of the stormwater from the existing industrial activities will be captured, contained and treated in a manner that is accepted best practice for industrial activities.

[054] Additionally, we were not provided with any evidence regarding how long it would take for any such stormwater infrastructure to be constructed.

³⁶ EIC, paragraph 12.

³⁷ By R J Hill Laboratories Limited.

³⁸ Reply evidence, paragraph 74.

³⁹ Section 42A Report, paragraph 254.

⁴⁰ Nor does the Ministry's Hazardous Activities and Industries List guidance" document mention concrete crushing.

⁴¹ HAIL list "E. Mineral extraction, refining and reprocessing, storage and use. 1. Asbestos products manufacture or disposal including sites with buildings containing asbestos products known to be in a deteriorated condition"

- [055] In the context of a two-year duration, on the evidence we cannot be certain that adverse effects on water quality will be minor or less during that two-year period. For us to be certain about that, the existing industrial activities would need to cease until such time as the necessary stormwater infrastructure was operational. That has not been offered by TGL.
- [056] Consequently, on the evidence we are not satisfied that the water quality effects of the Site stormwater discharges are no more than minor.
- [057] In her 13 October 2023 Memorandum⁴² Ms Perring advised that she wished to correct her advice regarding the Site's stormwater discharges. She correctly noted that the roadside drain is an 'artificial watercourse' which means that RMA s13 does not apply to it (because an artificial water course is excluded from the RMA definition of 'river' and s13 applies to the beds of lakes and rivers). However, RMA s15(1)(a) still applies to the discharge from the plastic culvert and any discharges that may occur from pipes under or through the perimeter bunds.
- [058] We are familiar with the BOPRC's Regional Natural Resources Plan. On the evidence in front of us we cannot be certain that the Site's stormwater discharge would meet the conditions of permitted activity Rule DW R20 (Rule 30) "Discharge of Stormwater to Surface Water"⁴³. It may well require consent from BOPRC under rule DW R20 or DW 8.
- [059] Consequently, if we had been inclined to find that the TGL application could pass the s104D(1)(a) 'gateway' in terms of effects on water quality, before coming to a firm conclusion on that matter we would have been minded to issue a Direction under RMA sections 41C(3) and 91 requiring TGL to either obtain a Certificate of Compliance from BOPRC for the Site stormwater discharge or otherwise apply for a stormwater discharge consent from BOPRC.

5.1.3 Noise

- [060] Notwithstanding the fact that some submitters were concerned about 'loud machinery noise' and 'metallic clanging' said to be coming from the Site, we are satisfied that potential noise effects will be no more than minor because, based on the assessment undertaken for TGL by Styles Group, subject to requiring the consent holder to ensure the tenants comply with a suitable Noise Management Plan (NMP), the existing activities can comply with the rural, rural residential and industrial zone noise limits that are set out in section 4C.1.3.2 of the ODP. If those noise limits are breached then that becomes an enforcement issue for the Council.
- [061] An NMP⁴⁴ was attached to the evidence of Jon Styles. We have reviewed that NMP and find it to be adequate for the existing four industrial activities occurring on the Site. We understand the NMP to implement the recommendations of Council's noise peer reviewer Peter Runcie of SLR Consulting. We agree with Mr Styles⁴⁵ that where a specific detailed NMP has been prepared and is acceptable to the consent authority, it is preferable to specify compliance with that Plan rather than a general NMP.

5.1.4 Cultural and Archaeological

- [062] Ms Perring advised that there are no historic buildings or structures, significant trees or heritage features identified by the ODP on the Site. However, the site is in close proximity to the historical Pukewhānake Pā site, and as described by Ms Shepherd at the Hearing, the wider area has cultural significance to Pirirākau.

⁴² Reply Evidence of Heather Perring (42A Reporting Officer) – Further response to questions raised in the Hearing, 13 October 2023.

⁴³ We note that the Reply representations helpfully included calculations of Site stormwater discharge volumes from Mr Bos, showing that the rate of discharge would not exceed 125 litres per second for a 10 minute duration 10% AEP storm event, thereby meeting condition (d) of DW R20. However, our concern relates to DW R20 water quality conditions (a), (c), (f), (h), (i) and (j).

⁴⁴ Noise Management Plan, 245 Te Puna Station Road, Te Puna Prepared For Barry Daniel, Date 22 September 2023.

⁴⁵ EIC, paragraph 15.3.

- [063] Ms Shepherd prepared, and represented at the Hearing, the Pirirākau Assessment of Cultural Effects (PACE) report for this proposal RC13924L, with the report explaining the:
- rangatiratanga and kaitiakitanga of Pirirākau in the Te Puna area;
 - relationship with Hakao Stream and wider area;
 - engagement with TGL; and
 - measures to manage the cultural adverse effects arising from the proposal RC13924L.
- [064] The PACE report was originally lodged in a position of conditional support, however to respect and acknowledge the submissions in opposition by Pirirākau kaumātua and whānau, the position changed to neutral prior to the Hearing commencing.
- [065] Submitter #93 Mr Neville Bidois, a kaumatua of Pirirākau, represented his and Submitter #88 George Hall's submission in opposition to the proposal at the Hearing. Mr Bidois outlined his concerns with the development as a whole, with a large number of those matters associated with:
- commitments in the TPSP Environment Court decision to Pirirākau and the Te Puna community;
 - requirements of the Te Puna Business Park Structure Plan;
 - issues of flooding; and
 - effects arising from onsite earthworks.
- [066] A number of these matters shared by Mr Bidois fall outside the scope of our considerations, and will be addressed in the Council's assessment of resource consent applications RC12979 and RC13474. For this reason, we find that the content and assessment within the PACE is appropriate, and that the recommended mitigation measures in that report and subsequently proffered by TGL as part of draft set of conditions, can manage the adverse cultural effects to Pirirākau whereby the adverse effects are no more than minor.

5.1.5 Financial Contributions

- [067] TGL are required to pay financial contributions relating to transportation and water. We understand that the transportation contributions are accepted by TGL, but the water contributions are not. In that regard Mr Crossan advised that although there was a requirement to upgrade the water supply in Te Puna Station Road within the Structure Plan, WBOPDC Senior Water Utility Engineer Mr Paul van den Berghe had advised that funding for that upgrade was not contained in any of Council's current plans or asset management plan.
- [068] At our request Ms Perring subsequently liaised with Mr van den Berghe regarding Mr Crossan's advice to us. In her 13 October Memorandum Ms Perring advised that Mr van den Berghe had simply advised Mr Crossan that to his knowledge he was not aware of a requirement to upgrade the main within the Structure Plan, but the main would be replaced sometime in the future as part of Councils Renewals Plan but not in the near future.
- [069] Consequently, Ms Perring considered that a water financial contribution should now be imposed on TGL. We agree and find that should the TGL application be granted, it should include a condition imposing a \$78,067 plus GST water financial contribution as was originally recommended⁴⁶ in the Section 42A Report.

⁴⁶ What was then recommended Condition 23.

5.1.6 Traffic safety effects

5.1.6.1 Te Puna Station Road and Te Puna Road Intersection

- [070] One of the main areas of disagreement regarding traffic safety effects between Ms Perring⁴⁷ and the TGL witnesses related to the need or otherwise to upgrade the intersection of Te Puna Road and Te Puna Station Road (“the intersection”).
- [071] There was disagreement about whether the upgrade of the intersection undertaken by WBOPDC prior to 2019 met the requirements of the Structure Plan and particularly Section 12.4.16.2.b of the ODP. However, again referring to our observation at [028] above, we do not consider that to be the relevant test. Instead, we consider the relevant test to be whether or not the level of traffic arising from the existing Site activities poses a more than minor traffic safety risk at that intersection, as it might be altered by any mitigation proposed by TGL.
- [072] We understand the level of traffic generated by the Site activities to be 25 vehicles per day, comprising 10 light vehicles and 15 heavy vehicles, which equates to two or three vehicles per hour at peak times. Given the current state of Te Puna Station Road to the east of the Site⁴⁸ and the commitment from the four tenants to avoid the use of Clarke Road, we consider it prudent to assume that all of that traffic will traverse the intersection. Based on the current configuration of that intersection, the main issue arises from vehicles traveling to the Site in a northerly direction along Te Puna Road turning into Te Puna Station Road.
- [073] The speed limit on Te Puna Road is 80km/hr at the intersection⁴⁹.
- [074] We viewed the intersection from all directions during our site visit. In our admittedly lay and subjective view, it appeared to us that the intersection poses a safety risk to vehicles travelling north along Te Puna Road. A driver travelling at 80km/hr crests the brow of a hill and immediately drops into a sharp right-hand bend and thereafter the intersection quickly looms up. A heavy vehicle stopped in the road waiting to turn right into Te Puna Station Road would necessarily require a driver to take evasive action.
- [075] Evidence for TGL on traffic safety matters was provided and given by Bruce Harrison. He advised⁵⁰ that there would be 7 to 8 heavy vehicles making a right hand turn from Te Puna Road into Te Puna Station Road each day. Mr Harrison considered⁵¹ that a right turn bay at the intersection was warranted now given the current levels of traffic, regardless of the traffic emanating from the TGL Site. On the basis of our site visit we endorse that view. A right turn bay would allow a vehicle travelling north on Te Puna Road approaching a vehicle stopped in the traffic lane to safely pass to the left of the stopped vehicle. Mr Harrison agreed with Ms Perring that designing and constructing a right turn bay could not practically be achieved within the two-year consent duration sought by TGL.
- [076] Mr Harrison considered that TGL’s proposed pavement marking alterations to the intersection as shown on the Stratum Consultants drawing 423022-CIV-D001 were adequate to cater for the general traffic generated by the Site and would improve the existing situation. Those marking alterations would move the painted ‘traffic island’ slightly further to the south to accommodate the turning path of articulated heavy vehicles⁵². In answer to our questions Ms Perring advised in 13 October Memorandum that the marking alterations could be required by a condition of consent, notwithstanding that TGL was not the road controlling

⁴⁷ Together with her technical advisers Justine Winton (WSP Senior Traffic and Safety Engineer for Westlink) and Callum McLean (Senior Transportation Engineer for WBOPDC)

⁴⁸ The road was closed in January 2023 and due to a landslip and is currently only open to cyclists and pedestrians. Around 600m of the road needs major repairs. WBOPDC is currently consulting the community on options for the road.

⁴⁹ In answer to our questions Callum McLean (Council’s Senior Transportation Engineer) advised that the Council was currently consulting on reducing the speed limit to 60km/hr but there is no certainty that will eventuate (or if it does when that might happen) and so we have assumed an 80km/hr speed limit applies.

⁵⁰ Page 91 of 188 of the 12 May 2023 s92 response. Letter dated 12 May 2023 from Harrison Transport to Shae Crossan.

⁵¹ EIC, paragraphs 24 and 25.

⁵² As shown on page 94 of 118 of the 12 May 2023 TGL response to the WBOPDC s92 Request,

authority⁵³. We understand that the marking alterations could be undertaken subject to them obtaining a Works Access Permits (WAP) from the Council. As part of the WAP process a traffic management plan would need to be provided by TGL. We received no information on how long the WAP process would take and therefore how long it would be until the road marking 'mitigation' occurred.

[077] We understand Mr Harrison's opinion to be based on his assessment⁵⁴ that:

- Having regard to his assessment that the available sight distance to the south was between 134m and 159m, people would have enough time, travelling at 80km/h, to see a vehicle stopped to turn, and to then be able to slow down and stop. In answer to our questions, he considered that would be the case even in adverse weather conditions (for example heavy rain or fog) due to the suitable sight distances;
- The transportation of houses would be carried out during off-peak times under specific traffic control as over-dimension loads; and
- The traffic from the Site has been occurring and utilising the intersection for the last 3-4 years, without any crash history⁵⁵. In answer to our questions Mr Harrison agreed that reportedly favorable crash history that could simply be a matter of 'good luck'.

[078] Conversely, Ms Wilton considered the proposed paint marking mitigation to be unsatisfactory. She recommended that a right turn bay (or similar treatment) should be installed on Te Puna Road to provide safe stacking) or queuing) for right turning vehicles, and intersection adjustments made for vehicles waiting to turn right out of Te Puna Station Road. Mr McLean considered the safety risk⁵⁶ at the intersection to be 'Serious, with a crash probability being 'likely'. That meant that a side impact collision at a speed limit of only 50 km/hr would have a 10% chance of a fatality.

[079] We prefer Ms Winton's and Mr McLean's evidence on this important traffic safety matter because:

- Waka Kotahi's Crash Analysis System (CAS) shows six crashes in the vicinity of the intersection within the last five years⁵⁷ and that record would not include minor incidents that are not reported to the NZ police;
- Since 2005, there has been a change to the give way rule which exacerbates any queue arising from traffic turning right from Te Puna Road into Te Puna Station Road⁵⁸;
- The Safe Stopping Distance (SSD)⁵⁹ for a car travelling at 60km/hr is 84m and for a heavy vehicle it is 101m. Contrary to Mr Harrison's evidence, the standard sight distance for northward travelling vehicles on Te Puna Road to the intersection (i.e. along the traffic lane) is actually only around 60m. If there are no vehicles in the southbound lane the sight distance is only around 77m⁶⁰. Those sight distances for through traffic are on the cusp of what is acceptable for braking to avoid collision, and could be below the acceptable stopping distance on any given day⁶¹;
- Safe Intersection Sight Distance (SISD)⁶² is another design parameter. For a car travelling at 60km/h the SISD is 130m. The purpose of SISD is two-fold; to enable a driver leaving the side road to see enough to get a safe gap and to enable a through road driver to see a potential conflict arising from the minor road vehicle. SISD is not available for vehicles approaching the intersection northwards along Te Puna Road; and

⁵³ After the Hearing concluded, and at our request, Ms Perring provided an outline of the process that TGL would need to undertake with Council to undertake the pavement marking alteration. This would require TGL to make Corridor Access Requests (CAR) and issue Works Access Permits (WAP). No works may be undertaken in the road corridor without a WAP.

⁵⁴ EIC, paragraphs 29 to 31.

⁵⁵ The applicant's Reply representations stated Mr Harrison meant to only refer to crashes of vehicles involving the TGL tenancies.

⁵⁶ Assessed in accordance with Waka Kotahi's Safe System Audit Guidelines – Road to Zero, July 2022.

⁵⁷ Reply Evidence of Calum Mclean, 10 October. Paragraph 16 and its associated figure.

⁵⁸ Reply Evidence of Justine Wilton, undated. Paragraph 79.

⁵⁹ Reply evidence, paragraph 81. Safe Stopping Distance is defined in Austroads Guide to Road Design Part 3: Geometric Design. Ms Wilton used a 2.0s reaction time and an 8% grade correction

⁶⁰ Ms Wilton also advised that the sight distance could be around 130m if the southbound lane was clear and the berm was also clear, but we consider it suitably precautionary to consider the shorter sight distances.

⁶¹ Reply evidence, paragraph 79 and Figure 19.

⁶² Reply evidence, paragraph 83. SISD is defined in Austroads Guide to Road Design Part 4a: Unsignalized and Signalised Intersections. Ms Wilton used a 2.0s reaction time and grade correction for the maximum grade on the section (10%).

- If a person is unable to stop prior to encountering a queue (from right turning traffic) at the intersection, their options are to hit the rear of the queue, swerve left and go over the Shared Path into trees or swerve right into the oncoming lane. Consequently, a crash at the intersection would most likely be rear-end, off road to the left, or cross centreline (including head-on and off road to the right). Such crashes can cause serious and fatal injuries⁶³.
- [080] TGL's proposed movement of the pavement markings would only mean that a right turning heavy vehicle does not have to track over the right-out lane on Te Puna Station Road. The above significant adverse traffic safety effects at the intersection would not be mitigated by TGL's proposed intersection mitigation. Conversely, TGL's vehicle movements can only exacerbate the existing traffic safety risk at the intersection.
- [081] Importantly, s3 of the RMA's definition of effect includes "*any potential effect of low probability which has a high potential impact*". An accident at the intersection caused by traffic originating from the TGL Site would axiomatically be an effect of that nature.
- [082] In the absence of the provision of a right turn bay at the intersection we are not satisfied that that the adverse effects of the application on traffic safety will be no more than minor. We make that finding in full knowledge of the level of traffic associated with the TGL application. It would only take one of the 15 daily heavy vehicle movements to cause a crash during the two-year consent duration to potentially result in a significantly more than minor adverse effect.
- [083] Our finding on the traffic safety risk at the intersection is reinforced by the persuasive evidence of several lay submitters who attended the Hearing and expressed concern about the safety of the intersection.
- [084] Alison Cowley said when travelling north on Te Puna Road she had encountered a truck parked on Te Puna Road awaiting a right hand turn into Te Puna Station Road. This had caused her to brake suddenly and hard to avoid a collision and then anxiously watch other cars coming up behind her in case they collided with her.
- [085] While not appearing at the Hearing⁶⁴, in her written submission Wilma Foster said "*I live close to the Te Puna Road and Te Puna Station Road corner and know that turning down Te Puna Station [Road] from Te Puna [Road] will be dangerous, cause more accidents. Often there is poor/difficult vision for people coming up Te Puna Station Road, vehicles (cars as well as trucks) tend to cut the corner to reduce the angle of turn which is more than 270 degrees. I have nearly been hit in my car by a truck taking this route more than once. The trucks waiting to turn in [to Te Puna Station Road from Te Puna Road] will also cause backing up of traffic and frustration for local residents especially accessing the school or marae in the district.*"

5.1.6.2 Site Access

- [086] TGL intend to upgrade the accessway to the Site from Te Puna Station Road. With regard to this being a retrospective application, we observe that normally the site accessway would have been upgraded before industrial activities commenced on the Site. At the time of the Hearing, the final upgrade configuration proposed by TGL was shown in the Figure attached to the evidence of Mr Bos. While there was no disagreement about the necessity to upgrade the accessway, there was disagreement about the necessary standard of upgrade.
- [087] At the Hearing Mr Harrison advised TGL proposed to upgrade and seal the current vehicle entrance to the site in accordance with the Waka Kotahi Planning Policy Manual 2007 (PPM 2007) Diagram D, except for the road widening opposite.⁶⁵ Conversely, Ms Wilton considered that Diagram E from the PPM 2007 was appropriate, including road widening opposite the accessway. We prefer Ms Wilton's evidence on that

⁶³ Reply evidence, paragraphs 88 and 94.

⁶⁴ Ms Foster was scheduled to speak but submitted her apology and could not attend.

⁶⁵ Mr Crossan advised that as part of the wider development of the Site Waka Kotahi Planning Policy Manual 2007, Diagram E would be used to further upgrade the Site access, including road widening adjacent to the access.

matter, primarily because the agreed level of traffic from the Site equates to 61 ecm/day⁶⁶ and it is clear⁶⁷ from page A4:2 of the PPM 2007 that for 31 – 100 ecm/day the appropriate accessway design is Diagram E, inclusive of road widening to provide a right turn bay so that vehicles travelling eastwards along Te Puna Station Road can safely pass vehicles stopped to turn right into the Site.

[088] For the record, we preferred Ms Wilton's evidence as we found it to be more objective. In that regard we reject Mr Harrison's reasons for not providing road widening and a right turn bay⁶⁸ for the comprehensive reasons set out in Ms Wilton's Reply evidence⁶⁹. In particular we find:

- The traffic volumes are not 'low' by any of the definitions used by Waka Kotahi for access design or road volume as the access generates between 31 and 100 ecm/day and traffic surveys have shown that Te Puna Station Road carries more than 500 vehicles/day⁷⁰; and
- Rear end, run-off road (into the deep roadside drains) and head-on collisions are reasonably foreseeable crash types at the accessway and, should this occur, serious to fatal injuries can be expected particularly in a multi-vehicle collision and especially if one of the vehicles is a heavy vehicle, motorcyclist or cyclist⁷¹.

[089] In that regard we note the posted speed limit on Te Puna Station Road is 80km/hr and the road is narrower than the Council standards⁷². Ms Wilton's concerns around the omission of road widening were summarised by Ms Perring⁷³ as follows:

"If any following drivers are distracted and don't notice the slowing/stopped traffic ahead, there is no safe evasive manoeuvre space. It also means that anyone wanting to turn right has no option but to stop in the traffic lane irrespective of the line of traffic behind them and/or the speed of vehicles approaching from behind. This is why all standard access layouts for sites with heavy vehicles, or with high site volumes (i.e. more than 100 ecm/day) have localised widening to varying degrees".

[090] We share Ms Wilton's concerns.

[091] We also heard persuasive evidence from some lay submitters regarding the Site accessway.

[092] Sarah Rice said "*There have been numerous occasions when we have had to stop and wait for vehicles turning into and out of Mr Daniels development. The road has no turning bay and as cars hurtle down it towards us at a standstill, we fear that they will hit us from behind.*"

[093] Drew Cowley said he often cycled down Te Puna Station Road which was narrow and dangerous for cyclists when heavy vehicles were travelling along it.

[094] In her written submission Wilma Foster said "*The road [Te Puna Station Road] is narrow for a two laned road with no verge on either side of the tarseal for allow for pulling off spaces for a sufficient turn into the property. This road has a high and increasing number of cyclists using it as part of the cycle way to Omokoroa. I am a user of the road as a cyclist and have been blown about by trucks entering into the property and nearly knocked off in more than one occasion. This road is not sufficiently wide or safe for multiple truck and vehicular access onto this property. The oversize width of the trucks transporting equipment and pools does not make it safe for vehicles to be going both ways on the road. The narrow road means that trucks are swinging out across the opposite lane to turn into the property often forcing other vehicles to stop.*"

⁶⁶ Reply evidence, paragraph 21.

⁶⁷ Reply evidence, paragraph 25 and Figure 3.

⁶⁸ That there is no through traffic, Te Puna Station Road is not a State Highway and the collision risk is low.

⁶⁹ Paragraphs 33 to 48.

⁷⁰ Reply evidence, paragraph 49.

⁷¹ Reply evidence, paragraph 60.

⁷² A width of 6.8 – 7.2m compared to a standard of 8.5m as set out in Ian Carlisle's evidence from 2003. At this Hearing Mr Harrison advised that was still the case.

⁷³ Section 42A Report, paragraph 129.

[095] On the evidence we find that the normal road widening associated with Diagram E as contained in the 2007 Waka Kotahi Planning Policy Manual should have been provided **before** any industrial activities on the Site commenced. However, that did not occur.

[096] In his written Reply Submissions Mr Gardner- Hopkins advised⁷⁴:

In order to remove the need for debate, and as it was always committed to undertaking the Structure Plan requirements in the longer term, the applicant is prepared to now offer to undertake the full Structure Plan treatment of the entrance way as a condition of this consent. This will require further detailed engineering design and a final plan to be certified by the Council as meeting this requirement, prior to the undertaking of these works. There will be some additional earthworks, and it will take longer than what had been proposed to undertake

[097] The revised conditions attached to the Reply included Condition 6 which is:

That within 6 months of the commencement of this consent, the consent holder shall complete the accessway upgrade to the Waka Kotahi Planning Policy Manual Diagram E Standard

[098] We consider TGL's concession to now fully upgrade the site accessway to Diagram E to be commendable.

[099] However, we are not satisfied that the completion of the physical upgrade work can in fact be completed in six months. As noted in revised Condition 7, the Council would be required to certify the accessway design, the geotechnical investigations and recommendations, the roadside drain hydraulic capacity assessment, design drawings and specifications, design calculations, any retaining wall design, and the project cost estimate for the upgrade works. Input would also be required from Kiwi Rail in terms of their adjacent maintenance accessway.

[100] We received no detailed timeline showing how all of that necessary pre-construction activity, and the construction itself, could be completed within six months. We raise this issue in the context of the two-year duration sought. On the applicant's own evidence, the traffic safety risk at the existing accessway will be unmitigated for up to ¼ of the consent duration sought. It may well be longer than that.

[101] Consequently, we are not satisfied that the traffic safety risk at the Site accessway will be minor or less.

[102] For us to have concluded that the traffic safety risk at the Site accessway would be minor or less, it would have been necessary for the existing industrial activities to cease until such time as the physical construction of the accessway upgrade was completed. That was not offered by TGL.

5.1.6.3 Other Transport Matters

[103] There are three other transport related matters that we need to address.

[104] The first relates to the non-sealing of the internal private roads, parking and loading areas. Mr McLean was concerned that material tracked onto Te Puna Station Road could have the effect of reducing the macrotexture of the road surface causing vehicles to lose traction, reducing their braking ability. In response Mr Harrison recommended that a length of 30m of the private and entrance be sealed from the edge of the Te Puna Station Road carriageway. Ms McLaen advised that the 30m should commence at the Site's property boundary and we prefer his evidence. We are satisfied that will reduce the potential adverse effect of concern to Mr McLean to a level that is no more than minor.

[105] The second relates to heavy traffic using Clarke Road. We understand that the traffic calming measures installed on that road have not entirely deterred its usage by heavy vehicles. Accordingly, Ms Winton considered that TGL should provide a Travel Management Plan (TMP) that described travel routes for the heavy vehicles and for the staff light vehicles, and excluded Clarke Road as a permitted route. The revised conditions instead required the preparation of a Site Management Plan (SMP) that would, amongst other

⁷⁴ Paragraph 20.

things, require that “*all activities operating under this consent shall ensure that their delivery staff and contractors shall not use Clarke Road for any heavy vehicle access to and from the site*”. We consider that to be appropriate find that the effects of the TGL vehicles on Clarke Road are minor or less.

- [106] We make the same finding regarding the the Wairoa Bridge underpass as the SMP would require “*all site traffic shall travel to the site via Te Puna Road, and shall not use the Wairoa Bridge underpass to travel to or from the site*”.
- [107] The only issue we have is that the conditions cannot bind the tenants, they can only bind the consent holder. However, that could be resolved by rewording the recommended SMP condition so as to impose an obligation on the consent holder to require the tenants to achieve the above outcomes.
- [108] The third issue relates to the effect of TGL traffic on the state of the chip seal surface at the the intersection of Te Puna Road and Te Puna Station Road. A memorandum⁷⁵ from Stratum Consultants concluded that the chip seal was currently free from loose stones and was performing well and the anticipated impact of the TGL traffic on that seal condition was considered to be negligible. We understand the Council accepted that conclusion. On that basis we find that potential adverse effect to be less than minor.

5.1.7 Non-transport effects of the access upgrade

- [109] As we noted earlier, TGL has confirmed that consent is required for proposed culvert installation and earthworks associated with the upgrade of the accessway to the Site. There are two potential adverse effects that we need to consider. Having said that we are satisfied any potential effects arising from sediment runoff during the accessway upgrade works can be managed to be less than minor by way of a routine erosion and sediment control plan or ESCP.
- [110] The first issue relates to possible flooding effects on downstream properties. This was assessed for TGL by Steven Joynes. He concluded that at the downstream property (177 Te Puna Station Road) the water level change for the 10-year storm was a 11mm increase to an existing depth of 1.29m and in a 100-year storm there was a 1mm increase to an existing depth of 1.9m. These are less than minor effects and in any case the owner of 177 Te Puna Station Road has provided his written approval to the TGL application.
- [111] In answer to our questions, we understand Mr Bos to have confirmed that the 1800mm diameter culvert to be installed as part of the access upgrade would be of sufficient size to convey the flow in the drain that might arise upon full development of the Structure Plan area.
- [112] The second issue relates to potentially contaminated soil being encountered during the earthworks related to the culvert installation. Mr Crossan advised⁷⁶ the applicant engaged Mr Alan Woodger (Senior Environmental Scientist of BCD Group) to undertake soil samples and analysis from the accessway area. Having viewed Mr Woodger’s summary letter we agree with Mr Crossan that that either the National Environmental Standard for Assessment Soil Contaminants in relation to Human Health (NESCS) does not apply; or the works can otherwise be undertaken as a permitted activity under the NESCS due to meeting the permitted activity conditions. Ms Perring advised⁷⁷ that she accepted Mr Crossan’s conclusions.
- [113] We accept the evidence of Mr Bos⁷⁸ that a separate traffic management plan is not required for the site accessway upgrading works, because works within the road reserve will require a Corridor Access Request and Road Opening Notice to be approved by WBOPDC, including traffic management approval.

⁷⁵ From Johan Becker to WBOPDC dated 7 June 2023.

⁷⁶ EIC, paragraph 55.

⁷⁷ Reply evidence, paragraph 58.

⁷⁸ EIC Bos, paragraph 22.

5.1.8 Other effects

[114] Some submitters raised the issue of windblown dust from the A&J Demolition tenancy, particularly the former concrete crushing site, posing a health risk due to it possibly containing respirable silica. We heard no qualified evidence on that matter and so we are unable to make a finding on it.

[115] Ms Perring referred⁷⁹ to the ODP requiring a 20m setback from Te Puna Station Road that had not been met. We asked her to clarify what that meant in terms of the application before us. In her 13 October Memorandum Ms Perring advised that, having carefully looked at the District Plan, she could confirm that there was no rule requiring a specific setback for industrial activity from waterways. However, no buildings (relocatable dwellings) or pool shells could be stored within 10m of the southern and eastern Site boundaries, or within 20m of the Site's northern (road-side) boundary. Ms Perring advised TGL was willing to accept these setbacks and that was indicated in revised Condition 16.

5.1.9 Conclusion on effects

[116] We are not satisfied that the following effects are minor or less:

- the adverse effects arising from stormwater runoff on receiving waters quality; and
- traffic safety effects associated with the intersection of Te Puna Road / Te Puna Station Road and the Site accessway.

[117] The application therefore fails to pass the section 104D(1)(a) gateway.

5.2 Objectives and policies of the Operative District Plan

[118] Section 104D(1)(b) refers to "the Plan" or "the proposed Plan". That limits our assessment to the Operative Western Bay of Plenty District Plan 2012. It does not involve an assessment of any national policy statement, the Bay of Plenty RPS or even directly Part 2 of the RMA.

[119] We agree with Mr Gardner-Hopkins⁸⁰ when he cited Court of Appeal authority that "*.. the real question in policy terms is whether it is appropriate to allow the activity.*"

[120] As we noted earlier, TGL have sought consent (RC12979) to waive some of the Structure Plan requirements. There is no guarantee that consent will be granted so we must assume that all of the Structure Plan requirements apply. However, as observed by Ms Perring, it is notable that there are no objectives and policies for the Business Park itself or Structure Plans within the ODP. Ms Perring and Mr Crossan agreed that meant that the relevant objectives and policies resided in the remainder of the ODP.

[121] We find that the relevant sections of the ODP are:

- Section 21 (Industrial Zone)
- Section 4B (Transportation, Access, Parking and Loading)
- Section 4C (Amenity)
- Section 8 (Natural Hazards)
- Section 12 (Subdivision & Development)

[122] Regarding Section 12 (Subdivision & Development) we acknowledge that there is no subdivision proposed by TGL, but for this retrospective consent we must necessarily assume that the four industrial activities 'proposed' for the Site are a form of development.

[123] Ms Perring and Mr Crossan both addressed the objectives and policies within the above sections of the ODP. Rather than set out their respective opinions, having carefully read their material we instead state

⁷⁹ Reply evidence, paragraph 77.

⁸⁰ EIC Gardner-Hopkins, paragraph 52.

our findings below. We do not repeat the actual wording of the objectives and policies as that can be found in section 11 of the Section 42A Report.

- [124] In her Section 42A Report Ms Perring assessed the application as being 'inconsistent' with certain ODP provisions. Mr Crosson took exception with the use of the word 'inconsistent'. In her Reply evidence Ms Perring advised⁸¹ that the term "inconsistent" could be most directly translated to, or alternated with, "at odds with", or "contrary to". A dictionary and thesaurus check of the word "inconsistent" provided a meaning of "not in keeping with"⁸², or "of an argument or opinion, containing elements that are opposed and do not match, so that it is difficult to imagine how both can be true"⁸³. Oxford Dictionary synonyms for "inconsistent" were "incompatible, conflicting, contrary, opposing". We find that Ms Perring's assessment of the ODP provisions can be relied on for a finding on whether or not the application is contrary to the ODP objective and policies.
- [125] We find that the application, subject to TGL's mitigation that can realistically be achieved reasonably early within the two-year consent duration sought, is contrary to:

Chapter 21 Industrial Zone

Objective 21.2.1.4

The application will not provide, extend or upgrade infrastructure with sufficient capacity to cater for future development within the Zone and in accordance with applicable structure plans.

Objective 21.2.1.5

In terms of stormwater quality, the application does not protect sensitive environments downstream of the Site from adverse effects of the stormwater infrastructure (such as it is) that services the Site.

Policy 21.2.2.2

The environment in the adjacent Rural Zone will not be protected from the adverse effects of TGL's traffic generation.

Policy 21.2.2.5

The application does not provide new infrastructure (roading and stormwater infrastructure in this case) that ensures adverse effects can be mitigated, remedied or avoided.

Chapter 4B Transportation, Access, Parking and Loading

Objective 4B.2.1.1

The application does not provide an integrated, efficient, safe and sustainable transportation network.

Policy 4B.2.2.2

The application does not avoid, remedy or mitigate the adverse effects of land use and development on the safety, efficiency, sustainability and capacity of the transportation network.

⁸¹ Reply evidence, paragraph 11.

⁸² Oxford Language Dictionary.

⁸³ Cambridge Dictionary.

Policy 4B.2.2.3

The application does not achieve the safe and efficient provision of site access at the local level and at intersections within the wider network.

Policy 4B.2.2.10

The application does not avoid, remedy or mitigate the effects of Site access activities on the transportation network, having particular regard given to the level of service that Te Puna Station Road provides within the district's roading hierarchy.

Chapter 12 Subdivision and Development

Objective 12.2.1.3

The application does not have infrastructure that is designed and constructed to minimum standards which will result in improved environmental outcomes without significant additional cost to the community. TGL proposes to use Te Puna Road / Te Puna Station Road for heavy vehicles without adequately mitigating the existing traffic safety issues at the intersection of Te Puna Road and Te Puna Station Road.

Policy 12.2.2.5.

We understand that the TGL development does not comply with the minimum standards in the Council's Development Code for the provision of infrastructure and services, nor to an alternative standard which is as effective and efficient in the long term and results in improved environmental outcomes.

Policy 12.2.2.9

The TGL development does not avoid, remedy or mitigate the adverse effects of traffic generation on the transport network.

- [126] On the basis of Ms Perring's 13 October Memorandum, and the proximity of the industrial activities to the Hakao Stream (which we observed on our site visit), we find that the application is also contrary to the following provisions:

Chapter 5 Natural Environment

Objectives 5.2.1.3 and 5.2.1.4

Policy 5.2.2.9

We heard compelling evidence from submitters⁸⁴ about the value of the Hakao Stream, especially to Pirirākau. The proximity of the industrial activities to the Hakao Stream does not preserve the natural character of that Stream and its riparian areas. Nor does it enhance the values of those degraded riparian areas. Adverse effects on those values arising from the proximity of the industrial activities are not remedied or mitigated.

- [127] We agree with Ms Perring⁸⁵ that in considering the relevant ODP objectives and policies 'as a whole', the application is contrary to substantially more provisions than it is consistent with. In particular, returning to Mr Gardner-Hopkins' observation, we find that in policy terms it would not be appropriate to allow an activity that has traffic safety effects that on the weight of evidence before us are more than minor insofar as in the worst-case scenario a fatality could conceivably occur during the two-year consent duration sought.

- [128] Consequently, we are not satisfied that the application can pass through the s104D(1)(b) 'gateway'.

⁸⁴ Including Julie Shepherd and Neville Bidois.

⁸⁵ Reply evidence, paragraph 104.

5.3 Precedent and Plan Integrity

- [129] Had we found that the application could pass the s104D 'gateways' then we would have turned our minds to matters of precedent and Plan integrity. As these issues were the subject of evidence at the Hearing, we set out what our findings would have been.
- [130] Ms Perring considered that granting the application would create adverse precedent effects and undermine the integrity of the ODP. In her view⁸⁶ it would "see an erosion of comprehensive development and mitigation of cumulative effects across the Business Park. It would also equate to 'environmental creep' or 'death by a thousand cuts', and the 'ad-hoc' development".
- [131] We understand that granting a consent application does not necessarily form a precedent as each application must be assessed on its merits. We initially thought that given the complex history of the TGL application it seemed unlikely that similar applications might arise in the future. However, we were informed that other businesses in the Te Puna Business Park were also operating in non-compliance with the Structure Plan requirements and without the necessary consents. Consequently, we find that approving the TGL application would set an unfortunate precedent that other nearby businesses might then have tried to rely on. In our view that would be a more than minor adverse effect.
- [132] Regarding District Plan integrity, we accept that granting 'retrospective' consent to TGL could undermine the integrity of the ODP and the Structure Plan, because the situation now before us is one that the ODP and the Structure Plan explicitly sought to avoid. That would undoubtedly be an adverse outcome, but on the available evidence we are unable to conclude whether it would constitute a more than minor adverse effect, although if pressed on that matter we would tend to say that it was.

5.4 Other matters

- [133] Written statements from the four tenants⁸⁷ of the Site (all dated 6 October 2023, that being zero working days prior to the Hearing) were tabled at the Hearing. All of the tenants helpfully advised they could comply with Mr Styles' 22 September 2023 NMP and that heavy vehicles accessing their business on the Site would avoid using Clarke Road.
- [134] Unsurprisingly, the tenants all supported the application. They outlined the value of the Site to their business activities and they advised that if the application was declined, they would need to vacate the Site which could force them to consider ceasing to trade⁸⁸ which would in turn lead to their employees being terminated or made redundant.
- [135] That would obviously be an unfortunate outcome, but we do not find it to be relevant to our assessment of this application for retrospective consent. The reason being that for a 'retrospective' consent application we must assume the industrial activities do not yet exist and then assess whether the actual and potential adverse effects that might arise from them (subject to mitigation proffered by the applicant) are (in this case given the application is a non-complying activity) no more than minor. As outlined above, we are not satisfied that would be the case.

6 Determination

- [136] As we are not satisfied that the TGL application can pass either of the section 104D (1)(a) or (b) 'gateways' we may not grant the application.

⁸⁶ Reply evidence, paragraph 43.

⁸⁷ Roy Lehdorf (A&J demolition and submitter 28), Tony Rodger (Compass Pools), James Hayward (Earthmover Tyres and submitter 177) and David McKeagg (Total Relocation Limited and submitter 168).

⁸⁸ Either temporarily (A&J Demolition) or permanently (Compass Pools, Total Relocation).

[137] The Tinex Group Limited application for retrospective resource consent from the Western Bay of Plenty District Council to authorise the use of part of the site at 245 Te Puna Station Road for industrial activities, prior to completing all necessary development and infrastructure works required by the Te Puna Business Park Structure Plan, is declined.

Signed by the commissioners:



James Whetu



Rob van Voorthuysen (Chair)
Dated: 22 October 2023