

# Western Bay of Plenty District Council

## Minutes of Meeting No. CH3 of an Independent Commissioner Hearing held on 21 June 2019 in the Council Chamber commencing at 9.30am

### Present

Commissioner Alan Withy

### In Attendance

C Watt (Environmental Consents Manager), R Friend (Senior Consents Planner), and B Clarke (Senior Governance Advisor)

### Others

A Sole (Chairperson, Waihi Beach Community Board), R Goudie (ex-Councillor, WBOPDC), and as listed in the minutes.

#### CH3.1 **HEARING: [RC10347L] Application made by Western Bay of Plenty District Council for a Resource Consent to Undertake Erosion Protection and Channel Realignment Works at Two Mile Creek, Waihi Beach**

The Commissioner opened the hearing and invited Andrew Morrison, (who had joined the Hearing via audio link from Singapore), to explain his interest in the proceedings for the benefit of those present.

#### **Status of Interested Person - Andrew Morrison**

Mr Morrison addressed the hearing, noting the following:

- He and his wife owned a property at 20-22 Wilson Road, Waihi Beach, which had been purchased from the Fell Family Trust.
- As the current owner of the property, he had inherited the submission made by the Fells, which was in opposition.
- He understood that his right to speak was limited to only those issues raised in the Fell Family Trust submission, and was at the invitation of the Commissioner.

The Commissioner welcomed all those present and called for appearances, which were listed as follows:

### **Appearances for the Applicant**

- Reuben Hansen, Senior Environmental Management Specialist/Principal (Tonkin & Taylor Limited)

### **Submitter in Support**

- Robert Hope, of 14 Wilson Road, Waihi Beach (Waihi Beach Home Hardware)

### **Commissioner's Instructions**

The Commissioner introduced staff, who outlined housekeeping matters and emergency evacuation procedures on his behalf. All other persons present introduced themselves. He outlined hearing procedure and noted the following:

- A site visit would be undertaken following the hearing.
- Pre-circulated evidence could be taken as read, with the provision of a suitable summary.
- No cross-examination would be permitted.
- People were entitled to their opinions, however, only facts carried weight in these proceedings.

### **Tabled Item on Behalf of Submitter in Opposition**

Staff Tabled Item (1) on behalf of Submitters Colin & Margaret Gillard (Largo Holdings Ltd) who were not in attendance.

- The submission outlined a request for further clarification on the components of the construction process, including channel construction, earthworks extent and property access.

### **Officer's Report**

1. **James Danby**, Consultant Planner/Director (iPLAN Ltd) and author of the Section 42A Officer's report, addressed the hearing as follows:

- His assessment of the application and planning framework was detailed in the Section 42A report, including a summary of the proposal.
- The application was essentially for a formation of the existing channel/concrete culvert, which was to be undertaken in stages.
- The proposal had been reduced in scale since the original application was submitted.
- In Mr Hansen's submission, there was a plan that referenced details of the channel entry point, (the upstream segment) and that plan should be referenced.

- At this time, nothing that had been submitted had caused him to alter his recommendation, which was that resource consent could be granted subject to conditions.

### **Evidence for the Applicant**

2. **Reuben Hansen**, Principal Environmental Planner of Tonkin & Taylor Ltd, appeared on behalf of Western Bay of Plenty District Council (the Applicant), and noted that his Statement of Evidence had been pre-circulated to all parties and could be taken as read.

#### Scope of Pre-circulated Evidence

- Introduction;
- The proposal;
- The site;
- Statutory Planning document assessment;
- Assessment of environmental effects;
- Submissions;
- Officer's Report;
- Conclusion.

In summary, Mr Hansen noted the following:

- The key objective for the Applicant was to work with the relevant property owners to find a solution to an inherited issue.
- Extensive details on drainage maintenance had been provided in documentation.
- Through the Council process, a substantive mitigation plan had been developed.
- The proposal was for the long term benefit for the community.
- Points raised in submissions had seemed reasonable.
- He had undertaken extensive discussions with various submitters/parties.
- He agreed that better information was needed in terms of how the barrier would be constructed, and details of the crest of wall.
- He had no issues of concern in relation to the Officer's Section 42A report.

Mr Hansen responded to questions as follows:

- He was in agreement with Mr Danby in relation to the changing of drawings and referencing detail of the upstream segment. He considered that this should be incorporated into the conditions of consent.
- In terms of the other conditions of consent, he and Mr Danby were in agreement.

Mr Danby responded to a question, noting that he would be comfortable with the map incorporating the channel entry point (upstream segment) into the conditions of consent.

Mr Hansen responded to further questions as follows:

- Over the years the relevant drawings had basically not changed, except that there had been some refinement in terms of where the channel terminated around the vicinity of 34 Hanson Road.

Mr Hope responded to a question, noting that he was familiar with the drawing being discussed. He advised that he was aware that some people were not satisfied with the early plans, specifically in terms of encroachments on physical buildings.

### **Evidence of Submitter in Support**

**3. Robert Hope** of 14 Wilson Road, Waihi Beach (Waihi Beach Home Hardware) addressed the hearing verbally in support of he and his wife, Susan's submission, noting the following:

- He wanted to ensure there was integration with the upstream system.
- He sought fencing of the culvert, provision for access into and out of the culvert, and landscape planning in consultation with landowners.
- He had been there for some years and saw significant change in the water course and stream. It needed to be fixed as soon as possible.
- Most people had been dissatisfied with the proposal of a solid earth structure, but when they heard about the new proposal for a concrete structure, most people seemed to support this. Some did not for reasons of their own. He considered the concrete structure to be a good solution.
- He had stood on the bank observing the water course, and on one occasion, it was like a bubble with water coming from various directions causing it to swell. That area of the construct was important.
- He was concerned with safety and how people or children could get out of the culvert if they were trapped inside. A solution might be a series of steps or ladders.
- He had witnessed the course during flood time.

Mr Hansen responded to questions as follows:

- The Hopes had discussed their concerns with him in relation to safety, and how a child could get out of the concrete channel and above water.
- He was not certain how that mechanism would be provided, but potentially this might be through a detailed design process. One

condition which had been suggested was that safety for humans needed to be demonstrated through that process.

- Safety for humans was certainly a matter that would be considered. Council could include a condition or set of conditions to ensure this was appropriately addressed and included.
- How the existing storm water caused change when it met other water could be covered in the conditions of consent. This had been discussed with Council's Utilities Manager, and it appeared to be a point upstream.

### **Commissioner's Request**

The Commissioner requested that Mr Hansen and Mr Danby confer in relation to the two issues which had been raised by Submitter Hope during the first break in proceedings. He was conscious that, until a detailed design was produced, he did not wish parties to be constrained, but considered it appropriate that they confer on the matters.

Mr Hope responded to a questions, noting that the only other issues he had were in relation to the appropriate design of the footbridge for access and to the carpark.

Through the Commissioner, Mr Hansen clarified that the footbridge design was not in his scope or jurisdiction, and he had not been contracted to consider it.

The Commissioner thanked Mr Hope, advised that he had read his submission and had no further questions.

### **Evidence of Submitter in Opposition**

4. **Andrew Morrison**, owner of 20-22 Wilson Road, Waihi Beach, had purchased his property from the Fell Family Trust. By operation of law, Mr Morrison succeeded to Shane Fell's submission as his successor in title (inherited submission). Mr Morrison addressed the hearing verbally as follows:

- On the points that Mr Hope had raised, he had no further comments, as he had read the documents and agreed with them.
- He had purchased the property less than 12 months ago.
- He was in complete agreement that the project was required.
- Up until a few months ago he had been in complete agreement with the Council.
- In general, he wanted to work towards what was proposed and viewed it as of value to the community.

- As an existing landowner he wanted to make sure he was not paying for this either in a monetary way or by handing over land.
- The property on 22-24 Wilson Road was two adjoining sites and was commercial land. In 2009, Council had an evaluation carried out, which he had discussed this with Council's Strategic Property Officer. The focus of this evaluation was taking land across the width of the section for the purposes of this project. The evaluation was still valid.
- The existing proposal would have a major impact on the value of his property. He had asked for mitigating factors such as an easement of land or parking if it proceeded.
- There was a question of safety. Currently the only access to car parking at the back of his property was part of the property facing out to the road, which was currently tenanted.
- In the past, there had been access, but that access was now blocked by a large barrier placed by Council.
- There had been disagreement between the previous landowner and Council. While that access was alright, there had been numerous 'near misses', and at times that access had been blocked with the result that people could not leave the property.
- It would make sense to have access on the street frontage, which would make access possible for him as well.
- There was a lot of planting to improve the property and an outdoor part of the property was used by guests.

### **Commissioner's Instructions to Parties**

The Commissioner noted that it appeared that nobody was opposed to this project in principle. He requested that Mr Danby, Mr Hansen, Mr Hope and Mr Watt hold a discussion of matters raised, as he considered that negotiation between parties was often the best course of action. He advised that he would allow a 30 minute adjournment for this purpose.

10.15am The hearing adjourned for a discussion between parties.

10.45am The hearing reconvened.

### **Outcome of Discussion between Parties**

The Commissioner invited parties involved in negotiations during the adjournment to discuss any progress.

A. Mr Hansen addressed the hearing, noting the following:

- During the recess he had spoken to Mr Hope in relation to his two concerns.

- While he had not yet drafted exact wording, there were two conditions which could work to allay Mr Hope's concerns in relation to the health and safety of persons, and in relation to discharge upstream.

In response to a question from the Commissioner, Mr Hope, Mr Danby and Mr Hanson advised that they had no objection to the proposed conditions in relation to the health and safety of persons, and in relation to discharge upstream, as per the discussion just held.

The Commissioner noted that ex-WBOPDC Councillor Ross Goudie had requested to address the hearing in relation to local history relevant to the proposal.

Mr Goudie addressed the hearing, noting that the issue of car parking and access which Mr Morrison had raised, as related to his property, had been an historic "sore point" within the community. He advised that he agreed with Mr Hope on the matter of public safety.

### **Matter of Clarification**

Mr Hansen addressed the hearing, noting that the issue that Mr Morrison had raised in relation to car parking was outside of the scope of the submission which he had inherited.

Mr Danby addressed the hearing, advising that he agreed with Mr Hansen on this matter, being conscious that Mr Morrison had inherited the Fell Family Trust submission which had outlined clear points, which Mr Morrison was confined to. He considered that Mr Morrison had raised matters outside of the scope of that submission, and therefore this hearing.

### **Commissioner's Instructions**

The Commissioner thanked all those present and advised that he had heard all he needed to in order to determine the matter.

He noted he would consider the scope of the issue and would be guided by the conditions that Mr Hansen and Mr Danby had negotiated on, and that he would like a copy of these provided to him within 48 hours.

He requested that he be provided with an indication of any conditions that were not fully acceptable to submitters.

The Commissioner requested that Mr Hansen provide some form of legal advice in relation to Mr Morrison's inheritance of the Fell Family Trust submission.

Finally, the Commissioner advised that the evidential part of the hearing was now concluded and he would adjourn the hearing until the provision of all information that had been requested, and until a site visit had been undertaken. Once satisfied that he had all that he required, he would formally close the hearing, and all parties would be notified.

The hearing adjourned at 11.00am.

CH3

**Minute Note 1:** Following the adjournment of the hearing, the additional Information requested was provided to the Commissioner on **24 June 2019**.

**Minute Note 2:** Following a site visit and deliberations, the Commissioner formally closed the hearing on **25 June 2019**.

**Minute Note 3:** Decision of the Independent Commissioner dated **4 July 2019** is attached.



**IN THE MATTER OF:**        **The Resource Management Act 1991**

**AND:**                        **The Western Bay of Plenty District Council**

**AND:**                        **An Application for Resource Consent**

**TO:**                         **Construct and use an Erosion Protection Structure**

**BY:**                         **Western Bay of Plenty District Council Utilities Department**

**AT:**                         **Two Mile Creek, Waihi Beach**

Council File Reference RC10347L

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## **1. INTRODUCTION**

Council appointed Independent Commissioner Alan Withy with fully delegated authority to hear and determine the application. (Regulatory Hearings Committee Resolution RH16.1 dated 27 February 2019 in terms of s34A of the Act.)

The hearing was held in Council Chambers on Friday 21 June 2019.

The Application was presented by Mr Hansen, a Principal Environmental Planner at Tonkin & Taylor, on behalf of the Utilities Department. He also gave expert evidence.

Mr Danby was appointed Reporting Officer (RO) in terms of s42A of the Act, and presented evidence.

## **2. THE PROPOSAL**

The proposal is ... “... to construct and use a concrete erosion protection structure (or “concrete channel” or “structure”) within private property along the banks of Two Mile Creek (“the creek”) at Waihi Beach. <sup>1</sup>

The RO described the proposal as follows: <sup>2</sup>

*The proposal overall is identified as a Non-Complying Activity. The application was received by the Council on 22 December 2016, and has been processed on a limited notified basis. A*

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<sup>1</sup> Hansen Evidence for the Applicant, Paragraph 1.5, Page 1

<sup>2</sup> Danby Evidence as s42A Reporting Officer, Paragraph , Page 1

*total of eight submissions to the application were received. In regard to the submissions and the proposal, the key issues to be considered relate to the construction effects; natural hazards; ecological and recreational values; safety and fencing. Having considered the proposal this report makes a recommendation to grant the resource consent, subject to conditions. The proposal also required several consents from the Bay of Plenty Regional Council. Those consents were granted on 4 July 2018.*

Mr Hansen further described the proposal as follows: <sup>3</sup>

*2.1 The AEE and s 42A report contain full details of the proposal and the context to this application being made. I agree with all details set out in the s 42A report. ... I shall provide a brief summary of some additional significant points.*

*2.2 As discussed in 2.2 and 3.1 of the AEE ... the creek is a man-made watercourse that was cut through the backdune landform to facilitate the urban development of Wilson Road and Edinburgh Street.*

*2.3 The creek collects and conveys stormwater from adjacent urban area and the rural hinterland into the Coastal Marine Area.*

*2.4 Along some segments of the creek dwellings are located near the crest of the current creek bank and, as evidenced by the presence of existing erosion protection works ... the creek banks are vulnerable to erosion.*

*2.5 The key components of the proposal are:*

- The creek will be temporarily diverted and the existing channel shaped to provide for the installation of the concrete channel.*
- The concrete channel will be placed/formed in segments within the creek bed and banks.*
- The landform behind the concrete channel will be modified in segments so as the crest of the structure ties into the landform.*
- The structure will be approximately 290 m long, commencing at the Dillon Street Bridge and ending at 34 Wilson Road.*

*2.6 The 290 m long segment of the creek that is subject to this application is located entirely within private land. That is, at the time the creek was cut through the backdune its alignment was not surveyed and a separate parcel of public land was not created to reserve a right for its ongoing function. Further, there is no easement in favour of the applicant to drain stormwater across the private land, or maintain the creek bed or banks for erosion protection, flow optimisation etc.*

*2.7 Aside from the erosion protection benefits that will result from the proposal, the applicant proposes to take over the ownership of the stream corridor confined within the erosion protection structure following construction. The applicant intends to enter into a legal agreement process with the private landowners and then undertake a land transfer process.*

*2.8 These mechanisms will address the current issue with the lack of a right to drain stormwater, as well as provide legal and physical access to the bed of the creek for the applicant to undertake construction and maintenance works.*

*2.9 The applicant intends to allow the private landowners whose properties adjoin the erosion protection structure to use the land subject to complying with standards that will ensure the ongoing structural integrity of the erosion protection structure.*

*2.10 On the basis of the above, the applicant has had to develop the erosion protection structure in order to address legacy issues surrounding multiple party ownership of the creek bed, the proximity of urban development to the creek, the re-routing of stormwater to the*

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<sup>3</sup> Hansen, Paragraphs 2.1 ...

*open coast, and a lack of an appropriate legal mechanism to allow maintenance works to be undertaken.*

*2.11 I do wish to make two minor points of clarification relating to the upstream extent of the concrete erosion protection structure (2.12-2.13), and construction methodology (2.17), and one point of clarification regarding ecological mitigation (2.14).*

*2.12 As set out in the s 42A report the proposal was modified following lodgement of the AEE. This modification was to shorten the length of the erosion protection structure by approximately 150 m. This decision was based on issues with obtaining written approvals from the requisite owners of the private land parcels, and that the upper reach of the creek has a comparatively lesser erosion issue (both from an erosion severity and risk perspective).*

*2.13 As part of drafting and agreeing on final conditions of consent with the BOPRC, the termination details of the upstream extent of the erosion protection structure were developed further than what was shown on the drawings submitted with the s 92 response to WBOPDC. The outcome is that the BOPRC approved drawings now show the termination details of the structure and how those details relate to the private land parcel located at 34 Wilson Road<sup>6</sup>. The written approval of the owner of 34 Wilson Road has been obtained agreeing to the termination details.*

*2.14 Another outcome of the processing of the BOPRC consent was that the applicant developed an Ecological Mitigation Plan (“EMP”)<sup>7</sup> for the “Broadlands Block”, immediately upstream of the private properties that the creek traverses. It was always envisaged that the EMP would be developed<sup>8</sup>, but the processing of the BOPRC consent has brought forward the development of the EMP.*

*2.15 The EMP will result in a substantial riparian restoration programme being implemented and will restore ecological habitat in the creek.*

*2.16 Consequently, the applicant requests that the Commissioner considers the BOPRC approved drawings as the final version of the resource consent level drawings, as well as the more definitive nature of the EMP (as opposed to the concept of an EMP in the AEE) in making their decision.*

*2.17 Section 2.3 of the s 42A report makes reference to the concrete erosion protection structure being “pre-cast” which is correct. Section 3.2 of the AEE states that the structure could also be “cast in situ”. Therefore, I wish to clarify that the structure could be pre-cast or cast in situ.*

### **3.0 THE SITE**

Mr Hansen explained that the ... *“AEE and s 42A report contains full details of the site and its environs ...”*<sup>4</sup>

Mr Hansen concurred with Mr Danby’s description and said he agreed *“ ... with all details set out in the s 42A report.”*<sup>5</sup>

### **4.0 NOTIFICATION AND SUBMISSIONS**

The RO described the consultation and notification process and indicated that 8 submissions had been received. He listed them and their concerns in Section 4 of his report.<sup>6</sup>

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<sup>4</sup> Ibid, Paragraph 3.1, Page 4

<sup>5</sup> Ibid

<sup>6</sup> Danby, Paragraphs 4.1 – 4.7

He made the following comments: <sup>7</sup>

*The application was ... assessed in accordance with the statutory notification provisions at that time. ... it was determined that the proposal should be subject to Limited Notification in accordance with Section 95B. ... and ... served on Ngai Tauwhao, Ngai Te Rangī and the Hauraki Māori Trust Board.*

**The submitters in support were:** T A Tinling & D J Kingsford-Tinling, P R T Hikaka & K E Rigg, R & S Hope, Soho 13 Ltd, and WB Investments Ltd. <sup>8</sup>

**Those in opposition were:** G R & J C Dell, C Gillard & Largo Holdings, and D M Stuart (Fell Family Trust). <sup>9</sup>

## 5.0 ATTENDANCE AT THE HEARING

Mr Hansen (Environmental Planner of Tonkin & Taylor) represented the Applicant and gave expert planning evidence.

The Reporting Officer Mr Danby (Director, iPLAN Ltd) presented his report in terms of s42A of the Act and gave expert planning evidence.

Submitters who participated in the Hearing were: Mr Morrison (who has recently taken over property from Submitter Mr Fell - via audio link from Singapore); and Mr Hope (Submitter in opposition).

The following WBOPDC Staff were in attendance: Mr Watt (Environmental Consents Manager); Ms Friend (Senior Consents Planner); and Ms Clarke (Senior Governance Advisor).

## 6.0 PROCEDURAL AND LEGAL MATTERS

Mr Hansen indicated in his right-of-reply that he wished to provide a legal opinion relating to submitter Mr Morrison. The legal opinion from Cooneys said:

*If a hearing proceeds, and Mr Morrison requests to be heard, he should be advised by the Consent Authority that he has no right of audience as a successor to the Inherited Submission, given Mr Fell indicated he did not wish to be heard. He should also be advised that he is limited to raising matters included within Mr Fell's written submission.*

Before that opinion was tabled, Mr Morrison had listened into proceedings by a teleconferencing facility and made some statements. However the decision and conditions have not in any way depended on comments made by Morrison.

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<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Ibid

## 7.0 STATUTORY PLANNING DOCUMENT ASSESSMENT

Messrs Danby and Hansen were in substantial agreement regarding the relevant planning instruments and their applicability. Mr Danby said the land was "... affected by multiple zonings and overlays ...", which he analysed together with the NESCS.

### Bay of Plenty Regional Policy Statement

Mr Danby indicated various regional council consents that had already been obtained. <sup>10</sup>

Mr Hansen said: <sup>11</sup>

*4.1 An assessment of the proposal against the Bay of Plenty Regional Policy Statement ("RPS") is included in the AEE. The RPS requirements have also been fully addressed by the BOPRC through its processing and granting the regional resource consents for the proposal.*

*4.2 I consider that the key provisions of the RPS that relate to this application are Objective 2, Policy CE 8B, Objective 31 and Policy NH 4B. In summary, these provisions require that the natural character and ecological functioning of the coastal environment is preserved and enhanced, and that natural hazards are avoided or mitigated.*

*4.3 Because the proposed concrete channel will be located in an area of the coastal environment where natural character values have been degraded by intense urban development, fish passage will be maintained through the creek bed, and the EMP will restore ecological function, I consider that the proposal is consistent with the key provisions of the RPS.*

Mr Danby agreed as Reporting Officer. <sup>12</sup>

### Western Bay of Plenty District Plan

The RO and Mr Hansen were in substantial agreement and Mr Hansen said: <sup>13</sup>

*An assessment of the proposal against the Western Bay of Plenty District Plan ("District Plan") is included in the s 42A report and AEE. ... The key details affecting this application are that the site is zoned Medium Density Residential, Commercial and Commercial Transition and is affected by Flood Hazard overlay. The construction and use of an erosion protection structure is not anticipated within the zones described above, but the earthworks within the Flood Hazard overlay are. Using the "bundling" principle the application carries a non-complying activity status.*

It was common ground that the proposal is a 'non-complying activity' and required analysis in terms of ss104 and 104D of the Act.

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<sup>10</sup> Ibid, Paragraph 5.17 and Attachment E

<sup>11</sup> Hansen, Section 4

<sup>12</sup> Danby, Section 8

<sup>13</sup> Hansen, Paragraphs 4.4 - 4.5

Mr Hansen said he agreed with Mr Danby that the following three key areas of the District Plan's provisions require consideration by the Commissioner: <sup>14</sup>

- *Residential amenity.*
- *Riparian terrestrial ecology.*
- *Natural hazards.*

They both agreed that the proposal will not be contrary to the relevant objectives and policies of the District Plan. <sup>15</sup>

## 8.0 ASSESSMENT OF EFFECTS

Messrs Danby <sup>16</sup> and Hansen <sup>17</sup> agreed that the effects were “*not more than minor*”. They both also agreed that the ‘gateway test’ had been satisfied. <sup>18</sup>

Having reviewed the analyses by the two planning experts and the three matters identified in s7 above, the Commissioner is satisfied the proposal has been developed and thoroughly assessed in relation to the relevant planning instruments.

It has also been shown to comply with the ‘gateway test’, and there are no other planning instruments nor any ‘other matters’ that prevent consent being granted.

## 9.0 OTHER MATTERS AND OVERALL ASSESSMENT

Given agreement between the experts on the planning instruments and effects and that the ‘gateway test’ was met, it is not necessary to enquire further into those matters. Some other matters were mentioned by Messrs Danby and Hansen, but none gave cause for review.

The Commissioner has had regard to Part 2 of the Act and considers the relevant matters to reaching a conclusion in favour of granting consent have been adequately analysed and reviewed.

## 10.0 SUBMISSIONS AND CONCLUSIONS

Various Submitters raised concerns and these have all been reviewed and considered. Nothing was mentioned which would give the Commissioner cause to decline consent. Many of the conditions attached are influenced by the submissions made and evidence given at the hearing.

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<sup>14</sup> Ibid, Paragraphs 4.6 – 4.7

<sup>15</sup> Application Paragraph 6.5 and RO, Paragraph 8.18

<sup>16</sup> Danby, Paragraph 7.45

<sup>17</sup> Hansen, Paragraph 8.3

<sup>18</sup> Hansen, Paragraphs 8.3 and 8.4; and Danby, Paragraph 7.46

Mr Hansen advocated consent being granted and negotiated with the RO the details of the conditions below. The concluding paragraph of his evidence reads as follows: <sup>19</sup>

*The applicant has had to develop the design and AEE for an erosion protection structure in order to address legacy issues surrounding multiple party ownership of the creek bed, the proximity of urban development to the creek, the re-routing of stormwater to the open coast, and a lack of an appropriate legal mechanism to allow maintenance works to be undertaken. ... The construction and use of the proposed concrete channel requires non-complying land use consent under the District Plan. This activity status arises because of the fact the creek bed is assigned residential and commercial zonings. ... The AEE, the s 42A report and my evidence have demonstrated that the effects of the proposal are likely to be no more than minor. Therefore, the first limb of the gateway test is satisfied. ... The proposal is consistent with the relevant key objectives and policies of the District Plan relating to amenity, ecology, and natural hazards. On this basis, the application can pass the second limb of the gateway test under s 104D of the RMA and is able to be granted under s 104 RMA.*

The overall conclusion of the RO was entirely consistent: <sup>20</sup>

*The proposal is identified as a non-complying activity in accordance with the ODP. Having assessed the proposal, it is my opinion that any actual or potential effects of the activity will not be more than minor and that it will not be contrary to the objectives and policies of the relevant planning documents- particularly the ODP. As such I consider that the proposal passes both the gateway tests under section 104D of the RMA and is able to be assessed fully under section 104 of the RMA. ... Having undertaken that assessment I consider that the proposal will achieve the overall purpose of the RMA and it is my recommendation that the proposal should be granted pursuant to section 104, subject to ... conditions ... ."*

The Commissioner is therefore of the opinion that consent should be granted as a non-complying activity, subject to the conditions negotiated by Messrs Danby and Hansen in and around the hearing.

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<sup>19</sup> Hansen, Section 8 - conclusion

<sup>20</sup> Danby, Paragraphs 11.1 and 11.2 - conclusion

## CONSENT

Pursuant to Sections 104, 104D and 108 of the Resource Management Act consent is hereby granted under delegated authority pursuant to Section 34A, to the Application as presented at the hearing, and subject to the conditions hereunder.

## CONDITIONS

### General

1. *THAT the activity be carried out in accordance with the application submitted (subject to any changes required through compliance with the following conditions) including:*
  - a) *Tonkin & Taylor Ltd Two Mile Creek Erosion Protection Works Resource Consent Application and Assessment of Environmental Effects Ref. 851969.302, dated December 2016.*
  - b) *Tonkin & Taylor Ltd Two Mile Creek Erosion Protection Works Ecological Assessment Ref. 851969.3020.v1, dated August 2016*
  - c) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Site Plan Ref. 851969.302-10, Rev.1, dated July 2017.*
  - d) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Proposed Layout – Sheet 2 of 3 Ref. 851969.302-21, Rev.2, dated April 2018.*
  - e) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Proposed Layout – Sheet 3 of 3 Ref. 851969.302-22, Rev.0, dated September 2016.*
  - f) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Cross Sections 148.6m to 192.8m, Ref. 851969.302-32, Rev.1, dated July 2017.*
  - g) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Cross Sections 204.2m to 234.0m, Ref. 851969.302-33, Rev.0, dated September 2016.*
  - h) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Cross Sections 245.5m to 297.0m, Ref. 851969.302-34, Rev.0, dated September 2016.*
  - i) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Cross Sections 313.4m to 354.0m, Ref. 851969.302-35, Rev.0, dated September 2016.*
  - j) *Tonkin & Taylor Ltd Creek Bank Erosion Protection Works Cross Sections 364.5m to 419.0m Ref. 851969.302-36, Rev.0, dated September 2016.*
2. *All costs associated with the conditions of this consent shall be met by the consent holder.*

### Design and Construction

3. *THAT the consent holder's representative shall submit to the Chief Executive Officer or duly Authorised Officer detailed design drawings of the concrete erosion channel for approval. Construction shall not commence until written approval of the plans and specification has been provided. The detailed design drawings shall include:*
  - a) *Details of how the structure will be integrated into the landform.*
  - b) *Details of how stormwater discharge and overland flow will be managed from adjacent properties into the channel.*
  - c) *A health and safety audit (or similar) of the channel design by an appropriately qualified person.*



- d) *Health and safety measures incorporated into the design in response to the recommendations of the health and safety audit.*
  - e) *Details and location of fencing along the sides of the channel.*
  - f) *Details and location of any landscaping provided either side of the channel*
4. *THAT design and construction shall be carried out to ensure that stormwater overland flow paths are provided clear of the buildable area of each Lot and to take into account the runoff from areas of road, including adjacent catchment where relevant.*
  5. *THAT the consent holder's or approval, with the appropriate engineering inspection fee; construction drawings, specifications, calculations and project cost estimate; covering all sections of work which it is proposed to be built in accordance with Council's Development Code and vest in Council. Any requests for dispensation from the Development Code requirements in respect to road carriageway widths / road cross fall geometry, vehicle entrance type and private way design will need to be assessed in the Design Road Safety Audit and will require specific approval from the Council's duly Authorised Officer at the Engineering document approval stage.*
  6. *THAT the consent holder's representative shall submit to the Chief Executive Officer or duly Authorised Officer, all quality assurance and testing records that are required in accordance with Council's Development Code, including sealing records.*
  7. *All activity on site associated with the bulk earthworks shall comply with the limits of New Zealand Standard NZS 6803:1999 "Acoustics – Construction Noise".*
  8. *Construction work shall only occur between 0730hrs and 1800hrs, Monday to Saturday. No construction work shall occur on site on Sundays or Public Holidays.*

Fencing & Landscaping

9. *That the Council ensure the childcare centre located at 43 Edinburgh Street is separated from the construction area at the rear of that property by a fence during the construction period. The fence shall be located and designed to prevent children being able to access the construction area.*
10. *That the Council be responsible for the cost of any new or replacement fencing and landscaping required on properties affected by the construction work.*



**Alan Withy, Independent Commissioner, 4 July 2019**

(Under delegated authority - Resolution RH16.1 dated 27 February 2019)