BEFORE HEARING COMMISSIONERS
IN THE WESTERN BAY OF PLENTY DISTRICT

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

REPRESENTATIONS IN REPLY / CLOSING ON BEHALF OF THE APPLICANT

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

INTRODUCTION

1. To assist the Panel, these representations in reply address matters arising following the opening of the applicant's case. They focus on key issues and seek to avoid repetition of the applicant's case wherever possible. Many of these matters were addressed in overview oral reply representations before the Panel.

2. These reply representations address the following, in particular:

   (a) The applicant/ Mr Daniel's past conduct.

   (b) The relevance of effects.

   (c) The evidence on effects.

   (d) The evidence as to the conduct of the appellants and the respondent.

(e) The evidence as to impacts on the tenants.

(f) Plan integrity.

The applicant's/ Mr Daniel's conduct

3. My primary representation on this issue remains that past conduct is irrelevant to a current consent application. However, Mr Daniel's integrity, motives, and strategy have all been brought into question, and it is not fair to him if the criticims go unanswered.

4. As first point, and primary point (addressed in opening representations), past non-compliances are matters for enforcement, which is primarily the Council's prerogative. In that regard:

   (a) The Council could have intervened in 2016 when A&J first located on the site. It did not.

   (b) The Council could have told Mr Daniel in no uncertain terms in 2019, that he could not allow Total Relocation to start operations. Not only did the Council not do this, but it gave acceptance to that activity, and indicated that the last remaining barrier to wider development was the traffic calming measures on Clarke Road.

   (c) The Council took no action in respect of the additional tenancies (locating there *after* the Clarke Road measures had been completed), until March 2020, when it issued abatement notices requiring no *further* development on the site (not requiring the existing activities to cease).

   (d) Mr Daniel complied, and started the process of seeking consent to authorise departures from the District Plan/ Structure Plan requirements to allow the full use of the site. It was only during the processing of that first consent application that a question arose that some of the earthworks were unauthorised. (As I have said in opening, they may in fact have been subject to existing use rights.) Mr Daniel duly applied for consent to authorise the earthworks in question, in any event.

5. There is no credible evidence of any intention by Mr Daniel to deliberately act unlawfully, or to game the system. He has done everything he can to

meet the rules, as they have become apparent to him. He originally had a consent for earthworks, which were supervised by the Regional Council, and it was that Council that suggested Mr Daniel surrender the consent, and proceed on the basis of the permitted earthworks limits at the time. He has had health issues, which have contributed to the delays in developing the site. In any event, the District Plan is permissive, and cannot compel development within any particular timeframe.

6. You have heard directly from Mr Daniel on these matters. In his own words he has explained how unsophisticated he is in planning matters, and relied on the advice of others. Through the original plan change process, that was of Mr Overton, who was project managing the process for the three landowners, and the other expert and legal advisors to the group. Mr Daniel is hands on, and was getting on with the necessary site earthworks at the time – himself. He was liaising directly with the Council (principally Phillip Martelli) after the rezoning had been approved and when he had had request for use of the land. And when issues arose more recently, Mr Daniel again responsibly sought professional advice.

7. There is criticism that Mr Daniel has not maintained the section of Hakao Stream traversing the rear of the property, and this is becoming overgrown and filled with sediment. He has been advised by the regional council that any works within the bead of a stream would require earthworks and that he must not undertake any works within the stream without a consent.

8. Mr Daniel mentioned, in particular, that the abatement notice (March 2020) prevented any more development of the site. This includes any earthworks. Accordingly, he could not create the overland flow path, pond, and wetland on the site from that point in time. Until his first and second resource consents are granted (or the abatement notice is cancelled), that work cannot proceed. So he is in something of a “Catch 22”, with some way to go still before those consent applications are resolved. The current stormwater solution for the wider consents, will at least achieve the requirements of the overland flow path per the structure plan.

9. In the meantime, Mr Daniel responsibly – I say – sought this consent to allow the existing tenancies to remain.

10. There is no basis for any real criticism of how Mr Daniel has acted.

Traffic safety/ risk

Te Puna/ Te Puna Station Road

11. The most "significant" issue appears to be traffic safety/ risk – although Mr Harrison for the applicant says that the effects are minor only, particularly with the road marking improvements proposed to be made to the Te Puna/ Te Puna Station Road intersection. Those road markings are shown on the Stratum Consultants drawing 423022-CIV-D001/Sheet 01/Issue A dated 11.05.23.

12. In respect of the lawfulness of imposing any such requirement, which is dependent on a "third party", ie the Council, for implementation, I consider:

    (a) It is somewhat questionable, on reflection, whether the Council is in fact a third party in this situation.

    (b) Conditions are routinely imposed by Councils requiring upgrades to the network that they are road controlling authority in respect of. It is the same entity; and it would be very strange if a Council were then to use its power as road controlling authority to frustrate the implementation of a consent that it had itself granted (including through Commissioners). That would seem to be unreasonable, and something vulnerable to challenge by way of judicial review.

    (c) In any event, the Council appears to have confirmed its willingness to allow the painting upgrades to occur, through its usual Works Access Approval ("**WAP**") process for works on its road corridor.

13. In respect of the benefit of the proposed road marking upgrades, while Mr Harrison considers that this will provide mitigation for some of the (minimal) effects of the small amount of additional traffic the subject of this application, all road users will benefit. This is therefore a small but important wider public benefit, that will not occur unless consent is granted.

14. This is because, unless the Council undertakes that road marking upgrade at its own cost, the intersection is likely to remain in its current

unsatisfactory state without any improvement until a right hand bay is eventually provided. This will likely take years, given that:

(a) The business park landowners consider that the obligation is no longer theirs, as the Council had agreed and represented to them that the district plan obligation for this intersection had been met. They relied on that and the Council is estopped from now arguing otherwise.

(b) Even if the business park landowners did agree to pay for the cost of that upgrade, then it will still take considerable time to implement. Land will have to be acquired, a process that has to be led by the Council. Kiwirail would also need to agree to any modifications to the rail bridge to the north.

15. If the Council is so concerned about safety at that intersection, then it should be moving now to provide a right turn bay, and pursuing recovery of those costs – if it considers there a basis for that – through the business park owners as they seek consents (ie through financial contributions, which it has the ability to require/ update through its annual and long term plan processes, if not through updating of its relevant financial contribution models).

16. I also note, that when Mr Harrison referred to there being no history of crashes arising, he was referring to crashes in respect of the tenants themselves, rather than more widely. This is evident from a careful reading of his evidence in this regard.

The site entrance

17. Again, this was a matter that Mr Harrison considered what was proposed (the current Diagram D treatment, without road widening) would mitigate effects to be minor only, given the sight distances, and very low traffic generated.

18. The Council's experts seemed to shy away from assessing the effects in terms of "minor" or otherwise, but were very focused on ensuring that the entrance met the current Waka Kotahi planning policy Manual Diagram E treatment, including road widening (which was what was anticipated by the

Structure Plan but to facilitate development of the entire site, rather than a small portion of it with just four tenancies.

19. While the applicant maintains that a more pragmatic approach would allow what Mr Harrison supports without generating undue risk, the applicant has reflected carefully on what it is prepared to offer in terms of site entry treatment as part of this consent.

20. 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. But the conditions proposed and agreed with the Council provide for this, which will result in a positive outcome overall, both in respect of the effects of the current activities, as well as for the longer term in meeting the Structure Plan requirements.

21. Submitters can hardly complain as to this Structure Plan commitment now being met.

Other benefits

22. My notes of Mr Crossan's acceptance of which of his benefits listed at [84](a)-(i) were more properly categorised as mitigation are unclear. I certainly accept that items (a), (b), (f), (g), and (i) are more properly categorised as mitigation. I have addressed item (h) as a benefit immediately above.

23. In respect of the remaining items, I respectfully suggest:

    (a) Item (c) provides a benefit as the additional planting will not provide any material mitigation for the current activities, but will result in a "head start" in the establishment of the mitigation planting to allow further activities as being sought in the first and second consent applications.

(b) Item (d), and item (e) are benefits that will not occur if consent is declined.

Landscape

24. There remains a contest in respect of:

(a) The height and extent of the shade screen. Mr May confirmed that his proposed 4.5m height was calculated on the basis of topographical mapping and the height of the stored pool shells. Mr Mansergh's 6m height requirement is based on the anticipated height of lot boundary trees at maturity. With consideration of the relatively low lying existing activities on site 6m high screen would be above and beyond what is required to provide adequate mitigation. Mr May also considers that the shade screens are only required on the western and southern boundaries of the Compass Pools lot.

(b) Regarding any setback distance and protective measures from the additional planting, Mr May confirmed that his 1m separation was sufficient to protect the root zone. Mr Mansergh stands by his 3m separation but has confirmed that his concern is to protect from activities that would compress the soil within that distance, rather than avoiding all activities within that area.

(c) Subsequently Ms Perring, in discussions with Mr Crossan on the final agreed set of conditions, has confirmed Council's position would be a 1m setback from shrubs and 3m setback from trees. The applicant has retained their position of a 1m setback from all vegetation based on the ability to manage compressible activities within this area.

Flooding

25. Again, the applicant's primary position is that current activities to which this consent have no impact on flooding.

26. The only point I wish to reply on is to provide the full quote that Ms Cowley provided only part of in her notes, in respect of what Mr Bos said in material

before the Court in the abatement notice hearing (emphasis added, which speaks for itself):

> **From the larger catchment modelling results the physical location of the site (towards the lower end of the catchment) and the singular effect of the runoff generated from the base site is not considered to be the primary cause of flooding or noted stormwater issues within the catchment**. In addition, further modelling works are currently underway to identify potential remedial works that result in the upstream water levels being lowered to ensure the level of effects on all parties are minimised and remain as the Structure Plan Baseline Intends.

Cultural matters

27. The applicant fully acknowledges the importance of the area generally to Pirirākau, and the wāhi tapu and other areas of particular significance identified by Ms Sheppard and others in the course of the hearing.

28. Mr Daniel has sought to engage with Pirirākau in the way he understood was most appropriate, being through Ms Sheppard as the Pirirākau Tribal Authority's Pāhake Aromatawai - Senior Technical Cultural Report Writer. Ms Sheppard has been the longstanding point of contact. But both Mr and Mrs Daniel recognise the mana of Pirirākau kaumatua, including kaumatua Bidois and kaumatua Borell. They understand Ms Sheppard's shift on behalf of Pirirākau Tribal Authority from support to neutral in light of the concerns of Pirirākau kaumatua.

29. Mr and Mrs Daniel would be more than prepared to engage with those kaumatua, and any other appropriate persons direct, as appropriate, and if they wish.

30. They remain committed to offering up the additional cultural conditions, as originally proposed. Ms Sheppard confirmed that was still a wish of hers.

31. In terms of the PACE, this was provided to Mr Daniel with a request that it remain confidential. Mr Daniel respected that request accordingly. It is the right of iwi and hapū to keep their information private if they wish.

32. In respect of other matters raised by the cultural experts:

    (a) Ms Sheppard raised cultural markers, particularly their kaitiaki species like the tuna. Her evidence was that for a time that there were very few tuna (eels) in the Hakao Stream near the site. However, when an unlawful upstream diversion was removed,

they quickly returned in abundance to the Hakao Stream near the site. Ms Sheppard emphasised that kaitiaki species were the best indicators of health at any point in time.

(b) The effects issues that kaumatua Bidois identified in respect of the four activities, in response to the Chair's questions were traffic and asbestos dust. Traffic matters have been addressed in the evidence already. In respect of asbestos, the relevant extract from the transcript of the Environment Court abatement proceedings is as follows (questioning of Mr Roy Lehndorf, A&J):

> A. … we don't typically do asbestos removal on that site.
>
> Q. But you may at times?
>
> A. We may have done and that is under the correct conditions too, so there's a WorkSafe notification, there's an ARCP that goes with it, there's the work that get carried out, the materials taken onsite because you need a resource consent to store bulk asbestos on sites and then an assessor comes in and clears the building as free from asbestos as the product is on a building currently, there's no risk to the environment.

(c) Mr Daniels categorically denies any doctoring of the original Garden HQ planting plan. It was produced by Garden HQ itself, in 2020 as part of the original intention to have Garden HQ undertake the planting at that time. It was approved by the Council. Pirirākau then, through Ms Sheppard, requested a preference for the planting to be undertaken through the local rugby club. Mr Daniels agreed, trying to do the right thing by Pirirākau. There were issues with how the planting was undertaken, as they weren't therefore professionally planted. These issues were rectified professionally at the time, and any further plantings that need to be replaced will be through conditions of this consent, should this application be granted.

Water quality

33. In respect of water quality and any obligation to "restore", I note that a condition can only be imposed under s108AA (as relevant) if it is directly connected to an adverse effect of the activity on the environment. So if there is no impact from the activities themselves, beyond "baseline", then no conditions requiring restoration (or improvement) can technically be imposed.

34. That said, the applicant is prepared to offer an additional water quality condition, proposing a water quality management plan, to better understand, manage, and improve water quality on the site. A condition to this effect is included in the agreed set of conditions between Ms Perring and Mr Crossan.

Water financial contributions

35. In this respect, Mr Crossan has a different recollection of his discussion with Council Water Infrastructure Engineer Mr Paul Van den Berg. In a consistent way to where Mr Daniel's integrity has been called into question, it is necessary to address this interaction, at least briefly:

    (a) Mr Crossan's recollection is that he originally spoke to Mr van den Berg regarding the water supply matter on 19 September 2023. He subsequently phoned Mr Van den Berg again on 22 September 2023 and asked Mr Van den berg if he was agreeable to referencing the telephone discussion *in evidence* that Mr Crossan was preparing for the upcoming Tinex hearing, so long as that was noted as being on a without prejudice basis. So there was no doubt as to the purpose of the discussions.

    (b) Mr Crossan further recollects the discussion was that an upgraded water supply to meet firefighting pressure could be provided in Te Puna Station Road if required, given that a water main had recently been upgraded in Te Puna Road. However, Mr Van den Berg noted that any upgrade of this water main was not scheduled in the current Water Asset Management Plan for the area.

36. As I understand it, the Water Asset Management Plans are set for water assets over the Long-Term Plan Period (i.e., 10 years). Accordingly, given that there is no water main upgrade currently scheduled for at least the next 10 years in the Water Asset Management Plan and the level of use and subsequent effect from the existing activities on water supply and demand is not going to trigger that upgrade, then no water financial contribution should be payable.

37. There is still the opportunity as part of the applicants "first" application for water contributions to be made payable for the overall site, if the Council

wishes to pursue a contribution at that point. It could be that the unlocking of the site as a whole would trigger the Council to update its Water Asset Management Plan; and in which case a financial contribution could then be warranted.

Regional Council consenting requirements

38. To quell any lingering doubt around regional consent requirements as to works in the roadside drain, Mr Crossan has obtained a written response from the regional council's principal consents advisor, Ms Marlen Bosch as **attached**. The response confirms that the roadside drains are man-made drains and that a culvert installation would be a permitted activity under the relevant Regional Plan. This includes any conveyance of water through the culvert. Ms Bosch has also confirmed that earthworks would be a permitted activity. This would also apply to the proposed road widening as well, with Mr Crossan having reviewed those new volumes against the relevant Regional Natural Resource Plan standards.

39. The final point in the email of Ms Bosch, and also raised by Ms Perring at the hearing was whether the stormwater discharged from the site was able to meet the permitted regional council stormwater discharge standards.

40. Mr Bos, has provided calculations of the sites flows as **attached**, which are able to meet the permitted limits. Furthermore, based on the water quality results to date compliance can be achieved. The further water management condition offered will ensure ongoing compliance.

41. Lastly, in terms of flooding, both Mr Bos, and Council's stormwater expert are of the view that the stormwater runoff from the existing activities area is no greater than any permitted scenario for the land, thus any flooding in the surrounding catchment is not affected by the site development as it exists.

Other minor matters/ clarifications

42. In respect of noise:

    (a) there was evidence from some neighbours about noise effects, including "unnatural" clanging, and vehicle noise. Some of that

was responsibly accepted as coming from sites other than the Tinex site.

(b) As an example of noise being unfairly attributed to the Tinex site, however is the example given of noise over this last weekend, in the mornings. Mr Daniel says that this was not resulting from activity on his site, but from rural hay making activities on Clarke Road. Apparently hay was cut on Saturday, and bailing was occurring on Sunday.

(c) The objective expert opinion of compliance with the District Plan standards is to be preferred.

43. Reference was made also made to a requirement for a 20m setback of activities from waterways (in particular). Mr Crossan confirms that this requirement does not exist in the current District Plan, and so there is no non-compliance in this regard. Ms Perring also appears to agree with this in her reply evidence of 13 October 2023.

“Contrary to”, integrity, and precedent

44. Mr Crossan confirms that there is no “avoid” objective or policy along the lines of “avoid any development within the Te Puna Business Park prior to completion of all structure plan requirements”. The structure plan requirements, if not met, mean that development is not proceeding in accordance with the structure plan, and triggers non-complying status. Provided one of the gateway tests are met there will be no challenge to the integrity of the plan.

45. In terms of precedent, it was mentioned that Mr Overton was seeking retrospective consent for activities on its land. I had not known of this, but was aware that they had been subject to an abatement notice (which they have not appealed, or complied with). While I have not seen the consent, the applicable abatement notice refers to swimming pool storage, relocatable homes, steel fabrication and engineering activities, and the processing and/or storage of firewood for sale.

46. While there is therefore some “crossover”, it is submitted that there is no significant precedent as:

(a) a key difference is that Overton's site is fully occupied (from observations looking in), rather than just being a small portion of their site, as in Mr Daniel's case;

(b) we understand some of the activities on site may already have resource consent;

(c) unless the Council gave similar assurances to Overton that its activities would be accepted, then that would be a significant distinguishing feature; and

(d) the Overton consent will be considered after the grant of this consent – if this consent is granted – and so Overton's traffic effects will be cumulative to those of the Tinex activities.

Conditions & supplementary evidence

47. Mr Crossan has worked with Ms Perring to provide an updated set of conditions, with agreement reached wherever possible. Where agreement has not been reached, this is indicated in the comments of the updated condition set.

48. As indicated, should the Panel wish for any of the matters above where I have recorded my understanding of the opinion of a witness or a factual matter that is not squarely in evidence, I can invite any witness to confirm their evidence in that regard with a short reply statement. Given the matters outstanding (including the very narrow differences in conditions), this was not considered necessary by the applicant (noting that it is searching for efficiency in its consenting process).

49. Otherwise, unless the Panel has any further questions or requests, that is the case for the Applicant. We thank you for your time and consideration of the application.

Project Manager for the Applicant
18 October 2023