

**BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY WAIPA
DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (Act)

AND

IN THE MATTER of an application for resource consent under section 88
of the Act for the establishment and operation of a sand
quarry and cleanfill operation located at 928 Kaipaki
Road, Cambridge [LUC/0108/20]

BETWEEN **SHAW'S PROPERTY HOLDINGS LIMITED**

Applicant

AND **WAIPA DISTRICT COUNCIL**

Consent Authority

LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

Dated: 23 November 2020

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MAY IT PLEASE THE COMMISSIONERS

1. These submissions are made on behalf of Shaw's Property Holdings Limited ("Applicant") as the Applicant in LUC/0108/20 to establish a Sand Quarry and Cleanfill operation at 928 Kaipaki Road ("Application").

INTRODUCTION

2. This is an application for a discretionary activity consent to establish and operate a sand quarry and cleanfill operation. The activity is located on the Applicant's property on which he and his family live. They are the most "affected" persons insofar as any adverse effects of the activity may arise. For that reason, the Applicant has a vested interest in ensuring that it is operated and maintained to avoid or minimise adverse effects on the environment, including his neighbours.
3. The Application is to be considered under section 104 of the Resource Management Act 1991 ("RMA"). Both the section 42A report¹ and the evidence of Mr Chrisp for the Applicant² set out the scope of the Application and the background to its lodgement, including the decision by Waipa District Council ("WDC") to limited notify the Application. Relevantly, the section 42A author recommends granting consent, subject to conditions. As discussed later in submissions, the remaining issues in contention are the detail of the consent conditions.
4. Mr Chrisp's evidence provides a detailed assessment of the proposal and planning evaluation of the same. For the purposes of this hearing, Mr Chrisp has prepared an updated set of proposed conditions of consent, following receipt of an amended proposed set of conditions from WDC on Thursday, 19 November 2020.
5. As discussed by Mr Chrisp, there is limited opportunity in the wider Waikato Region to produce and supply a high-quality sand product for

¹ Section 42A report, section 1; 4 and 6.

² Statement of evidence of Mr Chrisp for the Applicant, dated 6 November 2020, at [15] to [44].

use in building and roading construction. Given the existence and quality of the resource on his property, the Applicant seeks to realise this opportunity.

6. Based on the recent exponential growth in the Waikato Region, and the recent promotion of "shovel ready" projects by the Government to help off-set the negative economic impacts of COVID-19, there are a number of key infrastructure programmes planned for the next 10 to 15 years.³ These programmes will require sand products for various stages of construction, and as set out by Mr Roderick in his evidence, a number of the existing quarries in the Waikato have closed or have very limited raw stock.⁴
7. If granted, the proposed will assist with meeting the local demand for high-quality sand product. In turn, this will support and enable the provision of local and regional infrastructure. In my submission, the Application represents a vital component to future economic growth and will have significant positive social and economic benefits for Cambridge, the Waipa District, and the Waikato Region more generally.
8. All resource consents required from Waikato Regional Council for the operation of the quarry and cleanfill operation have been granted.⁵

Submissions

9. Three submissions have been received in opposition to the Application.⁶ One letter in opposition has been received from a non-submitter.⁷

³ Statement of evidence of Mr Chrisp for the Applicant, dated 6 November 2020, at [16] and [17].

⁴ Statement of evidence of Mr Roderick for the Applicant dated 6 November 2020, at [9].

⁵ AUTH141798.01.01: Water Permit to take groundwater in association with sand quarry and clean filling, and AUTH141798.02.01: Land Use Consent to discharge cleanfill to land in association with a sand quarry.

⁶ Rob and Debbie Comez (914 Kaipaki Road); Keith and Amanda Walker (899 Kaipaki Road) and NZ National Fieldays Society Inc (125 Mystery Creek Road).

⁷ Helen and Warwick Hartstone's email dated 28 September 2020.

10. Prior to and following lodgement of the application, the Applicant and its agents (Mitchell Daysh) sought to communicate and consult with those parties who could be affected by the proposed quarry. These good faith discussions have resulted in there now only being two submitters to the application. In that regard, while the New Zealand Fieldays Society ("NZFDS") were not originally limited notified, the issues raised in its prior communications with Waipa District Council ("WDC" or "Council") following limited notification were responded to by the Applicant, with additional consent conditions proposed to address the NZFDS concerns.
11. The revised operational parameters and proposed conditions in response to the concerns of the submitters (including Mr and Mrs Comez, who have since withdrawn their submission), are as set out at Annexure A to Mr Chrisp's evidence.
12. Mitchell Daysh and the Applicant attempted on several occasions to communicate with the Walkers. However, the Walkers did not respond to attempts to communicate. Nevertheless, the Applicant has, in good faith, responded to the concerns of the Walkers where these are considered to have a reasonable basis. However, as I will address later in submissions, the proposition to move their canter track is strongly opposed on the basis that there is no evidential basis to justify this requirement.

Revised parameters

13. The Applicant originally sought an unlimited consent duration to provide for flexibility of operation (District Council land use consents are typically granted without an expiry date). However, there were specific caps on extraction rate and vehicle movements which would apply regardless. Nevertheless, in recognition for the need for certainty of duration (a concern raised by submitters) and that the Waikato Regional Council consents have been granted for a period of 15 years, the Applicant proposed a consent duration of 15 years.

14. This revised duration does not affect Applicant's assessment of effects for proposed Sand Quarry. That assessment was based on the following operational parameters:
- (a) Maximum rate of sand extraction: 200,000 m³ / yr.
 - (b) Operational noise no more than the applicable Permitted Activity noise limits in the Waipa District Plan.
 - (c) Prescribed hours of operation, initially proposed to be:
 - 7:00am to 5:30pm, Monday to Friday;
 - 7:00am to 12:00pm, Saturday; and
 - Closed Sunday and Public Holidays.
 - (d) Maximum daily vehicle movements of 132 vmpd.
15. Counsel notes that the Saturday hours of operation have been further amended in response to submissions to restrict operation to 9:00am to 2:00pm. I understand that Council's s42A officer agrees to this change to the proposed hours of operation.

Right-turn bay into the Quarry Site from Kaipaki Road

16. Following advice from Mr Black, traffic engineer for the Applicant, a right turning bay is now proposed and has been included in the Applicant's revised proposed conditions (condition 36) at Annexure "A" to Mr Chrisp's evidence ("Applicant's Proposed Conditions"). Notwithstanding this change, Mr Black has confirmed the conclusion in the Integrated Traffic Assessment for the Application⁸ that the traffic effects of the Application will be acceptable to the surrounding receiving environment if the consent conditions as proposed are implemented.⁹

⁸ Appendix E to the Assessment of Environmental Effects for the Application.

⁹ Statement of evidence of Mr Black for the Applicant, dated 6 November 2020 at [11] and [12].

17. For completeness, I advise that Mr Black has corrected and clarified several matters raised by submitters in relation to the Integrated Traffic Assessment ("ITA") which can be found at Appendix E to the Assessment of Environmental Effects.¹⁰ These corrections and clarifications do not change the conclusions reached in the ITA.

Evidence before the Panel

18. The Panel has received statements from, and will hear from, the following experts in support of this Application:
 - (a) Mr Roderick who will be responsible for the operation of the quarry if consented, and who has provided an overview of how the quarry will be operated and how the proposed mitigation will be implemented 'on the ground'.
 - (b) Mr Cottle who has provided an assessment of the noise that is likely to be associated with the quarry.
 - (c) Mr Black who has provided expert advice on traffic design and effects and has recommended the proposed traffic mitigation as are reflected in the Applicant's Proposed Conditions. Mr Black has prepared a supplementary statement dated 23 November 2020 to assist the commissioners, following receipt of a revised set of conditions from Council officers on 19 November 2020.
 - (d) Mr Marsh who has provided expert evidence on the effects of the Application on the Walker's horses.
 - (e) Mr Chrisp who is the project planner for the quarry.
19. I address the evidence of the submitters and why the evidence for the Applicant should be preferred in a later section of these submissions.

¹⁰ Statement of evidence of Mr Black for the Applicant at [19] to [24].

LEGAL FRAMEWORK

20. The Panel will be familiar with the tests under ss 104, 108 and 108AA of the RMA. For completeness, the critical part of s 104 for the purposes of the assessment of the Application is s 104(1)(a) and s 104(2). Mr Chrisp sets out his planning analysis under s 104 in paragraphs [69] to [100]. This essentially aligns with the assessment provided by the s 42A author.
21. Under s 104(1)(a) the Panel must assess the actual and potential effects on the environment of allowing the activity, and these matters for assessment under s 104 are reflected in the evidence of Mr Chrisp. The s42A report also addresses the effects to be considered.

Permitted baseline

22. Section 104(2) of the RMA expressly provides that for the purpose of assessing the effects under s 104(1)(a), a consent authority *may* disregard the adverse effects of the activity on the environment if a plan (or NES) permits an *activity with that effect*. That is the effect of the activity which is the focus – not the activity *per se*. Further, the question of a “permitted baseline” applies to the subject site only.
23. There are numerous decisions of both the Environment Court and higher authorities on the question of the permitted baseline in the context of both notification and the determination of an application pursuant to s 104 RMA.¹¹
24. This concept was addressed in *Queenstown Lakes District Council v Hawthorn Estate Limited*¹² in the following terms at paragraph [65]:

It is as well to remember what the “permitted baseline” concept is designed to achieve. In essence, its purpose is to isolate, and to make relevant, **effects of activities on the environment that**

¹¹ For example, *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 [18 May 2015] which was a decision on notification and summarised the case law on the principle which preceded that decision.

¹² *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA45/05).

are permitted by a district plan or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application.

[Emphasis added].

25. As set out by Mr Chrisp¹³ and the s 42A author,¹⁴ the permitted baseline in respect of this Application includes farm quarries and earthworks not exceeding 1,000m³ of earthworks in volume. The Panel may disregard any adverse effects relevant to the Application under s 104(1)(a) that are permitted for farm quarries and earthworks not exceeding 1,000m³. In addition, Mr Chrisp identifies Rule 16.4.2.25 of the District Plan which sets the activity status based on the expected level of trip generation. Under Rule 16.4.2.25 for Minor Arterial Roads, such as Kaipaki Road, any activity generating less than 100 vehicles per day (expressed as car equivalents) is a permitted activity under this Rule.
26. In my submission, and in reliance on case law, the District Plan provides for a permitted activity (or activities) as above for which a reasonable comparison of adverse effects relevant to the Application can be drawn.¹⁵ As such, it is appropriate to apply the permitted baseline particularly in so far as it relates to adverse effects of the proposed Sand Quarry and cleanfill under s 104(2) RMA when assessing this Application under s 104(1)(a).

Sections 108 and 108AA

27. Section 108(1) provides that the Panel may impose any condition it considers appropriate. What is appropriate has been the subject of numerous Environment Court decisions and the principles are well

¹³ Statement of evidence of Mr Chrisp for the Applicant, 6 November 2020, at [65].

¹⁴ Section 42A report, section 6.

¹⁵ *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council* [2006] NZRMA 559 (EnvC) at [21].

known. In short, the conditions must be reasonable, certain, and enforceable.¹⁶

28. Furthermore, section 108AA of the RMA inserted new wording against which the discretion to impose conditions must be exercised and provides that a condition must be:

- (a) "directly connected" to an adverse effect of the activity or an applicable rule or environmental standard; or
- (b) relating to "administrative matters" essential to the efficient implementation of the consent; or
- (c) agreed to by the Applicant.

29. As discussed below, the key issues in contention are whether the proposed or recommended condition(s) satisfy the requirements of ss 108 and 108AA of the RMA.

30. In my submission, the Applicant's Proposed Conditions should be preferred over Council's recommended conditions as these satisfy the requirements of ss 108 and 108AA.

Actual and potential effects on the environment

31. These are comprehensively addressed in the evidence for the Applicant of Mr Marsh, Mr Cottle and Mr Black. Counsel does not wish to traverse the conclusions reached in the evidence for the Applicant, other than to record the following:

- (a) Mr Cottle confirms that the proposed Sand Quarry can be constructed and operated to comply with the Permitted Activity noise limits in the Waipa District Plan. He concludes that with the

¹⁶ *Cookie Munchers Charitable Trust v Christchurch CC* EnvC W090/08; *Newbury DC v Secretary of State for the Environment*; *Newbury DC v International Synthetic Rubber Co Ltd* [1981] AC 578; [1980] 1 All ER 731 (HL).

proposed mitigation in place, the operational noise can be practically controlled to reasonable levels.¹⁷

- (b) Mr Marsh concludes that overall, he does not consider that the proposed Sand Quarry will increase the safety risk(s) to horses or riders above those inherent with horse riding generally. In his view, the safety risks related to the proposed traffic entering or exiting the proposed Site will be imperceptible at most.¹⁸
- (c) Mr Black concludes that subject to conditions relating to limiting the quantity of sand extracted and heavy vehicle trip generation, upgrading the vehicle crossing and internal access, and payment of a financial contribution, the traffic effects on the surrounding environment are expected to be acceptable.¹⁹
- (d) Mr Roderick considers the functioning and implementation of the draft Quarry and Cleanfill Management Plan²⁰ and provides confidence that the mitigation measures as proposed in the Application to mitigate dust, noise, traffic, erosion and sediment run off and amenity effects are straight forward to implement by staff on the ground.²¹

32. Mr Chrisp has considered and relied on the advice of the Applicant's experts to draft the revised Proposed Conditions (at his Annexure "A") and concludes that:²²

The Application has demonstrated that actual and potential adverse effects are able to be appropriately managed on site with the imposition of conditions.

¹⁷ Statement of evidence of Mr Cottle for the Applicant, 6 November 2020 at [20].

¹⁸ Statement of evidence of Mr Marsh for the Applicant, 6 November 2020 at [21].

¹⁹ Statement of evidence of Mr Black for the Applicant, 6 November 2020 at [113].

²⁰ Appendix D to the Application. Supplementary statement of evidence of Mr Black, dated 23 November 2020, at [43].

²¹ Statement of evidence of Mr Roderick for the Applicant, 6 November 2020 at [30], [38], [42], [46], [49].

²² Statement of evidence of Mr Chrisp for the Applicant, 6 November 2020 at [105].

SUBMITTER CONCERNS

33. Insofar as the submissions raise matters which are within the scope of the Application, all these matters have been comprehensively addressed in the evidence of Mr Marsh, Mr Cottle, Mr Black and Mr Chrisp.
34. Counsel wishes to respond to the following matters raised in submissions:
 - (a) Questions regarding effects envelope and duration / issues as to scope;
 - (b) Equine effects; and
 - (c) NZ Fielday's traffic concerns.

Questions regarding effects envelope and duration / Issues as to scope

35. Prior to the Application being formally lodged with WDC, the Applicant commissioned a geotechnical report, which is included with the Application's Assessment of Environmental Effects at Appendix C. This Report established that there was a high-quality sand resource within a 13.4-hectare area of the Site, containing approximately 900,000m³ of material.²³ While this report estimated approximately 900,000m³ of economic sand resource, this was considered the minimum volume of saleable sand expected.
36. Given that it was not possible to determine the exact quantity of extractable saleable sand from the Site, the 'envelope of effects' which was used as the basis for the Sand Quarry's assessment of effects, was based on a **yearly maximum extraction rate**. This maximum set the parameters for the application which were used to assess the effects of the proposed Sand Quarry. Accordingly, the preliminary estimate of potential total resource was and is irrelevant to the scope of the application. It merely provided confidence that there was a commercially

²³ Assessment of Environmental Effects, Appendix C – Geotechnical Report at page 3.

viable quantity of sand which meant it was worthwhile seeking the necessary resource consents to be able to extract it.

37. As set out above and by Mr Chrisp,²⁴ the effects envelope of the proposed Sand Quarry was determined based on a yearly maximum extraction rate of 200,000m³. To provide better certainty of potential duration and to align with the duration of the WRC consents for the activity, a consent duration of 15 years is proposed.

38. Case law has confirmed that any amendments to design and other details of an application may be made up until the close of hearing, but only if they are within the scope of the original application. The High Court in *Atkins v Napier City Council*²⁵ held:

[20] ...the test, as developed by the Environment Court and Court of Appeal through a series of cases is whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (of notification was required) in terms of:

- The scale or intensity of the proposed activity, or
- The altered character or effects/impacts of the proposal.

39. The operational parameters which effectively set the scope for the Application (maximum yearly extraction rate, vehicle movements per day), have not changed (other than where these have been reduced – especially in relation to duration). There are no issues as to scope.

Equine effects

40. The Walker's submission raises concerns regarding some level of increased horse and rider risk from the Applicant's proposed Sand Quarry operation. This is disputed by the Applicant and its witness, Mr Marsh.

²⁴ Statement of evidence of Mr Chrisp for the Applicant dated 6 November 2020 at [26] to [32].

²⁵ *Atkins v Napier City Council* (2008) 15 ELRNZ 84.

41. The RMA is not a “no-risk” statute.²⁶ There is no evidence in the witness statements on behalf of the Walkers which provide relevant examples of such effects on horses. I note that the track was previously buffered by a dense hedge along the boundary of the property. As illustrated by Mr Black’s supplementary statement, for some reason the hedge has been cleared in one section opposite the quarry entry. This would potentially exacerbate the risk the Walkers complain about.
42. In short, the request for the Applicant to ‘relocate’ the Walker’s canter track is unreasonable and has no evidential basis. While the Walkers have engaged several “experts” to present equine related evidence on their behalf, in my submission these effects have been overstated.
43. The fundamental complaint from the Walkers is that trucks entering and exiting the proposed Sand Quarry from Kaipaki Road may startle horses on the canter track, posing an increased risk to horse and rider safety.
44. The Applicant’s traffic expert demonstrates that the existing environment is currently made up of *around* 13% heavy vehicles and that the Quarry will increase this by only 2.5%.²⁷ In Mr Marsh’s opinion, the safety risks related to the proposed traffic entering or exiting the proposed Quarry site will be imperceptible at most.²⁸ Traffic entering and exiting the Quarry will be travelling a lot slower than traffic just passing the site.
45. Under s 104(1)(a), the actual and potential adverse effects of the Application must be assessed against the environment as it exists at the time of assessment. This includes the current vehicle movements on Kaipaki Road. The speed limit on Kaipaki Road is currently 100km and, based on Mr Black’s evidence, Kaipaki Road currently carries 3,200 vehicles/day which includes approximately 10% HCV (or 320 HCV/day).²⁹

²⁶ *East Park Development Ltd v Auckland Council* [2012] NZEnvC 190 at [15].

²⁷ Statement of evidence of Mr Marsh for the Applicant, dated 6 November 2020, at [17(b)].

²⁸ Statement of evidence of Mr Marsh for the Applicant, dated 6 November 2020, at [21].

²⁹ Statement of evidence of Mr Black for the Applicant, dated 6 November 2020, at [35].

Based on the proposed conditions of consent, the Application will be limited to contributing an average of 106 HCV/day on Kaipaki Road.³⁰

46. Mr Chrisp states at paragraph 85 of his evidence:

... I also observe that the Applicant is already entitled to have trucks enter and leave the property – such traffic can be associated with a number of different permitted land use activities that the Applicant may choose to undertake.³¹

47. It follows that when considering the effects on horses under s 104(1)(A) the Panel should only consider the effects that exist above what is permitted, and what exists currently. In Mr Marsh's opinion, considering the existing environment, the safety risks related to the proposed traffic entering or exiting the proposed Quarry site will be imperceptible at most.³² Mr Marsh has extensive and relevant local experience and, in my submission, his evidence should be afforded considerable weight.

48. Mr Marsh also observes that Sir Mark Todd was the previous owner of the Walker's property and constructed the canter track in its current location alongside Kaipaki Road.³³ He refers to advice he received from Mr Black, that around 13% of the current traffic along Kaipaki Road is already made up of heavy vehicles and that the Quarry will increase this by only 2.5%.³⁴ As noted above, the estimate of 13% may be overstated and Mr Black will clarify that the estimated HCV is 10% currently.

49. With respect to Sir Mark Todd, the Walkers provided further material to Council on Thursday, 20 November 2020 which was forwarded to the Applicant's agents (Mitchell Daysh). This includes a document purporting to be an email from Sir Mark Todd which, in my submission, is of dubious

³⁰ Mr Marsh has used the approximation of 13% heavy vehicles. This exceeds the 10% estimated by Mr Black. As such, Mr Marsh has potentially overestimated the number of heavy vehicles. However, this does not undermine his conclusions given that it is based on a higher number.

³¹ For example, farming, cropping, poultry farming all subject to meeting relevant performance standards.

³² Statement of evidence of Mr Marsh for the Applicant, dated 6 November 2020, at [21].

³³ Statement of evidence of Mr Marsh for the Applicant, dated 6 November 2020, at [17(a)].

³⁴ Statement of evidence of Mr Marsh for the Applicant, dated 6 November 2020, at [17(b)].

origin.³⁵ Regardless, Sir Mark Todd is not a witness for the Walkers and is not present at the hearing. Accordingly, the Hearing Panel should give no weight to the letter in its assessment of the effects of the Application.

50. In reliance on both Mr Marsh and Mr Black, counsel submits that the potential adverse effects related to horse and rider safety has significantly overstated by the Walker's experts.

51. In summary, the Walker's experts have significantly overstated the effects of the proposed Sand Quarry for the following reasons:

- (a) The evidence does not consider the existing environment insofar as it relates to existing traffic movements on Kaipaki Road;
- (b) The permitted baseline provides that the Applicant is entitled to have heavy vehicles entering and existing its site; and
- (c) Regardless of whether the permitted baseline is applied, in reliance on Mr Marsh's expert opinion, the safety risks to horses and riders which may be related to traffic entering or exiting the proposed Quarry site will be negligible.

52. I note that the Walkers also sought that a right turn bay be installed for trucks entering the quarry (turning right off Kaipaki Road). Mr Black recommends that the right turn bay be constructed, and the Applicant has agreed to do so. The Walkers cannot now claim that this will exacerbate the effects on the horses using the canter track. Indeed, the trucks which the Walkers claim could startle their horses will be further away from their boundary and it will be the existing traffic – unrelated to the quarry – which will continue to use the road as they did previously.

³⁵ For example, the email address is redacted and there is a lawyer's footnote at the end of the page.

53. Finally, the proposed upgrading of a short section of Kaipaki Road, to provide a safe and efficient access to the Quarry (including the installation of a right turn bay), will be within the road reserve (being a strip of land dedicated for roading purposes including access to private land).

NZ Fielday's traffic concerns

54. NZFS has raised concerns relating to traffic safety associated with the proposed Sand Quarry. Mr Campbell in his statement of evidence considers that both a right turn bay into the Quarry entrance, as well as at the Kaipaki Road / Mellow Rd intersection would improve road safety and would mitigate the presence of additional turning large vehicles generated by this Application.³⁶ Mr Campbell recommends at [22] of his evidence that the provision of a right-turn bay at the Mellow Road/Kaipaki Road intersection be a condition for installation prior to the quarry becoming operational.
55. This is unnecessary for the following reasons and a condition as requested by Mr Campbell is unreasonable and is not directly related to the effects generated by the Application.
56. Mr Black revised his traffic design recommendations and now considers that a right-hand turn into the Quarry site is required. This has been accepted by the Applicant and is reflected in the Applicant's Proposed Conditions.
57. My Black gives detailed reasons as to why a right turning bay at the Mellow Road / Kaipaki Road intersection is not required. Specifically, Mr Black advises that:³⁷

³⁶ Statement of evidence of Duncan Richard Campbell in support of NZ Fieldays, dated 12 November 2020 at [19].

³⁷ Statement of evidence of Mr Black for the Applicant, dated 6 November 2020 at [59]; and Supplementary statement of Mr Black, dated 23 November 2020 at [36].

- (a) The proposed trip generation conditions as proposed by the Applicant limit the maximum number of vehicles from the quarry which also limits trips through the Mellow Road / Kaipaki Road intersection.
 - (b) The quarry traffic is likely to represent a small portion of traffic turning right during peak periods.
 - (c) The quarry traffic increases the predicted injury crash rate by 2% for rear end crashes and 6% for other crashes involving right-turn movements from the major road.
 - (d) There is sufficient safe sighting distance for a following vehicle on Kaipaki Road to avoid a rear-end crash with a stationary truck at the Mellow Road / Kaipaki Road intersection.
 - (e) Basing the trigger for a right-turn bay solely on the number of heavy vehicles is not equitable. All vehicles turning right at the intersection will contribute to the crash risk and would benefit from construction of right-turn bay.
58. Furthermore, an intersection is never free from risk. The Environment Court in *East Park Development Limited v Auckland Council* observed that.³⁸

[15] It has been said often enough that the RMA is not a non-risk statute. **No road, and no intersection, is completely free from risk.** Certainly, there are occasions when the evidence is plain that a certain development of design is highly likely to cause an unacceptable situation...

[Emphasis added.]

59. There is no compelling evidence before the Panel which demonstrates that the proposal is likely to cause an unacceptable situation at the Mellow Road / Kaipaki Road intersection so as to justify a requirement for the Applicant to provide a right turn bay.

³⁸ *East Park Development Limited v Auckland Council* [2012] NZEnvC 190.

60. With respect, the NZFDS is not the Road Controlling Authority and it does not have a monopoly over who may or may not use roads in the vicinity of Mystery Creek. It does not have a "veto" over this Application or the conditions of the consent.
61. Accordingly, the Hearing Panel should not impose additional traffic requirements above and beyond those proposed or offered by the Applicant, as no intersection is completely free from risk. Furthermore, this is not a situation where the evidence shows that a particular design is likely to cause an unacceptable situation.

REVISED CONDITIONS OF CONSENT RECEIVED FROM COUNCIL 19 NOVEMBER 2020

62. As noted above, the Council s42A officer sent an updated set of proposed conditions to the Applicant's agent on Thursday, 19 November 2020. This includes additional traffic related conditions which, based on the supplementary evidence of Mr Black, in my submission are unnecessary and unreasonable.
63. Counsel refers to Mr Black's supplementary evidence in respect of the evidence of Mr Campbell, Mr Apeldoorn and the subsequent updated suits of conditions circulated by Council's s42A officer. Based on Mr Black's evidence, in my submission:
 - (a) There is no basis for requiring that the non-compliant access to the Walker's property be retained.
 - (b) There is no need for a condition relating to agricultural vehicles accessing the quarry.
 - (c) There is no justification for a requirement for monitoring and improvements at the Kaipaki Road/Mellow Road intersection.

Such a condition is considered *ultra vires* pursuant to section 108AA.³⁹

- (d) The proposed condition regarding the entrance and access improvements to the site should be amended as set out by Mr Black in paragraph [28] of his supplementary statement of evidence.
- (e) The proposed condition to decommission/close the right turn bay following expiry of the consent should be amended as set out by Mr Black in paragraph [40] of his supplementary statement of evidence.
- (f) The proposed condition relating to “no-overtaking” lines should be amended as set out by Mr Black in paragraph [23] of his supplementary statement of evidence.
- (g) The proposal by Mr Apeldoorn for a speed limit reduction on Kaipaki Road is unreasonable and does not satisfy the test in section 108AA.
- (h) There is no justification for an increased financial contribution, as suggested by Mr Campbell for NZFDS and addressed by Mr Black at paragraphs [4] to [6] of his supplementary statement of evidence.
- (i) There is no justification for review condition which would exclude quarry traffic from part of Mystery Creek Road, as address by Mr Black in paragraph [7] to [9] of his supplementary statement of evidence.
- (j) The proposed condition 42 “Travel Plan” should be revised to ensure there is no “double up” with proposed condition 18.

³⁹ Refer to paragraph [36] of Mr Black’s supplementary statement of evidence dated 23 November 2020.

CONCLUSION

64. All actual and potential effects of the Application are either avoided, remedied or mitigated through the Applicant's Proposed Conditions. This is supported by the evidence of Mr Marsh, Mr Cottle, Mr Roderick, Mr Black and Mr Chrisp in his planning assessment where he concludes at paragraph 109:

Overall, it is considered that, subject to the term and consent conditions being proffered by the Applicant as set out at [Appendix A], of my evidence, the application in this case can be granted pursuant to s 104 of the RMA on the basis that:

- (a) any adverse effects from the proposal are no more than minor; and
 - (b) the proposal is consistent with relevant planning documents; and
 - (c) the proposal is consistent with the purpose of the RMA.
65. The actual and potential effects of the Sand Quarry are of an acceptable level given the rural context of the site and receiving environment. The Application therefore satisfies the tests in s 104 of the RMA.
66. Accordingly, it is appropriate and consistent with the purpose of the RMA for the Commissioners to grant consent for the Application subject to the Applicant's Proposed Conditions, as updated in the version to be tabled through Mr Chrisp at the hearing.

Dated this 23rd day of November 2020



M Mackintosh
Counsel for Shaw's Property Holdings Limited