

BEFORE THE HEARING PANEL AT WAIPA DISTRICT COUNCIL

IN THE MATTER of Land Use Consent for a Discretionary Activity for the establishment and operation of a mineral extraction activity (sand quarry) under the Waipa District Plan

BETWEEN **WAIPA DISTRICT COUNCIL**

AND **SHAW'S PROPERTY HOLDINGS LIMITED**

**LEGAL SUBMISSIONS FOR AMANDA AND KEITH WALKER
(SUBMITTERS)**

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May it please the Hearings Panel:

Introduction

- 1 These submissions are in support of the submission lodged by Amanda and Keith Walker (**the Submitter/the Walkers**) on resource consent application LU/0108/20 (**Application**).¹ The Submitter lives at 899 Kaipaki Road on a 40ha property (**Property**) directly opposite the proposed entrance to the proposed sand quarry at 928 Kaipaki Road (**the Site**).
- 2 The fundamental position of the Walkers is that unless the end of their canter track on their property² is moved then the Application will not sufficiently avoid, remedy or mitigate adverse effects on the environment and therefore the Application should not be granted.³

Section 104 Assessment and Equine Concerns

S 104(1)(a)

- 3 We agree with the observation in the s 42A report that a consent authority must have regard to any actual and potential effects on the environment of allowing the activity (s 104(1)(a) of the Resource Management Act 1991) (**RMA**) when making a decision on an application for a resource consent.
- 4 The Submitter raised concerns regarding the adverse effects of the Application, if granted, in respect of the equine activities it conducts on its Property and on traffic safety along Kaipaki Road. Having reviewed the Applicant's evidence and proposed consent conditions, the remaining concern for the Walkers relates to the safe use of the canter track on their property.⁴ The Application will result in changes to the entrance that will bring heavy traffic unacceptably close to the track and in direct line of sight of horses as they round the track towards the quarry entrance.
- 5 The Walkers and their expert witnesses agree that it would be unsafe to use the track with trucks so close and propose that the only way that the

¹ Mitchell Daysh, Shaw's Property Holdings Limited, Kaipaki Road Sand Quarry and Cleanfill Operation – Resource Consent Application for a Mineral Extraction Activity and Associated Works, 26 April 2020.

² The 230m section of the canter track which is adjacent to Kaipaki Road.

³ Resource Management Act 1991, s 5.

⁴ At [15], Appendix 1: Submission of Keith and Amanda Walker.

effects of the entranceway could be mitigated is by relocating the track. This relocation would have to occur before the initial construction phase for the quarry entrance begins.

- 6 The proposed quarry entrance and the alterations to Kaipaki Road will completely change the environment along the last 230m (the end) of the canter track. Kaipaki Road will be re-aligned within 2.5m of the end of the canter track. It is also recognised that when the construction work to widen Kaipaki road is carried out, the plant and machinery will be only 1m away from the canter track. At the moment, the closest part of the seal is 7.5m from the canter track.
- 7 As is apparent from the Submitter's evidence, untenable health and safety issues in relation to the Submitter's equine activities will be created if the Application is granted and the canter track is not relocated. Daily use of the canter track and its continued operation is fundamental not only to Mrs Walker's lifelong passion for training horses but also to the Submitter's equine business.
- 8 In the context of s 104(1) of the RMA, the directive "must have regard to" does not mean "must give effect to", but rather that the decision maker is to give genuine attention and thought to the matters set out in s 104(1), but that they must not necessarily be accepted.⁵ It is submitted that a consideration of s 104(1)(a) is particularly important in the context of this Application, in the sense that on the evidence provided by the Submitters and its expert witnesses, the Application will have significant adverse effects on the environment if granted in its current form. These adverse effects arise from the proximity of Kaipaki Road and the quarry entrance to the canter track.
- 9 The Walkers are willing to accommodate changes on their Property that would enable the sand quarry to operate provided the adverse effects on equine/rider health and safety can be addressed.
- 10 This is not an ideal scenario for the Walkers, who would prefer to keep using their existing track and have no sand quarry opposite, but they are genuinely willing to offer up options that would avoid and mitigate serious adverse effects.

⁵ *Foodstuffs (South Island) Ltd v Christchurch City Council* (1998) 5 ELRNZ at p 314.

- 11 The Submitter considered three options for mitigation of the adverse effects on the canter track in the Joint Evidence. Supporting aerial photographs were appended to the Joint Evidence to illustrate each alternative. After evaluating the three options, Option 3 is considered by the Submitter⁶ as the most logical and practical alternative, even though that option results in a shorter track that will be less desirable for training race horses. The Walkers are not prepared to facilitate this new venture for the Applicant by relocating the track at their own expense and inconvenience.

S 104(1)(ab)

- 12 S 104(1)(ab) of the RMA states that when considering an application for resource consent an authority must have regard to any measure proposed or agreed to by the Applicant for the purpose of ensuring positive effects on the environment or to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity. It is submitted that the latter half of this provision is particularly relevant in the context of the Application.
- 13 It is submitted that the Applicant could have engaged with the Submitter on an appropriate measure or method to address the adverse effects that the Application will have on the equine activities which take place on the canter track. Such a measure could have represented an appropriate measure pursuant to s 104(1)(ab).
- 14 Given such a measure has not been advanced nor has been considered by the Applicant, it is submitted that consent for the Application should only be granted if there is a consent condition as outlined at paragraph 57(3) of the Submitter's Joint Evidence requiring the appropriate mitigation. This states that the consent holder must relocate the canter track so that it is in accordance with Option 3 before the initial construction phase of the Application can begin. The advice note to this condition should state that if this condition is not complied with, then the adverse effects of the consented activity cannot be considered sufficiently avoided, remedied or mitigated.
- 15 We note that it is not unusual for a resource consent to include a prerequisite condition requiring work to be done to mitigate adverse

⁶ Statement of Submitter: Amanda and Keith Walker, at [51(3)].

effects. For example a consent holder may have to carry out work on the road to improve safety (as in this case) or may have to undertake widening that requires other land, or may have to undertake tree trimming or removal to improve sight distances. If the Applicant cannot or will not undertake such mitigation the consent cannot be given effect.

Traffic and Safety

- 16 The Stantec Peer review raised several concerns about the operation of the accessway to the proposed quarry and the claim in the ITA that certain road safety outcomes could not be achieved.
- 17 These concerns stem from the fact that Kaipaki Road is busy and the proposed quarry entrance has a number of other entrances close by. The Submitter acknowledges that the Applicant has addressed a number of the concerns raised by the Peer Review and also Council's peer review report undertaken by BBO. There are still, however, some outstanding issues which are raised in Mr Apeldoorn's expert evidence which the Submitter would like to be addressed through conditions to any consent granted for the Application.

S 42 A Report

- 18 The s 42A Report author, Ms Hayley Thomas (**Ms Thomas**), states that the Applicant may wish to address the adverse effects of the Application on equine activities at a hearing⁷ but then states that overall, the proposed conditions of the Application will mitigate the potential adverse effects as best as practicable on the surrounding rural environment.⁸
- 19 The Submitter agrees with Ms Thomas that a hearing is the appropriate forum to have effects on equine activities addressed, but respectfully disagrees that the conditions proposed by the Applicant will sufficiently mitigate potential adverse effects.

Section 104(1)(b)

- 20 Section 104(1)(b) of the RMA requires an assessment of the proposal against any relevant provisions of a national environmental standard, national policy statement, regional policy statement, plan or any other regulations.

⁷ At [9.24], s 42 A Report – LU/0108/20.

⁸ At [9.26], s 42 A Report – LU/0108/20.

Waikato Regional Policy Statement (WRPS)

- 21 The WRPS provides an overview of the resource management issues in the Waikato Region and directs how integrated management of the Region's natural and physical resources can be achieved. The WRPS outlines a number of objectives and policies on key regional issues and those considered relevant to the proposal are discussed.

Objective 3.2 Resource use and development

Recognise and provide for the role of sustainable resource use and development and its benefits in enabling people and communities to provide for their economic, social and cultural wellbeing, including by maintaining and where appropriate enhancing:

- a) access to natural and physical resources to provide for regionally significant industry and primary production activities that support such industry;*
- b) the life supporting capacity of soils, water and ecosystems to support primary production activities;*
- c) the availability of energy resources for electricity generation and for electricity generation activities to locate where the energy resource exists;*
- d) access to the significant mineral resources of the region; and*
- e) the availability of water for municipal and domestic supply to people and communities.*

Policy 4.4 Regionally significant industry and primary production

The management of natural and physical resources provides for the continued operation and development of regionally significant industry and primary production activities by:

- a) recognising the value and long term benefits of regionally significant industry to economic, social and cultural wellbeing;*
- b) recognising the value and long term benefits of primary production activities which support regionally significant industry;*
- c) ensuring the adverse effects of regionally significant industry and primary production are avoided, remedied or mitigated;*

d) co-ordinating infrastructure and service provision at a scale appropriate to the activities likely to be undertaken;

e) maintaining and where appropriate enhancing access to natural and physical resources, while balancing the competing demand for these resources;

f) avoiding or minimising the potential for reverse sensitivity; and

g) promoting positive environmental outcomes.

- 22 The Application states that it is consistent with Objective 3.2 as it seeks to provide for the sustainable use of existing resources.⁹ However the Application fails to recognise that the Objective seeks to maintain and enhance access to resources which provide for regionally significant industry. A regionally significant industry is defined in the WRPS as “*an economic activity based on the use of natural and physical resources in the region and is identified in regional or **district plans**, which has been shown to have benefits that are significant at a regional or national scale. These may include social, economic or cultural benefits.*” **[Emphasis added]**.
- 23 It is submitted that the equine industry is a regionally significant industry according to this definition. Section 1 – Strategic Policy Framework of the Waipa District Plan (**WDP**) states that “*Economic wealth and prosperity in the District is largely derived from the land. Its soils support an exceptionally productive rural sector including dairying, dry stock farming and the **equine industries**.*” **[emphasis added]**¹⁰. Section 1 further states that “*the dairying and **equine** industries are important contributors to the District and national economy. These industries are reliant on the high class soils of the District and the availability of a rural land base with large lots from which to operate. Development and subdivision reduces the land base and the resources that these industries are reliant upon* **[emphasis added]**.”¹¹
- 24 It is submitted that these excerpts from the WDP are grounds to sufficiently classify the equine industry as a regionally significant industry for the purposes of the WRPS. If this is accepted then it is submitted that

⁹ Above n 1, Section 6.1.2.4 at page 87.

¹⁰ Section 1 – Strategic Policy Framework, Waipa District Plan, at 1.1.3 (Introduction).

¹¹ Section 1 – Strategic Policy Framework, Waipa District Plan, at 1.2.2 (Resource Management Issues – The future settlement pattern of the District).

the proposal cannot be said to be consistent with Objective 3.2 and Policy 4.4 of the WRPS, in particular Objective 3.2(a) which seeks to maintain and enhance access to resources to provide for regionally significant industry and Policy 4.4(a) which recognises the value and benefits of regionally significant industry. The reason for this inconsistency is the adverse effects that the Application will have on the Submitter's equine activities if the end section of the canter track is not relocated.

District Plan Objectives and Policies – Section 104(1)(b)

- 25 As outlined in the s 42A report, the WDP contains a number of objectives and policies that directly relate to the Application.

Rural Zone Provisions

- 26 The Site is located within the Rural Zone in the WDP. Section 4 of the WDP deals with the Rural Zone. The following objectives and policies are seen as relevant to this application.

4.3.2 Objective - Rural activities: farming:

The capacity of rural areas and rural resources to support farming activities and lawfully established rural based activities is maintained.

Policy - Equine industry

- 4.3.2.5 *To enable the activities of the equine industry to be undertaken within the rural areas of the District.*

- 27 The s 42A report states that Objective 4.3.2 and its associated policies seek to ensure farming activities can occur in the Rural Zone.¹² It is submitted that the ambit of Objective 4.3.2 is wider than this and an important part of this objective is the "support" of lawfully established rural based activities which by strict interpretation, are separate to farming activities. It is submitted that this support extends to the support of equine activities, demonstrated by Policy 4.3.2.5. The Application therefore must consider the extent of these effects on existing lawful equine activities, as is currently operated by the Submitter. It is submitted that granting the Application without conditions to sufficiently mitigate its adverse effects on the equine activities on the Submitter's Property is contrary to this Objective and Policy.

¹² At [10.9], s 42A Report.

- 28 The s 42A report seems to dismiss Policy 4.3.2.5 by stating that the Application is not seeking to restrict the equine activity in any manner and for this reason the Application upholds Objective 4.3.2 and Policy 4.3.2.5. It is submitted that the effects of the Application on the equine activity must be considered and that both the Application itself and the s 42A report has failed to take this into account. In fact, the Application does not consider Objective 4.3.2 nor Policy 4.3.2.5 and we consider this is an oversight. The Submitter is open to discussions around how the remedial measures can be taken by the Applicant to ensure that the adverse effects of the equine activities undertaken on the Property are limited.
- 29 Ms Thomas states that while the Submitter has expressed concern regarding the effects of the mineral extraction activity on the Submitter's equine activity, the mineral extraction is not seeking to restrict the equine activity in any manner. We would suggest that this statement is inaccurate or at least incomplete. The Application is for the establishment and operation of a sand quarry and the adverse effects of the proposal as a whole must be assessed against the relevant objectives and policies of the WDP. It is submitted that the evidence put forward by the Submitter and its experts clearly illustrates that the Application will restrict the equine activities that can be carried out on the Submitter's Property to an unreasonable degree in that existing facilities will become unsafe and unusable.
- 30 As a result, contrary to the s 42A report, it is submitted that the proposed activity does not uphold Objective 4.3.2 nor Policy 4.3.2.5.

4.3.5 Objective - Rural activity: mineral and aggregate prospecting, exploration and extraction

*To meet the District's and Region's mineral and aggregate needs from predominantly local sources and ensure that the location, use and development of the District's mineral and aggregate resources is provided for, **subject to the management of the adverse effects associated with such activities.***

Policies - Mineral extraction

4.3.5.3

*Mineral extraction activities are managed so that the adverse effects of the activities are internalised, or avoided, remedied or mitigated **as far as practicable** through methods such as management, mitigation and rehabilitation plans that address matters such as:*

*(a) **Managing** dust, noise, vibration, **access** and illumination to **maintain amenity values**, particularly during the night-time; and*

(b) Ensuring buildings and structures are appropriately located in relation to boundaries, and of an appropriate scale; and

(c) Undertaking remedial measures during extraction operations; and

(d) Requiring sites to be rehabilitated and ensuring appropriate materials are used for this purpose.

- 31 The Application states that the WDP recognises the importance of meeting the District's mineral and aggregate needs from predominantly local sources, subject to the management of the adverse effects associated with those activities and that the Rural Zone is an appropriate location provided adverse effects are appropriately managed.¹³ There is no reference in the Application to the relevant objectives and policies which relate to equine activities such as Objective 4.3.2 and 4.3.2.5. As a result, the Application has not considered the adverse effects of the proposal on equine activities and has not sufficiently set out how the adverse effects of the proposal will be internalised, avoided, remedied, mitigated or managed in accordance with Objective 4.3.5 and Policy 4.3.5.3.
- 32 There is case law which holds that there is a greater expectation of internalisation of the effects of newly established activities than of older existing activities.¹⁴ This is a sound and logical principle – an activity should not be consented if it will place an unreasonable burden on an existing activity. In this instance, the burden comes in the form of serious health and safety risks on activities which are carried out by the Submitter, which could result in both human and animal injury. At its core, such outcomes are what the RMA seeks to prevent.¹⁵

¹³ Above n 1, at Section 6.1.2.6 at page 99.

¹⁴ *Orica Mining Services New Zealand Limited v Franklin District Council* W032/09 Environment Court, Wellington, 5/5/2009, Thompson Judge at [53].

¹⁵ See the reference to *health and safety* in s 5(2).

- 33 It is recognised that total internalisation of effects is not feasible in every case and that the RMA does not prescribe this. However that does not mean that neighbours to a proposal should bear the adverse effects of a proposed activity or restrict their own activities so as to avoid or mitigate the adverse effects of the proposed activity if it is not reasonable to do so¹⁶, especially given there is a greater burden on the proposed activity to internalise its adverse effects. In this instance, it is submitted that the Application unreasonably expects the submitter to bear the adverse effects of the proposal. Notwithstanding this, suitable conditions could be granted to allow for the Application to be granted on the condition that adverse effects are sufficiently mitigated. This is consistent with the principle of integrated management which is regularly provided for in high level planning documents such as the WRPS.¹⁷
- 34 The Environment Court has also stated that if a proposal for a discretionary activity does not achieve the objectives and policies of a plan and does not attempt to do so, then this will be a factor holding significant influence in the decision making of whether or not to grant consent.¹⁸ The Submitter does not deny that there are objectives and policies in the WDP which provide for mineral extraction but the provision for such activities should not come at the expense of making the continuation of a pre-existing activity untenable, especially when that activity is considered a regionally significant industry. The Application does not consider the adverse effects on the Submitter's equine activity and it is submitted that the Application places an untenable risk on the health and safety of both the horses and riders engaged in equine activities on the Submitter's Property.

Part 2

- 35 The Application states that it is consistent with Section 5 of the RMA and that with respect to the requirement that effects be avoided, remedied or mitigated (section 5(2)(c)), the Application satisfies this by adherence to

¹⁶ *Orica Mining Services New Zealand Limited v Franklin District Council* W032/09 Environment Court, Wellington, 5/5/2009, Thompson Judge at [54].

¹⁷ See for example, *Objective 3.1 – Integrated Management*.

¹⁸ *Pillu v Hutt City Council* Environment Court, Wellington, 20/1/2006, W008/06, Smith Judge, Howie Commissioner, Manning Commissioner at [42].

various management plans¹⁹ and presumably the proposed draft conditions of consent.

- 36 The Application states case law has established that section 5(2)(c) requires that an applicant must do what is necessary, given the circumstances of the particular case, to lessen the severity of the adverse effects.²⁰ This statement is accepted to an extent but needs to be put in context. The Environment Court has held that while the RMA does not require the elimination of all risk, the adverse effects of a particular proposal may be an “unacceptable impost on the surrounding environment” to the degree that consent to that proposal should not be granted.²¹ Further, health and safety issues are a fundamental part of the purpose of the Act²² and creating a risk to the health and safety of participants to a lawful and existing activity to an unreasonable level by granting consent to a new activity would be contrary to the principles sought to be implemented by the RMA.
- 37 The Environment Court has also stated that in every case, proposed activities should internalise their effects unless it is shown, on a case by case basis, that they cannot reasonably do so.²³ The RMA dictates that emitted effects are to be avoided, remedied or mitigated by the emitter to the greatest degree reasonably possible.²⁴ It is submitted that the Application has not reasonably sought to internalise the adverse effects of the proposal. As a result, the Application cannot be granted in its existing form and to grant consent would be contrary to the purpose of the Act.

Conclusion

- 38 The Submitter still has outstanding concerns in relation to the adverse effects that the Application will have on the equine activities that it operates on its Property and its adverse effect on traffic and safety.
- 39 It is submitted that unless the end section of the Submitter's canter track is relocated, then the adverse effects of the Application cannot be said to

¹⁹ Above n 1, at Section 7.1 at page 107.

²⁰ Above n 1, at Section 7.1 at page 108.

²¹ *Orica Mining Services New Zealand Limited v Franklin District Council* W032/09 Environment Court, Wellington, 5/5/2009, Thompson Judge at [65].

²² *Yachting New Zealand v Tasman District Council* [2004] NZRMA 373 at [34].

²³ At [52].

²⁴ At [52].

have been sufficiently avoided, remedied or mitigated and the Application should be declined accordingly.

40 The Submitter therefore seeks the following relief:

- (a) That consent only be granted for the Application if the new condition at paragraph 57(3) of the Joint Evidence of Keith and Amanda Walker is included in the consent (or a condition which has the same intent and outcome in that it sufficiently avoids, remedies or mitigates the adverse effects of the Application on the equine activities undertaken by the Submitter on its Property);
- (b) That if consent is granted for the Application, the suite of amendments sought to the Applicant's consent conditions at paragraph 56 of the Joint Evidence of Keith and Amanda Walker are incorporated into the consent conditions;
- (c) That if consent is granted for the Application, the suite of new conditions at paragraph 57 of the Joint Evidence of Keith and Amanda Walker are included in the granted consent;
- (d) That if the Application is granted, the consent conditions are amended in accordance with the proposed conditions outlined in the Statement of Evidence of Mr Apeldoorn and/or as amended in his further comments to this hearing.

Dated: 23 November 2020



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