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

CLOSING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

Dated: 24th November 2020

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MAY IT PLEASE THE COMMISSIONERS

1. These written closing 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"). They follow the brief verbal closing which was given prior to the adjournment of the hearing on 23 November 2020.

2. The closing submissions focus on the matters arising during the hearing and the remaining issues in contention. As such, these submissions address:

   (a) The legal submissions of counsel for the Walkers, particularly the relevant legal framework and principles which apply to the application.
   (b) Potential "equine" effects (i.e., effects of the proposed activity on the horses at the Walkers' property).
   (c) Traffic effects.
   (d) Overall assessment.

3. Before turning to consider the substantive matters, counsel notes that there was a "typo" error in a quote in paragraph [24] where the word "relevant" should read "irrelevant". This concerns the permitted baseline section of the submissions. The corrected paragraph and quote is set out below:

   "This concept was addressed in *Queenstown Lakes District Council v Hawthorn Estate Limited*[1] 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 irrelevant, **effects of activities on the environment that 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.

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

[Emphasis added]."

LEGAL FRAMEWORK

4. The opening legal submissions for the Applicant set out the relevant legal framework which was also reflected in the evidence of Mr Chrisp. For completeness, counsel notes the relevance of section 104B regarding the determination of applications for discretionary or non-complying activities. That is, after considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority:

   (a) may grant or refuse the application; and
   (b) if it grants the application, may impose conditions under section 108.

Relevant statutory provisions and applicable legal principles

5. Counsel for the Walkers made submissions that section 104(1)(ab) applies in this case. With respect, it does not. The question of "offset" or "compensation" is not in play in this Application. An effect must first be identified, and evidence be produced to support that contention. Putting aside that enquiry, the legal submissions went on to state that a condition should be imposed to relocate the canter track.

6. Putting aside the question of validity of such a condition, requiring that this work be completed is a form of direct "mitigation" – it is not an offset and it is not compensation. Those concepts are ordinarily relevant in the context of complex environmental matters where some effects of an activity cannot be avoided, remedied, or mitigated to an acceptable level. Furthermore, the Applicant has not "proposed" or "agreed" such a measure.

7. Counsel for the Walkers presented a (planning) argument that the Waikato Regional Policy Statement ("WRPS") Policy 4.4 (Regionally

significant industry and primary production), is relevant to considering effects on the Walkers' property.

8. That is misguided. While the equine industry at the regional scale falls within the definition of "regionally significant industry", the equine activities on the Walkers' individual property do not. Furthermore, there was no evidence presented which would call into question the consistency or otherwise of the proposed activity with Policy 4.4. The Application is for a sand quarry and it is that activity which must be assessed against the WRPS. To suggest that the proposed sand quarry must be assessed against Policy 4.3.2.5 is misguided as it is a policy relating specifically to enabling equine activities. The sand quarry is not preventing equine activities to occur on the Walkers' property or anywhere else in the District.

EQUINE ISSUES

9. Counsel for the Walkers made submissions that, based on 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.[2]

10. In my submission, the evidence for the Walkers did not demonstrate that the trucks turning into the quarry will generate the level of adverse effect claimed by the submitters, or a risk of such effect. Their witnesses did not present any empirical or other research to support their opinions. Furthermore, only one of the witnesses (Mr Johnstone) appeared to have spent time at the Walkers' canter track. There is no evidence that the Walkers will be precluded from using the canter truck due to the operation of the quarry.

11. Ms Bradwell gave a recorded statement and was not available for questioning. She is based in the United Kingdom ("UK") and referred to

[2] Paragraph 7 of legal submissions for Amanda and Keith Walker (Harkness Henry).

having “seen the pictures” of the canter track. While she may have visited the property in the past, her examples of animal fright were UK based. Accordingly, her evidence should be given little, if any, weight.

12. Ms Masters noted that she is not based in Cambridge. She also referred to her having “pictured a large truck” at the entrance to the proposed quarry, when giving evidence about the effects on horses. She conceded that this was her “imagination”, rather than first-hand experience of horse fright, due to a horse seeing a vehicle. This “evidence” is speculative and should not be afforded any weight in evaluating the effects of the Application.

13. Sir Mark Todd was not a witness and was not available for questioning. Accordingly, his email statement should be given no weight in evaluating the effects of the Application.

14. The Walkers and their traffic expert, Mr Apeldoorn, made numerous references to the need for the gate (or access) on the boundary of the Walker property to be retained. It remains unclear as to what this is used for as it is not a complying vehicle entrance.

15. In contrast to the above, Mr Marsh presented first-hand and local examples of working and walking horses next to or along busy roads. He is familiar with the site and the local area. He does not consider there to be an issue with trucks entering and exiting the quarry site, with reference to potential effects on horses.

16. As indicated at the hearing, the Applicant is prepared to re-instate the hedge and relocate the access gate which is currently located opposite the proposed quarry site entrance. However, this cannot be imposed as a condition of consent for the same reasons set out above in relation to the canter track. This could be achieved by way of side agreement between the Applicant and the Walkers. For the avoidance of doubt, the

Applicant is not prepared to enter into a similar agreement regarding the canter track for the reasons set out above (and discussed at the hearing).

Legal principles

17. As stated in opening legal submissions, the RMA is not a "no risk" statute.[3] There is always an element of risk and it is for the Commissioners to take a practical and robust approach to the purported risk in this case and evaluate the degree of that risk.[4]

18. In doing so, it is appropriate to consider the existing environment which includes traffic on Kaipaki Road, with a 100km speed limit, and the fact that heavy (and potentially noisy) vehicles and trucks already use that road.

19. Relevantly, Mr Inder for the Council noted at the hearing that the existing distance between the road edge of Kaipaki Road and the gate to the Walkers' property is approximately 8.2m. If the right turn bay is installed, this would reduce to approximately 5.2m. However, if the right turn bay is centrally located, this would result in distance of 6.7m. At worst this is a 3m difference – contrary to the evidence of Mr Apeldoorn who recorded that the distance would be reduced to 1.5m.[5]

20. In *Land Air Water Assn v Waikato RC* EnvC A110/01, the Environment Court observed that, in the context of resource consent applications for a landfill, the RMA did not explicitly promulgate a "no risk" approach and that case law has indicated that a certain element of risk is acceptable. The Environment Court also observed that the measure of risk and its assessment and the acceptable degree of risk avoidance are matters of fact in each particular case.

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[3] Opening legal submissions for the Applicant, 23 November 2020, paragraph [41].
[4] *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 130,
[5] These numbers are as noted by Council during the hearing on 23 November 2020. Accordingly, these are referred to as being "approximate".

21. The Environment Court stated that it is required to exercise its discretion in the circumstances of each case, including:

    (a) Evidence of adverse effects or risk to the environment, rather than mere suspicion or innuendo;
    (b) The gravity of the effects, regardless of scientific uncertainty, if they do occur;
    (c) Uncertainty or ignorance regarding the extent, nature, or scope of potential environmental harm;
    (d) The effects on the environment and whether they are serious or irreversible;
    (e) Recognition that the Act does not endorse a "no-risk regime"; and
    (f) The impact of otherwise permitted activities.[6]

22. Against this background, there is simply no reliable evidence of a significant risk or a potential adverse effect on the Walkers' horses or riders to justify declining the Application – or to require the Applicant to relocate the canter track. There were a range of opinions about a potential risk of an effect (albeit these were unquantified and not backed up with real examples or research), and no evidence of the likelihood of an effect arising. This is not a situation of scientific uncertainty, which in some circumstances lends itself to the application of a precautionary approach.

23. Even if there was a risk of an effect on the horses or riders, that does not mean that consent should be declined. Indeed, all witnesses discussing equine issues described how it is common practice to expose their horses to things that might cause "fright", so they are, ideally, "bomb proof". In my submission, based on the evidence of Mr Marsh, any risk is very low to the extent that any potential effect is minor.[7]

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[6] *Land Air Water Assn v Waikato RC* EnvC A110/01, paragraph [515].
[7] *Franks v Canterbury Regional Council* unreported High Court Christchurch CIV 2003-485-0011131 Pankhurst J, 10 June 2004 at [16].

***Vires* of proposed condition**

24. Counsel for the Walkers conceded that the proposed condition requiring the Applicant to relocate the Walkers' canter track is unlawful. In my submission, even if the Applicant were to agree to such a condition, it would fail the requirements under section 108 of the RMA that a condition be reasonable and certain. While a "condition precedent" is a valid approach in some circumstances, unless there is certainty that the "preceding" works can be carried out and that the consent will not be frustrated, the condition will be invalid.

25. In the context of this matter, if a condition precedent were imposed to require works to be carried out on a third-party property (i.e., the Walkers' property), the third party could frustrate the consent by refusing to allow the works to be carried out. Such a situation is untenable.

TRAFFIC EFFECTS

26. In my submission, Mr Campbell for the New Zealand Fieldays Society ("NZFDS") was unable to articulate what effects on NZFDS were fundamentally at issue, nor was he able to explain how/why the proposed draft conditions should be amended to address those concerns. In my submission, his evidence should carry little weight.

27. The key outstanding issue as between the Applicant and Council officers appears to be the condition requiring monitoring of the Mellow Road/Kaipaki Road intersection and a potential future requirement that the Applicant pay additional financial contributions based on the outcomes of that monitoring.[8]

28. Mr Black addressed this issue in his supplementary evidence at paragraph [36]. In addition to the reasons against the proposed condition set out by Mr Black, in my submission such a condition is unreasonable and is not

[8] The Council officers/traffic expert did not expressly address this point in the hearing.

"directly connected" to the proposed activity (section 108AA). Determining cause and effect is fraught and it is unreasonable to place the burden of monitoring on the Applicant who is only one of many who will use the intersection. The Applicant is already paying financial contributions based on the formula in the Waipa District Plan (in addition to rates and road user charges/petrol tax), and it is unclear as to the legal basis Waipa District Council would seek to impose an additional charge.

29. Accordingly, the Applicant opposes the imposition of this condition.

CONDITIONS

30. The planning and traffic witnesses for the Applicant have considered the evidence of Mr Inder during the hearing and have reviewed the proposed draft conditions to produce an updated suite of conditions. In summary, most of Mr Inder's suggested changes to the conditions have been accepted by the Applicant. The **attached** conditions reflect the Applicant's position on conditions, following the hearing of evidence on 23 November 2020 ("Conditions supported by Applicant").

CONCLUSION

31. The evidence demonstrates that all actual and potential effects of the Application are acceptable on the basis that these are avoided, remedied, or mitigated through the Conditions supported by Applicant. Accordingly, it is appropriate and consistent with the purpose of the RMA for the Commissioners to grant consent for the Application subject to the Conditions supported by Applicant.

Dated this 24th day of November 2020

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M Mackintosh
Counsel for Shaw's Property Holdings Limited