BEFORE HEARING COMMISSIONERS
IN HURUNUI

UNDER THE	Resource Management Act 1991 (“**Act**”)
IN THE MATTER OF	Notified resource consent applications **RC220060** and **RC220072** for subdivision and land use consent for Stages 3-6 of a multi-staged residential development known as “The Clearing”, located at 64 Amberley Beach Road and 187 Carters Road, Amberley
BETWEEN	**UWC LIMITED**
	Applicant
AND	**HURUNUI DISTRICT COUNCIL**
	Consent authority

REPRESENTATIONS IN REPLY ON BEHALF OF THE APPLICANT

Commissioner: Dean Chrystal (Chairperson)

Commissioner: Dave Smith

1. These representations in reply on behalf of the applicant address matters arising in the course of the hearing. They are accompanied by:

   (a) *A response to the Panel’s “Questions for Mr Chen” recorded in Minute 3*: being a memorandum by Ms Hilliker, who supervised Mr Chen’s work and assessment as recorded in the Acoustic Report dated 21 March 2022. While in memorandum form, Ms Hilliker has attested to the Code of Conduct, and it can be received as evidence. Also, while it is in written form, it can be considered the equivalent of Ms Hilliker answering the Panel’s questions at the hearing, which she could have done had she been available.

   (b) Supplementary statement of evidence of (Engineering) Gary Stevenson.

(c) Supplementary Statement of Evidence (Transport) of Wayne Gallot.

Each of these statements also responds to the Panel's questions or information sought in Minute 3, or otherwise raised in the hearing.

(d) *Updated Masterplan AMBE-DRG-LA-101 Rev B*. This shows, in red lines, the replacement of the originally proposed smaller lots on the SH boundary with larger lots, each over $700m^2$. Other changes should be self-explanatory.

(e) *Updated scheme plans*:

(i) Scheme Plan (Rev E) 301-304, Overall – amended layout with staging as lodged.

(ii) Scheme Plan Pot. Staging Amend (Rev E) – updated layout with the amended Stage 5 boundary.

The Scheme Plans reflect the updated Masterplan. They each also show in red outline the lots that will be affected (ie lost) if a first flush basin is to be adopted rather than the proprietary Filtera system. The second Scheme Plan has an amended Stage 5 boundary, which can be adopted if the Panel determines that there should be a "hold point" to limit further development to Stage 4 only until the Carters Road SH 1 link becomes operational. The applicant does not consider this necessary, but wished to provide that option for the Panel if it decided otherwise. These matters are addressed further below.

(f) *Covenant (as applied to earlier stages)*.

(g) *Updated Conditions*. These have been agreed with the Council, save for some minor final changes.

2. As with my opening representations, my preference is to generally let the supplementary material from the experts speak for itself. That said, I address some matters addressed in the supplementary evidence, and other matters, in this reply as follows:

(a) density issues and legal considerations;

(b) lot sizes adjoining the SH boundary, and maintenance conditions;

(c) the Carters Road SH 1 link issue;

(d) the stormwater treatment system: proprietary or first flush basin;

(e) design controls – covenants or conditions;

(f) ECan's approach to take (only) consents; and

(g) scope of reply and final steps.

3. In addition, in terms of the specific questions in Minute 3, the Attachment to this memorandum provides a response or indication as to where to find the response to each of the questions.

Density issues and legal considerations

4. At times, the Panel seemed potentially troubled at the density proposed and the extent to which that might create a precedent or undermine the integrity of the plan.

5. The leading case on precedent remains the Court of Appeal decision in *Dye*:[1]

> The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have consistency in the application of legal principles, because all resource consent applications must be decided in accordance with a correct understanding of those principles. But a consent authority is not formally bound by a previous decision of the same or another authority. Indeed in factual terms no two applications are ever likely to be the same; albeit one may be similar to another. The most that can be said is that the granting of one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities.

6. Precedent (such that it exists) is linked to the concept of integrity of the plan, which was mentioned at the hearing. As Cooper J observed in *Rodney District Council v Gould*:[2]

> The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and

[1] *Dye v Auckland Regional Council* [2002] 1 NZLR 337, at [32].
[2] *Rodney District Council v Gould* [2006] NZRMA 217 (HC) at [99].

> policies whether under s 104(1)(d) or s 105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the statute strongly suggests that their application in any given case is not mandatory. In my view, a reasoned decision which held that a particular non-complying activity proposal was not contrary to district plan objectives and policies could not be criticised for legal error simply on the basis that it had omitted reference to district plan coherence, integrity, public confidence in the plan's administration, or even precedent.

7. This strongly suggests that the focus should be on the statutory tests under s104D, rather than any "overlays". In that regard, the idea of any requirement that a non-complying activity be an exception (also mentioned in the course of the hearing) is "unhelpful". As recently found in *Gray v Dunedin City Council* [2023] NZEnvC 45, at [222]:

> We do not find it helpful to apply a further non-statutory test of whether the proposal is a true exception.

8. Finally, as discussed at the hearing, there is no need or requirement under the RMA to seek a plan change, if a proposal can meet one or other of the s104D gateway tests. It would be an unduly onerous requirement (and contrary to the scheme of the RMA itself) for an applicant to have to request a private plan change for every material departure from a standard, where the effects are minor, or the proposal is not contrary to the objectives and policies as a whole. It would add considerably to delays and costs, for both the developer and, ultimately, the future home owners.

Lot sizes adjoining the SH boundary, and maintenance conditions

9. It appeared at the hearing as if the smaller lot sizes originally proposed to adjoin the SH boundary were perceived as one of the most "problematic" aspects of the proposal. While the applicant, and, more importantly, its experts, were satisfied that these smaller lot sizes were appropriate, and would still achieve good amenity and urban design outcomes, the applicant is prepared to now amend its proposal in that regard. There are now proposed to be only 13 lots adjacent to the SH, down from 21 (reduced yield 8), with lot areas ranging from 700-891m² (where they previously ranged from 410-612m²).

10. The applicant is confident that this change will sufficiently address the concerns raised in respect of this issue.

11. As for maintenance of the proposed acoustic fence and planting requirements (on the landowner's property), it is the applicant's position

that this is not an uncommon situation – although it may be more common for the such acoustic fences and planting to be on land to be vested in a Council. I observe that concerns are usually raised with either option. If on private land, questions as to enforcement of maintenance arise, while if on vested land, questions of the cost of maintenance to the Council arise.

12. In the present circumstances, while the area of land for the fence and planting may be of little "functional" use to a landowner, it does form part of their property and land value. Maintenance obligations are to be highlighted by consent notices, and can be enforced by Council. In the circumstances, this is considered more appropriate than having that land vested in the Council together with all ongoing obligations for maintenance.

13. It is also noted that the conditions currently provide for a 2-year maintenance obligation of the planting. That is considered reasonable in the circumstances, particularly where the planting is to first be approved through the landscape plan certification process, such that appropriate low maintenance and fast growing species can be required to be planted. 2-years is also a commonly adopted period. Accordingly, a 5-year obligation as is understood to be sought by NZTA Waka Kotahi is considered unreasonable and unnecessary.

The Carters Road SH 1 link issue

14. The applicant understands the Panel's reservations about any perceived reliance on the Carters Road SH 1 link becoming available, in order to address effects of the proposal – but without certainty that the SH 1 link will become available.

15. With this concern specifically in mind, the applicant's expert advice is that:[3]

> ... the surrounding road network will continue to operate at acceptable levels of service during both the AM Peak and PM peak periods with full development of Stages 1-6 of The Clearing regardless of whether or not the planned new Carters Road (SH1) link road and intersection are in place and operational

16. On this basis no staging "hold" is considered appropriate.

17. However, if the Panel thought it necessary, the applicant has provided a Scheme Plan with a Stage 5 boundary that could provide a hold point, so

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[3] Mr Gallot's supplementary statement.

that Stages 5 and 6 could not proceed until the SH 1 link becomes available.

18. If so, the Panel would need to include a condition at the Stage 5 point as follows:

> **STAGE 5 – Lots 274–284, Lots 287–324, Lot 1004, Lot 1006, 1007, Lot 5000, and balance land**
>
> **Deferment**
>
> The section 224(c) certificates for Lots 274–284, Lots 287–324, Lot 5000, and balance land shall not be issued until such time that a road link can be provided to the new intersection on State Highway 1.

19. It would logically follow that Stage 6 could not proceed until Stage 5 had occurred, but a similar condition could also be included for completeness:

> **STAGE 6 – Lots 285-286**
>
> The section 224(c) certificates for Lots 285-286 shall not be issued until such time that a road link can be provided to the new intersection on State Highway 1.

Stormwater treatment: proprietary system or first flush basin

20. There was some discussion over this issue at the hearing.

21. The applicant takes the view that it is most appropriate to have the final stormwater treatment design resolved by the Regional Council, as it is the consent authority for such matters. The District Council will be entitled to participate in that consent process, and put its concerns jn respect of the proprietary system that is proposed by the applicant to the Regional Council.

22. The District Council will then be required (unless it were to appeal the Regional Council's decision) to accept the Regional Council's decision, and, ultimately, the vesting of either the proprietary system or first flush basins in it.

23. The Scheme Plan and conditions now provide for either option (noting the loss of housing lots if the first flush basin approach is adopted).

24. It is also noted that district councils routinely take over stormwater systems as land is developed within their urban environments (or is brought into their urban environments). To the extent there is a cost of doing so,

including any cost of maintenance of a proprietary system rather than first flush basins, that will, in time all be factored into rates.

Design controls – covenants or conditions

25. The applicant has now provided a copy of the covenant it requires purchasers to accept to the Panel. These require compliance with the Design Manual, as follows:

> The Covenantor hereby covenants that they shall:
>
> …
>
> (b) Not apply for a building consent or commence construction on the Property unless the Developer has given written approval to the Covenantor's:
>
> (i) site plan for the Property showing driveways, fencing, building layout and location, patios and basic landscaping including positions of trees, shrubs, garden beds and lawn areas;
>
> (ii) floor plans of the dwelling to be constructed on the Property showing floor areas and locations of windows and doors;
>
> (iii) a full set of elevations of the dwelling to be constructed on the Property from all sides; and
>
> (iv) a list of materials indicating all exterior materials, finishes and colours (walls, roof, window and door frames, gutters and driveways) for the dwelling to be constructed on the Property.
>
> The Developer shall be entitled to withhold its consent if the documents described in this clause and presented by the Covenantor to the Developer for approval do not comply with the Design Guidelines and/or otherwise with the provisions set out in this instrument.

26. The covenant approach is part of the basis on which the application has been put forward, and its acceptance and "implementation" has worked without issue for the earlier stages (and in other circumstances). It is also in the applicant's interest to ensure that purchasers of individual lots do meet the requirements of the Design Guidelines, as that ensures that houses are of an appropriate standard and fit for the community. Purchasers do not want sub-par or out of character houses popping up next door to them.

27. On this basis, and, as agreed with the Council officers, there is no need for a specific additional condition or consent notice in respect of this issue.

ECan's approach to take (only) consents

28. The Panel raised the issue of ECan's current approach to take (only) consents, following the Court of Appeal Decision in *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] 3 NZLR 918. It is the subject of an ECan technical advice, dated 19 August 2022. The note identifies potential issues for (among other things) stand-alone takes of water where there is no use (but typically with an associated discharge) eg for:

   (a) stormwater treatment wetlands intercepting high groundwater levels;

   (b) on-going removal of 'nuisance' high groundwater levels (e.g. impacting on basements or other infrastructure).

29. ECan takes the view that these must be considered under the general "take and use" rules (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater, or a relevant sub-regional rule where it prevails over the regional-wide rules). This can be problematic in fully or over-allocated allocation zones.

30. To the extent that the consequences of the AWA decision might be an issue for the present Project, it is considered that this is not a matter for this Panel, on the basis that:

   (a) Any such consents fall within ECan's jurisdiction, as opposed to that of HDC.

   (b) If there are issues that arise before ECan, it will be for the applicant to resolve with ECan. ECan's interpretation is not universally accepted, and each application or activity needs to be considered carefully on a case-by-case basis.

   (c) The AWA decision was heard by the Supreme Court earlier this year, and so the approach to be taken may change, in any event, as a consequence of that decision.

31. In short, the Panel can confidently proceed to make its decision on matters within HDC's jurisdiction, and leave any AWA "fallout" issues (if any) for the applicant to resolve with ECan.

Scope of reply and final steps

32. As will be evident, the additional information the applicant has provided is focused and addresses matters arising in the course of the hearing, rather than relating to new issues. The extent of information provided is not considered to be unusual, and no prejudice arises to any party.

33. The applicant has no objection to Council officers providing any final comment or confirmation of their position arising from the further information only, by 4 July 2023, as directed by the Panel (but strictly on the basis that no new issues are raised that would then require the applicant to have to address them – there needs to be finality to the process).

34. The applicant thanks the Panel for its thorough and thoughtful consideration of the application and approach to the process.

Project Manager for the Appellant

22 June 2023

Attachment – confirmation of responses to the Panel's questions in Minute 3

	Question/ issue	Location of response
1.	Questions of Mr Chen.	Memorandum of Ms Hilliker.
2.	Mr Gallot was to confirm the date of the traffic surveys.	Mr Gallot's supplementary statement.
3.	The Applicant was to provide a potential mechanism for the Carters Road SH 1 link.	Alternative Scheme Plan provided with an amended Stage 5 boundary, with a draft condition in the reply representations.
4.	Mr Stevenson was to provide information regarding the frequency with which the attenuation ponds would have at least 1m of water.	Mr Stevenson's supplementary statement
5.	The Applicant was to provide a revised Master Plan, which addressed: a. The location of the lower (2m) acoustic bund for lots 253-256 and 279, 280, 285 and 286 b. The location of the playground and Filterra stormwater system c. The location of the public fencing of the stormwater system d. Where the single storey dwelling restriction applied	Revised Master Plan provided, covering (a), (b). Item (c) is resolved as no fencing is proposed, as explained in Mr Stevenson's supplementary statement. Item (d) is explained in the memorandum of Ms Hiliker, final bullet point p5: "We still recommend that two-storey buildings are not constructed on road-side lots 256 and 259 –279". This translates in the Revised Masterplan to Lots 256 and 259-270, and 279.
6.	The Applicant was to consider whether development could occur on Lot 175 without the need for further resource consent.	Lot 175 and 176 have been redesigned to address this potential issue, as shown on the updated Masterplan.
7.	The Applicant was to provide a revised set of conditions. On this issue we would expect that any revision was based on discussions with the Council and that matters that remained in dispute were identified and the various reasoning provided in that regard.	Updated conditions provided
8.	An assessment of the Amberley Beach Road / Carters Road intersection in the morning peak period.	Mr Gallot's supplementary statement.
9.	An assessment of the lifetime costs of the Filterra system.	Mr Stevenson's supplementary statement