

**IN THE MATTER OF**

The Resource Management Act  
1991

**AND**

**IN THE MATTER OF**

An application by L D Cole to the Waikato District Council for land use consent to operate a depot associated with a civil contracting business, to import 5,500m<sup>3</sup> of cleanfill and for retrospective consent to the placement of 2,500m<sup>3</sup> of existing fill on a property at 1559A Churchill Road, Tuakau

(Waikato District Council file reference: LUC0049/16)

**DECISION OF INDEPENDENT HEARING COMMISSIONER RUSSELL DE LUCA  
ON BEHALF OF THE WAIKATO DISTRICT COUNCIL**

**SUMMARY OF DECISION**

That the application be **granted consent** on the grounds that:

- Subject to on-going compliance with the conditions of consent, any adverse environmental effects created by the proposal, including effects on the rural character and amenity values of the locality within which the subject site is situated, will be no more than minor; and
- While contrary to policies 17C.2.2.3 and 17C.2.2.3A of the operative Waikato District Plan (the aims of which are to limit the range of industry and service activities within the Rural Zone to those with a clear connection to, or which provide services to, rural activities, and to avoid activities which do not rely on or support the productive use and capacity of rural land), the nature and scale of the contracting depot activity is such as to not be contrary to other Rural Zone District Plan objectives and policies relating to the rural land resource and to the character and amenity values of the rural environment; and
- Given the foregoing, granting consent is not considered likely to create a planning precedent nor undermine the integrity of the District Plan.

## **DETAIL DECISION REPORT**

### **Introduction**

- [1] Pursuant to section 34A of the Resource Management Act 1991 (“the RMA”), I was appointed by the Waikato District Council (“the District Council”) as sole independent commissioner to hear and determine the above application.

### **Background**

- [2] The applicant owns a 4.7494ha rural property located at 1559A Churchill Road, Tuakau. In April 2012 the District Council became aware of the unauthorised operation of a contracting depot and depositing of fill within an area of approximately 3000m<sup>2</sup> land on the property adjacent to the Churchill Road frontage. There followed a protracted length of time during which the District Council initiated enforcement action that culminated in the Environment Court issuing an enforcement order in April 2015. Under directions of the Court, the applicant then lodged a resource consent application with the Council to retrospectively regularise the unauthorised activities which had been and were being undertaken. Following a further extended period of time during which the applicant provided additional information on the resource consent application and the Council commissioned an acoustic report on noise effects, the application was put through a limited notification process and the matter finally set down for a hearing on 10 August 2016.

### **Proposal**

- [3] The proposal is for the establishment and operation of a depot associated with a civil contracting business (Environmental and Construction Services Ltd) owned and operated by the applicant. As part of the unauthorised establishment of the depot, approximately 2,500m<sup>3</sup> of fill has already been deposited on the site and retrospective consent is sought for this activity while consent for an additional 5,500m<sup>3</sup> of fill is also sought so as to form an enlarged level platform within the site on which the depot activity will occur. On-site activities associated with the depot use include:
- a “Portacom” building for use as an administrative office; and
  - the storage, maintenance, servicing and minor repair of vehicles, plant, machinery and other equipment used by the contracting business.
- [4] Currently the vehicles and machinery operated by the contracting business comprise three diggers, one six-wheel truck, one four-wheel truck, one light utility vehicle, one loader and one bulldozer. For the majority of the time, most of these vehicles will be kept off-site, remaining on the sites of the various contracting jobs undertaken by the business. However, they may sometimes be returned to the depot site between jobs as well as for maintenance, servicing and minor repair work.
- [5] The business currently employs seven full-time equivalent staff (including the applicant) and it is intended that only one administrative staff member will be based at the depot site during usual business operating hours. Other employees will either travel direct to the sites of the jobs they are working on within the wider Auckland

region or will travel to the depot site first thing in the morning before leaving together in a company vehicle (most likely the light utility vehicle) and return to the depot at the end of the working day before then departing in their own vehicles.

- [6] Proposed hours of operation for the depot activity are 7.00am to 8.00pm, Monday to Friday and 8.00am to 5.00pm on Saturdays. No business activities will occur on the depot site on Sundays and public holidays.

#### **Site and locality**

- [7] The subject site (“the site”) comprises an area of land of 2,930m<sup>2</sup> lying within a 4.7494ha rural lifestyle property owned by the applicant, situated at 1559A Churchill Road, Tuakau. To the immediate north the site adjoins Churchill Road and is currently fenced off from both the road and the balance of the parent property. Adjacent to Churchill Road, the topography of the land within the site is flat (having been subject to previous unauthorised filling, consent for which is included within the current application) and then in the south falls steeply to lower lying land within the parent property including a small gully on the western side through which an existing stream runs.
- [8] The neighbouring property to the west of the site is a rural lifestyle property at 1599 Churchill Road owned by Mr & Mrs Russell who have lodged a submission opposing the current application.

#### **Notification and submissions**

- [9] The application was subjected to a limited notification process through which the owners and occupiers of six neighbouring properties were notified. Two submissions supporting and one submission opposing the application were received. Only the opposing submitters (Mr & Mrs Russell) requested to be heard in respect of their submission.

#### **Section 42A hearing report and other expert evidence**

- [10] In accordance with RMA section 103B, the following expert evidence was circulated to all parties prior the hearing:
- An RMA section 42A hearing report on the application prepared by Mr Kelly Cattermole, an “Intermediate Planner” employed by the District Council;
  - Planning evidence for the applicant, prepared by Ms Kylie Hall, a planning consultant employed by Baseline Group Ltd;

The scope of the foregoing documents includes an assessment of the actual and potential environmental effects of the proposal as well as an analysis of the relevant provisions of the applicable statutory planning instruments. Where appropriate, I refer to the relevant content of these documents elsewhere in this decision report.

#### **Site inspection**

- [11] I undertook an unaccompanied inspection of the site on the morning of Wednesday 10 August 2016, prior to the commencement of the hearing of the application on that same day.

## **Hearing**

- [12] The hearing was held on Wednesday 10 August 2016 at the Waikato District Council, 15 Galileo Street, Ngaruawahia, commencing at 1.00pm. Those in attendance were:

### Council

Mr Kelly Cattermole, Intermediate Planner and author of the pre-circulated S42A hearing report;

Ms Karleen Thomson, Consents Team Leader (West);

Mr Malcolm Brown, Consultant Land Development Engineer;

Mr Alan Parkes, Environmental Health Officer;

Ms Bridget Parham, legal counsel (Tompkins Wake).

Mr Cattermole presented supplementary evidence at the hearing in response to matters raised in the pre-circulated evidence of the applicant's planner and to other evidence presented at the hearing for the applicant and by the submitters.

### Applicants

Mr Lew Cole, applicant;

Ms Kylie Hall, Senior Planner, Baseline Group Ltd;

Mr John Ferguson, Director, Baseline Group Ltd;

Mr Chris Shanks, Contaminated Land Specialist, Tonkin & Taylor Ltd;

Mr Shane Moore, Contaminated Land Practitioner, Tonkin & Taylor Ltd;

Ms Hall presented supplementary evidence relating to matters traversed in her pre-circulated principal evidence.

### Submitters

Mrs Susan Russell and Mr Warren Russell.

Mrs Russell presented a prepared statement of evidence and both she and Mr Russell provided additional comments in response to questions and matters raised in respect of evidence presented on behalf of the applicant.

## **Draft consent conditions**

- [13] Following presentation of the applicant's right of reply to matters raised during the course of the hearing, and to cover the possibility that the application may be granted consent, the hearing was adjourned to enable preparation of a set of conditions agreed between the planners for the applicant and the Council. Such conditions would then be provided to the submitters for any comments they wished to make. I received the draft set of conditions, together with Mr & Mrs Russell's comments, at 5.30pm on Thursday 25<sup>th</sup> August, at which time the hearing was formally closed.

## **Application activity status and relevant statutory provisions**

[14] It was common ground that as the depot proposal is not provided for under the relevant provisions of the Operative Waikato District Plan (“the District Plan”), the overall status of the proposal was that of a non-complying activity.

[15] As a non-complying activity, the application must first pass one of the two “threshold tests” of RMA section 104D before being given full consideration under RMA section 104, which is expressly subject to Part 2 of the Act. The section 104D tests are:

Either

(a) the adverse environmental effects of the proposal will be no more than minor;

or

(b) the activity will not be contrary to District Plan objectives and policies.

[16] If either of the above “threshold tests” is met, the application may then be given full consideration under RMA section 104. As noted above, that consideration is specifically subject to relevant matters under Part 2 of the Act.

**Relevant provisions of the District Plan and other applicable statutory planning instruments**

[17] There was general agreement between the applicant’s planner and the Council’s planner as to the applicable statutory planning instruments and their relevant provisions.

Waikato District Plan (Franklin Section)

[18] In his RMA section 42A hearing report, Mr Cattermole identified the following key Rural Zone objectives and policies:

- |         |   |
|---------|---|
| 17C.2.1 | Objectives – Key rural zone   |
| 2.      | <i>To manage landuse activities, subdivision and development carefully so that ...rural character and amenity values are maintained or enhanced.</i>  |
| 8.      | <i>To recognise and provide for the sustainable management of natural resources.</i>  |
| 9.      | <i>To provide for local social, cultural and economic non-residential activities of an appropriate size and scale that maintain and/or enhance rural character, rural productivity and the wellbeing of the people and communities of, and visitors to, the district.</i> |

- |         |   |
|---------|---|
| 17C.2.2 | Policies – Key rural zone   |
| 3.      | <i>Limit the range of industry and service activities that can be established in the Rural and Coastal Zones to those that have a clear connection to, or provide services to, rural activities (including FARMING, forestry, HORTICULTURE, INTENSIVE FARMING) or marine farming/fishing activities, and avoid activities which do not rely on or support the productive use and capacity of rural land or the marine environment, and/or are</i> |

*more appropriately located in a Business Zone.*

3A. *In addition to Policies 1, 2 and 3 above, enable the people and communities of the district to provide for their social, cultural, economic and environmental wellbeing in a way that is compatible with and/or enhances the rural economy and character of the area. The scale, intensity, context and character of non-residential activities should support rural activities, the rural economy (including tourism) and maintain and/or enhance rural or natural character or a cultural association with the area. This is to be achieved by:*

- *directing and managing non-residential activities that, because of their scale, intensity and characteristics, have little association with the rural and coastal areas, are contrary to the long term rural goals for maintaining rural character, and/or are more appropriately located within the metropolitan urban limits of Auckland or within the district's towns or villages;*
- *avoiding activities that do not rely on or support the productive use and capacity of rural land, or do not have an association with the character, amenity, communities, recreation and tourism, character or attributes of the district;*
- *enabling a diversity of rural business activities that have a clear and genuine connection with the resources, communities or the character and amenity of the rural areas of the district, with a focus on:*
- *limiting any storage activities to those that are ancillary to home occupations, rural activities, rural industry and services or the manufacture or processing of agricultural and horticultural produce.*

11. *Maintain and enhance landscape, cultural, archaeological, heritage and amenity values.*

12. *Ensure all subdivision, use and development is designed in such a way that landscape and ecological values are maintained or enhanced.*

[19] Other District Plan provisions identified by Mr Cattermole included:

- Objective 17C.3.1.2 and Policy 17C.3.1.3.1 relating to managing conflicts in rural areas;
- Objectives 17C.3.2.2.2 & 17C.3.2.2.3 and Policies 17C.3.2.3.1 & 17C.3.2.3.2 relating to rural character and amenity values;
- Objectives 9.3.1 & 9.3.2 and Policies 9.3.1.1.2, 5 & 6 and 9.3.2.1 & 2 relating to traffic conflict and safety;
- Objective 15.5.1, 1 and Policies 15.5.1, 1 & 2 relating to earthworks.

#### Other relevant statutory planning instruments

[20] The Waikato Regional Policy Statement (WRPS) and the Waikato Regional Plan (WRP) also contain relevant provisions but the subject matter of these are generally addressed in greater detail in the foregoing District Plan provisions, which I consider to be consistent with the content of the regional planning documents.

National Environmental Standard (NES) for Assessing and Managing Contaminants in Soil to Protect Human Health

[21] This NES is also of relevance in respect of the issue of any contaminants in the fill which has already been deposited on the site.

**PRINCIPAL ISSUES IN CONTENTION**

[22] The following were the principal issues in contention:

- The degree of adverse effects on rural character and amenity values, in particular noise, lighting/glare, visual impact and hours of operation;
- Roading and traffic impacts;
- Measures to address contaminants in the fill already placed on the site;
- The appropriateness of allowing additional fill to be placed on the site;
- Stormwater run-off and drainage effects;
- Effects on underground water and existing bores;
- Track record of the applicant;
- Extent to which the proposal is contrary to or inconsistent with relevant District Plan objectives and policies;
- Matters relating to planning precedent and District Plan integrity.

**DISCUSSION OF PRINCIPAL ISSUES AND FINDINGS IN RESPECT OF THOSE ISSUES**

**Adverse effects on rural character and amenity values**

[23] The submitters, Mr & Mrs Russell, referred to a number of adverse environmental effects on rural character and amenity values which they had experienced since the unauthorised filling and other depot related activities first commenced in 2012. These included:

- Noise throughout the day and night (6.00am to 10.30pm), seven days a week, with vehicle start-up noise and idling before 6.00am and other noise (banging, scraping, rattling etc) from “industrial” vehicles and machinery;
- Lighting and glare from vehicle headlights and on-site sources;
- Visual impact from the unscreened site.

Noise

[24] Under the Franklin section of the District Plan, there are no specific rules controlling noise generated by activities within the Rural Zone. The applicant’s planner, Ms Hall, referred to and agreed with the Marshall Day acoustic assessment report commissioned by the Council which concluded that activities on the site would comply with the relevant New Zealand standards, being NZS 6801 and 6802: 2008. The Council reporting planner, Mr Cattermole, acknowledged that noise associated with the depot activities would occur more often than those from permitted rural activities. He did however reiterate his opinion that consent to the application could be granted subject to the assumptions contained within the Marshall Day report

being incorporated into conditions on any such consent. I note that those assumptions are wide ranging and in effect constitute a noise management plan for the filling and depot activities.

- [25] I find that construction noise associated with the completion of filling activity and operational noise associated with on-going depot activities will be acceptable only if such activities are undertaken in a manner consistent with the Marshall Day assumptions which accordingly need to be incorporated into conditions imposed on any consent granted.

#### Lighting/glare

- [26] The submitters refer to previous use of an outside light attached to the portacom building on the depot site as well as to temporary lights being “strung up” to facilitate the undertaking of vehicle and machinery repairs in the evenings. The evidence of the two planners refers only to vehicle lights. I find that there is the potential for adverse light spill and glare effects if lighting is used on the depot site after dark. I further find that any such adverse effects are able to be addressed through consent conditions restricting depot hours of operation and prohibiting on-site lighting outside of those times, apart from a single motion-activated security light attached to the portacom building.

#### Visual impact

- [27] The submitters expressed concerns as to the effectiveness of the proposed landscaping given the lack of detail, inappropriate plant species, and the lack of any specified on-going management/maintenance measures. . It was their view that any landscape planting to mitigate this adverse effect would need to be extensive and of the correct plant species which would take years to have the desired effect and would require on-going maintenance. Both planners acknowledge the need for landscaping so as to screen the depot site from neighbouring land as well as to prevent soil erosion. Their opinion is that these matters are able to be addressed through appropriate consent conditions.
- [28] I find that unacceptable adverse visual and landscape effects will occur unless appropriate landscape plantings are established on the site and thereafter maintained on a continuing basis. Any consent conditions need to be suitably detailed and include provision for on-going maintenance.

#### **Roading and traffic impacts**

- [29] The submitters expressed concerns about past depot activity spilling over on to the adjoining roadside. They were also concerned about conflict between traffic associated with the depot and through traffic on Churchill Road.
- [30] Ms Hall’s evidence on behalf of the applicant was that for the majority of the time larger vehicles associated with the contracting business would be transported from job site to job site rather than return to the depot between jobs. Her opinion was that traffic movements would be similar to those generated by farming activities. Mr Cattermole was of a similar view and noted the recommendation of the Council’s Consultant Land Development Engineer, Mr Brown, that conditions be imposed on



any consent granted requiring the vehicle entrance to be upgraded to the Council's heavy vehicle standard and that parking within the public road reserve be prohibited.

- [31] Whilst acknowledging the previous traffic and roading issues identified by Mr & Mrs Russell, I find that subject to consent conditions of the foregoing nature being imposed, any traffic and roading effects associated with the operation of the depot will be, at worst, no more than minor.

#### **Filling operations**

- [32] The Tonkin & Taylor Ground Contamination Assessment Report prepared in respect of the proposal identifies the presence of asbestos in three soil samples taken from the existing filled area. The report concludes that the "*asbestos fibres within the fill material are unlikely to pose a risk to human health.*" Overall, the Tonkin & Taylor analysis of the fill indicates that "*all contaminant concentrations within the fill and underlying natural materials are below the NES SCS for a commercial land use scenario, and were within the relevant environmental protection criteria.*" However, the report recommends the undertaking of further investigations to confirm this. The advice of Council's Environmental Health Officer, Mr Parkes, is that while it would have been preferable for the aforementioned investigations to have already been undertaken, the matter is able to be addressed through consent conditions.
- [33] While the submitters are of the view that the existing fill material should be removed from the site, that view is not supported by the evidence of the suitably qualified experts, including Mr Parkes for the Council. I therefore find that subject to appropriate consent conditions being imposed in respect of further investigations and management, the existing fill is able to remain on the site.
- [34] With respect to the proposed additional fill, I again find that subject to compliance with consent conditions relating to fill management, any adverse environmental effects relating to the on-going fill operation will be no more than minor.

#### **Stormwater runoff and drainage effects**

- [35] The submitters raised concerns in respect of the control of stormwater from the depot site, including effects on an existing culvert under Churchill Road and on a stream adjacent to the site. The advice of the Council's Consultant Land Development Engineer, Mr Brown, is that "*stormwater discharged from the site is downstream of the road culvert and will have no effect on the performance of the upstream culvert.*" Mr Brown does however recommend a condition requiring the preparation of a stormwater management plan to be submitted to Council for approval prior to a resumption of site earthworks. Subject to this proviso, I find that any stormwater runoff and drainage effects created by the proposal will be no more than minor. I note that these matters are also addressed in the conditions of the related resource consent recently granted by the Waikato Regional Council.

#### **Effects on underground water and existing bores**

- [36] The submitters also raise concerns in respect of "*potential impact on underground water integrity*" and refer to the proximity of a number of existing water bores in the

vicinity of the depot site which may be affected by contamination. In paragraphs 87-88 of her pre-circulated hearing evidence, Ms Hall refers to investigations undertaken by Tonkin & Taylor in respect of these concerns. She notes their conclusion that *“the potential effects on these [existing] groundwater takes (if any) is less than minor.”* As no contrary expert evidence was presented in respect of this matter, I find accordingly. I also note that this is a matter which falls more directly under the jurisdiction of the Waikato Regional Council and that as far as I am aware it has not been identified as a concern by that regulatory authority.

#### **Track record of applicant**

- [37] Mr & Mrs Russell state in their submission that the applicant’s past actions *“reflect poorly on the integrity and nature of the applicant and cast doubt on how he will conduct his business activities in the future on this site.”* Resource management case law in respect of such matters is clear: while the prior conduct of an applicant can have some peripheral relevance in terms of other matters considered necessary to determine an application (such as the nature and scope of consent conditions), poor conduct cannot in itself be used as a reason to refuse consent. The Environment Court case referred to in section 4.2.3 of Mr Cattermole’s hearing report (Walker v Manukau City Council) underlines this point. Therefore, while I have some sympathy with and fully understand the submitters’ lack of confidence in the applicant’s commitment in respect of on-going compliance with conditions imposed on any consent granted, I find that I am unable to use this in itself as a ground for refusing consent.

#### **Consistency of proposal with District Plan objectives and policies**

- [38] I have set out the relevant objectives and policies of the Operative District Plan (as identified in Mr Cattermole’s hearing report) in paragraph [18] of this decision. It is the opinion of both Mr Cattermole and Ms Hall that the proposal is not contrary to the relevant District Plan provisions. Notwithstanding that expressed opinion of the two planners, I note that policy 17C.2.2.3 specifically states that the range of industry and service activities within the Rural Zone should be limited to those which *“have a clear connection to or provide services to rural activities”* and that activities *“which do not rely on or support the productive use and capacity of rural land, and/or are more appropriately located in a Business Zone”* should be avoided.
- [39] The more detailed policy 17C.2.2.3A is in a similar vein, the clear intent of the two policies as I see it being to ensure that in the Rural Zone activities that do not themselves constitute primary production, be limited to those which service or support productive rural uses. I therefore find that the current proposal is contrary to those particular provisions.

#### **Planning precedent / District Plan integrity**

- [40] This is a matter raised by Mr & Mrs Russell and which I consider follows on from the foregoing discussion on consistency with relevant District Plan objectives and policies. The consideration in the context of that discussion is whether the conflict of the proposal with the policies I have identified above is of such significance that consent to the application would undermine the integrity of the District Plan as a

statutory planning document on which the community can continue to rely. Again, both Ms Hall and Mr Cattermole agree that District Plan integrity will not be compromised, primarily (as I understand their evidence) because in their opinion the environmental effects of the proposed activities are considered to be the same as or similar to those of a rural contractor's depot and the nature of the applicant's civil contracting business is such that it has the potential to support or service productive rural uses and the wider rural community.

- [41] While I consider the planning precedent / District Plan integrity issues to be validly raised by the submitters, I find that consent to the current proposal is unlikely to create a precedent leading to other similar non-complying applications being lodged which if also granted would result in the integrity of the District Plan being undermined.

#### **RMA section 104D finding**

- [42] In light of the foregoing discussions, I find that overall the adverse environmental effects of the proposal will be no more than minor but that the proposal is directly contrary to the two District Plan policies which I have identified. The application therefore passes one of the "threshold tests" of RMA section 104D(1) and qualifies for full consideration under RMA section 104.

#### **RMA section 104 findings**

##### Environmental effects

- [43] I find that notwithstanding the likelihood that previous unauthorised use of the land undertaken by the applicant created unacceptable adverse environmental effects, in the context of the current application and subject to compliance with a comprehensive set of consent conditions, the adverse environmental effects potentially created are able to be appropriately avoided, remedied and mitigated to an acceptable level.

##### District Plan provisions

- [44] While I have found that the proposal is contrary to District Plan policies which specifically aim at avoiding the establishment of non rural activities in the Rural Zone which do not have a functional or other legitimate need to locate in rural areas, overall I find that the proposal is capable of being operated in a manner which will be generally consistent with other District Plan policy provisions relating to such matters as protection of the productive rural land resource and of rural character and amenity values. Again, this finding is based on the assumption that conditions controlling the operation of the activity are able to be imposed on any consent granted and that such conditions are complied with on an on-going basis. This in turn will be reliant on appropriate compliance monitoring (and enforcement action if necessary) on the part of the District Council as the regulatory authority which has a clear and direct statutory responsibility in respect of such matters.

##### Other statutory planning instruments

[45] As I have noted earlier in this decision, I consider the relevant provisions of both the Waikato Regional Policy Statement and the Waikato Regional Plan are in most cases addressed through the more detailed provisions of the District Plan. I also note that the provisions of the regional documents will have been considered and addressed through the resource consent process relating to the application to the Waikato Regional Council.

National Environmental Standard (NES) for Assessing and Managing Contaminants in Soil to protect Human Health

[46] I am satisfied that matters relating to this NES have been adequately addressed or will be so addressed through consent conditions.

Other matters

[47] The principal “other matter” raised by the proposal is that relating to planning precedent and District Plan integrity. As I have already found, while this matter is validly raised by the submitters, I consider it unlikely that consent to the current application will lead to other similar non-complying applications being lodged which if granted would create the potential for the integrity of the District Plan to be undermined.

RMA Part 2 assessment

[48] Overall, I find the proposal to be consistent with the sustainable management of resources purpose of the RMA as set out in section 5 and, to the extent that they are relevant, is consistent with the associated matters to which regard is to be had as set out in section 7. In particular, I find that:

- The proposal will meet the needs of the applicant, whilst ensuring that any adverse effects on the environment are appropriately avoided, remedied or mitigated; and
- Subject to compliance with all consent conditions, the quality of the existing environment in which the subject site is situated and the character and amenity values prevailing within that environment will be maintained.

[49] Given the foregoing, consent to the application is granted in accordance with the attached.



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Russell De Luca, Independent Commissioner  
30 August 2016