

**BEFORE INDEPENDENT HEARINGS COMMISSIONERS
AT NEW PLYMOUTH**

IN THE MATTER

of the Resource Management Act
1999

AND

IN THE MATTER

of an application by Airport Farm
Trustee Limited to the Taranaki
Regional Council to replace an air
discharge consent for a poultry
farm at 58 Airport Drive, New
Plymouth

Consent No: 5262-3.0

LEGAL SUBMISSIONS ON BEHALF OF THE NEW PLYMOUTH DISTRICT COUNCIL

Dated: 15 February 2022

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THE LAWYERS

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MAY IT PLEASE THE COMMISSIONERS:

1. Introduction

1.1 These legal submissions are made on behalf of the New Plymouth District Council (the "District Council").

1.2 Airport Farm Trustee Limited's Poultry Farm, the subject of this hearing, is located in an area that is earmarked for future urban development in New Plymouth's Operative District Plan ("ODP") and Proposed District Plan ("PDP"). Specifically, it is zoned with a Future Urban Development Overlay in the ODP and with a Future Urban Zone (FUZ) in the PDP.

1.3 The land immediately across the road from the Poultry Farm is zoned as Residential A in the ODP and as General Residential in the PDP. For ease of reference, the planning maps from the ODP and PDP are below.

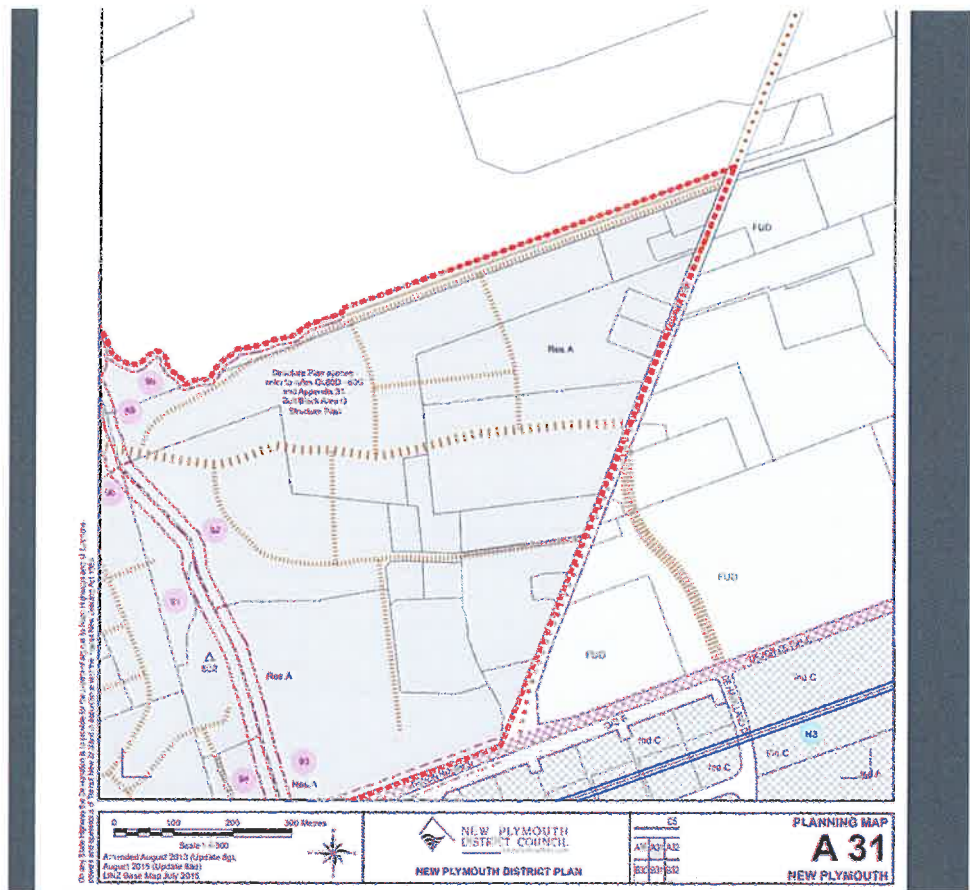


Figure 1 – ODP Planning Map

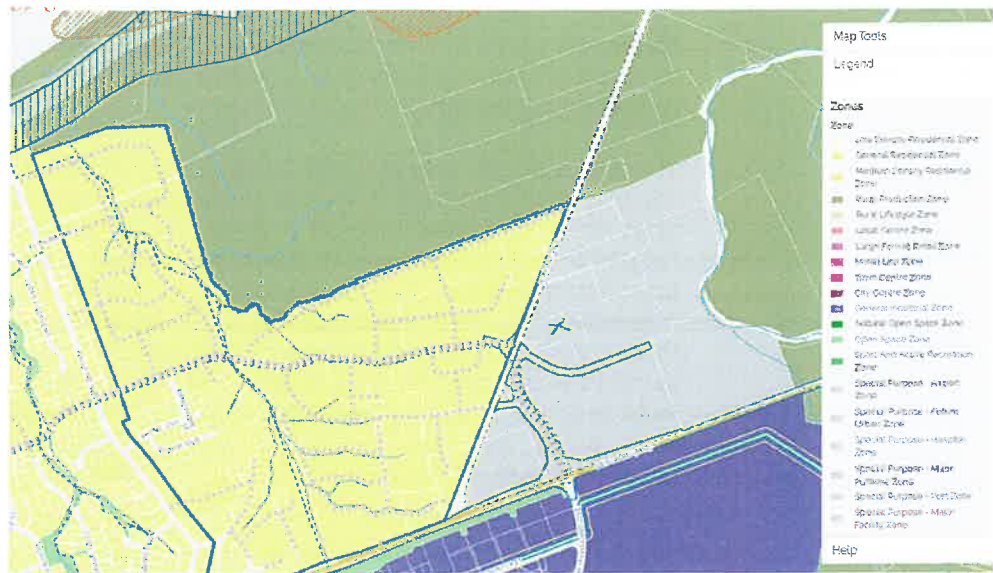


Figure 2 – PDP Planning Map

1.4 The District Council's interest in this hearing relates to the potential implications that replacing resource consent 20-05262-3.0 will have on the urban development capacity of Area Q and Area R and on its ability to give effect to its ongoing obligation under the National Policy Statement on Urban Development 2020 (NPS-UD) to provide for sufficient development capacity. The Council also owns one of the properties that is located within 400m of the Poultry Farm.

1.5 The three issues these submissions address are:

- a) activity status and relevant assessment considerations;
- b) the sensitivity of the receiving environment;
- c) potential adverse effects, and the best method for preventing or minimising adverse effects on the environment.

1.6 I will deal with each in turn.

2. Activity status and relevant assessment considerations

The application

2.1 The consent application describes the proposal as follows:

Airport Farm Trustee Limited (AFTL) proposes to renew its existing resource consents and **convert its existing operation to free range. This will include conversion of its four existing poultry sheds from conventional (i.e. non-free range) broiler to a free-range configuration. ...**

The effect of the proposal will be to reduce the overall housing capacity at the site from 95,000 birds allowed at present to 61,020 birds such that there will be less effects experienced by the neighbours compared with the status quo. The application site has been earmarked for future residential activity, however this requires a zone change and is some time away. The recently proposed New Plymouth District Council proposed plan (which has a lifespan of some 10 years) does not seek to rezone the site to residential. AFTL need to continue to have business certainty and operate its existing farm which has had significant financial and infrastructure investment in it.

2.2 Accordingly, the application indicates it is for a renewal. However, at paragraph 13 of Ms Booker's legal submissions she states "the application is for a new resource consent to replace the existing consent".

2.3 While little turns on whether it the application is for a replacement or renewal given that the applicant does not seek the protection of section 124 Resource Management Act 1991 ("RMA"), it is submitted that it is appropriate to treat and consider this consent as a new consent which will replace an existing consent. The reasons for this are:

- (i) the existing consent does not expire for another four years; and
- (ii) the applicant has offered as a condition of consent to surrender its existing consent upon the commencement of the new consent.

Activity status

2.4 The applicant (and TRC) consider this application triggers Rule 52 of the TRAQP, which applies to:

Discharges of contaminants to air from intensive poultry farming when more than 30,000 poultry are kept at any one time, and where the poultry farm is an existing operation and a new consent is being applied for to replace or renew an existing consent.

2.5 The single condition for Rule 52 is that "*the nature and scale of the effects of the activity are unchanged from that of the existing consent that is to be replaced or*

renewed". Where that standard is not met, the activity defaults to a discretionary activity.

- 2.6 The dictionary definition of "unchanged", means not changed or unaltered. The condition is not ambiguous or unclear. It is not appropriate to strain its language so that its application is limited only to situations where there is an increase in adverse effects beyond the boundary. In my submission, an ordinary and reasonable person would interpret the condition to simply mean what it says. Where there is any change in the nature or scale of the effects of a discharge from an intensive poultry farm, a discharge will not meet the condition in Rule 52, and it must therefore fall to be considered as a discretionary activity. In this regard, it is important to note that this is in the context of applying for a new consent. The plan provisions accordingly enable full and unrestricted consideration of all relevant matters for any new consents where there is a proposed change.
- 2.7 In this case, it is submitted that the nature and scale of the effects of the activity for which consent is being sought are not "**unchanged**".
- 2.8 The expert evidence before the Panel is not that the effects will be the same. Different conditions from those of the existing consent have been proposed to deal with different effects, for example, Mr Van Kekem and Mr McDean have recommended a requirement for a minimum ground coverage in the ranging area to reduce the potential for dust discharge beyond the site boundary (generated by the birds foraging and dust bathing natural behaviour) and odour discharges.
- 2.9 It is therefore submitted it is appropriate to determine this application as a fully discretionary activity, without any restriction as to the matters you can consider when determining whether to grant or decline consent.¹
- 2.10 Notwithstanding, it is acknowledged that the Reporting Planning considers the application should be treated as a restricted discretionary activity. I will therefore address the relevant assessment considerations for a restricted discretionary activity. Such considerations can of course also be taken into account for a discretionary activity.

Relevant assessment considerations

¹ Section 104(5) RMA

- 2.11 Under section 104C RMA, a consent authority must consider only those matters over which it has restricted the exercise of its discretion in its plan or proposed plan.
- 2.12 In *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37, the Court held that in considering an application for a restricted discretionary resource consent, the council had a duty to consider all the matters over which discretion was restricted, the objectives and policies of the plan and the relevant national policy statement in so far as they related to the matters over which discretion was restricted, and matters under ss 105 and 107 RMA where relevant.
- 2.13 Under Rule 52 TRAQP, the matters over which discretion has been restricted are:
- a) Duration of consent;
 - b) Monitoring;
 - c) Effects relating to odour and dust and loss of amenity value of air;
 - d) Imposition of limits on or relating to discharge or ambient concentrations of contaminants, or on or relating to mass discharge rates;
 - e) Best practicable option to prevent or minimise any adverse effects on the environment;
 - f) Any matter contained in Appendix V;
 - g) Review of the conditions of consent and the timing and purpose of the review.
- 2.14 'Best practicable option' means the best method for preventing or minimising the adverse effects of a discharge on the environment having regard to, among other things, the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects².
- 2.15 The matters contained in Appendix V include:

b) Buffer distances

Preferred minimum buffer distances between sheds and other features

Table 1: Recommended buffer distances

Number of poultry	1. Distance to nearest off site dwellinghouse metres	2. Distance to nearest sensitive area (refer to <u>Policy 2.3</u>)	3. Distance to road metres	4. Distance to any boundary metres

² Section 2, RMA

Fewer than 30,000	100	100	100	50
30,000 – 59,999	200	200	100	50
60,000 – 79,999	300	300	100	50
more than 80,000	400	400	100	50

The Taranaki Regional Council will **have regard to these buffer distances** in determining whether notification of resource consent applications is required, and **in determining the extent of any mitigation requirements**.

cc) Reverse sensitivity

To safeguard the opportunity for future expansion, site owners should remain aware of any proposals to subdivide or to change the zoning (land use controls) of nearby land that may allow any establishment of activities that are incompatible with intensive farming.

2.16 Policy 2.3 provides:

Air quality management in Taranaki will be carried out in a way that recognises that some areas of the region have within them, uses or values or activities that are more sensitive to the discharge of contaminants to air than other areas. In particular, recognition will be given to any adverse effects from the discharge of contaminants to air on:

- a) people and property in urban areas, residences and places of public assembly and on the safe and efficient operation of roads, airports and flight paths and other infrastructure;

....

2.17 Section 105 RMA requires the consent authority to have regard to the nature of the discharge and the sensitivity of the receiving environment to adverse effects; the applicant's reasons for the proposed choice; and any possible alternative methods of discharge, including discharge into any other receiving environment.

2.18 Accordingly, the matters you may consider include:

- a) the sensitivity of the receiving environment,
- b) the distance between the sheds and people and property in urban areas, and residences, particularly when determining the extent of any mitigation requirements;
- c) the applicant's reasons;

- d) the best method for preventing or minimising adverse effects on the environment;
- e) reverse sensitivity effects;
- f) the duration of the consent.

3. The sensitivity of the receiving environment

3.1 The 'environment' includes:

- a) ecosystems and their constituent parts, including people and communities; and
- b) all natural and physical resources; and
- c) amenity values; and
- d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

3.2 An assessment of what constitutes the environment also includes the future environment, which calls for a "real world" assessment of what the future environment will be³. The question does not require certainty⁴.

3.3 In *Living Earth Ltd v Auckland RC* EnvC A126/06 the Court held it will not be every case where it is necessary to consider the future environment. In many cases, it will be difficult, if not impossible, to consider the effects on anything except the neighbourhood as it exists. However, a genuine attempt is required to envisage the environment in which future effects, and effects arising over time, will be operating. Ascertaining the likely future state of the environment is essentially an evaluative factual exercise⁵.

3.4 In *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815 and the related decision in *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 817, the High Court held that it was an error for the Environment Court to have completely disregarded a proposed plan change for urban rezoning of the relevant land, and to have assumed that the area was going to remain undeveloped. This conclusion was incorrect in light of an objective in the

³ *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009

⁴ *Otway Oasis Soc Inc v Waikato Regional Council* [2020] NZEnvC 169

⁵ At paragraph 178

operative plan which provided for the urbanisation of the plan change area (including industrial zoning). The High Court held that the Environment Court had wrongly used the Court of Appeal's decision in *Queenstown Lakes DC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA) to remove consideration of the relevant objective in examining the future environment concerned. The High Court held that the Environment Court should have recognised that the future environment was urban, consistent with the objective and policies in the Operative District Plan and that there was competition for development of that land and a pending plan change. It said:

[84] ... The [Hawthorn] decision recognised the importance of context. Read as a whole, it endorses having regard to objective 6 and its policies as a guide to the future environment.

[85] ... the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment. Read as a whole, *Hawthorn* endorses having regard to [the operative plan objective and policies]. The current development of Frankton Flats, ..., was inconsistent with the plain statutory injunction imposed on the consent authority to consider the adverse effects on the future environment, contained in the phrase "will be".

3.5 It is therefore submitted that it is necessary and appropriate to take account of relevant provisions in plans and proposed plans that might allow certain kinds of activities on adjoining land in the future, including likely future changes to it, as part of the exercise necessary to understand the sensitivity of the receiving environment⁶.

3.6 In the ODP, objective 1A and Policy 1A.1 provides as follows:

Objective 1A To ensure that activities within and adjacent to the Future Urban Development OVERLAY do not adversely affect the ability to rezone and subsequently develop areas identified as FUTURE URBAN GROWTH AREAS.

Policy 1A.1 Activities within the Future Urban Development OVERLAY should be located and undertaken in a manner that does not have any actual or potential adverse effects on the future rezoning and subsequent development of land identified as a FUTURE URBAN GROWTH AREA.

3.7 In the PDP, intensive indoor primary production activities (including Intensive Poultry Farms) are a discretionary activity in the Future Urban Zone.

⁶ *Wilson v Selwyn DC* (2004) 11 ELRNZ 79; [2005] NZRMA 76 (HC); *Freda Pene Reweti Whanau Trust v Auckland RC* (2004) 11 ELRNZ 235 (EnvC)

3.8 Objective FUZ-O4 is that activities within and adjacent to the identified Future Urban Zones do not compromise the ability to develop the area for urban growth purposes. Policy FUZ-P3 provides:

Avoid activities that are incompatible with the role, function and predominant character of the Future Urban Zone and/or activities that will:

1. constrain, limit or compromise the ability to comprehensively develop and use the Future Urban Zone for urban growth purposes;
2. result in reverse sensitivity effects and/or conflict:
 - a. with permitted activities; and/or
 - b. between incompatible activities once urban development occurs;
3. result in adverse effects on the character and amenity of the surrounding area which cannot be avoided, or appropriately remedied or mitigated; or
4. inhibit the efficient provision of infrastructure to service future urban growth needs.

3.9 In addition, the land immediately to the west of the Poultry Farm comprised in Area Q is already zoned residential under the ODP and the PDP and the expert evidence is that the area presently has a rural residential character.

3.10 It is acknowledged that under the ODP and PDP the release of that land for full residential development is not intended to occur until the realignment of Airport Drive has been completed and Area R (FUZ) has been rezoned to an urban zone through a plan change process.

3.11 In this regard, Ms Booker advocates that any potential future planning changes and resource consents to be granted for residential development do not form part of the receiving environment. With respect, it is submitted this glosses over the requirement for a "real world" assessment of what the future environment will be.

3.12 The NPS-UD direction that the territorial authorities 'must' provide for sufficient development capacity is an ongoing obligation. Development capacity is achieved through the provisions of the district plans in the short to medium term, with long term intentions set out in the local authorities' Long-Term Plans.

3.13 Submissions have been received in respect of the activity status of residential development within Stage 3E of Area Q in the PDP and this will be heard by the District Council's Hearings Commissioners in the next month. Submissions have

also been received on Area R in opposition to the FUZ zoning and to accelerate the urban zoning of parts of Area R.

- 3.14 Ms Williams evidence is Area Q represents 13-14% of the District's short and medium term land supply needs and that it is a critical component of New Plymouth District's urban growth and development capacity. Area R is currently identified in the 2016 HBA as being available for urban development in the long-term (after 2028). The District Council has approached the Government to access it's Infrastructure Acceleration Fund for funding to construct the necessary infrastructure to support developments in Area Q. Its LTP included the Bell Block to City and to Airport Transportation Connections 2023 to 2024, the Waitaha Stream Bridge and Underpass Area Q 2023 – 2024 and the Airport Drive/Area Q Intersection 2023-2024.
- 3.15 It is understood that the current expectation of Waka Kotahi New Zealand Transport Agency is to commence construction of the Airport Drive realignment in the summer of 2023/24.
- 3.16 That Areas Q and R will be urbanised is not merely speculative. Area Q is already zoned residential. In my submission, given the current development demands and the District Council's obligation to provide development capacity, the urbanisation of these areas is more likely than not. The only area of uncertainty is the timing within which urbanisation will happen. However, given the evidence of Ms Williams, it is more likely than not that the urbanisation of these areas will occur within the next 8-10 years.
- 3.17 It is my submission that the NPS-UD and relevant planning provisions justify a different approach when assessing the receiving environment in this case. Further, that it is a directly relevant consideration to the duration of any replacement consent of an expiring permit.

4. The applicant's reasons

- 4.1 It is accepted that the applicants have the right to order their affairs as they see fit, however the applicant's reasons for making this application are relevant under section 105 RMA.
- 4.2 The applicant purchased the Poultry Farm in 2013. At that time, the site was zoned with the Future Urban Development Overlay. The Structure Plan for Area Q indicated that residential development of the area is restricted until Area R is

rezoned through a plan change process (to either residential or employment land) and released upon completion of Airport Drive⁷. The applicant was a submitter on Plan Change 20, and supported an ongoing restriction on urban residential type subdivision and development in the area.

4.3 The PDP has now re-zoned Area R as Future Urban. The applicant did not submit on the PDP.

4.4 It therefore appears that the applicants purchased the farm and have since made all of their investments in the Poultry Farm with the knowledge that the site and surrounding area is identified for urban re-zoning, and with the knowledge that there was a risk its current consent may expire in 2026.

4.5 Mr Whiting stated that the applicant is seeking a new resource consent prior to the expiry of its existing air discharge consent for the purpose of maintaining supply contracts and commercial certainty. However, it is not clear from the evidence why supply contracts are at risk if an application is not made now.

4.6 With respect to maintaining commercial certainty, presumably one of the relevant factors is that a replacement consent with an extended expiry date will form part of the existing environment during the period when urbanisation is expected to occur. Thus it will be necessary to have regard to the long term presence of the Poultry Farm in respect of any decisions on re-zoning of the area and/or residential development in and around the farm.

4.7 An additional plausible explanation may be that the current planning framework is more suited to the current application, than the planning framework which is likely to be in existence in 2026.

5. The best method for preventing or minimising adverse effects on the environment

5.1 It is submitted that the key adverse effects that are likely to arise as a result of this application are adverse odour and dust effects, adverse reverse sensitivity effects and utilisation of land for an inappropriate use.

5.2 It is noted that Ms Ryan yesterday advised the Commissioners in response to questioning that the odour emissions from the Poultry Farm wouldn't meet the relevant odour threshold if the surrounding environment was residential.

⁷ Appendix 31, ODP

5.3 In *Winstone Aggregates v Matamata-Piako District Council* (2004) 11 ELRNZ 48 the case involved a plan reference and at issue was the sustainable co-existence of rural industries and the potential for reverse sensitivity in the Matamata-Piako Proposed District Plan. The Court stated as follows:

Sustainable co-existence is important because, inevitably, industries of these kinds and scales may produce effects on their surrounding environments, or at least people believe they do. In turn, reactions to those effects, or perceived effects, by way of complaints or actions in nuisance can give rise to pressures on the industries that can stifle their growth or, in an extreme case, drive them elsewhere. ... If an industry or activity likely to emit adverse effects seeks to come into a sensitive environment, the problem should be manageable by designing appropriate standards and conditions, or by refusing consent altogether. It is when sensitive activities [usually, but not always, residential activities] seek to establish within range of a lawfully established effect emitting industry or activity that management may become difficult. This is the concept known as *reverse sensitivity*.

5.4 Policy 2.3 of the TRAQP recognises that some areas of the region are more sensitive to the discharge of contaminants to air than other areas. Part a) of the policy recognises that people and property in urban areas and residences are more sensitive. That this is true is presently being borne out. The submitters on this application have all indicated they are presently experiencing adverse effects. Complaints have been made. Further urbanisation and increasing numbers of residences within close proximity to the Poultry Farm can only result in further incompatibilities and conflict. While this application and an extended term may be viewed as a vehicle to legitimise the ongoing operation of the Poultry Farm in an urban area and to prioritise it over future residential growth, the issue remains that ultimately the two activities are unlikely to sustainably co-exist.

5.5 In *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815 the Court noted that all counsel agreed that utilisation of scarce land for an inappropriate use can be an adverse effect. This is because Part II of the Act, particularly s 5(2), includes consideration of meeting community needs, in the future.

5.6 Given the above, it is submitted that the best method for preventing or minimising adverse effects on the environment is to ensure the duration of any consent is appropriate in light of the current and future urbanised environment.

5.7 In *Re Otago Regional Council* [2021] NZEnvC 164 the Court examined relative efficiency and effectiveness of relying on s 128 review of a long-term consent versus short-term consents. It held:

The fundamental difference between use of a s 128 review compared with an application to re-consent an expiring permit under ss 104-104D, is that provided the consent application is not for a controlled activity, it can be declined. Whereas an existing permit can only be cancelled on review if there are both material inaccuracies in the consent application and adverse effects on the environment resulting from the exercise of the consent. Subject to this qualification, any change to a consent condition cannot have the effect of preventing the activity for which the resource consent was granted in the first place.

[107] Thus relative efficiency and effectiveness of relying on s 128 review of a long-term consent versus short-term consents is a function of the degree of change from the status quo and secondly, we find, the permit holder's objectives for their business, together with their personal values and circumstances. ...

the grant of long-term consents creates the unrealistic expectation of water security, thereby encouraging investment. Given that potential for significant change in the region's water management strategy, in his opinion the more efficient and effective process is the one proposed by the Regional Council in PC7, i.e. short-term consents, which will be renewed under the proposed policy statement and a new regional plan.

5.8 As discussed above, it is submitted that the grant of a long-term consent will encourage further investment in the Poultry Farm and create an expectation that the farm should be permitted to continue to operate without interference. Given the potential for significant change in the surrounding area, it is submitted that the most efficient and effective method for preventing or minimising adverse effects is a short term consent. In this regard, and in the event the Commissioners determine it is appropriate to grant the consent, the District Council considers a term of 8 years from today's date is entirely reasonable.

Dated: 15 February 2022



LP Wallace
Counsel for the New Plymouth District Council