BEFORE THE HEARING PANEL ON PROPOSED PLAN CHANGE 43 TO THE OPERATIVE TAUPO DISTRICT PLAN

IN THE MATTER of the Resource management Act 1991 (the Act)

AND

IN THE MATTER of a Proposed Plan Change 43 to the Taupo District Plan

---

Memorandum of counsel on behalf of the Taupo Industrial Estate Limited ("TIEL") in relation to Hearing Panel direction for Planner Caucusing/Joint Witness Statement affecting Site 7
Dated: 6 October 2023

Marianne Mackintosh
BARRISTER

021 332 572
marianne@mmackintosh.co.nz
www.mmackintosh.co.nz

PO Box 6
Raglan 3265
New Zealand

MAY IT PLEASE THE HEARING PANEL

INTRODUCTION

1. This Memorandum is filed on behalf of Taupo Industrial Estate Limited ("TIEL") in response to the Hearing Panel direction contained in Minute #18. This Minute requires the relevant planning witnesses for Parties to proposed Plan Change 43 ("PC43") to caucus and produce a Joint Witness Statement concerning potential "interface" effects between the proposed Site 7 Industrial Zone boundary and the adjoining Residential Zone.

2. With respect, TIEL is concerned that the Hearing Panel has not adequately or appropriately considered its obligations with respect to issues of trade competition. That is, the Hearing Panel has wrongly conflated a claim by APGL/Mr Ladbrook of "concern" about potential environmental effects of the interface between the proposed Industrial Zone for Site 7 and the existing Residential Zone as constituting a wider environmental effect.

3. In short, if the Hearing Panel allows the submission by APGL together with the further submission by Mr Ladbrook, and makes a decision on PC43 which amends the proposed Industrial Zone provisions for this interface in response to those submissions, it risks making an error of law.

ENVIRONMENTAL EFFECTS

4. There are no demonstrable wider environmental effects arising from the interface between the proposed Industrial Zone for Site 7 and the adjacent Residential Zone.

5. The Residential Zone land adjacent to Site 7 is owned by Taupo District Council ("Council"). The underlying resource consent [RMA230135,

136 & 137] is held by Council. The only parties directly affected by the interface between Site 7 and the Residential Zone are TIEL and Council. Neither party has raised any concerns about the interface between the zones. There are no wider environmental effects in play. Indeed, if there were any material effects of concern these would be potential reverse sensitivity effects – which are only of concern to TIEL. There is no impact whatsoever on APGL/Ladbrook.

TRADE COMPETITION

6. Counsel for TIEL has previously provided written legal submissions on this point. These are reproduced below (footnotes removed):

> The section 42A Report for PC43 raises concerns about the submission on behalf of APGL and Mr Ladbrook:
>
> > 109) The area of land to the immediate north of Napier Road Rezoning, is also zoned Taupō Industrial Environment. That site currently consists of a number of large format Trade Suppliers, including Mitre10 (also a Trade Supplier). That land is owned by Caboo Properties Ltd, with Warren Ladbrook as a Director.
> >
> > 110) The matter I wish to raise with the Panel is that the Submission from APGL states (and confirms) that 'it could not gain an advantage in trade competition through this submission'. Plaintively this is incorrect, and the Submitter has a responsibility not to contravene the provisions in the RMA that proscribe the involvement of a Trade Competitor.
> >
> > 111) I have noted the restraints on Trade Competition enshrined within the Resource Management Act in Section 2 of this report, including s74(3) and clause 6(3) of the First Schedule.
>
> Clearly the submission by Mr Ladbrook is grounded in concerns about trade competition – not environmental effects. In that regard, the evidence for TIEL demonstrates that there are no transportation effects which would preclude re-zoning and that the consent notice on the title is redundant. Moreover, the concern about the interface between the residential zoned land and industrial zone does not present an effect on APGL or Mr Ladbrook. In any event, this interface can be effectively managed to ensure appropriate screening and a buffer between zones to mitigate any potential effects.
>
> The Courts have considered this issue in numerous decisions. The term was described by the Environment Court in Bunnings v Hastings District Council as follows:

> [30] It is apparent from the above discussions and descriptions that the term trade competition is constrained in its meaning and **relates to those matters arising directly out of rivalrous behaviour occurring between those involved in commerce and does not extend to wider effects on the market or the environment.**
>
> [Emphasis added.]

The Resource Management Act 1991 ("RMA") is clear as to the prohibition on trade competition. As directors and property developers for Mitre 10, Mr Ladbrook and APGL are trade competitors – Person A (trade competitor) and/or Person C (surrogate of trade competitor), referred to in section 308A. Similar circumstances were at issue in the Environment Court's decision on an application to strike out a section 274 notice of a "person" considered to be a trade competitor. The Court considered the meaning of the terms "trade competition" and "trade competitor" as follows:

> The terms "trade competition" and "trade competitor" are not defined in the RMA. The general test as to whether trade competition exists between two entities is whether there is a "competitive activity having a commercial element" (citing Montessori). This approach was affirmed by the Environment Court in Kapiti Coast Airport Holdings v Alpha Corporation Limited.

In that decision, the party H&J Smith Limited were deemed to be a trade competitor due to its links to a rival operator and its s274 notice struck out. The Court described this in the following terms:

> [47] The H&J Smith Group is clearly linked with Mitre 10. That store would compete with a Bunnings in Frankton. The purpose of section 308B is to ensure the RMA is not used by trade competitors for commercial gain by keeping competitors out of the relevant market. In light of this, H&J Smith Holdings Limited and HJSL can be considered to be trade competitors of Bunnings on this application.

In my submission, the Hearing Panel must disregard the submissions by APGL and Mr Ladbrook. To do otherwise would contravene the Resource Management Act 1991 ("RMA") provisions which preclude consideration of matters relating to trade competition.

7. While counsel responded to the Hearing Panel questions to say that it may consider genuine wider environmental effects arising from the APGL submission, these have not been made out in evidence. There is no residential development within the vicinity of Site 7. The "Masterplan" anticipated development within Site 7 which is not

materially different to what the proposed Industrial Zone provides for.

8. Furthermore, APGL/Ladbrook have not provided any technical evidence to support a potential effect (such as a noise assessment) – other than a generalised contention that future residential development "won't like" there being an Industrial Zone next to it. Given Council owns the land in question, that contention is misguided.

9. In summary, APGL/Ladbrook have no role to play in commenting on "interface effects" and are ostensibly using the PC43 process to secure commercial gain by keeping competitors out of the relevant market.

DIRECTIONS SOUGHT

10. On the basis that the submission/further submission from APGL/Mr Ladbrook are based on matters relating to trade competition, it is not clear why planner caucusing is necessary in relation to Site 7. For the reasons explained above, it is not.

11. If the Hearing Panel nevertheless considers caucusing to be necessary, counsel respectfully requests directions as to the purpose and scope of that caucusing.

M Mackintosh
Counsel for Taupo Industrial Estate Limited

6 October 2023.