

5 December 2023

Simpli Consulting
Taupo

TW Property Limited
Napier

Attn: Scott Devonport and Sam Coxhead

By email: scott@simpliconsulting.co.nz and sam@twco.co.nz

Dear Scott and Sam

Re Resource Consent Application to develop 30 rural lifestyle lots and ancillary lots at the Wairakei International Golf Course – an application by Wairakei International Golf Course Limited and TW Property Limited

1. I have been instructed by Burton Partners to provide advice in relation to this application for resource consent and the legal advice the District Council (**TDC**) obtained from James Winchester to it.

Background

2. A description of the application and its background, including the relevant planning documents are helpfully set out in both the application's AEE, and then in Mr Winchester's advice (set out in this letter to TDC of 30 October 2023).
3. Since the early 2000s TDC's district plan (**TDP**) has sought to respond to the perceived adverse effects of urban development in the rural environment by moving from a purely effects-based approach to one making more use of zoning controls. Specifically the TDP introduced stronger activity status thresholds linked to minimum lot sizes and more directly worded objectives and policies.
4. The TDC strategic planning document, Taupo District 2050 (**TD2050**) describes this in the following terms¹:

In the early 2000's [sic] Taupō was facing three key issues that drove the direction of TD2050 2006:

- *Council needed to change the way the District Plan managed the effects of urban growth. The Proposed District Plan had created an ad hoc approach to development of residential living opportunities in the rural areas. The case by case consideration of subdivisions made it difficult to take into consideration cumulative effects of new developments. There was also growing pressure on Council to extend the town's infrastructure but no certainty about where future development would take place.*

.....

¹ Page 5 TD2050

This was supported by a clear signal that urban development in the rural areas would not be permitted to avoid the cumulative effects of uncontrolled growth.

5. A review of TD2050 and the TDP indicates the adverse effects that Council is seeking to avoid primarily include:
 - a. Fragmentation of land parcels which might have an adverse effect on its future viability as productive rural land;
 - b. Uncontrolled and out of sequence demand on Council to upgrade infrastructure to an 'urban' standard;
 - c. Loss or adverse impact on rural character and amenity;
 - d. Reverse sensitivity effects on existing activities within the rural environment;
 - e. Loss or adverse impact on landscape, natural character and features including ONLs and ONFs.
6. As Mr Winchester outlines, the TDP rural environment provisions contain directive policies including:
 - a. Policy 3b.2.1.ii (*Avoid* urban development in the Rural Environment except through a TD205 Structure Plan Process and associated plan change);
 - b. Policy 3b.2.2.iv (*Prevent* urbanisation of the rural environment except as provided through the TD2050 Structure Plan Process etc); and
 - c. Policy 3e.2.1.iii (*Prevent* urban development in the rural environment outside of the identified Urban Growth Areas).²
7. In his advice Mr Winchester details how the Supreme Court's in *NZ King Salmon (NZKS)*³, demanded more weight be given to the directive nature of some policies (*avoid* policies). *NZKS* also requires that RMA decision-makers, where possible read objective and policies as a coherent whole and make a "...thoroughgoing attempt to find a way to reconcile..." various policies.⁴
8. *NZKS* stricter approach has recently been softened by *Port Otago*⁵. *Port Otago* addressed the potential conflict between environment *avoid* policies and enabling policies relating to (inter) regionally significant port infrastructure. In determining the inter-relationship between policies relating to these more equally important resources it adopted a more nuanced view about balancing competing policy directions than it did in *NZKS* when addressing policies relating to private commercial marine farming operations and outstanding natural environments.
9. The AEE addresses the leading case on non-complying subdivision in the rural environment, *Sade Developments No.2 Limited v Taupō District Council*⁶ and Mr Winchester evaluates this analysis. While he disapproves of aspects of the AEE's analysis, he similarly concludes that *Sade* cannot be treated as authority for the proposition that rural subdivision below a certain size will be deemed

² Mr Winchester has suggested that the *prevent* policies are at least as strong as the *avoid* ones. While I agree with his summation directive wording, I am not aware of any caselaw addressing *prevent* wording and so reserve my position on the question of comparative directiveness.

³ *Environment Defense Society v NZ King Salmon Company Limited* [2014] NZSC 38

⁴ *NZKS* paragraph 131

⁵ *Port Otago Limited v Environment Defense Society* [2023] NZSC 112

⁶ NZEnvC Auckland A083/09, 14 September 2009

to be *urban development* and contrary to the policy without any other factors being considered. I address *Sade* further below.

10. As the concept of *urban development* is used in the key directive policies, both the AEE and Mr Winchester seek to define it. As the TDP does not define *urban development* it must be interpreted with reference to the plain ordinary meaning of the words having regard to the context of the words and the purpose of the TDP, and relevant higher order planning documents.
11. The cases cited by the AEE on this point suggest that in many instances what is *urban* or *rural* will not be driven by the nature of the activity itself, but by its scale, form and operation and how that interacts with where it is proposed to be located⁷. In my view that is the case with the current proposal, and I do not understand Mr Winchester's advice to disagree with that proposition.
12. In terms of relevant definitions of *urban* in this context, the AEE cites the definition of *urban* in NPS- Highly Productive Land (**NPS-HPL**). Given the TDP's concern with fragmentation of productive rural land this must be considered relevant. The National Policy Statement on Urban Development Capacity (**NPS-UD**) also contains the following definition:

Urban environment means an area of land containing, or intended to contain, a concentrated settlement of 10,000 people or more and any associated business land, irrespective of local authority or statistical boundaries.
13. The RPS defines *urban* as:

a concentration of residential, commercial and/or industrial activities, having the nature of a city, town, suburb or a village which is predominantly non-agricultural or non-rural in nature.
14. It defines *rural-residential development* as:

Residential development in rural areas which is predominantly for residential activity and is not ancillary to a rural or agricultural use
15. Taken together, these provisions indicate that *urban development* will be;
 - a. residential or commercial activities, and associated infrastructure;
 - b. concentrated to a level which results in a city, town, suburb, village or settlement; and
 - c. which is predominately non-agricultural or non-rural in nature.
16. Further, the RPS suggests that merely being residential development not ancillary to rural uses will not be on its own *urban development*.
17. In this context it must be remembered that the TDP recognises that the district's rural environment contains rural activities that are not traditionally rural by nature, and rural amenity and character will vary in particular localities as a result⁸. This, and the recognition that there might be more intensive development patterns associated with recreational and tourist activities expands the RMA decision-maker's discretion when considering rural development which otherwise would be contrary to the TDP.

⁷ Including *Runciman Rural Protection Society v FDC and Albert Road Investments v Auckland Council*

⁸ TDP 3b.2.1 Explanation (page 3 -4)

18. This expanded scope can be seen in operation in the assessment of the previous land-use and subdivision consent granted in 2017. As detailed in the AEE, this consent was granted, on a non-notified basis, to a proposal to construct a hotel facility and 40 associated standalone chalets on their own subdivided lots (**chalets consent**). In its decision granting this consent Council consider any of the TDP's *avoid* or *prevent* policies in respect of *urban development* as relevant and only assessed the proposal requirement to avoid *patterns of urbanisation* (Policy 3b.2.2 (xi)).
19. As indicated in *Port Otago*, interpretation of *avoid* policies should also be undertaken in light of what is sought to be protected including the relevant values and when considering development whether measures can be put in place to avoid material harm to those values⁹. The values that are attempted to be protected, or the mischiefs the *avoid* policies seek to address, are set out above in paragraph 5.

Executive Summary

20. The advice from Mr Winchester largely reflects an orthodox approach to assessment of the effects and plan provisions. Subject to integrating some additional material considerations, Mr Winchester's advice provides helpful guidance in assessing this application.
21. Mr Winchester has advised TDC not to rely on the previous chalets consent to the extent suggested in the AEE. I generally concur with that advice, not least because I do not think this is necessary where it seems generally accepted by all parties that the proposal does not have any relevant adverse effects (rural amenity, landscape, infrastructure and reverse sensitivity etc).
22. Mr Winchester seems to agree that despite some contrary statements by the Court in *Sade*, lot size *per se* does not constitute *urban development*. While Mr Winchester might appear to suggest that sub-4ha lots sizes create *prima facie* presumption of *urban development*, this appears to be his own gloss, and one that I do not think will assist Council in evaluating this proposal given its peculiarities.
23. Where sub 4ha subdivision is a non-complying and not prohibited activity, then the 4ha limit should be primarily seen as a trigger for assessment of whether there is *urban development*, not an answer to that question in of itself. While lot sizes should be given some weight in that analysis, other factors are relevant to this assessment.
24. As per *NZKS*, assessment of the application should involve first reading the objectives and policies as a whole, seeking to reconcile them into a coherent narrative which addresses the values the objectives and policies are trying to protect. Then, using that reconciled position the decision-maker should evaluate;
 - a. whether this proposal represents *urban development*, after carefully considering the proposal, including the nature of the rural environment it is to be placed in; and if it is
 - b. the extent to which the particular 'brand' of *urban development* identified can be said to be contrary to the objectives and policies of the TDP; and then
 - c. "...have regard to" that policy position and balance that against the other considerations required by s104(1).
25. While Mr Winchester has touched on all of these matters, on my reading his opinion focused on some elements more than others. There does not appear to have been an (explicit) attempt to

⁹ *Port Otago* paragraph 68

reconcile what the TDP's objectives and policies say about this proposal in terms of *urban development* given its atypical rural qualities. Rather, the question of *urban development* has been considered only by reference to the individual policies that use those words. It is then implied that the conclusion reached through that more siloed analysis be balanced with the other considerations required under s104(1) of the RMA including other more permissive objectives and policies.

26. I assume that this approach was in part a function of the limits of Mr Winchesters brief, which has appropriately left the evaluative assessments to Council. It also likely reveals gaps in the AEE's detailing of the links between the proposed activity and the golf course's ownership and operation.
27. A reconciled reading of the objectives and policies in the TDP indicate that while they generally seek to (strongly) discourage stand-alone smaller-lot subdivision in rural areas, they provide a more nuanced and permissive approach to smaller lots in respect of land development "associated with recreation, commercial accommodation and tourism activities". In my view the TDP contemplates a different approach for (rural) activities within this sub-set, which I suggest is as follows:
 - a. what is *urban development* where the proposal is associated with (relevantly) recreation and tourism activities and "...will not lead to patterns of urbanisation"; and/or
 - b. if it is *urban development*, where does it sit on the spectrum of urbanisation and to what extent can it be said to be contrary to the objectives and policies if its adverse effects avoided.
28. When assessing these questions a proposal which leads "...to patterns of urbanisation" is a distinct question from what is *urban development*. *Patterns of urbanisation* could be interpreted as incorporating questions of precedent and exceptionality, which would be consistent with the way it was interpreted by Council in its analysis of the chalets consent.
29. The Wairakei International Golf Course is a recreational facility of regional significance which falls squarely in the sub-group of activities in which the TDP says "*higher densities may be appropriate...*". While it may not be necessarily appropriately detailed in the AEE my understanding of the proposal is that it is closely associated with the recreational and tourist activities centred around the golf course. Where these connections are not currently clear to Council they need to be detailed for Council.
30. This will be highly relevant to Council's assessment because the proposal does not seem to give rise to adverse effects (including on rural amenity, reverse sensitivity, productive land fragmentation, etc). This means any issues with the proposal will primarily (if not exclusively) relate to plan integrity matters. While the current proposal may not as obviously linked to the tourist and recreational activities on the site as the chalets consent, the links which do exist will still allow Council to evaluate the proposal on a substantially stronger policy footing than would otherwise.

Substantive Advice

31. I set out below the substantive advice which underpins the summary above, as well as addressing some of the collateral matters raised by Mr Winchester's advice.

Existing Consent

32. The application material as it stands refers to and places some reliance on the 2017 chalets consent. Your instructions indicate that in part this arose as a result of pre-application discussions with Council which highlighted the obvious commonality between the two proposals.
33. In my view, Mr Winchester is correct, the chalets consent does not create an effects 'baseline' against which the effects of this proposal can be 'netted' against, and Council would be on stronger ground to eschew that approach. However, as Mr Winchester says the chalets consent does provide useful guidance to Council in processing this application.
34. While the chalets consent cannot provide a *baseline* against which the effects of the proposal can be ameliorated, it seems apparent that these are minimal in any event. I understand from you and Mr Winchester's advice¹⁰ that Council has indicated its initial assessment of the proposal is that it does not give rise to any adverse effects, or at least has less than minor effects. This is understandable where the chalets consent resulted in similar effects to the current proposal but was processed on a non-notified basis.
35. As stated above, it is notable that in its decision granting this consent Council did not identify any of the *avoid urban development* policies (3b.2.1(ii) and 3b.2.2(iv)) as being relevant to its decision. This is despite the fact that that proposal resulted in subdivided lots far smaller than those proposed by the current application¹¹. This demonstrates Council accepts that the rural environment's objectives and policies, when read as a whole, provide for a significantly more permissive regime for subdivision linked with recreational and tourist activities.

Avoid in the TDP

36. While Mr Winchester's analysis of *avoid* policies is both correct and helpful, it is important to remember that the *avoid* language was included in the TDP prior to *NZKS*. *Avoid* policies which have their provenance before *NZKS* have been contrasted in caselaw¹² with those that have come after.
37. While PC 38 and 42 will address this distinction going forward, I raise it to highlight the difficulty of strictly interpreting *NZKS* "avoidance" in respect of policies seeking to *avoid* lots sizes below specified limits. Policy 3b.2.3 (i) seeks to do this. However, if the true intent of the TDP was to *avoid* this pattern of subdivision in an absolute manner the activity would be prohibited, not non-complying, as there would be no need to evaluate an application to determine if it offends the policy. Thus, at a structural level the TDP's use of *avoid*, even at its most prescriptive, cannot be interpreted as contemplating absolute avoidance.
38. For the same reason any interpretation of *Sade*¹³, which strictly equates sub-4ha lots with *urban development* which must be avoided in an absolute *NZKS* sense cannot be correct. Rather a more credible interpretation of that decision is that it:

¹⁰ Paragraph 91

¹¹ The chalet lots were 409 m² in the chalet consent as opposed to between 1500m² - 2239m² in the current application.

¹² For example, this dynamic was canvassed in *RJ Davidson* line of cases one which is discussed in Mr Winchester's opinion.

¹³ *Sade Developments No.2 Limited v Taupo District Council*

- a. Was reached using a broader range of factors than purely lot sizes, where the Court discusses other features of the development which were relevant to the question of its *urban/rural* status. This is the view that Mr Winchester takes; and/or
 - b. Where *Sade* was pre *NZKS*, when *avoid* policies were interpreted less strictly, the Court did not have to address the adverse implications to the overall coherency of the TDP of deeming a minimum lot size as *urban development* and therefore a lot size bottom-line.
39. Either way, *Sade* cannot be applied in literal terms. This decision is discussed in both the AEE, and this discussion was addressed by Mr Winchester. Despite disagreeing with some of the analysis set out in the AEE, it appears Mr Winchester has also concluded that *Sade* is not authority for the position that *urban development* will be strictly dictated by lot size. In fact Mr Winchester seeks to add his own gloss to *Sade* by suggesting sub-4ha subdivision is not *deemed* to be *urban development* but rather *prima facie* is.
40. I do not understand that this gloss is supported by any authority and consider it too prescriptive to be helpful given the variability of potential applications and their receiving environments.
41. Rather, I conclude that the 4ha threshold should principally be considered a trigger for assessment as a non-complying activity, which then results in evaluation of the lot sizes in light of the rural environment they will be located in. While in this context smaller lot size will be important and should be carefully weighed, the structure of the TDP and caselaw, including *Sade*, makes it clear that other factors are relevant to an overall assessment of whether this Proposal constitutes *urban development* in the context of the TDP.

Mischief that the TDP seeks to address

42. As stated above when evaluating the TDP's *urban development avoid* policies, and the weight that might be attributed to them, it is important to do so considering what is sought to be protected, including the relevant values of the rural environment or the mischiefs the *avoid* policies seek to address.
43. As discussed in paragraph 5 above, the TDP and TD2050 set out clearly the qualities of the rural environment the *avoid* policies are seeking to protect. These policies should also be assumed to be particularly focused on cumulative effects on these qualities¹⁴.
44. To the extent that this proposal does not give rise to these effects, either directly or cumulatively, it must be seen as being less likely to constitute *urban development* and/or less likely to be a type or brand of *urban development* which is so unsupported by the objectives of the TDP as to be contrary or even repugnant to them.

Averaging and Clustering

45. The proposal involves clustering of lots and the AEE uses averaging of the proposed lot sizes across the area of the entire facility in assessing its effect. Mr Winchester makes it clear that the application cannot take advantage of the clustering rules used elsewhere in the TDP, and I agree with that conclusion. I also accept that the TDP's provisions allow rural subdivision to the lot sizes proposed here to side-step an assessment against the *urban development* policies via averaging.
46. However, it is clear that the comparative size of the lots to the remaining open recreational and conservation and the clustering approach will be relevant when of assessing the effects of the

¹⁴ Caselaw confirms 'precedent effects' are not environmental effects and so cannot be considered to be cumulative effects.

proposal. In particular, its effects on rural amenity and character, fragmentation of rural land, reverse sensitivity and impacts on the natural environment. The subdivision patterns could also be relevant to the question of the extent the proposal is supported or otherwise by the objectives and policies.

Reconciled view of the relevant objectives and policies

47. As detailed above, NZKS requires RMA decision-makers to first read plans' objectives and policies as a whole in an attempt to reach a reconciled view of what the plan is trying to achieve. In doing so they should consider the different level of directiveness of the language used in the respective objectives and policies. Unlike many district plans, the TDP's approach to development in the rural environment can largely be read as a coherent whole.
48. Given this, after identifying the relevant objectives and policies and seeking the reconciled approach, the framework of assessment of proposals in the rural environment involve;
 - a. Evaluating whether this proposal represents *urban development*, after carefully considering the proposal itself, including the peculiar attributes of the rural environment it is to be placed in; and if it is
 - b. Evaluating the extent to which the particular *urban development* found is contrary to the objectives and policies of the TDP, again taking into account the peculiar rural environment; and only then
 - c. Balancing the proposal's position as per the objectives and policies against the other considerations required by s104(1).
49. In his analysis Mr Winchester has touched on all of these matters, but on my reading of his opinion has tended to address the question of *urban development* only by reference to the policies that use those words, rather than reading the objectives and policies as whole. He then suggests that the conclusion reached through that more siloed analysis of individual policies be balanced with the other considerations required under s104(1) of the RMA. His conclusions appear to have been reached without (explicitly) seeking to apply a reconciled view of the TDP's objectives and policies when addressing the question of whether the proposal is *urban development*, and if it is, the extent its brand of *urban development* is contrary to the objectives and policies, where that falls on a spectrum.
50. I point this out not to criticise Mr Winchester's approach. Clearly his brief was to avoid straying into evaluating the competing attributes of the proposal, which he properly makes clear is Council's job. Further, his advice helpfully reveals that the application material as it stands may not have conveyed as clearly as it could have the links between the proposal and the viability of the existing recreational and tourist facilities on site. It is largely these links which trigger the need to take a more holistic view of the objectives and policies. This is why I have recommended that you provide Council more details in respect of that matter.
51. In my view, a reconciled reading of the objectives and policies indicate that while they generally seek to discourage stand-alone smaller-lot subdivision in rural areas, they provide a more nuanced and permissive approach to smaller lots in respect of land development "*associated with recreation, commercial accommodation and tourism activities*". This reflects the TDP's recognition, at various points, that unlike traditional rural environments, the Taupo District's rural environment contains a diverse range of land-uses (which includes geothermal energy and recreation, tourism and commercial accommodation) that require the location of activities close to the resource. The TDP also recognises that the rural environment includes established activities

that are not traditionally rural by nature, and rural amenity and character will vary in particular localities¹⁵. In this respect the TDP provides a limited caveat or proviso to the stringency of application of the avoid policies.

52. The plan is not completely clear whether these uses should be treated as part of a broader range of rural land-uses than the “traditional rural” land-uses, whether they should be considered to be noted exceptions to “traditional rural” land-uses, or both. However, what is clear that the TDP contemplates a different approach for (rural) activities within this sub-set and that considerable weight can be given to these this sentiment when assessing the proposal stringency of application of the *avoid* policies.
53. Reconciling these themes leads to the conclusion that rural objectives and policies requires a different assessment of a proposal associated with (relevantly) recreation and tourism activities and I would suggest the following:
 - a. what is *urban development* where the proposal is associated with (relevantly) recreation and tourism activities and it “...*will not lead to patterns of urbanisation*”; and/or
 - b. if it is *urban development*, where does sits on the spectrum of urbanisation and to what extent can it be said to be contrary to the objectives and policies if “...*adverse effects are avoided, remedied or mitigated and that granting consent will not lead to patterns of urbanisation and reverse sensitivity issues*”;
54. When assessing these questions I take the view that a proposal which leads ‘...*to patterns of urbanisation*’ is *distinct from “urban development”* and could be interpreted as incorporating questions of precedent and exceptionality. This is consistent with the TDP inclusion of a strong zoning focus as opposed to a purely effects-based approach. It also seems consistent Council evaluation of the chalets consent, which it completed without any reference to the *urban development* policies.
55. The Wairakei International Golf Course is an international quality recreational facility which has been established for over 50 years. It was this country’s first international quality course and today still remains one of New Zealand’s few. It is a recreational facility of regional significance which falls squarely in the sub-group of rural land-uses which the TDP contemplates should be treated as a subset of traditional rural activities where “*higher densities may be appropriate...*”.
56. Your instructions are that although they may not have been as clearly expressed as they could have been, there are clear links between the future successful operation of the golf facility and this proposal. At a bare minimum it is apparent that having a core group of well-resourced families making a large and long-term financial commitment to the golf-course and conservation area will assist in assuring their ongoing operation and availability as a preeminent tourist facility in the district.
57. This will be highly relevant to Council’s assessment because the proposal does not seem to give rise to adverse effects (including on rural amenity, reverse sensitivity, productive land fragmentation, etc). This means that any issues with the proposal primarily (if not exclusively) relate to plan integrity matters. While the current proposal may not be as obviously linked to the tourist and recreational activities on the site as the chalets consent, in that case consent was granted to far more intensive subdivision than is proposed on a non-notified basis without any benchmarking against the *urban development* policies. To that extent detailing the links which

¹⁵ TDP 3b.2.1 Explanation (page 3 -4)

evidently do exist between this proposal and the golf course will allow Council to evaluate the proposal on a substantially stronger policy footing than would otherwise be the case.

Conclusion

58. If you require any further assistance, and specifically in assessing the potential relevance of the links between the proposal and the golf course please contact me.

Ngā mihi

A handwritten signature in blue ink, consisting of several loops and a trailing flourish.

Patrick Mulligan
Barrister

Copy to: Michael Tinker, Burton Partners