

**IN THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA  
KI TĀMAKI MAKĀURAU**

**Decision [2024] NZEnvC 093**

IN THE MATTER OF an appeal under section 120 the Resource  
Management Act 1991

BETWEEN OCEAN DYNAMICS LIMITED  
(ENV-2023-AKL-000102)

Appellant

AND TAURANGA CITY COUNCIL

Respondent

AND TMH (1982) LIMITED

Applicant

Court: Chief Environment Court Judge D A Kirkpatrick sitting alone  
under s 279 of the Act

Last case event: 18 March 2024

Date of Order: 29 April 2024

Date of Issue: 29 April 2024

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**CONSENT ORDER**

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A: Under section 279(1)(b) of the Resource Management Act 1991, the  
Environment Court, by consent, orders that:

- (1) the appeal is allowed subject to the amendments to the conditions of  
consent as set out in Appendix A;



(2) the appeal is otherwise dismissed.

B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.

## REASONS

### Introduction

[1] This is an appeal by Ocean Dynamics Limited against a decision of Tauranga City Council granting a resource consent to TMH (1982) Limited to undertake alterations and extensions to an existing building at 105 Birch Avenue, Tauranga (**the Site**) and to operate a basketball facility there.

### Background

[2] On 31 May 2023 an Independent Commissioner acting on behalf of the Council granted TMH's application for consent. Ocean Dynamics filed a notice of appeal on 26 June 2023 seeking rescission of the consent principally on the grounds that its fibreglass production business nearby could be the subject of complaints about odour and about issues of parking and traffic management.

[3] No other person has given notice to become a party under section 274 of the Act.

### Agreement reached

[4] Following mediation on 14 November 2023, the parties have now reached an agreement. They conclude that it is appropriate for consent to be granted subject to certain amendments to the conditions of consent.

[5] Key changes to the conditions that have been agreed include:

- (a) **Traffic management plan:** Amendment to condition 14 to clarify that the Council must certify a traffic management plan prior to the activity commencing.

- (b) **Parking:** A new condition 17 requires the consent holder to reserve, at all times, three on-site car parking spaces for use by pick up and drop off users of the site and to erect signage that notifies users of this facility. This is intended to address the appellant's concerns about overflow parking spilling into the street or creating traffic management issues which might adversely affect the appellant's lawful industrial activities.
- (c) **Temporary traffic management:** Amendment to condition 22 to require the traffic management plan for temporary events to include details of consultation undertaken with the owners or occupants of neighbouring sites.
- (d) **No-complaints covenant:** Amendment to condition 29 relating to the no-complaints covenant to remove reference to properties within 300 metres of the site getting the benefit of the covenant. This created a privity issue as the owners of those properties would not necessarily be party to the covenant. The amended condition requires the consent holder to make an offer to all submitters who opposed the application to register a covenant for their benefit. The consent holder must then register the covenant against the title to any properties which take up the offer and the appellant's property. For certainty, as the parties have now agreed on the specific wording of the covenant, the condition requires the registered covenant to reflect the wording to be appended to the consent. As a "belts and braces" approach, as such covenants only bind land-owners and not tenants (and as the consent holder is the tenant operator of the basketball facility, not the owner of the Site), the condition will also require a deed of covenant to be entered into by any future tenant operating under the benefit of the consent (upon request), which reflects the wording of the registered covenant.
- (e) **User agreement:** Condition 30 requires the consent holder to prepare a user agreement to be signed by every user of the building which sets out the range of effects accepted as part of the industrial working environment and advises users that the terms of use include an

agreement not to complain about lawfully authorised activities to any local or regional authority. Through resolving the appeal, the parties have agreed on wording which meets the requirements of condition 30, as included in Appendix A to the memorandum of the parties in support of a consent order. By signing the memorandum, the applicant agrees to include that wording in the Hire Agreement to be entered into with users of the basketball facility.

- (f) **Temporary activities:** A new advice note (j) is added to the conditions of the resource consent which clarifies that the consent holder cannot undertake temporary activities provided for as a permitted activity under the Tauranga City Plan in addition to the temporary events governed by the resource consent.

### **Consideration**

[6] The Court has read and considered the joint memorandum of the parties dated 18 March 2024

[7] The Court is making this order under section 279(1) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands for present purposes that:

- (a) all parties to the proceedings have executed the memorandum requesting this order; and
- (b) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction and conform to the relevant requirements and objectives of the Act including in particular its purpose and principles in Part 2.

### **Order**

[8] The Court therefore orders by consent that the appeal is allowed and the resource consent granted by the Tauranga City Council to TMH (1982) Limited to undertake alterations and extensions to an existing building and to operate a basketball

facility at 105 Birch Avenue, Tauranga, is amended by making the amendments (insertions shown underlined and ~~deletions~~ shown struck through) to the conditions of consent as set out in **Appendix A** attached to and forming part of this consent order.

[9] The appeal is otherwise dismissed.

[10] Under s 285 of the Act, there is no order as to costs.




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**D A Kirkpatrick**  
Environment Judge



## APPENDIX A

 <i>Tauranga City</i>	<b>RESOURCE CONSENT NUMBER RC29481</b>
	<b>CONDITIONS OF RESOURCE CONSENT</b>

**Resource Consent RC29481 is subject to the following conditions:**

### General

1. Subject to any amendments required to be made to comply with the following conditions, the consented activity must proceed in accordance with the application submitted including:
  - (a) The Application and Assessment of Environmental Effects Report prepared Lysaght and titled 'Proposed Development for TMH (1982) Limited', dated 14 November 2022.
  - (b) Flood hazard assessment prepared by Lysaght dated 2 November 2022, reference 225222.
  - (c) Geotechnical investigation report prepared by CMW Geosciences dated 3 May 2022, reference TGA2022-0051AB Rev 1.
  - (d) Contaminated site management plan prepared by Pennan & Co titled '105 Birch Avenue, Judea, Tauranga', dated 26 August 2022.
  - (e) The following plans prepared by Complete Architecture, project reference 'Basketball Facilities – MLNL Works, 105 Birch venue, Tauranga':
    - i. Site Plan dated 2 May 2023
    - ii. Elevations dated 8 June 2022
  - (f) Additional information received via email from Lysaght on 14 November, 5th, and 22<sup>nd</sup> December 2022 titled 'RE: RC29841– s92 RFI - 105 Birch Avenue'
2. [The consent holder shall be responsible for a](#)All costs associated with ~~the~~ conditions of this consent, including [preparation and registration of the covenant under condition 29 or costs related to service agreements or upgrades](#) ~~those~~ required under the Infrastructure Development Code ~~must be met by the consent holder~~.
3. All earthworks design, testing and construction must be undertaken in accordance with the Infrastructure Development Code, Tauranga City Council 'Erosion and Sediment Control Guidelines, and the specific requirements of the consent holders appointed Geo-Professional.
4. All electrical fittings must be set above RL3.39m NZVD16

5. Prior to the utilisation of the building authorised by this resource consent, the consent holder must form, seal and mark out 22 on-site car parking spaces in accordance with the Site Plan referenced in Condition 1.
6. Prior to the utilisation of the building authorised by this resource consent, the consent holder must provide 12 bicycle parks in accordance with the Site Plan referenced in Condition 1.
7. Access, parking, and manoeuvring areas must be formed and sealed in accordance with the Infrastructure Development Code.
8. The combined gross leasable floor area (GLFA) used for the office must not exceed 6.2% of the GFA.

### Operation

9. Activities undertaken on the site must be limited to the purpose of:
  - a) basketball court training;
  - b) community basketball games;
  - c) basketball court hire;
  - d) afterschool/school holiday and youth basketball programmes;
  - e) a 3 on 3 basketball league;
  - f) basketball tournaments, and
  - g) Administration facilities that are ancillary to the activities listed in clauses a) to f)
10. Temporary Activity Events held on the site are limited to basketball tournaments and must occur a maximum of five (5) times in a calendar year. ([see advice note i](#))
11. The maximum number of persons in the building authorised by this resource consent at any one time must not exceed 300 persons (including office/administration staff).
12. The consent holder must keep a logbook of all events and activities (including Temporary Activity Events) held in the building authorised by this resource consent, including numbers of persons in attendance. The logbook must be made available for inspection by Tauranga City Council monitoring officers at all times should a copy of it be requested by those officers.

### Car parking

13. The consent holder must ensure that between the hours of 6 am – 4 pm Monday to Friday, no on-street parking other than the carparks directly [adjoining adjacent to](#) the site's Birch Avenue road boundary are utilised by staff, users of the building authorised by this resource consent or any other person associated with the consented activity.
14. [Prior to commencement of the consented activity, a](#) Car Parking Management Plan (CPMP) must be submitted to ~~Council~~ Tauranga City Council's Team Leader: Monitoring (or their delegate) [for certification](#) detailing how operational procedures will ensure Condition 13 is complied with. The CPMP must as a minimum include:

- a) Basketball training schedules;
- b) Establishment of attendance thresholds above which alternative modes of transport for attendees will be utilised;
- c) Location of staff allocated car parking spaces;
- d) Signage;
- e) Notification of access and parking requirements to attendees and users of the building authorised by this resource consent;
- f) Details of how attendees and users of the building authorised by this consent will be precluded from using parking spaces on surrounding private property in the absence of written approval to do so from the property owners; and
- g) Car parking monitoring and recording procedures.

*Advice Note: Tauranga City Council's certification is limited to confirming that the CPMP contains the information specified in Condition 14.*

15. The consent holder must make compliance with Conditions 13 and 14 a written term of use for any users of the building authorised by this resource consent.

16. The consent holder must reserve four onsite carparking spaces for the use of staff and erect signage that notifies users of the building authorised by this consent of that reserved use.

- ~~16-17.~~ The consent holder must reserve, at all times, three onsite carparking spaces for the use of pick up and drop off users of the site and erect signage that notifies users of the building authorised by this consent of that reserved use.

- ~~17.~~ The CPMP may be included in the Traffic Management Plan required under Condition 22.

## **Flood Risk Management**

18. Prior to the utilisation of the building authorised by this resource consent the consent holder must submit a Flood Safety and Evacuation Plan (FSEP) to Tauranga City Council's Team Leader: Monitoring (or their delegate) for their certification that it meets the requirements of (a) to (c) below. The FSEP must:
- (a) Be prepared by a suitably qualified specialist in the fields of health and safety and evacuation management.
  - (b) Include the following details as a minimum:
    - (i) Proposed measures to monitor weather and actions to be taken to pre-empt the need for evacuation from the building authorised by this resource consent in an adverse weather event and to ensure people are not onsite during a forecasted extreme flooding events.
    - (ii) The circumstances that would necessitate an evacuation of the building authorised by this resource consent, including but not limited to weather forecasts, Civil Defence notifications, and flooding in or around the site.
    - (iii) Proposed actions to be taken and procedures to be followed in the event that evacuation is required including actions required to ensure the safety of occupants during flooding events including the more vulnerable (elderly, disabled, children)
    - (iv) Any other measures the author of the FSEP deems necessary to ensure the health and safety of staff and occupants of the building authorised by this resource consent during flood events.



(c) Be held on site.

19. The FSEP must be reviewed by the consent holder at intervals no longer than three yearly; be updated if the review results in changes to the FSEP and be resubmitted to Council Tauranga City Council's Team Leader: Monitoring (or their delegate) for their information.
20. The building authorised by this resource consent must not be utilised by members of the public until the FSEP has been certified.
21. The consent holder must adhere to the certified FSEP for the duration of the activity.

### Traffic Management

22. Prior to the commencement of any of the five Temporary Events referenced in Condition 10, the consent holder must submit a Traffic Management Plan (TMP) to Tauranga City Council's Team Leader' Monitoring (or their delegate) for certification. The TMP must be prepared by suitably qualified person and at a minimum must include:
  - a. Details of local car parking areas, public transport routes and timetables, cycling / walking routes to the site and cycle parking that is provided on site;
  - b. Measures proposed to avoid unnecessary traffic circulation and vehicle movements;
  - c. Details of how traffic management information will be provided to visitors; and
  - d. Details of the appointment a TMP Coordinator, who will be responsible for the implementation of the TMP and who will liaise with Council.
  - e. Details of consultation undertaken with neighbouring sites (those adjoining and opposite to the site as a minimum) including who was consulted (e.g. owner or occupant), feedback received and measures included to address concerns raised.

*Advice Note: Tauranga City Council's certification is limited to confirming that the Traffic Management Plan contains the information specified in Condition 22.*

23. The consent holder must adhere to the certified TMP for the duration of any Temporary Events the activity authorised by condition 22 of this resource consent.

### Contaminated soil

24. The contaminated site management plan ('SMP') referenced in Condition 1(d) must be implemented and adhered to by the consent holder and the consent holder must ensure that the SMP is also adhered to by any contractors engaged to undertake site earthworks.
25. Following the soil disturbance on site, soil sampling must be completed in accordance with the SMP and a works completion report must be submitted to Tauranga City

Council's Team: Leader Monitoring (or their delegate). The work completion report must include the following information:

- a. Details and results of the soil sampling undertaken.
- b. Volume of soil or fill disturbed and removed from site.
- c. Documentation confirming any soil or fill that is removed from the site has been removed to an appropriate off-site disposal facility.

## Engineering

26. All matters and works relating to the servicing and accessing of the building authorised by this consent, must be designed, supervised, constructed and certified in accordance with the requirements of the Tauranga City Council Infrastructure Development Code.
27. The consent holder must upgrade the wastewater connection to 150 millimetres (diameter).
28. Within three (3) months of the code of compliance certificate being issued for the building authorised by this consent, the consent holder must supply Tauranga City Council with a set of 'as built' plans of all engineering works in accordance with Tauranga City Council's Infrastructure Development Code.

## No Complaints

29. Prior to the use of the building authorised by this consent for basketball activities, the consent holder must supply evidence to Tauranga City Council's Team: Leader Monitoring (or their delegate) of a 'no complaints' land covenant [reflecting the wording appended to this consent having been registered on the Record of Title of the site and on the Record of Title of the site of any owner of a property whose owner or occupier made a submission opposing this resource consent application who takes up an offer by the consent holder to have the covenant so registered preventing any complaints being made by the staff or any other occupants of the building to any local or regional authority; with respect to an established activity lawfully operating within 300m of the site as a permitted activity, under a resource consent, or through existing use rights \(legally authorised activities\). Following covenant registration, any tenant of the site acting pursuant to the terms of the consent, shall if required by any covenantee, sign a Deed of Covenant restating terms of the registered covenant in favour of that covenantee at that covenantee's cost.](#)
30. The consent holder must also prepare a user agreement to be signed by every user of the building authorised by this consent that includes a clause pertaining to the 'no complaints' land covenant required under condition 29. The user agreement must detail the range of effects associated with and accepted as part of an industrial working environment and advising that the terms of use include an agreement not to complain about legally authorised activities to any local or regional authority.
31. A notice must be included [with on the website of the operator of the building authorised by this consent and on the website for](#) the sale of tickets for ticketed events that explicitly advises all users and visitors that there are industrial uses operating within the surrounding area, and advise that the expected effects in that kind of working environment include heavy vehicles, dust, noise and odour.

**Advice Notes**

- a) Under sections 357A and 357B of the Resource Management Act 1991, you have a right of objection to the consent authority in respect of the above decision or any additional fees and charges required in respect of this decision. In accordance with section 357C notice of any such objection must be in writing to the Council within 15 working days of receiving this decision and/or the date on which the invoice is received. Any notice given under section 357C should describe the reasons for the objection.
- b) Please direct any information in relation to the compliance with the above conditions to the following email: [emac@tauranga.govt.nz](mailto:emac@tauranga.govt.nz)
- c) In accordance with the Council's schedule of user fees and charges, additional fees for environmental monitoring of this Resource Consent may apply. An invoice/s may be sent as environmental monitoring is completed to determine compliance with the conditions set in this Resource Consent.
- d) All signage associated with the consented activity remains subject to the relevant signage provisions within the Tauranga City Plan. The Consent Holder's attention is directed to the permitted activity provisions in Rule 4D.2.3.4 in particular.
- e) New connections to Council infrastructure (sanitary sewer manhole) must be inspected and approved by a Council Development Monitoring Advisor or Development Engineer prior to backfilling.
- f) The consent holder must supply to the Council a set of 'as built' plans of all engineering works in accordance with the Council's Infrastructure Development Code.
- g) Where any building or drainage works are required to satisfy conditions of this consent, all consents required under the Building Act 2004 must be obtained prior to the works being carried out.
- h) In accordance with the Council's Schedule of Fees and Charges, if not accompanying this decision, an invoice may be sent at a later date if the actual cost of processing the application the subject of this decision exceeds the application fees deposit paid on lodgement of the application.
- i) Prior to any works commencing on-site the consent holder must submit to Council plans of the servicing of the proposed subdivision for a service connection approval. Applications must be submitted to [sca@tauranga.govt.nz](mailto:sca@tauranga.govt.nz) and as a minimum, include the following:
  - Location and details of existing services and connections.
  - Route of proposed pipework with invert level and details of access points or rodding eyes.
- j) [The consent holder is advised that they do not have a right to undertake temporary activities provided for as a permitted activity under the Tauranga City Plan \(or its successor\) in addition to the Temporary Events governed by this resource consent.](#)

**Appendix to Resource Consent RC29481**  
(Refer Condition 29)

**Covenant Instrument to note land covenant**  
(Section 116(1)(a) & (b) Land Transfer Act 2017)

**Covenantor**

TMH (1982) Limited *or such other alternate registered proprietor at time of registration*

**Covenantee**

Glenn Allan TODD, Sheryal Christine TODD, Valerie Winifred TODD and Jeanette Valerie ACOTT *or such other alternate registered proprietor at time of registration*  
Ocean Dynamics Limited (in gross)

**Grant of Covenant**

**The Covenantor** being the registered owner of the burdened land set out in Schedule A grants to the **Covenantee** (and, if so stated, in gross) the covenants set out in Schedule A, with the rights and powers or provisions set out in the Annexure Schedule(s)

**Schedule A**

*Continue in additional Annexure Schedule, if required*

Purpose of covenant	Shown (plan reference)	Burdened Land (Record of Title)	Benefited Land (Record of Title) or in gross
Land Covenant		Lot 15 DPS 24187 (RT SA28C/846)	Lot 7 DPS 24187 (RT SA23/578)  Ocean Dynamics Limited (in gross)  <i>[Any other offeree who has requested registration in their favour – refer condition 30 of consent]</i>

## **Covenant rights and powers (including terms, covenants and conditions)**

*Delete phrases in [ ] and insert memorandum number as required.  
Continue in additional Annexure Schedule, if required*

The provisions applying to the specified covenants are those set out in:

~~[Memorandum number \_\_\_\_\_, registered under section 209 of the Land Transfer Act 2017]~~

[Annexure Schedule 1]

## Annexure Schedule 1

*Insert instrument type*

**Covenant Instrument**

*Continue in additional Annexure Schedule, if required*

The Covenantor covenants with the Covenantee:

- (1) in respect of the Record of Title listed as Burdened Land in Schedule A (“the Burdened Title”);
- (2) in accordance with the terms as set out in Schedule B below;

and it is accepted that:

- (3) the land covenants contained in Schedule B (“the land covenants”) shall bind the owner for the time being of the Burdened Land and any lessee, licensee or occupier of the Burdened Land from time to time (collectively “the Burdened Land Owner”); and
- (4) the Burdened Title shall be bound by the land covenants and the owner or owners for the time being of the Records of Title listed as a Benefited Land in Schedule A, all lessees, licensees or occupiers of such land, and any other parties listed as benefited in gross in Schedule A (collectively referred “the Benefited Land”), may enforce observance of the land covenants against the Burdened Land Owner.

### SCHEDULE B

1. The Covenantor acknowledges and agrees that:
  - a) The Benefited Land at the date of this Covenant is able to be used to carry out lawfully permitted and/or lawfully authorised activities (including but without limitation) fiberglass manufacturing, spray-painting and general industrial manufacturing (“the Activities”); and
  - b) Common, unavoidable associated effects of the Activities include noise generation, dust, reduced air quality, traffic movement, vibration, lights, disturbance, and other effects which are unavoidable effects of the Activities and which may have effects, and cause loss of amenity, beyond the boundaries of the Benefited Land.
2. The Covenantor agrees and covenants that it will:
  - a) allow the Activities on the Benefited Land without interference or restraint (or purported interference or restraint) from the Covenantor.
  - b) not lodge or permit to be lodged, or support or encourage any other party to lodge or support, any complaint with the Tauranga City Council, or the Bay of Plenty Regional Council, or any other territorial or other authority having jurisdiction in relation to the Activities.
  - c) not at any time directly or indirectly make any claim or demand, or take any action or proceedings, or be a party to or otherwise support in any way any

claim or proceedings, arising from the Activities including for nuisance, negligence, interference or general damages.

- d) not make, support, permit to be made or encourage any other party to make or support, any application to the Environment Court or other Court or forum of competent jurisdiction for a declaration or order regarding the Activities;
  - e) not at any time directly or indirectly make, lodge, be a party to or otherwise support in any way any submission, objection, application, proceedings or appeal (whether pursuant to the Resource Management Act 1991 or any other statute or to any statutory amendment or replacement thereof) which has the effect of objecting to, limiting, prohibiting or restricting:
    - i. the Activities;
    - ii. any district or regional planning provisions applying or relating to the Activities; or
    - iii. any application for any consent or approval for continuation of the Activities.
  - f) Provide written approval immediately on request for any application for consent or approval for continuation of the Activities.
3. The terms of this covenant shall continue to apply until the earlier of:
- a) Cessation of material carrying on of the Activities for a continuous period exceeding twelve (12) months; or
  - b) The unqualified full and absolute surrender, expiry, or termination of the Land Use consent granted by TCC in 2023 (RC [REDACTED]) for a basketball community facility to be operated on the Burdened Land.
4. The Covenantor agrees it shall immediately and without delay upon reasonable request from the Covenantee, procure a binding Deed on terms acceptable to the Covenantee from any lessee, licensee or occupier of the Burdened Title binding that party to the terms of this Covenant in favour of the Covenantee and Benefited Land.
5. The Covenantor agrees to meet the reasonable costs of the Covenantee for purposes of registration of this covenant (including any applicable mortgagee consent) and any costs on surrender if requested by the Covenantor following expiry of this covenant pursuant to its terms.