IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TE TĀMAKI MAKAURAU

Decision No. [2023] NZEnvC 254

IN THE MATTER	of an appeal under s 325A(7) of the Resource Management Act 1991
BETWEEN	GI FINLAY TRUSTEES LIMITED, BETH MARY DANIEL and BARRY CARE DANIEL (ENV-2022-AKL-000189) Appellants
AND	WESTERN BAY OF PLENTY DISTRICT COUNCIL Respondent

Court:	Environment Judge L J Semple Environment Commissioner K A Edmonds Environment Commissioner I Buchanan
Hearing:	at Tauranga on 31 July 2023 – 3 August 2023
Appearances:	L Burkhardt for the Appellants A Hopkinson and R Zame for the Council A Cowley and N Bidois for Priority Te Puna Inc
Last case event:	15 August 2023
Date of Decision:	28 November 2023
Date of Issue:	28 November 2023

DECISION OF THE ENVIRONMENT COURT

A. The appeal is refused. The date for compliance with the abatement notice issued on 18 May 2022 remains 1 November 2022.

B. Costs are reserved. Any application for costs should be made within 10 working days of the date of this decision. Any party may reply within a further 10 working days. Any response to matters raised for the first time in the reply may be made within a further 5 working days.

REASONS

Background

[1] The history to this appeal is lengthy and somewhat complex. In 2001, Mr and Mrs Daniel were one of three proponents in respect of a private plan change application to rezone land at Te Puna Station Road (which is the location of the current abatement notice) from rural to rural industrial (the Te Puna Business Park Zone).

[2] The Western Bay of Plenty District Council (Council) declined that request, and it was appealed to the Environment Court in 2003. The Environment Court subsequently granted the plan change in June 2005 having found that:[1]

> … the granting of this change would avoid ad hoc development in this area, which has the potential to derogate from the values of the area without providing appropriately for amenity issues.

[3] Relevant to the matter now before this Court, the Court records at paragraph [70] of its decision:

> We have concluded that the appellant is taking an industrial park approach to this change, intending to achieve a more certain outcome by the imposition of requirements around the perimeter of the site (as well as the central overland flow area (now wetlands) and ponds and internal planting. This is coupled with performance standards and the requirement for any exceptions to be dealt with as discretionary activities. The appellant presses on the Court that this is a more certain outcome to the application of the Plan than further ad hoc

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1 *Thompson v Western Bay of Plenty District Council* A16/2005 at [122].

developments.

[4] The "industrial park approach" to be taken was secured by way of a Structure Plan and bespoke planning provisions included in the District Plan. Those provisions included a number of infrastructure prerequisites which were to be completed before the site could be used for industrial activities. If such prerequisites were not met, industrial activity would otherwise require a non-complying activity consent.

[5] Subsequent to the rezoning in 2005, a full District Plan review was undertaken between 2008 and 2012. The (at that time) relatively new Te Puna Business Park Zone provisions were the subject of some 41 submissions in opposition. We heard from Ms Perring, a consultant planner contracted to the Council that the "key differences are that with the 2012 plan review the site was rezoned to industrial, before that it was a rural industrial zone, and the noise provisions were adjusted in terms of the measurement tool … the impact of which was to increase the noise allowed at the Te Puna Business Park by approximately seven decibels".[2]

[6] Critically, for the purposes of this hearing, there was no amendment to the requirement that certain infrastructure was required to be developed and/or upgraded before industrial activities could be undertaken on the site.

[7] In that regard, a helpful table setting out the current operative plan requirements for the Te Puna Business Park Zone was provided to the Court and is reproduced in part below:[3]

Te Puna Business Park - Infrastructure Requirements and Mitigation Measures

Infrastructure / mitigation	**District Plan**

2 NOE at 307, lines 8-13.

3 Common Bundle (CB) 00041. Note that the original table provided to the Court also identified requirements within an Agreed Statement of Facts referenced in *Thompson v Western Bay of Plenty District Council*. Our determination is limited to the matters contained in the District Plan and as such those items are not reproduced here.

requirement[4]	
Road upgrading requirements	
Te Puna Road/State Highway 2 intersection must be upgraded to a roundabout or similar traffic management alternatives. *	12.4.16.2(a)
Te Puna Station Road/State Highway 2 intersection must be upgraded by widening for left turn traffic movements onto the highway or similar traffic management alternatives. *	12.4.16.2(a) & 12.4.16.2(f) (ii)(b)
The Te Puna Road/ Te Puna Station Road intersection must be upgraded to include provision for left turn and right turn movements or similar traffic management alternatives. *	12.4.16.2(b)
A minimum of two calming thresholds shall be installed at the northern end of Clarke Road. *	12.4.16.2(c)
Access from the land onto Te Puna Station Road must be formed for safety reasons up to and including compliance with Diagram D "Moderate Use Access Standard" from the Transit Planning Policy Manual. *	12.4.16.2(d) (ii)
A financial contribution of $29,545 (based on 2002 figure adjusted annually by the CPI for inflation) per hectare estimated net developable area shall be paid. *	12.4.16.2(e) (i)
Road upgrading requirements – continued	
Until the northern arterial bypass route is constructed and operational, monitoring is required to demonstrate that traffic generation limits are under the threshold provided in 12.4.16.2(f)(i) and that the capacity of the intersection of SH2 and Te Puna Station Road remains adequate.	12.4.16.2(f)(i) and (ii)

4 * Denotes that the requirement must be completed prior to commencement of any industrial or business activity on Te Puna Business Park land.

Landscape planting and stormwater management	
Any development of land within the zone shall be designed, approved and developed to incorporate and illustrate amenity screen landscaping, acoustics earth bunds/fences and a stormwater collection system in accordance with the Te Puna Rural Business Park Structure Plan in Appendix 7.	4C.5.3.2.f.i and Appendix 7 (Te Puna Business Park Structure Plan)
The area of the planted land around the zone boundary, the area of land subject to the Te Puna Station Road roadscape [planting] and the stormwater ponds and overland flow path / wetland shown in the Te Puna Rural Business Park Structure Plan shall be established and vested in the Council. *	4C.5.3.2.f.ii, 12.4.16.3(a), and Appendix 7 (Te Puna Business Park Structure Plan)
Secondary planting shall be provided on boundaries between land parcels as set out in the Structure Plan.	4C.5.3.2.f.iii, 12.4.16.3(b), and Appendix 7 (Te Puna Business Park Structure Plan)
Earth bunds or earth bunds with fences shall be constructed along the northwestern, southern and north-eastern peripheral Business Park boundaries. *	12.4.16.3(c) and Appendix 7 (Te Puna Business Park Structure Plan)
Landscape planting and stormwater management	
Landscape plans for the zone boundary, Te Puna Road roadscape, and stormwater ponds and overland flowpath/wetland shall be prepared by a qualified landscape designer and approved by Council. The plan for the overland flowpath/wetland shall be prepared in consultation with Pirirakau.	4C.5.3.2.f.iv
Additional amenity screen planting shall be provided to the Council's satisfaction for each new building over 100m2 gross floor area.	4C.5.3.2.f.v and 12.4.16.3(d)
Water supply	
An adequate water supply shall be provided to meet Western Bay of Plenty District Council Code of Practice for	12.4.16.5(a)

Class C fire risk and a peak hour flow of 1.0l/s/ha.*	
A financial contribution of $20,052 (based on 2002 figure adjusted annually by the CPI for inflation) per hectare net developable area shall be paid to the Council when requested on approval of any subdivision building or resource consent.	12.4.16.5(b)

[8] Although there was some dispute between the parties regarding the degree to which some of these prerequisites have now been complied with, it was accepted by the Appellants in their Notice of Appeal that "some performance standards have not been met, and that a resource consent is required to authorise departure from those standards".[5]

[9] Despite that acceptance, the Court heard unchallenged evidence that industrial activity has been occurring at 245 Te Puna Station Road since late 2015 without the performance standards having been met or such activities being authorised by way of resource consent.

[10] This has resulted in abatement notices being issued on 3 March 2020 requiring the Appellants to cease development of the property for industrial or business activities; in December 2020 requiring the Appellants and their tenant A & J Demolition Ltd to cease concrete crushing; and on 18 May 2022 requiring the Appellants to cease using the property for any industrial activity. It is the 18 May 2022 abatement notice (the abatement notice) that is the subject of this appeal.

The Abatement Notice

[11] The abatement notice was issued as a result of Mr Keaney, a Council enforcement officer, visiting the site at 245 Te Puna Station Road on 30 March 2022

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5 Notice of Appeal dated 7 November 2022 at [8(d)].

and 16 May 2022 and observing the following industrial activities:[6]

(a) the storage of five relocatable homes by Total Relocation Ltd;
(b) the storage of five trucks and a number of large tyres from earthmoving vehicles by Earthmover Tyre Services Ltd;
(c) the storage of at least 15 swimming pools by Central Pools Ltd (trading as Compass Pools);
(d) the storage of an excavator and large demolition waste skip bins by A & J Demolition Ltd.

[12] Mr Keaney provided evidence that at the time of those visits he noted that the following District Plan prerequisites to industrial activity had not been complied with:

(a) the stormwater collection system required by the Structure Plan had not been installed;
(b) the shelter planting along the site boundary had not been completed;
(c) the stormwater ponds had not been established;
(d) the parking and loading areas had not been sealed.

[13] Mr Keaney confirmed in evidence that he had subsequently learnt that in addition to the above, the provisions of the plan relating to road upgrades, including at the Te Puna Road/Te Puna Station Road intersection, had also not been complied with.

[14] It is accepted by the Appellants that no resource consent to authorise such activities is held by them or their tenants.

[15] The Appellants argue, however, that such an application was extant, having been applied for on 9 June 2021 (RC12979) (consent application 1). That application was not provided to the Court, but we understand it was an application to vary aspects of the Structure Plan to enable development (including, we assume, the existing unconsented activities) to proceed as a non-complying activity. The application was

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6 Evidence Bundle (EB) 00753 at [62].

placed on hold on 24 June 2021 pending applications for retrospective consent for earthworks undertaken in a flood zone. That application (consent application 2) was subsequently lodged on 8 April 2022 and, alongside the original consent application, was the subject of an extensive s 92 request issued in June 2022. The Court understands that to date the request has not been fully answered.

[16] Given the protracted progress of consent applications 1 and 2, the Appellants lodged a third resource consent application in February 2023 (after the appeal on the abatement notice was lodged) that sought to authorise the continuation of the current industrial activities on the site as a non-complying activity for a period of two years (consent application 3).

The Appeal

[17] A Notice of Appeal was originally filed in relation to this matter on 18 October 2022, some five months after the abatement notice was issued and more than 90 working days out of time. The Notice of Appeal was accompanied by an Application for Waiver of Time. To rectify a defect, the original Notice of Appeal was then replaced by an Amended Notice of Appeal dated 31 October 2022, again accompanied by an Application for Waiver. Both Notices of Appeal were lodged pursuant to s 325(2) of the Act.

[18] In the intervening period, the Appellants had sought from the Council, a one month extension to the date for compliance set out in the abatement notice (from 1 November 2022 to 1 December 2022). That request was declined by the Council on 25 October 2022 and gave rise to a right of appeal under s 325A(7).

[19] The Court understands that the Council indicated an intention to challenge the Application for Waiver in respect to the appeal under s 325(1) and the Appellants elected to instead pursue an "in time" appeal to the extension request under s 325A(7). This was confirmed in a replacement Notice of Appeal filed under s 325A(7) on 7 November 2022. That appeal sought by way of relief an amended compliance date of "at least 1 February 2023".

[20] In opening submissions, Counsel for the Appellants sought that the original relief be amended to "extend the time for compliance with the abatement notices until WBOPDC has determined the application for consent for the activities to which the abatement notice relates".[7] Should consent application 3 be declined, the Appellants alternatively seek a period of a further six months to "appeal any such refusal and attempt to have the appeal heard and determined under urgency" and/or otherwise enable the tenants to find alternative premises.

[21] In discussing that matter with the Court, Counsel indicated that a hearing date for consent application 3 had been set for early October 2023 and, as such a decision could be expected by the end of November 2023. A further six months from that date would extend the time for compliance to the end of May 2024, some 18 months after the original compliance date of 1 November 2022. It is understood that the Council has now heard and determined that matter. The Court has not considered that decision in its determination, other than to note the application was declined and as such the provisions of s 325(5)(a)(ii) do not apply.

The Appellants' Case

[22] The Appellants argue that "extending the time for compliance … is of little or no consequence to the environment",[8] providing stormwater/flooding, traffic, noise, and landscape evidence that the effects of the current unconsented activities are minor or less than minor. Against that background, they say the effects on the tenants of having to relocate will be "severe" causing businesses to close and people to "lose their jobs and livelihood"[9] and adducing evidence from several current tenants confirming that it would be impossible for them to find alternative sites on the terms they currently enjoy and indicating their businesses would likely close as a result.

[23] The Appellants further argue that they have taken all measures to obtain the necessary consents to authorise the activities but that the Council hasn't been "willing

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7 Opening submissions at [11].
8 Opening submissions at [6].
9 Opening submissions at [7].

or able to advance its third consent application to notification immediately after the appellants requested [it]" causing a delay in resolution which has been to the Appellants' detriment.[10] Moreover they raise questions as to the "extent to which WBOPDC endorsed some of the activities" to which the abatement notice relates.[11]

The Respondent's Position

[24] For its part the Council argues that there is no dispute that the Appellants have been carrying out unlawful activity at the site since 2019 despite having "been aware of the District Plan requirements since 2005 but [failing] to implement those requirements over the intervening 18 year[s]".[12] They argue that the Appellants have been given significant time to comply since the first abatement notices were issued in 2020 and allege that the "appellants are benefitting financially from their continuing non-compliance". They assert that, contrary to the clear intent of the original plan change, the Appellants now argue that they require the income from unlawful activities to fund compliance with the plan. Against this background, Council does not consider that circumstances exist which warrant any further "indulgence" from the Court.

[25] Moreover, Council considers that to extend the period "during which they carry out industrial activities at the site unlawfully for a further, indefinite period … will call into question the need to comply with District Plan requirements, not only in the Western Bay of Plenty but in New Zealand"[13] and undermine public confidence in both the District Plan and the Council's ability to consistently administer its provisions.

Priority Te Puna Incorporated

[26] Priority Te Puna Inc (PTP) is an incorporated society established to "support

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10 Opening submissions at [87(c)] and [91].
11 Opening submissions at [9].
12 Opening submissions at [125].
13 Opening submissions at [126].

the Te Puna residents to protect and enhance the environment for the health and wellbeing of the community".[14] By notice under s 274 of the Act and dated 31 October 2022, it opposed the appeal on the basis that the unlawful activities being carried out at the Te Puna Business Park posed "a threat to the Te Puna environment" with members experiencing "flooding of neighbouring properties, dust issues, traffic safety issues, and daily stress". PTP considers that the Appellants have already been given sufficient time to obtain the necessary resource consents or cease unlawful activities and accordingly no further accommodation should be given to the Appellants by this Court.

The legal framework

[27] Section 322 provides a local authority with the power to issue an abatement notice in circumstances where an individual or organisation is undertaking an activity which is (*inter alia*) contrary to a rule in a plan or a resource consent. It provides for action to be taken or ceased and forms part of a suite of tools designed to ensure compliance with the planning regime established under the Act, which itself is designed to promote sustainable management.

[28] Pursuant to s 325A(4) and (5):

> (4) Any person who is directly affected by an abatement notice may apply in writing to the relevant authority to change or cancel the abatement notice.
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> (5) The relevant authority shall, as soon as practicable, consider the application having regard to the purpose for which the abatement notice was given, the effect of a change or cancellation on that purpose, and any other matter the relevant authority thinks fit; and the relevant authority may confirm, change, or cancel the abatement notice.

[29] The Court's powers on appeal are as set out in s 290 of the Act and relevantly provide that:

> (1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against … as the person against whose

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14 Notice of Appeal at [3(a)].

> decision the appeal … is brought.

[30] As such, it is the responsibility of this Court to consider the purpose for which the abatement notice was given, the effect of changing the time for compliance with the abatement notice and "any other matter" we think fit.

Purpose of the Abatement Notice

[31] As outlined previously, the site has a long history of non-compliance with the requirements of the District Plan. Despite the plan providing for a significant list of infrastructure prerequisites to be attended to prior to industrial activity commencing on the site, it is accepted by all parties that industrial activity has occurred on the site since 2015 without those prerequisites being adhered to and without any resource consent permitting that non-compliance.

[32] Given the long history of compliance issues at the site it was not clear, from the evidence presented to the Court, what prompted the Council to take action again in May 2022. Many, if not all, of the activities being undertaken at that time had been in existence at previous times when the Council had visited. Other than the concrete crushing which had commenced, and (subject to an abatement notice issued in December 2020) then ceased, the site appears to have stayed much the same throughout the past five or six years, perhaps with varying levels of activity at some stages.

[33] Counsel for the Council endeavoured to explain that the situation was one of "escalating enforcement"[15] where the "Council does not turn up on day one with a legal bazooka" but is "trying to work with people to achieve compliance".[16] Counsel characterised this as the "damned if you do, damned if you don't" dilemma which Councils endeavour to navigate.

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15 NOE at 166, line 24.

16 NOE at 171, lines 12-13.

[34] The evidence of Ms Curtis, the Council's General Manager Regulatory Services, provided some further insight, indicating that the Council had received a "significant number of complaints from the public about the property commencing industrial activities or development without complying with the Structure Plan requirements"[17] culminating with a complaint to the Ombudsman by Ms Alison Cowley in June 2021.

[35] That rationale is also evident in Council's decision on the application for a change to the abatement notice terms (date for compliance) issued on 25 October 2022 which states:[18]

> The abatement notice was the result of ongoing complaints the Council is receiving from local residents that industrial activities are occurring at the property despite the fact that the requirements of the Structure Plan and the staged infrastructure requirements have not been satisfied.

[36] We have more to say on the actions of Council later in this judgment but, suffice to say, the somewhat inconsistent approach taken by Council to the activities on this site over the years has not made our task any easier.

[37] Despite that background, we find it clear that the abatement notice was lawfully issued for the purpose of requiring unlawful industrial activities being undertaken on the site to cease within a defined period (being 1 November 2022). While there were some questions regarding the wording of the notices and/or the section under which they were issued, there was no substantive challenge to their *vires* or to accuracy of the activities they described. The Appellants accept that the activities are, and were at all times, unlawful. The purpose of the abatement notices was to finally bring that unlawful activity to an end by 1 November 2022.

Effects of a Change in Compliance Date

[38] We say at the outset that any determination made here in relation to the effects of extending the time for compliance should not be considered to be determinative

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17 EB-00958 at [8].

18 EB-00974, Exhibit Note 4 at [10(k)].

or even of relevance to any decision with respect to consent application 3. That consent was the subject of a publicly notified hearing process and has been determined on the basis of the evidence filed with respect to that matter, including evidence by submitters who were not in front of this Court.

[39] The Appellants argue that the effects on the environment of providing a longer period of time for compliance are "minor or less, particularly if the conditions on the abatement notice sought by the appellants are imposed by the Court".[19]

[40] Those conditions are:

(a) compliance with a Noise Management Plan;
(b) screening or covering of the swimming pools stored on site;
(c) sealing and upgrading of the entrance to the site;
(d) directing tenants to require operators of heavy vehicles to avoid Clarke Road;
(e) advancing resource consent application RC13924 (consent application 3) with all reasonable diligence.

[41] The Court heard evidence on stormwater/flooding, noise, traffic and landscape. With respect to stormwater/flooding and transport, expert conferencing was undertaken, and joint witness statements lodged. However such conferencing focused almost exclusively on consent applications 1 and 2, was held before consent application 3 was lodged and did not specifically consider the effects of extending the time for compliance with the abatement notice. As such, those statements provide little assistance to the Court.

Stormwater Effects

[42] In regard to stormwater/flooding effects, evidence filed by Mr Bos for the Appellants and Mr Olatunbosun for the Council gave the Court some greater clarity.

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19 Closing submissions at [31].

[43] Mr Bos' evidence was that "stormwater from the existing industrial activities has very minimal overall stormwater effects and that the stormwater from the areas is dispersed via overland flow".[20] This lead Mr Bos to conclude that "the existing activities generate no more stormwater than would be generated by an equivalent permitted metalled area".[21] For clarity it is recorded that the application for resource consent 3 records that "an additional consent is required … including consent to retain the existing yards as a metalled surface (Restricted Discretionary Activity under Rule 4B.3.2(a))".[22] Be that as it may, Mr Olatunbosun confirmed under cross examination that he agreed with the stormwater volumes provided by Mr Bos.

[44] No expert evidence was provided to the Court in relation to stormwater quality. Mr Bos confirmed in answer to questions of cross examination that he had not addressed such matters.[23] Mr Olatunbosun's evidence was that "[n]o assessment has been made in relation to stormwater quality at the site"[24] and as such for that and other reasons he was "not currently in a position to either agree or disagree with Mr Bos' statement that the stormwater impacts of the existing on-site activities can be considered 'minimal'".[25] Mr Crossan, as the Appellants' planner, confirmed that he had undertaken a planning assessment against the Resource Management (National Environmental Standards for Storing Tyres Outdoors) Regulations 2021 but confirmed that he was not a stormwater expert and that no stormwater quality testing had been done.[26]

[45] The Court also heard from local residents who described observing "water coming from the drains running through the bunds and significant discolouration".[27]

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20 EB-00317 at [11].
21 EB-00317 at [11].
22 EB-00558.
23 NOE at 104, line 5.
24 EB-01042 at [15(c)].
25 EB-01042 at [16].
26 NOE at 151, line 24.
27 NOE at 105, line 26.

Traffic Effects

[46] With respect to transport matters, it was the evidence of the Appellants' witness Mr Harrison, that "based on traffic surveys of the site and existing activities, that there is a very low level of traffic generated and safe access can be provided to and from the site".[28] Mr Harrison considered that to achieve this "minor upgrading and sealing of the existing site vehicle entrance" would be required which he recommended. This was reflected in conditions to the abatement notice offered by the Appellants.

[47] Ms Wilton gave evidence on behalf of the Council and concluded that "the site's operation can be made safer" but was "not certain…that what has been proposed in the Third Resource Consent Application [and mirrored in conditions to the abatement notice offered by the Appellant] is sufficient to ensure public safety both at the site and along the access routes to SH2".[29] Ms Wilton's position was that even when considering only the current activities on the site "there is still a significant amount of through traffic on Te Puna Station Road that conflicts with the vehicles entering the site and leaving the site and that the existing access arrangement carries significant safety risks for both the public and the site's personnel".[30]

[48] On traffic matters the Court also heard evidence and submissions from local residents who spoke to road safety concerns they had observed with respect to heavy vehicles using the Te Puna Station Road/Te Puna Road intersection. While there was no suggestion that some of the accidents observed involved vehicles directly associated with the existing industrial activities on the site, the point was well made that residents considered the intersection to be dangerous[31] and had relied on the upgrading works set out as part of the plan change to mitigate those effects. That has not occurred. While it is accepted that this is lay evidence it does illustrate that the

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28 EB-00203 at [13].
29 EB-01014 at [23].
30 EB-01014 at [25].
31 NOE at 319, line 19.

traffic non compliances identified by Ms Wilton create real issues for local residents.

Visual/Landscape Effects

[49] In respect to visual/landscape effects we heard evidence from Mr Clinch and Mr May for the Appellants and Mr Mansergh for the Council. It was agreed by all parties that some landscaping has been undertaken on the site although this was not entirely in accordance with the Structure Plan requirements, principally as a result of substituting indigenous species as a response to consultation with members of the Pirirakau hapu. It was accepted by Mr Clinch that "[t]he substitution of exotic tree species for native tree species to boundary mitigation planting areas results in mitigation planting that is slower to establish overall, when compared to exotic species"[32] but it was his opinion that the "landscaping undertaken to date achieves the intention of the Structure Plan".[33]

[50] For the Council, Mr Mansergh considered it remained unclear "when the mitigation will achieve the landscape intentions of the Structure Plan" but that "planting on the bund along Te Puna Road is already tall enough to screen activities within the site from view from the road" and planting on the western bund "should reach sufficient height to screen activities within the site from ground level within the next 3 to 5 years".[34]

Noise Effects

[51] Finally with respect to noise matters, evidence was provided by Mr Styles for the Appellant and Mr Runcie for the Council. Mr Styles confirmed to the Court that "updated modelling and assessments of those [existing] activities demonstrates that they will meet the relevant permitted noise standards in the District Plan".[35] Mr Runcie generally agreed with Mr Styles that the existing activities could achieve

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32 EB-00093 at [9].
33 EB-00292 at [12].
34 EB-01033 at [41].
35 EB-00329 at [10].

compliance with the relevant permitted noise standards in the District Plan but cautioned that such assessment relied on certain measures in the proposed Noise Management Plan being complied with.

Determination on Effects

[52] It is clear on the evidence before us and confirmed by the Appellants' offer of "conditions" to be attached to the abatement notice that there are ongoing effects of the current unlawful activities being allowed to continue. While the changes to the landscape plan appear to be minor (noting the Council's concern that full information is not yet available) and the effects of noise and the visual effect of the swimming pools could be managed on a temporary basis with the imposition of conditions, we are concerned that matters of water quality have not been considered.

[53] Further, and critically, we do not find that the traffic concerns are adequately addressed. The Structure Plan sets out an extensive list of roading upgrades which are required before the site is able to be used for industrial activities. While some matters (for example the Northern Arterial Bypass) provide for some development to be established on site prior to its completion, the upgrade of the Te Puna Station Road/SH2 and Te Puna Road/Te Puna Station Road intersections were to have been established before <u>any</u> industrial activity took place at the site, including the level of activity now being undertaken.

[54] We are not satisfied on the evidence before us that these requirements can be departed from, even for a limited time period. We heard evidence from both Ms Wilton and local residents that the current intersection arrangements are inadequate for the heavy vehicles using them. We also heard evidence that abatement notices have been issued with respect to unlawful development and activities on at least two other sites in the vicinity. We do not consider that we have sufficient evidence before us to allow unauthorised industrial uses to continue to occur without the requisite traffic upgrades occurring or a comprehensive alternative arrangement being considered via a resource consent hearing.

Other relevant matters

[55] In addition to the effects on the environment outlined above, there were a number of other matters we found to be relevant to our decision as set out below. We note several of these are consistent with the Council's original decision declining to grant the extension.

Extant Resource Consent Applications

[56] The Appellants currently have three consent applications before the Council. Two of those consent applications were extant at the time the Council made its decision to decline the extension. Those consent applications were not provided to the Court but are identified in Ms Perring's evidence, as:

- RC12979 – to authorise a range of development activities that do not comply with all of the District Plan staging, development, and infrastructure requirements;
- RC13474 – to retrospectively authorise earthworks undertaken in a floodable area.

[57] A third consent application (RC13924) was lodged after the Council declined to grant an extension to the abatement notice compliance timeframe. That application seeks to consent only the current activities on the site, for a period of two years and subject to conditions. That application is for a non-complying activity. It has been publicly notified, the subject of a Council hearing and declined at first instance.

[58] It is both relevant and significant that each of the consent applications which might be said to "regularise" the unlawful activities on the site, are applications for non-complying activities which seek to permit substantive departures from the existing District Plan requirements. Specifically, they seek to enable development to progress without some of the infrastructure requirements which formed part of the original plan change decision.

[59] Counsel for the Appellants noted in opening (by reference to the decision in *Baxter v Tasman District Council*):[36]

> Abatement notice appeals are not infrequently lodged in situations where appellants have sought resource consent to legitimise activities which are the subject of the abatement notices. In that situation, it is not uncommon for stays to be granted and appeals to remain extant until resolution of any relevant resource consent application.

[60] That is certainly correct and there are situations in which the Court will provide time for the consent to be dealt with. However, as Judge Dwyer noted in the continuation of the above quoted paragraph, that situation was not the basis on which the appeal was lodged by the Baxters. Rather the application for resource consent in that case post-dated the appeal. The Court found that the Baxters were endeavouring to use their appeal on the abatement notice to undo conditions previously volunteered by them. Similar circumstances exist here.

Public confidence in the Plan

[61] As set out previously, this site has a long and complex history. No party disputes that unlawful activity has occurred on the site since 2016. It has been the subject of three abatement notices since 2020.

[62] Mr Watt, a former enforcement officer with the Council, gave evidence that the site has been the subject of complaints from members of the public since 2019 with "[t]he extent of the complaints and the volume of material held by Council … such that, when the Appellant made a request under the Local Government Official Information and Meetings Act 1987 (**LGOIMA**) for 'copies of all information the Council holds in respect of community concerns relating to Te Puna Business Park compliance' Council had to respond stating that it would need to significantly extend the time limit specified by section 13 LGOIMA, due to the large quantity of information".[37]

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36 *Baxter v Tasman District Council* [2011] NZEnvC 4 at [44].

37 EB-00885 at [30].

[63] Ms Curtis outlined in her evidence that in June 2021 the Council was notified of a complaint that had been made to the Ombudsman regarding the "Council failing to uphold mitigation measures around the partial rezoning of the Te Puna Business Park".[38]

[64] Although the Ombudsman ultimately concluded "the Council has not acted unreasonably", the ongoing disquiet of the community was clearly a factor in Ms Curtis' original decision not to grant the extension to the compliance date.

[65] By letter dated 25 October 2022 declining to extend the time for compliance and offered as part of her evidence, Ms Curtis notes that "[t]he Council has a duty under section 84(1) of the RMA to observe and enforce observance of its Plan. … The abatement notice was the result of ongoing complaints the Council is receiving from local residents that industrial activities are occurring at the property despite the fact that the requirements of the Structure Plan and the staged infrastructure requirements have not been satisfied".[39] It was Ms Curtis' view that "[t]he effect of changing the abatement notice would be to disincentivise compliance with the provisions of the Plan at the property and to endorse ongoing non-compliance with long-standing and important requirements of the Plan".[40]

[66] Community concern was further evidenced by the submissions and evidence of Ms Cowley for PTP. Ms Cowley commenced her legal submissions by stating "PTP represents the community's deep anger, upset and stress at continuing avoidance by the appellant of his responsibilities and obligations". Ms Cowley went on to say that "the outstanding issue for PTP is the ongoing lack of compliance and continually stretched timeframes the applicant persistently requests".

[67] The Court accepts that public confidence in the Council's willingness and ability to uphold and enforce the provisions of the plan is a relevant matter for our consideration and that such confidence has been eroded by unlawful activities

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38 EB-00959 at [10].
39 EB-00974.
40 EB-00974.

occurring on the site for more than 8 years now. We accept that public confidence in the plan would be further eroded by such activities being allowed to continue for a longer period.

Effect on tenants

[68] Mr Daniel, Mr Lehndorf and Mr McKeagg all gave evidence regarding the likely financial hardship that would befall the landowner and tenants should the date for compliance not be further extended.

[69] Mr Daniel confirmed in answer to questions that he was aware he wasn't "supposed to have developed the property for industrial use until the requirements [he] agreed to in 2004 had been implemented" but outlined in his evidence that he "needed to lease the current sites out to generate an income as a way to pay for the work required to be done, in order to achieve full compliance and consent to allow the opening up of the whole site".[41] This was despite Mr Daniel agreeing under cross examination that he had confirmed to the Court in respect of the plan change in 2005 that "all infrastructural requirements can be met on site. The appellant is prepared to pay a number of significant costs involved in infrastructure development".[42] Mr Daniel also confirmed in answer to questions from the Court that he considered "it might be a good idea to get the front end sorted out … either by changing the plan or by applying for a non-complying consent"[43] rather than progressing with the unlawful activities but that he had been busy and then unwell and as such had not done so.

[70] In response to careful cross examination from Counsel for the Council, Mr Daniel also agreed that in the period since 2016 he has earned the following rental income from activities on the site:

(a) A & J Demolition Ltd - $96,000 per annum from 2016 (7 years);

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41 EB-00011 at [8].

42 NOE at 36, line 34 – 37, line 2.

43 NOE at 60, lines 15-18.

(b) Total Relocation Ltd - $34,800 per annum from March 2019 (4.5 years);

(c) Compass Pools - $51,600 per annum from August 2019 (4 years);

(d) Earthmover Tyre Services Ltd - $18,000 per annum from November 2019 (4 years).

[71] On the Court's calculation[44] that equates to something approaching $1,100,000 in revenue from what Mr Daniel accepts is unlawful activity.

[72] The abatement notice provided the Appellants with 6 months to allow tenants to make alternative arrangements for their businesses. No appeal was lodged in respect to the abatement notices until five of those six months had elapsed. The evidence of Mr Daniel under cross examination was that as at the date of the hearing (some 14 months after the abatement notice had been issued) he had taken no steps to help the tenants find new sites and that it was for them to make alternative arrangements.

[73] Mr Lehndorf, the General Manager of one of those tenants, A & J Demolition Ltd, gave evidence that he was not aware of the original timeframe for compliance in the abatement notice and that in the 14 month period between the abatement notice and the hearing, the company had taken no steps to find an alternative site because "we didn't know – we weren't under the understanding that we had to vacate that particular site".[45] Despite having taken no action to consider alternative locations specifically for the activities currently on the site (but accepting the company had looked for sites in relation to other parts of its business) Mr Lehndorf's evidence was that "[f]orcing the closure of this yard would have a drastic impact to all business currently on site … it will cost people their jobs and put the business under immense financial and emotional strain".[46] Mr Lehndorf's estimate was that it would cost $400,000 to demolish the buildings and clear the site[47] and that it would likely "take

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44 It is noted that the Court's calculations are conservative in terms of the timeframes and as such the amount actually earned may be higher.

45 NOE at 91, lines 21-22.

46 EB-00191 at [6].

47 EB-00194 at [17].

months or longer" to find a viable alternative site.[48] Answering questions of cross examination, Mr Lehndorf confirmed that there were other sites available but not "sites as cheap as this".[49]

[74] Another tenant, Mr McKeagg of Total Relocation Ltd, also provided evidence to the Court. He confirmed that he had never sighted the abatement notice which is the subject of the appeal and had no knowledge of the date for compliance with its terms. He also confirmed that he had taken no steps to find alternative accommodation in the 14 month period since the abatement notice was issued.

[75] Despite that, Mr McKeagg also gave evidence that "[r]elocating the yard to a new location, if we were able to secure an affordable and suitable alternative, would incur costs the business could not afford and we would have to consider ceasing trading as a result".[50]

[76] The Court did not hear evidence from the remaining two tenants.

[77] The Court does not doubt that compliance with the abatement notice will result in effects on the landowner and the tenants. However, against that, it was clear from the evidence that the sites in question were being leased at a considerably cheaper rate than other locations in part due to the lack of infrastructure; that is to say, the very matter that renders the activities unlawful is what provides the significant reduction in rent. There is no doubt that both Mr Daniel and the tenants have benefitted financially from that arrangement over the past 4 – 8 years.

[78] As the Court found in *Waikato Regional Council v Campbell*:[51]

> I understand the concept that the Court should not countenance continuation of unlawful activity so as to provide income to the wrongdoers and their dependants…..In considering exercise of judicial discretion to avoid an unjust and disproportionate result by [affording] leniency, I do not accept that the financial consequences to the respondents and those dependant on their

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48 EB-00194-EB-00195 at [21].

49 NOE at 92, line 12.

50 EB-00199, Exhibit DM1.

51 *Waikato Regional Council v Campbell* A206/2002 at [51] and [52].

> business should be excluded from consideration. However the weight to be given to those consequences should reflect that they are the result of unlawful activity.

[79] While this matter related to an enforcement order rather than an abatement notice appeal, we find the principle equally applicable here. As such, the Court considers that we, too, must take account of the financial benefits which have accrued as a result of the unlawful activity and the message it sends to others if such activities (and the income generation that comes from them) are allowed to continue.

[80] Moreover, we have taken into account that, despite setting out in some detail the likely implications for tenants if the time for compliance with the abatement notice was not increased, it was clear from all three witnesses that no action had been taken to find alternative locations in the 14 months since the abatement notice had been issued. Neither was there any suggestion in any of the evidence provided, that should the Court grant more time for compliance, the tenants or Mr Daniel would use that time to make any effort to relocate the existing tenants. Rather, the emphasis was on "regularising" the situation by way of resource consent, and only relocating should all appeal options in that regard be exhausted.

[81] Given those circumstances, and despite having considerable sympathy for the tenants, particularly Mr McKeagg who has clearly worked hard to establish and maintain his small business through a very difficult personal period, the Court is not satisfied that the impacts on those businesses are so disproportionate to the effects on the wider community of allowing the unlawful activities to continue unabated, that the Court should intervene and provide more time for compliance. This is particularly the case when the Court weights the financial advantage that Mr Daniel and the tenants have benefitted from as a result of the duration of those unlawful activities.

[82] With respect to Mr Daniel's position, it is accepted that circumstances can change over time. However, the appropriate response to that, which Mr Daniel accepted in response to questions from the Court, was to apply for a resource consent or a plan change, not to simply embark on 8 years of unlawful activity.

The Council's involvement

[83] There is one final "other matter" that troubled the Court based on the evidence we heard and that relates to the Council's conduct both in "authorising" the unlawful activities in 2016 and in failing to take any further action with respect to the abatement notices issued in 2020.

[84] The Court heard evidence that in early 2016 the Council received an approach from Mr Daniel with a view to storing buildings on the site. By letter dated 31 March 2016 Mr Watt, the (then) Environmental Consents Manager at the Council, replied stating:[52]

> The activity of "Storage" is a permitted activity on Industrial zoned land under the 2012 Western Bay of Plenty District Council Operative District Plan. However, your land is zoned staged industrial. That is, the only activities allowed are those that fall to the rural sector until such time as specific infrastructure is in place. No industrial activities are should [sic] occur on the land until required infrastructure improvements are completed.

[85] From our review of the evidence including the original Environment Court decision on the plan change this is an accurate reflection of the plan provisions.

[86] However, Mr Watt went on to say:

> Work on the Te Puna Road/State Highway 2 intersection through the construction of the roundabout is due to start imminently and the associated development should be completed in the near future.
>
> The completion of these works will allow the underlying Industrial zone on your land to take effect.

[87] It is clear from the evidence this Court has heard that Mr Watt's statements in this regard were inaccurate. The list of infrastructure requirements was extensive, related to more than the SH2 intersection and, as we have heard, is still not complete. Certainly, there was no basis on which to single out the Te Puna Road/SH2 intersection as the only matter to be dealt with. It was, however, on the basis of the

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52 EB-00189.

above paragraph that Mr Watt advised that "Council will take a pragmatic approach when dealing with the building storage activity currently occurring on your property".

[88] This raises two matters; the approach of Council effectively "authorising" unlawful activity (which it is not entitled to do) and the second of providing inaccurate information. It is accepted that mistakes happen from time to time. However, this inaccurate approach to documenting the outstanding infrastructure of the Te Puna Business Park occurred on at least two further occasions.

[89] By email dated 11 February 2019, Mr Daniel sought to store more temporary dwellings on his land, citing the 31 March 2016 "permission" letter referred to above. In that email he indicated the "outstanding matter is the traffic calming on Clarke Road". Mr Watt replied on 12 February 2019 stating:[53]

> I am satisfied that the timing of the works is now more advanced but that the rationale and pragmatism under the above letter [31 March 2016] remains and that you may store those dwellings on the site as intended

[90] Once again, no attempt is made to set out a comprehensive list of the infrastructure requirements which were to be in place prior to <u>any</u> development occurring. Rather, a singular item of infrastructure is identified and said to be imminent or progressing such that a pragmatic approach can be taken to enabling additional unlawful activities to occur.

[91] This somewhat inconsistent approach to identifying the infrastructure requirements of the Te Puna Business Park is further reflected in a Memorandum of Agreement dated 21 July 2020 between the Council and the three business park landowners. In that memorandum the background recital states:[54]

> The Te Puna Road/Te Puna Station Road intersection has been upgraded by Council which satisfies the requirements of District Plan clause 12.4.16.2(b).

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53 EB-00015.

54 CB-00047.

[92] Despite this record, the Court heard that it is the now the position of Council that these works have not in fact been completed in accordance with the District Plan requirements because the right-hand turn is not complete.[55]

[93] While the Court is satisfied that Mr Daniel knew that the activities that were being undertaken on his site were unlawful and that a number of infrastructure matters were required to be dealt with before such activities could lawfully establish, the ambiguous, incomplete and at times inaccurate information provided by the Council has not assisted in the clear and consistent administration of the plan. Nor do we consider that it has contributed to an even-handed administration of the plan which the public at large can depend on.

[94] While the Court appreciates the Council's attempts to work pragmatically with landowners, in this instance the Council's pragmatism has enabled unlawful activity to occur on the site for just on 8 years. In these circumstances it is somewhat incongruous that the Council now seek to rely on the consistent and even handed administration of the plan as a ground for this Court to deny a longer period for compliance, a point well made in cross examination on behalf of the Appellants.

Determination

[95] As the Court traversed in *Waikato Regional Council v Campbell*,[56] judicial discretion "extends to postponing the time for compliance with an enforcement order to avoid an unjust and disproportionate result in the circumstances of the particular case". In exercising that discretion, the Court has been urged in similar cases to be "alert to insensitive, unthinking administration" that might produce an unjust result in a particular case. As the Court said in *Warringah Shire*, such a discretion permits the court to "soften" the application of particular rules and this softening can be achieved in some cases by "postponing the effect of injunctive relief".[57]

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55 NOE at 124, line 31.

56 *Waikato Regional Council v Campbell* A206/2002 at [29].

57 *Waikato Regional Council v Campbell* A206/2002 at [30], citing *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335.

[96] The discretion is not however without limitation which is made clear in *Russell v Manukau City Council* where (then) Justice Elias noted:[58]

> Where grounds for an enforcement order are made out, as they are here with the conclusion that the use is in breach of the district plan … I accept that it would only be in unusual circumstances that an order to effect immediate compliance would be refused.

[97] While these cases relate principally to enforcement proceedings we find them apposite here. Specifically, we do not find that there are such unique or unusual circumstances to warrant the Court "softening" the effect of the abatement notice timeframe.

[98] For the reasons set out above, we decline the appeal.

[99] We are not persuaded that the effects of the continued non-compliance on the environment are less than minor, particularly with regard to matters related to water quality or the transport network as set out previously.

[100] There is no dispute that the activities in question are unlawful and have continued for a significant duration. The Appellants and their tenants have had a considerable period of time in which to regularise the activities taking place on the site, either by complying with the infrastructure prerequisites, obtaining consent or finding alternative premises. That has not occurred. Moreover, it is clear on the evidence before us that the Appellants and tenants have benefitted financially from the continuation of those unlawful activities over a sustained period of time. We do not find it in the interests of justice to allow that non-compliance to continue.

Costs

[101] Costs are reserved. Any application for costs should be made within 10 working days of the date of this decision. Any party may reply within a further 10 working days. Any response to matters raised for the first time in the reply may be

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58 *Russell v Manukau City Council* [1996] NZRMA 35 (HC).

made within a further 5 working days.

L J Semple
Environment Judge

K A Edmonds
Environment Commissioner

I Buchanan
Environment Commissioner