

## **Report and decision of Hearings Commissioner Alan Withy Whangarei District Council has delegated all the functions, powers and duties as provided under the Resource Management Act 1991 to the Commissioner to consider and decide the application on behalf of Council. The application was heard in the May Bain room, Whangarei Library on Thursday 22 May 2014**

The Hearings Commissioner ('the commissioner') heard the resource consent application lodged by Uphof Investment Trust relating to a land use at 1036 Cove Road, Waipu. The application, made in accordance with the Resource Management Act 1991 ('the Act') was lodged with Whangarei District Council and referenced as LU1300140 (P116331).

<b>Present</b>	<b>Hearings Commissioner</b> Mr Alan Withy
<b>Applicant</b>	Mr Jeremy Brabant – Counsel for Applicant Mr Anthony Uphof Mrs Lisa Uphof Mr Russell Mortimer – Resource Management & Assessment Limited – Planning Consultant Mr Dean Scanlan – Traffic Engineer Mr Nevil Hegley – Acoustic Consultant
<b>Consent Authority</b>	<b>Whangarei District Council</b> MS Carine Andries – Reporting Planner Mrs Kelly Ryan – Planning Team Leader Mr Dean Murphy – Environmental Engineer Mr Greg Monteith – Senior Roading Engineer
<b>Submitters</b>	Mr Manfred Hirsch Mrs Jutta Hirsch Mr Gordon French Mrs Liz French Mr Derren Witcombe MS Sharon Gibson
<b>In attendance</b>	Mrs Linda Wheeler – Administration Team Leader (Resource Consents)

### **1 Description of the proposal activity**

The Applicant is the Uphof Investment Trust, and Mr and Mrs Uphof who attended the hearing are two of the three trustees. They reside in a house on the immediately adjoining land to the north.

Mr Brabant (Counsel) represented the trust and called Mr Uphof who gave evidence in support of the application, together with several expert witnesses.

The site is described as Lot 1 DP362756, has an area of 3.7 hectares, is subject in part to a right of way easement in favour of the neighbouring property to the South, and is located at 1036 Cove Road Waipu.

The Reporting Officer (RO) described the site and surroundings in the s42A Report (the Report) as:

*... located to the south of Cove Road and to the west of the coastal settlement known as Langs Beach. It has an undulating topography, sloping down from the road and culminating in a vegetated gully which forms part of ecological area Q08/225g, identified by the Department of Conservation as part of their Protected Natural Areas Programme.*

*The site has an unusual shape, which is somewhat triangular. There is little road frontage in comparison to the size of the lot. No residential unit has been established, although a barn is located along the north-western boundary together with an outdoor horse training arena and stock yards. The*

site contains some trees, mainly poplars, and shrubs around the barn, horse arena and stock yards, but is otherwise reasonably devoid of vegetation other than the gully in the southern part of the property.

The immediately surrounding area is characterised by the prevalence of lifestyle blocks of varying sizes. Further to the south/south-west a number of larger farming blocks remain. To the east, an area of land is zoned Living 3 Environment, which is at an approximate distance of 115m from the entrance of the application site. The Living 3 Environment leads on to the Living 1 Environment of the Langs Beach settlement. The distance to Waipu Cove is approximately 1.3km as the crow flies.<sup>1</sup>

The formal application seeks consent to “establish an artisan cheese production facility, shop and cafe. The proposal includes alterations and additions to an existing building.”<sup>2</sup>

The RO described the proposal as follows:

*The applicant proposes to establish and operate an artisan cheese production facility incorporating a cheese production kitchen, maturation areas, storage and handling areas. In conjunction with this activity, it is proposed to operate a deli shop and cafe providing seating for up to 40 people, including a fully equipped commercial kitchen for food manufacturing purposes.*<sup>3</sup>

Various amendments were made to the proposal prior to the hearing, as described in the Report paragraphs 1.1.2-6. Further modifications were made to the proposal during the hearing and confirmed in Counsel's right of reply (RoR). The hearing was adjourned at 5.50pm, and the applicant was invited to provide within five working days, suggested conditions should consent be granted.

## 2 District Plan Rule(s)

The RO described the proposal in relation to the Operative Whangarei District Plan as follows:

*The proposal infringes items d) and e) of rule 38.3.1 'Activities Generally' insofar as the total gross floor area of the building will exceed the 500m<sup>2</sup> allowed for commercial activities, taking into account the proposed extension to the barn and addition of a 150m<sup>2</sup> basement. The definition of 'gross floor area', being “the sum of the total area of all floor areas of a building or buildings, including additional floors above ground level, measured from the exterior faces of the exterior walls or from the centre line of walls separating two buildings but excluding covered parking areas and covered vehicle loading and unloading areas”, does not preclude floors below ground level, as opined by the applicant's agent. Even though underground floors are not specifically mentioned within the definition, it is considered that the wording 'all floor areas of a building' means exactly that, whether floors are below or above ground level. The proposed activities are also to be undertaken within 100m of an existing residential unit on a separate site.*

*Given the proposal will furthermore infringe rule 38.3.6 'Traffic Movements' by generating an approximate 90 vehicle movements within a 24 hour period, the application will need to be assessed as a discretionary activity pursuant to rule 38.3.1 'Activities Generally'. The proposal constitutes a restricted discretionary activity pursuant to rule 38.3.6 'Traffic Movements' as it cannot comply with the 30 vehicle movements allowed for within a 24 hour period. Additionally, the proposal infringes rule 47.2.11 'Engineering Standards' as it cannot comply with the requirements for vehicle crossings and sight lines, and as such requires consideration as a restricted discretionary activity.*

*The proposal complies with all other relevant rules of chapters 38 and 47.*

*Overall, the application is considered to be for a Discretionary Activity.*<sup>4</sup>

<sup>1</sup> The Report, 2.2.1-3

<sup>2</sup> Agenda, Page 00033

<sup>3</sup> The Report, 1.1.1

<sup>4</sup> Ibid, 3.1.1-4

Counsel for the applicant agreed in opening submissions that the application is to be considered as a discretionary activity.<sup>5</sup> That status means the commissioner is to have regard to the relevant rules but is not bound by them. He may also consider the permitted baseline, and there was considerable reference to that concept by Counsel and witnesses.

### **3 Notification and submissions received**

The application was 'limited notified' on 26 February 2014 and a total of 7 submissions were received. The Report sets out the process surrounding notification and a summary of the submissions received.<sup>6</sup>

The following four submitters were opposed to the proposal and asked that the application be declined:

- G & L French (Frenchs)
- D Witcombe and S Gibson (Witcombe/Gibson)
- M & J Hirsch and the Cervus Trust (Hirschs)
- R Ogra, R Bhat and Winaki Ltd (Winaki)

The first three of these submitters were present and addressed the commissioner at the hearing.

Two submitters (J & J Bailey, and the Watson Searle Family Trust/TW & CE Watson/Y & A Searle) did not wish to be heard but asked for the application to be approved. The New Zealand Historic Places Trust lodged a submission which arguably did not comply with the requirements of the Resource Management Act 1991 (the Act). A condition was requested but the Commissioner concludes that the submitter's interests are appropriately protected by council's standard advice note (Advice Note No 3).

The principal issues raised in the written submissions included:

- The nature and scale of the operation
- Operating hours
- Noise generated by the proposed activities
- Traffic movements and safety
- Odours and dust generated by the proposed activities
- Waste disposal
- Future expansion

### **4 Procedural matters**

Sections 1 and 4 of the s42A Report describe how Council processed the application before the hearing, and the commissioner is satisfied that the requirements of the Act were met in that regard.

The hearing was adjourned late on Thursday 22 May 2014, and the applicant was invited to lodge with Council a suite of suggested conditions should consent be granted, given that no comprehensive set of conditions was provided in the Report.

A Minute dated 24 May 2014 was issued directing the process. A second Minute was issued on 9 June 2014 acknowledging receipt of the 'suite of conditions', and comments thereon from Council, the submitters who attended the hearing, and the applicant. The second Minute formally closed the hearing and indicated that a decision would be promulgated within 15 working days.

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<sup>5</sup> Opening Submissions by Counsel on behalf of the applicant, para. 4

<sup>6</sup> The Report, 4.1-3

## 5 Evidence heard

The commissioner heard evidence from the applicant, expert witnesses, submitters, and the council's reporting officers. The following is a summary of the evidence heard at the hearing.

### 5.1 Applicant's evidence

Mr Brabant presented written opening submissions and oral closing submissions. He pointed out in opening that the reporting planner's main concern seemed to relate to the effects of the proposed café and deli shop, as she had concluded that the artisan cheese making facility was 'appropriate'. He opined that she had incorrectly assessed the environment and permitted baseline in terms of the law as set out in the Act and relevant case law.

He referred to various cases including the Beejay<sup>7</sup> case in which the Environment Court gave consent in 2008 to a professional office within the Living 1 Zone of the Whangarei District Plan. He also drew attention to several other Environment Court and High Court cases where the concepts of 'environment', 'future environment', 'receiving environment', 'amenity' and 'permitted baseline' were addressed. His submission was that the proposal met the required tests under the Act and relevant case law.

Mr Brabant called evidence from:

- Mr Uphof (on behalf of the applicant trust) who explained the intentions regarding the cheese making and related activities.
- Mr Mortimer (a resource management consultant) who described the proposal against the 'receiving environment', assessed the 'permitted baseline', considered the effects against the provisions of the Act and planning instruments including the District Plan and addressed points raised by the submitters. He concluded that *"the proposal meets the core purpose of the Act as it constitutes the sustainable management of natural and physical resources ... the cheese production aspect could be undertaken as of right ... the District Plan provides for this type of application, in this receiving environment to be advanced, considered and approved."*<sup>8</sup>
- Mr Hegley (an acoustic consultant) described the likely effects of the proposed activities on the receiving environment and the submitters in particular. He produced a plan showing predicted noise contours and gave his assessment of how the submitters would be affected by noise resulting from the proposed activities. He concluded that *"the predicted noise level from (the proposal) will comply with the District Plan requirements for a permitted activity with a very good factor of safety. This is after including a 100% factor of safety in the calculations"*.<sup>9</sup> and *"When taking into account the large factor of safety in the analysis and the low predicted noise levels ... I believe the project will not have any adverse effects for the neighbours and do not see any reason why the project should not be approved with respect to noise."*<sup>10</sup>
- Mr Scanlen (a traffic engineer) assessed the likely traffic effects on submitters, possible dust nuisance, vehicle and pedestrian traffic safety, and concluded that *"... provided the proposed mitigation measures are put in place, the proposal will have acceptable effects on traffic safety on the proposed access, its connection to Cove Road and on the wider network."*<sup>11</sup>

In oral closing submissions Mr Brabant argued that the RO appeared to have based her opposition to the proposal on an incorrect assumption that the existing environment should be maintained. He argued that a wider assessment was required and that Mr Mortimer's evidence demonstrated the proposal complied with a proper baseline test. He submitted that although the submitters *"like what they have ... the District Plan does not protect that ... and living in the country involves activities that are offensive to rural-residential residents*

<sup>7</sup> *Beejay Limited and Johnston O'Shea Limited v Whangarei District Council*, A118/2008.

<sup>8</sup> Mortimer evidence, 85, 86, 94

<sup>9</sup> Hegley evidence, 8.1

<sup>10</sup> Ibid, 8.6

<sup>11</sup> Scanlen evidence, 30

... and must accept economic activities that may involve adverse effects".<sup>12</sup> He undertook to provide a suite of conditions within 5 working days.

## 5.2 Submitters' evidence

Mr Whitcombe & Ms Gibson argued that the proper place for the proposal was in Waipu which has been identified as the 'hub' or 'commercial centre' for the coastal settlements. They pointed to the District Plan and Coastal Management Strategy-Structure 20 Year Plan adopted by Council in 2009. They asserted the community should be able to decide whether this "*industrial complex*" is allowed to proceed. They pointed out that the Puhoi Valley Cheese operation had started as an Artisan operation in the 1980s and has become "*a facility that covers many acres, owned by a multinational company.*"<sup>13</sup> They noted their major opposition points as: largely increased traffic, noise, waste, possible future expansion, and adverse effects on lifestyles and traffic safety.

Mr & Mrs Hirsch expressed similar concerns as neighbours who had "*put their building plans on hold*"<sup>14</sup> after hearing about the Uphof proposals.

Mr & Mrs French supported the other neighbours' concerns and pointed out they share their driveway access with that giving access to the proposal site. They summarised the concerns of the neighbours in saying "*the proposal is not in keeping with the existing character of the locality and by its very nature creates a conflict with the residential and lifestyle uses of the surrounding area, with the adverse effects created by the proposed activities.*"<sup>15</sup>

The thrust of the submitters' evidence was to the effect that the proposal would be out of keeping with the environment which they as residents enjoy, and that the adverse effects would be considerable.

## 5.3 Council's reporting officer's report and evidence

Ms Andries (s42A RO) presented her pre-circulated report and after hearing the submissions and evidence in support of the application and by the submitters, indicated she had not changed her mind. She commented specifically on Mr Hegley's acoustic evidence in relation to the proposed '10pm closing up to twice a week', and her opinion that there may be noise after that time as patrons left the site. She drew attention to the amenity effects of noise, as distinct from noise 'per se'.

She explained that the District Plan and Act do not prohibit change, but that they do have a goal of maintenance and enhancement of the environment. In regard to the 'permitted baseline' she said her concern was for the effects of the use of the building rather than the appearance of it, as she considers the visual effects can be mitigated. Also she emphasised the fact the land is zoned 'countryside' and not 'commercial' or 'rural residential'.

Mrs Ryan (Planning Team Leader) was present throughout the hearing and helpfully answered several questions from the commissioner. She explained components of the District Plan in relation to defined activities and the references to the Health Act 1956 and offensive trades.

Mr Murphy (Environmental Engineer) confirmed his written opinion that the traffic effects of the proposal could be appropriately handled in the ways proposed by the applicant. He considered the conditions proposed would ensure a safe entry and exit to Cove Road and suitable on-site parking provisions.

Mr Monteith (Senior Roading Engineer) was present throughout the hearing and confirmed his agreement with Mr Murphy's opinions from a roading point of view.

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<sup>12</sup> Closing Oral Submissions by Counsel on behalf of the applicant

<sup>13</sup> Whitcombe Oral Submissions

<sup>14</sup> Hirsch Oral Submissions

<sup>15</sup> French Oral Submissions

## 6 Principal issues

The principal issues that were in contention were:

- a) The nature and scale of the operation
- b) Operating hours
- c) Noise generated by the proposed activities
- d) Traffic movements and safety
- e) Odours and dust generated by the proposed activities
- f) Waste disposal
- g) Future expansion

## 7 Main findings of fact

The commissioner considers the following to be the main findings on the principal issues that were in contention relating to this application:

- a) The nature and scale of the operation: The cheese making operation as described in the application and subject to appropriate conditions is a permitted activity by reference to the relevant planning instruments. The Café and associated activities are discretionary activities under the District Plan, and so overall the proposal falls to be considered as a Discretionary Activity under s104B of the Act. The expert evidence differed substantially on how the café related to the objectives and policies of the DP and its effects on amenities. The commissioner finds the size of the building to be appropriate considering it is already there, and the extra floor space proposed above the 500 m<sup>2</sup> comprises entirely basement. The proposed activities will certainly affect the existing environment and this must be weighed in reaching a final decision on this application.
- b) Operating hours: The proposal is for variable daytime hours according to the season, plus evening hours on any two days per week. The commissioner finds the artisan cheese-making to be consistent with the objectives and policies of the District Plan and to have minor effects in the area. However the proposed café including evening activities significantly changes the nature of the proposal and its likely effects. The commissioner finds the evening hours to be somewhat inconsistent with the objectives and policies of the DP but not contrary to them, and to have no more than minor effects over and above those involved with the daytime operation of an artisan cheese making facility with an associated café.
- c) Noise generated by the proposed activities: The expert evidence of Mr Hegley is accepted. The Commissioner concludes that the proposal can comply with the requirements of the DP. However there are residual concerns with the noise effects of night time activity and additional traffic, from an amenity point of view. These were eloquently expounded by the resident submitters, and the RO also alluded to these. These concerns must be weighed in reaching a final decision.
- d) Traffic movements and safety: The commissioner understands the concerns of residents about traffic safety and the mitigation measures proposed, but must accept the expert evidence of Mr Scanlen with which the council engineers agreed. That evidence was unchallenged by any expert evidence.
- e) Odours and dust generated by the proposed activities: Mr Scanlen considered dust would not cause adverse effects on neighbours, and even if it did, considered it could be addressed under what has become Condition 11.k). This expert opinion was not challenged by Mr Murphy on behalf of Council.
- f) Waste disposal: The applicant will be obliged to dispose or otherwise deal with waste according to requirements of the Act and other legislation. Provided that is done, waste should not produce effects on the neighbours. Mr Murphy's expert opinion was that the proposal would, subject to suitable conditions, comply with the requirements of the Regional Soil and Water Plan administered by the Regional Council.<sup>16</sup>
- g) Future expansion: The proposal will be constrained by the conditions of consent, which limit the hours of operation and volume of cheese that may be produced. Any extension of those limits could only

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<sup>16</sup> The Report, 7.3.2

be allowed by specific application, which would have to be considered on its merits. Should the conditions to this consent be breached the neighbours have access to Council's Compliance Officer and remedies under the Act and other legislation.

## 8 Relevant statutory provisions

### 8.1 Policy statements, plan provisions, and likely effects

a) In considering this application, the Commissioner has had regard to the matters outlined in Section 104 of the Act. In particular, the Commissioner has had regard to the relevant provisions of the following planning documents:

- i the Northland Regional Policy Statement – current and proposed (RPS and PRPS)
- ii the Northland Regional Water and Soil Plan (RWSP)
- iii the Whangarei District Plan (DP)
- iv the Whangarei Coastal Management Strategy (WCMS)
- v the Waipu Cove/Langs Beach Structure Plan (WC/LBSP)

b) The RO analysed the proposal against the above statutory (i-iii) and non-statutory (iv-v) planning instruments as follows:

- i) **RPS and PRPS:** She concluded the proposal ... *"cannot be said to be inconsistent with the overall policy direction."*<sup>17</sup>
- ii) **RWSP:** She indicated *"Mr Murphy is satisfied that, subject to appropriate conditions of consent, the proposal will achieve RWSP outcomes.... The Northland regional Council was notified of the application and that no submissions were received."*<sup>18</sup>
- iii) **DP:** She analysed the proposal in paragraph 7.4 of her Report in relation to the District Plan (particularly Chapter 5 - Amenity Values, Chapter 6 - Built Form and Development, Chapter 8 - Subdivision and Development and Chapter 22 - Road Transport), and concluded that the proposal ... *"is considered generally inconsistent with the objectives ... (and) ... provisions of the district plan"*.<sup>19</sup>

She said in Paragraph 6: *"The cheese production side of the proposal can be undertaken entirely indoors, and is considered to create few adverse effects that cannot be mitigated by appropriate conditions of consent. Indeed, subject to the floor area restrictions, this activity could be a permitted activity under current district plan rules."*<sup>20</sup>

*On the whole, it is considered that, provided appropriate conditions of consent are imposed, the artisan cheese making facility is entirely appropriate within this rural-residential setting and will not create undue adverse effects with regard to odour, noise, visual intrusions or general character and amenity that could not be sufficiently remedied or mitigated by conditions of consent."*<sup>21</sup>

*The proposed cafe and deli shop, on the other hand, are considered to create significantly more adverse effects than the cheese production facility when considering existing character and amenity of the surrounding locality. The effects associated with these activities are less easily mitigated especially when considering operating hours from 7am until 5pm on five days a week, and 10pm on two nights a week."*<sup>22</sup>

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<sup>17</sup> Ibid, 7.2.6

<sup>18</sup> Ibid, 7.3.2

<sup>19</sup> Ibid, 7.4.3-4

<sup>20</sup> Ibid, 6.3.8

<sup>21</sup> Ibid, 6.3.13

<sup>22</sup> Ibid, 6.3.14

In Paragraph 7 she analysed the proposal and concluded that it was inconsistent with the objectives and policies of: Chapter 5 - Amenity Values; Chapter 6 - Built Form and Development; and Chapter 8 - Subdivision and Development; but consistent with those of Chapter 22 - Road Transport.

iv. **WCMS and v. WC/LBSP:** The RO concluded that the proposal ... “does not find direct support”<sup>23</sup> in the two plans which ... “present similar visions and seek similar outcomes.”<sup>24</sup> She said that the consultation during formulation of the two plans ... “indicated that the lack of commercial activity was an important feature for the area; and that rural areas are to be retained for rural productive purposes.”<sup>25</sup>

c) Mr Mortimer disputed much of the above analysis, and said:

*I have revisited those objectives and policies I consider most relevant to this application and I remain of the view they are those relating to amenity, and subdivision and development.*<sup>26</sup>

*... in my opinion the relevant significant amenity value issues identified in the District Plan are: control of potentially incompatible activities whose environmental effects might compromise characteristic amenity values of a locality; and control of the specific attributes of a development such as bulk, siting and design of buildings and management of the consequent risk of compromise to amenity values of a locality.*<sup>27</sup>

d) Mr Brabant helpfully drew the Commissioner's attention to a recent Environment Court decision which commented on the topic of amenity and the task facing the decision-maker as follows.

*The topic of amenity can be emotionally charged... People tend to feel very strongly about the amenity they perceive they enjoy. ... Assessing amenity values can be difficult. The plan itself provides some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised ... it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in the space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of the subjective, it must be able to be tested objectively.*<sup>28</sup>

e) Both Mr Mortimer and the RO analysed the relevant provisions of the DP in some detail, applied the 'permitted base line test', and carefully considered the likely effects of the proposal. They came to significantly different conclusions and it falls to the Commissioner to weigh the differing assessments, draw conclusions and exercise the discretion required by ss101 and 104 of the Act.

f) Section 104(1) of the Act provides the statutory basis for consideration of the application and reads as follows:

*When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—*

*(a) any actual and potential effects on the environment of allowing the activity; and*

*(b) any relevant provisions of—*

*(i) a national environmental standard:*

*(ii) other regulations:*

*(iii) a national policy statement:*

*(iv) a New Zealand coastal policy statement:*

*(v) a regional policy statement or proposed regional policy statement:*

*(vi) a plan or proposed plan; and*

<sup>23</sup> Ibid, 8.3.3

<sup>24</sup> Ibid, 8.3.1

<sup>25</sup> Ibid, 8.3.2

<sup>26</sup> Mortimer evidence, 56

<sup>27</sup> Ibid, 57

<sup>28</sup> *Raymond Keith and Cherie Schofield v Auckland Council* (2012) NZEnvC68 at (51)



(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

g) With regard to s104(1)(b) the commissioner concludes the relevant provisions of the planning instruments are not fatal to the application. The decision hinges on assessing the actual and potential effects on the environment, having regard to the 'permitted baseline'. The principal issues identified in 6 above all relate primarily to effects and are:

- a) The nature and scale of the operation
- b) Operating hours
- c) Noise generated by the proposed activities
- d) Traffic movements and safety
- e) Odours and dust generated by the proposed activities
- f) Waste disposal
- g) Future expansion

h) The findings of fact in 7 above indicated satisfaction with Items d) to g) above. Items a), b) and c) require further comment. The evidence indicated that the effects of the artisan cheese-making activities would be likely to be significantly greater with the addition of a café holding evening functions. Furthermore it would be the evening operations which could have greater impact than those in the daytime. Although the expert acoustic evidence established the operations could comply with the DP requirements, the RO carefully considered and analysed the effects of the proposal in amenity and character terms in her 6.3.

i) She concluded that ... *"effects associated with the proposed deli shop and cafe for 40 patrons with extended opening hours from 7 a.m. until 10 p.m. are considered to create adverse impacts upon the amenity and character of the surrounding environment that cannot be adequately remedied or mitigated, particularly during summer periods. Revised maximum capacity and operating hours more compatible with the surrounding lifestyle environment, and sealing of metal surfaces, may well result in the different assessment."*<sup>29</sup> This conclusion is one that resonates with the commissioner, and suggests the reasons for her recommending against the application being approved were finely balanced.

j) The maximum capacity of the operation is regulated to some degree by the size of the building which, excluding the basement, is within the maximum specified for the site.

k) Operating hours are able to be controlled by the conditions. It is noteworthy that the proposal is on a busy tourist route and only just over 100 metres from a residential zone.

l) Sealing of metal surfaces should that become desirable, is a matter addressed by the engineers' evidence and subject to a condition.

m) The 'permitted baseline' was discussed by Counsel and the experts for the applicant and Council. After various questions and answers it became clear that a wide range of activities with potentially adverse effects on an environment such as this could be considered as within the 'permitted baseline'. Mr Mortimer emphasised the importance of this, even after his initial list was whittled down considerably during questions and answers.

n) The commissioner concludes that the 'permitted baseline' is relevant to consideration of this application. The possible activities identified within the 'permitted baseline' are not considered 'fanciful', and some of them could have greater adverse effects than the proposal. This weighs in favour of consent to the application.

## 8.2 Part II matters

a) In considering this application, the commissioner has taken into account the relevant principles outlined in Sections 6, 7 and 8 of the Act as well as the overall the purpose of the Act as presented in Section 5.

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<sup>29</sup> RO, 6.3.27

b) Mr Brabant referred to various decisions of the court which were helpful to the commissioner. The 2013 decision of the High Court (Whata J), *Queenstown Airport Corporation Limited v Queenstown Lakes District Council*,<sup>30</sup> addresses Section 5 and 'overall broad judgment', and affirmed the approach taken by the Environment Court where it "... adopted the longstanding approach recommended by the Court in *North Shore City Council v Auckland Regional Council (Okura)*, namely that it is necessary to compare the conflicting considerations, their scale and degree and relative significance or proportion in arriving at the final outcome."

c) Having regard to the matters required by s104(1), and *comparing the conflicting considerations, their scale and degree and relative significance and proportion in arriving at a final outcome*, the commissioner concludes the proposal should be granted consent with suitable conditions under s108 of the Act.

### 8.3 Conditions

- a) The conditions imposed are substantially those suggested by the applicant but with some modifications to bring them into accordance with Council practice.
- b) Various comments on the proposed conditions were received during the hearing adjournment and those have been carefully considered. Three conditions deserve comment: 11a (hours), 11g (traffic counting), and 11h (lighting).
- c) The suggestion that the evening openings should be non-sequential during any week, is considered unnecessary and possibly 'ultra vires' in that it was not discussed at the hearing.
- d) The traffic counting condition proposed by the Council officers as Condition 11(g) has been replaced with a reference to the power under s128 of the Act to review the Condition 11(f) relating to traffic movements. It has also been applied to: Conditions 11(a) - shop/café hours of operation; and 11(f) - vehicle movements; and 11(h) – carparks; and 11(j) - dust control.
- e) The lighting condition is formulated to protect neighbours from avoidable 'light spill', and is based on a condition imposed by the Environment Court in respect of an application for a 'home office' in the Whangarei District.<sup>31</sup>

## 9 Decision

That pursuant to the Resource Management Act 1991, consent is **GRANTED** to the application by Uphof Investment Trust, being RC 40811, to establish and operate an artisan cheese production facility, shop and café in the Countryside Environment. The application includes alteration and additions to an existing building to increase ground floor area to 498m<sup>2</sup> with an additional 150m<sup>2</sup> basement. The proposal is at 1036 Cove Road and is legally described as Lot 1 DP 362756, subject to the following conditions:

1. That the proposed development shall conform with the land use consent application submitted by Resource Management and Assessment Ltd (Reference UPH.01) and the site plan, elevations and accompanying details of the application dated 4/11/13 attached to this decision.
2. That prior to undertaking any construction works associated with the proposed activity on the site, the consent holder shall submit a detailed set of engineering plans prepared in accordance with Whangarei District Council's Environmental Engineering Standards 2010 Edition. The engineering plans are to be submitted to the Senior Environmental Engineering Officer for approval.

It is to be noted that certain designs may only be carried out by an Independently Qualified Person (IQP) or Chartered Professional Engineer (CPEng) working within the bounds of their assessed competencies. IQP's must have been assessed by Whangarei District Council and hold a current status to submit design work.

Plans are to include but are not limited to:

<sup>30</sup> [2013] NZ HC 2347

<sup>31</sup> *Beejay Limited and Johnston O'Shea Limited v Whangarei District Council*, A118/2008.

- i. Design details of onsite parking with a suitable compacted roading type aggregate surface (replacement of existing sand surface) with 20 parking spaces marked with treated timber fixed to the parking surface with steel pins or similar. Dimensions are to be in accordance with AS/NZS 2890.1 requirements.
  - ii. Design details of HGV manoeuvring to the south west of the factory with a with a suitable compacted roading type aggregate surface.
  - iii. Design details of sight benching earthworks and vegetation removal within the Cove Road reserve to achieve a forward sight distance of at least 85.0m for drivers turning right into the site. Note that IQP/CPEng certification is required to demonstrate stability of the earthworks cut batter.
  - iv. Design details of vegetation removal within the Cove Road reserve to maximise the available sight distance to the northwest from the vehicle entrance crossing.
  - v. Design details of the installation of a convex mirror opposite the vehicle entrance, aligned to afford maximum visibility to the northwest as recommended in the addendum compiled by Engineering Outcomes dated 14th February 2014.
  - vi. Design details of the construction of a passing bay in a suitable location with a metalled surface on the existing driveway in accordance with Section 3.4.11.3. This requirement is separate to the required vehicle crossing upgrading.
  - vii. Design details of the upgrade of the existing vehicle crossing in accordance with Sheet 21 Rural Type 1A Crossing also in accordance with sheets 22 & 23. The crossing is to have a minimum width of 5.5m at the property boundary with a sealed surface to allow for two way vehicle movements. Entrance crossings are to be designed and constructed in such a manner that will control stormwater run-off entering a property from the road.
3. The consent holder shall notify council, in writing, of their intention to begin works, a minimum of seven days prior to commencing works. Such notification shall be sent to the Senior Environmental Engineering Officer and include the following details:
- i Name and telephone number of the project manager.
  - ii Site address to which the consent relates.
  - iii Activities to which the consent relates.
  - iv Expected duration of works.
4. Prior to the opening and operation of the activity, the consent holder shall complete all work on the approved engineering plans in condition 2 above, and in accordance with conditions 5 – 10 below, to the approval of the Senior Environmental Engineering Officer or their delegated representative.

All work needing design/certification by a Whangarei District Council approved IQP/CPEng will require completion of a producer statement (construction).

In the case of works to remain in private ownership, these may be inspected and approved by a Whangarei District Council approved IQP who has been certified to design/construct such works. (The works that fall into this category will be advised by the Senior Environmental Engineering Officer as part of Engineering plan approval). A producer statement (construction) is to be provided by the Whangarei District Council approved IQP, along with copies of any required test results/photographs. The Senior Environmental Engineering Officer is to be advised of any necessary inspections/testing of private works a minimum of 24 hours before they take place in order that the Senior Environmental Engineering Officer may observe the inspection/testing if so desired.

A copy of the approved engineering plans and a copy of the resource consent conditions and the above letter are to be held onsite at all times during construction.

5. The applicant shall ensure that spoil from the site and works within the Cove Road reserve must not be tracked out onto Council Road formations to the approval of the Senior Environmental Engineering Officer.
6. Any damage to the road stormwater channel, road carriageway formation & road berm caused by the construction works associated with the land use activities shall be reinstated at the expense of the consent holder.
7. Upon completion of the development works, the consent holder must submit for approval a "Certificate of Completion of Development Works" (Form EES PS4) to the Senior Environmental Engineering Officer or their delegated representative.

8. The applicant following completion of construction shall provide a works producer statement/s from the suitably qualified contractors who completed the works certifying that the works have been completed in accordance with the approved engineering plans, the Whangarei District Council Environmental Engineering Standards 2010 Edition and best trade practise to the satisfaction of the Senior Environmental Engineering Officer or their delegated representative.
9. The consent holder must submit a certified and dated "as built" plan of completed works and services, and "RAMM" data prepared by a suitably qualified person in accordance with Council's Environmental Engineering Standards 2010 Edition to the approval of the Senior Environmental Engineering Officer.
10. The consent holder is to submit a Road Opening Notice (RON) application or Corridor Access Request (CAR) and receive approval for all works to be carried out within the Whangarei District Council Road Reserve in accordance with Whangarei District Council Environmental Engineering Standards 2010 to the approval of the Senior Environmental Engineering Officer.
11. The activity shall comply on an on-going basis with the following conditions:
  - a) The shop/cafe will not be open for visitors, clients or deliveries beyond the hours stated below:
    - i. Peak Season: 20 December to 31 January opening hours of the shop and café 0700 to 1400 - seven days a week with additional hours of operation 1400-2200 on any two of those days.
    - ii. Shoulder season: Labour weekend through to the end of Easter or the Term 1 school holidays (whichever is later) and excluding 20 Dec – 31 Jan the opening hours of the shop and café 0700 to 1400 - six days a week with additional hours of operation 1400-2200 on any two of those days.
    - iii. Off Peak: Immediately after Easter or Term 1 school holidays (whichever is later) to the Friday before Labour weekend opening hours of the shop and café 0830 to 1400 four days a week and additional hours of operation between 1400-2200 on any two days of the week.
  - b) The shop/cafe shall be contained wholly within the building, and will have a maximum seating capacity of 40 people. No outdoor seating shall be provided.
  - c) The artisan cheese production facility will not be open for visitors, clients or deliveries beyond the hours of 0700 -1800 five days a week
  - d) The artisan cheese production facility is to have a maximum annual production of cheese of 40,000kg.
  - e) All access to the toilets shall be internal to the building
  - f) Vehicle movements to and from the site shall not exceed 90 in any 24 hour period.
  - g) Any security or amenity lighting shall be directed into the site, with shielding provided as may be necessary, to address avoidance of light spill nuisance on adjoining properties. The light spill from the activity onto any site measured at the boundary is not to exceed 10 lux at any receiving property boundary. Artificial light is to be shielded in such a manner that light emitted from the fixture is projected below a horizontal plane running through the lowest point on the fixture; and the lower edge of the shield is to be at or below the centreline of the light source.
  - h) A minimum of 20 car parks are to be available on the site at all times
  - i) The convex mirror as required under Condition 2(v) and installed under Condition 4 shall be maintained by the consent holder for the duration of the consented activity. It is the consent holders responsibility to ensure that mirror is repaired or replaced to an acceptable standard in the event it is damaged or removed.
  - j) The consent holder shall use the best practicable option available to ensure that any dust nuisance associated with the access and parking area is utilised. The best practicable option may include sealing of some or all of the access or parking areas if no other option proves suitable to avoid a nuisance.

- k) In accordance with section 128 of the Resource Management Act 1991, the Council may serve notice on the consent holder of its intention to review any or all of Conditions 11(a), 11(f), 11(h) and 11(j) of this consent six months following the commencement of the activity on the site and for every six month period following for up to 2 years following commencement. The review will be for the purpose of dealing with any adverse effects on the neighbouring environment not currently mitigated through the conditions of consent and which may arise from the exercise of the consent and/or is appropriately dealt with at a later stage or to require the consent holder to adopt the best practicable option to remove or reduce any adverse effects on the environment.

This condition will allow the Council to have particular regard to the on-going management of the activity to ensure that it is carried out in the manner described in the application and in a manner that does not result in any concerns in the locality.

12. This resource consent will expire ten years after the date of commencement of consent unless:
- (a) It is given effect to before the end of that period; or
  - (b) Upon an application made prior to the expiry of that period (or such longer period as is fixed under Section 37 of the Resource Management Act 1991), the council fixes a longer period. The statutory considerations which apply to extensions are set out in Section 125 of the Resource Management Act 1991.

#### **Advice Notes:**

1. Section 357 of the Resource Management Act 1991 provides a right of objection to this decision. An objection must be in writing, setting out the reasons for the objection and delivered to Council within 15 working days of the decision being notified to you. A fee may be payable to cover the costs of processing any objection.
2. A copy of this consent should be held on site at all times during the establishment and construction phase of the activity.
3. All archaeological sites are protected under the provisions of the Historic Places Act 1993. It is an offence under that act to modify, damage or destroy any archaeological site, whether the site is recorded or not. Application must be made to the New Zealand Historic Places Trust for an authority to modify, damage or destroy an archaeological site(s) where avoidance of effect cannot be practised.
4. The Consent Holder shall pay all charges set by Council under Section 36 of the Resource Management Act 1991, including any administration, monitoring, inspection and supervision charges relating to the conditions of this resource consent. The applicant will be advised of the charges as they fall.
5. A Corridor Access Request (CAR) is defined in the new "National Code of Practice (CoP) for Utilities access to the Transport Corridors". This CoP has been adopted by the Whangarei District Council and will be phased in. It provides a single application for TMP/RON applications. Enquiries as to its use may be directed to WDC's TMC on 430-4230 ext 8258.
6. Building Consents may be required for retaining structures.
7. All earthworks are required to comply with section 32.2 (Environmental Standards for Earthworks) of the Northland Regional Council Regional Water and Soil Plan for Northland noting Erosion & sediment control and dust suppression requirements.
8. The applicant is advised that a further site inspection of completed works will be required if a period greater than 3 months has passed since the last Council inspection prior to Council signing off on the completed works.

## 10 Reasons for the decision

- a) The proposal comprises a discretionary activity and is generally consistent with the relevant planning instruments.
- b) In considering the permitted baseline, the effects of the proposed activity on the environment are likely to be minor.
- c) It promotes the sustainable management of natural and physical resources, being the purpose of the Resource Management Act.
- d) The conditions are designed to ensure avoidance and mitigation of unreasonable adverse effects.
- h) Those conditions relating to the nature and scale of the operation, operating hours, traffic and dust generated by the proposed activities, are particularly formulated to reduce any adverse effects on Cove Road and neighbouring properties to an acceptable level.

Issued this 19<sup>th</sup> day of June 2014



**Alan Withy**  
**Independent Hearings Commissioner**