IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a resource consent application to, Whangarei District Council by GBC Winstone for the Otaika Quarry overburden disposal area project

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SUBMISSIONS ON BEHALF OF THE APPLICANT IN REPLY

Dated: 11th May 2018

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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION

1. These legal submissions are provided as part of the Applicant's reply. Counsel intends to keep these relatively brief, focusing only on the matters that have arisen from submitters, the Officer's reply and items where the Chair indicated a legal response would be helpful.

MATTERS THAT FORM PART OF THE REPLY

Conditions

2. The Reporting Officer's final recommendation was that the project be granted subject to conditions, and the Chair's directed that conferencing occur on the content of draft conditions. The Applicant and Officer have liaised and a full set of suggested draft conditions is submitted for the Panel's consideration with this reply. There is a total agreement as to the content of conditions between Council and the Applicant.

Further information provided

3. The Applicant's expert witnesses have already provided responses to factual matters that arose over the course of the hearing as part of the verbal reply. The following additional documents are also provided in reply:

   a. Summary notes of Mr Kamo, Mr Wallace, Mr Evans, Mr Harris, Mr Lines and Mr Edmonds' oral reply comments on 18 April 2018;

   b. Evidence summary of Andrew Curtis presented 16 April 2018 (not available at the hearing);

   c. The definition of "construction" from the Oxford Dictionary (9th Edition);

   d. The Construction Noise Standard NZS 6808 1999;

   e. The proposed agreed conditions and accompanying Maps regarding identifying property parcels and adjacent landowners and properties which are within 150m of overburden footprint for the purposes of written notice of works; and

f. In response to concerns over the accuracy of the flyover model presented by Mr Norman and Mr Spencer, particularly the exaggeration of vertical contours, the Applicant has provided a copy of its own flyover model of the overburden disposal area prepared by Boffa Miskell which was used for the scoping of the project. This was not presented at the hearing due to concerns regarding the limited usefulness of flyovers not depicting the proposal from a realistic viewing position. This is a bare flyover model in that it does not depict finished surfaces as grassed or planted, but is useful because it does accurately depict the change in landform as a result of the OBDA. A Dropbox link to access the model has been provided.

REMAINING ISSUES

Scope of Application – "earthworks season"

4. In the Officer's reply, Mr Hartstone refers to reference at paragraph [3.5] of the AEE that:

> *'...enabling works will be completed within the first two earthworks seasons following the commencement of the consents, depending on the weather conditions.'*

5. Mr Hartstone notes that *'he understands that statement to confirm the enabling works will be completed within two consecutive years'*. This is incorrect, the reference to the first two earthworks seasons, is to the first two phases of earthworks that form part of the enabling works. It is not proposed that these be consecutive, while the wording of the AEE could have been clearer. It is confirmed that these were intended to be 3-5 year intervals between Stage 1 and Stage 2 of the enabling works (the same staging as the campaigns). This is evident in the AEE's discussion at page 25 which notes the "*approximate 5 year timeframe*" for the enabling works. The supporting assessments of effects accompanying the AEE support this.

6. The Panel is entitled to rely upon all of the Application when determining the scope of a resource consent application. There is no difference in the extent of the effects, just the timing as to when these effects occur.[1] Therefore, in the Applicant's submission, no scope issues arise. From an operational and project funding point of view, the Applicant's preference is that works are timed as it had intended, being that first two

[1] In this regard it is noted that Mr Runcie in his oral response to the Panel indicated that how the enabling works were staged "made no difference" and that it was a "matter of preference." Residents in consulted by GBC Winstone as to timing have displayed a range of views some preferring a break while others preferring to get on with it and get it done.

earthworks seasons that form the enabling works are not consecutive and would occur depending of market demand approximately 3 to 5 years apart.

Issue of interpretation – "construction"

7. An issue arose over the course of the hearing as to the interpretation of construction in the ODP.NAV 6.2 of ODP provides:

> *'Noise from the demolition and construction[..], shall comply with the guidelines and recommendations of NZS 69803: 1999 Acoustics – Construction Noise." Noise levels shall be measured and assessed in accordance with New Zealand Standard NZS 6808:1999 Acoustics – Construction Noise.'*

8. The term "construction" is not defined in the plan. The introduction to the ODP provides the following general rules of interpretation:

   a. Any term which is not defined in this section takes it's common meaning from the Concise Oxford Dictionary (Ninth Edition) or the Williams Maori Dictionary (Seventh Edition); and

   b. References to New Zealand Standards include amendments.

9. The Concise Oxford Dictionary (Ninth Edition) defines "construction" as:

> *'1. The act or mode of constructing,*
>
> *2. A thing constructed'.*

   "Construct" is further defined as:

> *'1. Make by fitting parts together, build or form (something physical or abstract)[..]'*

10. This is a wide definition which would arguably encompass all of the works for the OBDA, as this is a "form" which is "built" or "constructed".

11. Given NAV.6 refers to (and applies) NZS6803: Construction Noise in the Applicant's submission, it is helpful to also consider the definition of "*Construction work*" as defined in NZS 6803:1999:

*"**means any work in connection with the construction**, erection, installation, carrying out, repair, maintenance, cleaning, painting, renewal, **removal**, alternation, dismantling, or demolition of:*

(a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

(b) any road [..];

(c) any drainage, irrigation or river control work;

(d)[..]

*(e)any [..] **earthworks** [..];*

***Construction work includes**:*

(g) any work in connection with any excavation, site preparation, or preparatory work, carried out for the purpose of any construction work;

(h) the use of any plant, tool, gear, or materials for the purpose of the construction work;

[..]

*"**Construction noise**" means noise arising from any construction work, as defined above."*

(our emphasis added)

12. The Applicant's proposed use of the Construction Noise standard for the enabling works fits comfortably within this definition and meets the long-term limits prescribed in the standard. The elements of the works that are required as preparatory works, for the purposes of foundation, land stability and drainage, are discussed in Mr Line's evidence in Chief at 8.1 - 8.8[2] and Reply. Mr Hartstone in reply, cited the Standards Note at Cl.1.3 that examples of activities to which the standard is not intended to apply are, *'ongoing activities from a site, for example quarrying, landfills'.*[3] The Applicant's enabling works are for the construction related elements of the project, <u>not</u> every day operations. Mr Hartstone failed to note the earlier part of C.13 which gave examples of '*a haul road,*' and *'a perimeter drain or noise bund around an open cast mine or Quarry,'* as being examples of acceptable reliance on the standard. Ms Wilkening in

[2] The enabling works are identified as comprising of a shear key, toe buttress, sub- soil drainage network and mattressed fill.
[3] NZS6803:1999 page 5.

her oral reply, and Mr Runcie in his response, both confirmed that the use of the construction noise standard was appropriate for the enabling works and that reliance on the construction noise standard for these aspects of the work was common practice in other similar projects.

13. The Applicant's proposed reliance on the construction noise standard is also supported at Cl. 7.3(a) and (c) of NZS6803 which makes it abundantly clear that it is the construction, "*the activity*", which gives rise to the use of the standard, as opposed to the nature of the project.

> *'in some circumstances it may be necessary, to define the extent of works the condition is intended to cover, and exactly what works constitute construction work as opposed to works associated with routine operations' and directs a resource condition be focused on 'the activity or class of activity to be regulated any exceptions' and 'numerical noise limits and the time periods of application'.*

14. In this instance, the agreed conditions provide for these measures including notification as to when enabling works commence and are completed and for compliance monitoring and reporting as a check to ensure that the construction noise limit is being complied with.

Cultural evidence

15. A key issue is the cultural significance of the Pegram Block, the impact that the application would have on the Ruarangi Cultural landscape and the cultural effects of the proposed activity – leading Ms Chetham to conclude that these were '*significant and irreparable and were incapable of mitigation'.* Ms Chetham's response relied on detailed evidence of the intangible cultural effects of the proposal that she indicated that she "*believed would be provided to the Panel by Mr Taipari Munro*".[4]

(a) Weight to be placed on Ms Chetham's evidence

16. Ms Chetham was not present to hear the cultural evidence provided on Day 3 of the hearing. Therefore, in our submission the comments in her reply are not based on the all of the evidence heard. She did not witness the presentation of that evidence, nor did she witness the validity of those assertions which she had relied upon being rigorously tested by the Panel in questioning. Ms Chetham's response was based on

[4] This was made clear by Ms Chetham in response to a question from Commissioner Hunt.

assumptions (which in the Applicant's submission did not eventuate) as opposed to hearing key submitter evidence on cultural effects. On this basis, and due to her reliance in evidence on facts that were not established, it is the Applicant's submission that both her response and evidence should be disregarded.

(b) Evidence of Mr Munro

17. In the Applicant's view, the claims of significant adverse cultural effects arising from the proposal were simply not established in the evidence provided by Mr Munro[5] to the Panel (or by any other witness). Mr Munro's evidence was very vague and general in nature. Caselaw is clear that raising cultural concerns does not amount to a right of veto and that the effects of the proposed activity on cultural values needs to be weighed and assessed like any other effect. The party claiming the effect has the evidential onus to establish that effect and in this case that did not occur. Under questioning from Ms Hunt, Mr Munro was unable to offer any specific examples of how the proposal would impact on the spiritual values or intangible spiritual connection that Maori had specifically with the Pegram Block other than that the OBDA would wipe away '*the footprints of ancestors*'. With respect, the same could be said for many sites. It is not unique to the Pegram Block and in itself does not constitute a significant adverse effect on cultural values.

18. It is impossible to reconcile Ms Chetham's recommendation that the application be declined under s 6(e) RMA due to "irreparable harm" with the evidence presented. The Court in *Living Earth v Auckland Regional Council,*[6] at [274]:

> *'For section 6(e) to apply, there must be some factor or nexus between the culture and traditions and the land in question which affects the relationship of the Maori people with the land.'*

19. A recommendation to decline the application on s6(e) RMA grounds would normally be supported by evidence of a direct impact on a cultural site of significance such as urupa, pa site or site where waahi tapu rites were conducted. The proposal has demonstrated that it will not impact on the Ruarangi Block or archaeological sites. The Applicant concurs with the conclusion reached by Mr Kamo that '*he had not seen or*

[5] It is noted that Mr Munro purported to "*make his submission as the Chair of the Ruarangi Trust to represent the views of the Ruarangi Trust*" – however it is noted that the Ruarangi Trust did not make a submission on the Application, Mr Munro did make a submission in his personal capacity. Due to division in the Trust the Applicant's understanding (confirmed by Mrs Mira Norris) was that the disagreeing Trustees had agreed that no-one could speak for the Ruarangi Trust. Mr Munro was unable to confirm when question by Commissioner Hunt as to whether the Trust had mandate to engage in interests outside of the Trust land or regarding quorum of the Trust.

[6] NZEnvC Auckland A126/06, 4 October 2006, Judge Sheppard.

been provided with any information that indicates a direct [cultural] impact within the Pegram Block'.[7]

Te Parawhau Ki Tai

20. In resolving conflicts between evidence as to Maori cultural effects, Courts tend to give greater weight to the evidence given by persons with kaitiaki or tangata whenua status of the proposed site,[8] while accepting that more than one iwi or hapu may have an ancestral association to the site or area.[9] The dominant consideration of the Court in this instance remains an assessment of the quality of the evidence, not merely who is giving it.

21. Te Parawhau Ki Tai have undisputed mana whenua and kaitiaki status of the Pegram Block site. Mr Walker explained the careful and robust process undertaken by the Hauauru Trust in its preparation of the CIA over 18 months. Mrs Fletcher the author of the CIA, who has been entrusted with the history and went to some lengths to detail her experience and role in recording and keeping the history of both Te Parawhau Ki Tai and the Ruarangi Trust.[10] Mr Walker also explained the decision making framework the Hauauru Trust adopted in its assessment and reaching its conclusion that the cultural effects of the proposal could be mitigated with the agreed conditions. Te Parawhau Ki Tai's response has been exemplary in that it has been carefully considered, gathered all the necessary information and has been thoroughly researched and determined that they could support the application and that the cultural effects of the application can be mitigated by conditions proposed. In the Applicant's submission, the evidence presented by Te Parawhau Ki Tai should be preferred.

Inclusion of the Ruarangi Trust in cultural monitoring conditions

22. The Applicant has offered to provide conditions which made provision for the Ruarangi Trust to participate in the project in a similar way to Te Parawhau Ki Tai. No response was provided by the Ruarangi Trust as to whether or not they supported the inclusion of these conditions. Te Parawhau Ki Tai are the undisputed mana whenua of the Pegram Block and have kaitiaki over the site. Therefore, they are the appropriate party to be recognised in the conditions for the project. The Applicant has also consulted with Te Parawhau Ki Tai as to whether or not the Ruarangi Trust should be included

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[7] Mr Kamo, reply comments at paragraph 2.
[8] *Otaraua Hapu v Taranaki RC* at [14]
[9] Lower Waitaki River Management Society Inc v Canterbury RC NZEnvC Christchurch C80/09,21 (29 September 2009).
[10] In *Takamore Trustees v KCDC* [2003] 3 NZLR 496 (HC) the Court held that those entrusted with the history should be accepted – unless successfully challenged, shown to be unreliable or contradictory evidence is preferred.

in these provisions. They have expressed a reluctance for these conditions to be offered to the Ruarangi Trust, due to the dysfunctional status of that Trust. In other words, the Ruarangi Trust is not in a position to participate to the extent required at this point in time and may result in significant delays to the project. On reflection, the Applicant does not consider that these conditions should be extended to the Ruarangi Trust, its involvement (in light of the evidence presented) is not necessary to mitigate the cultural effects of development. Council has expressed a desire to include the Ruarangi Trust so these conditions have been left in at present, for the Panel's consideration.

23. Despite this position, the Applicant confirms its intention is to continue to try and advance discussions with the Ruarangi Trust regarding its renewed MoU and Partnership Agreement. GBC Winstone has confirmed that its mitigation offer is still very much "live" for the Ruarangi Trust to consider (when it is capable of doing so). There is no intention to withdraw this offer. Should the Panel reach a different conclusion from the Applicant as to the extent of cultural effects on Ruarangi (or the need to mitigate them as part of the application), the extensive efforts of the Applicant and contents of the mitigation offer, wording made can be taken into account (either as mitigation or compensation of residual effects) under s104(1) (ab) RMA.[11]

Approach to dust – Yaldhurst case

24. The jurisdiction of the district and regional councils was covered generally in our opening submissions at paragraphs 13 to 15. The Chair has requested specifically that counsel address *Yaldhurst*[12] in respect of jurisdiction to impose conditions on dust. In that case, the Court considered whether it could consider the amenity effects of dust on a land use consent.[13] The Applicant had submitted that the effects of dust are comprehensively addressed in the air discharge permit granted by the Regional Council, and as the grant of that permit had not been appealed, that the Environment Court '*has no jurisdiction to consider the effect of dust on air quality and while the Court may consider land use activities it cannot consider the effect of dust on rural amenity'.* The Court found that:

> *'[220] dust gives rise to a range of effects, aside from the effects that arise in its contaminant form. As a contaminant, dust may have a deleterious effect*

[11] In *Crest Energy Kaipara Ltd v Northland Regional Council* NZEnvC Whangarei A132/2009 the Environment Court confirmed that packages to address Maori concerns could come within the scope of s104(1)(ab) RMA and took into account the Applicant's offer to fund a trust for environmental restoration in and around Kaiparara Harbour.
[12] Yaldhurst Quarries Joint Action Group v Christchurch City Council & Others [2017] EnvC 165 at Christchurch.
[13] Ibid para [219].

on human health and on the amenity associated with access to clean air. The City Council contends, correctly in our view, that there is overlapping jurisdiction under the RMA when dealing with effects of dust and that the City Council has jurisdiction under s31 RMA to manage the effect of dust on amenity. This includes visual and nuisance effects and the associated effect on amenity.'

25. The Court reviewed the existing case law and found that:

> *'The territorial authority has jurisdiction under s 31 RMA in relation to the effects of use and development of land and associated natural and physical resources of emissions. This section does not preclude the City Council from managing effects of emissions, aside from their quality as a contaminant.'*[14]

26. At [228], the Court confirmed the correct approach to land use is for a local authority 'to consider the effects of dust other than as a contaminant, emanating from the proposed quarry'.[15]

27. The Applicant, in both its application and opening legal submissions, has acknowledged the overlapping jurisdiction to control dust effects. We submit that the Applicant's approach to dust is entirely consistent with the Court in *Yaldhurst*. Conditions are proposed by the Applicant on the land use Application to ensure that the land use aspects of dust effects are managed and a draft dust management plan has been tabled to demonstrate how this will be achieved.

28. The Court in *Yaldhurst* also confirms the Applicant's approach to respirable [crystalline] silica. GBC Winstone addressed this matter in evidence to allay fears of the community as to their health and safety.[16] However, GBC Winstone firmly remain of the view that this is an Air Quality issue for the Regional Council. Mr Curtis (as supported by two independent peer reviews) has confirmed that respirable silica and PM10 are below levels at which a Regional Consent would be required. In *Yaldhurst*, the Court confirmed that *'respirable silica' was a discharge of a contaminant to air'.*[17] While the Court declined to consider whether it had jurisdiction to consider the effects of respirable silica on general amenity, based on the Court's earlier comments in the decision, it quite properly reserved consideration of effects of dust as a contaminant to the Regional Council. The *Yaldhurst* decision has not been appealed. In our

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[14] Ibid at [225].
[15] Part of the basis for this decision appears to be that the Council's conditions to address the amenity effect of dust emissions had not been appealed.
[16] Mr Curtis, Brief of Evidence.
[17] *Yaldhurst* at para [235].

submission, the Panel is entitled to rely upon the approach taken by the Applicant to dust effects.

RJ Davidson Trust case – re objectives and policies

29. The Chair queried whether it was necessary, in this instance, to resort to Part 2 of the Act. Counsel notes that the Court of Appeal has yet to hear the *Davidson* Appeal – the High Court decision stands, that the reasoning in *King Salmon* applies to resource consent applications under s 104(1) RMA. There is no need to undertake an overall judgement under Part 2, because the relevant provisions of the planning documents *'have already given substance to the principles in Part 2'.*[18]

30. The law stands that decisionmakers should only resort to Part 2 *'where there has been invalidity, incomplete coverage, or uncertainty of meaning within the planning documents'.*[19] In this case, in the Applicant's submission, the planning framework is clear[20] (and comprehensive). While the Panel will have to weigh competing policies, evidence and effects, that is not at all unusual.

31. In any event, the relevant objectives and policies of the plans and the directions that they pertain to decisionmakers, adequately mirror the directions found in Part 2 RMA – they not only "give substance to the principles in Part 2" they repeat them. For example:

    a. In terms of cultural effects RPS Objective 8.1.2 contains the wording of s6(e),[21] s7(a)[22] and s8.[23] With the only difference being that the plan substitutes the term *Maori* in the Act, for *tangata whenua*. The RPS is also given effect to in the operative district plan at objectives 7.3.1, 7.3.2 and associated policies;

    b. The wording of s7(c) RMA, 'that decision makers have particular regard to the maintenance and enhancement of amenity values,' is reflected in objective 5.3.1 of the ODP; and

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[18] *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [76].
[19] Ibid at [76].
[20] In the Applicant's contention, this is not a case where there is an uncertainty of meaning amongst the planning documents- the purpose of the buffer area overlay is to protect the Quarry from reverse sensitivity effects as reflected in the wording of the RPS and ODP.
[21] RPS Policy 8.1.2 (a) '*recognise and provide for the relationship of tangata whenua and their culture and traditions with their ancestral land, water, sites, wahi tapu and other taonga.*'
[22] RPS Policy 8.1.2 (b) '*have particular regard to kaitiakianga.*'
[23] RPS Policy 8.1.2(c)' *take into account the principles of the Treaty of Waitangi and partnership.*'

c. Sections 7(b) and 7(g) RMA (efficient use of natural resources and finite characteristics) are well covered in the RPS (objectives 3.5).[24]

32. Given the extent that Part 2 RMA is reflected in the planning provisions, in the Applicant's submission resorting to Part 2 RMA would provide no additional assistance to the Panel.

Weighing of evidence under s 104 RMA (Post *Davidson*)

33. The decision as whether to exercise discretion and grant (or refuse) consent necessarily entails a judgement that is informed having regard to all of the matters under s104 RMA. That section adopts an open ended approach to the weight to be attached to the relevant matters.[25] In the absence of an overall balancing of matters under Part 2, the weighing of findings under s104 RMA is critical. The Court in *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150 sets out the post *Davidson* approach to s104 RMA:

> *'[35] We will determine the facts, including making predictions about future effects of the proposal. How much weight is given to this evidence depends on a variety of factors including any policy direction on the fact or effect in issue and the materiality of them to the determination of the case.'*

Comments on the Addendum to Officer's Reply

34. Mr Hartstone has provided further information on the planning origin of the "buffer area" and has confirmed that dates back to a consent order settling a GBC Winstone Appeal in 2004. His response does not provide any further insight into the primary "reason" or purpose of the Mineral Extraction Buffer Overlay.

35. Of concern to the Applicant is the Officer's emphasis on the point that, *'no direct reference to the [buffer] area was inserted into the objectives or policies'*. It is important to remember that the proposal is afforded discretionary activity status under s104 RMA, and is not a non-complying activity under s104D that needs to pass one of the threshold tests in order for consent to be available.[26] There is no requirement that an

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[24] *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150.
[25] *Stirling v Christchurch City Council*(2011) 16 ELRNZ 798 at [53].
[26] The Applicant notes that similar confusion as to the test for activity status plagued the planning assessment in Mr Hartstone's Officers Report for example reference at paragraph 9.29 that *'visual effects (being a component of both landscape and amenity) have been assessed as significant and more than minor [..] boundary planting [..] is not adequate to mitigate effects to a minor level for an identified catchment of residents.'* The Officer's emphasis in the Officers Report that the project was "contrary to," "inconsistent with" or "could not meet "certain objectives and policies at paragraphs [9.3.0] , [9.4.9], [9.5.1] gives the impression that the activity being assessed had non-complying status as opposed to full discretionary.

application for a discretionary activity be consistent with all objectives and policies or for it to have effects that are no more than minor.

36. In the Applicant's submission, the Officer has wrongly focused on the "silence" of the ODP objectives and policies regarding the buffer areas. Section 104(1)(b)(iv) RMA directs that the Panel must have regard to, '*any relevant provisions of,' an operative or proposed plan'*. In this case, Ms Clarke[27] has rightly pointed to the Introduction of the Minerals Chapter of the District Plan which does provide an explanation as to the purpose of the buffer area. These are "relevant provisions" put in place to aid the interpretation of the plan. These very clearly set out the purpose and intent of the buffer overlay as being to protect the Quarry from reverse sensitivity effects:

> *'The mineral extraction area includes a buffer area beyond the active area of the quarry. In these cases it may not be reasonable to require the quarry operator to comply with all the permitted activity rules for mineral extraction, in relation to the Active Area. This approach was recognised by the Environment Court in Winstone Aggregates v Auckland Regional Council A49/2002, where it was held that effects such as noise and vibration could not be reasonable and economically be contained within the site, and a reverse sensitivity buffer was imposed.'*

37. Ms Clarke's interpretation is also consistent with the Policy direction of the RPS.[28] There is no wording in either the ODP or the RPS which supports Mr Hartstone's interpretation that the purpose of the Buffer Overlay is an "amenity buffer". While several residences enjoy the current amenity provided for in the buffer area, it is unreasonable to expect the Applicant to refrain from using this land at all and to retain this area in its current state in perpetuity, for a reason this is not recognised or referred to in the plan.

38. In our submission, (noting that much of the project footprint is outside of the buffer overlay), the proposed OBDA activity is a very reasonable and infrequent use of the buffer area and Pegram site, that complies with the permitted dust and noise limits in the plan.

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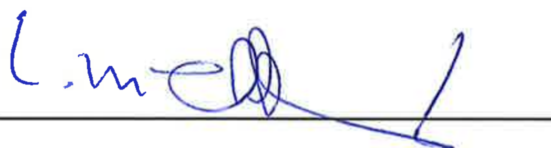
[27] Ms Clarke Brief of Evidence at 47-50.
[28] Ms Clarke Evidence in Chief at 50.

39. Overall, the proposal respects and retains the integrity and function of the "buffer area" for the purpose set out in the ODP, in terms of protecting the Active Mineral Extraction Area from reverse sensitivity effects of encroaching residential development.

Concluding remarks

40. Overall, it is submitted that the Applicant has presented a well-considered, carefully designed proposal which avoids, remedies and mitigate effects to an acceptable level. GBC Winstone respectfully seeks consent, in accordance with the suggested conditions tabled with this Reply.



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