Consents

BEFORE HEARING COMMISSIONERS
APPOINTED BY TARANAKI REGIONAL COUNCIL

Consent No: 5262-3.0

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	an application for resource consent discharge emissions into the air from a free range poultry farming operation
BETWEEN	**AIRPORT FARM TRUSTEE LTD**
	Applicant
AND	**TARANAKI REGIONAL COUNCIL**
	Consent authority

LEGAL SUBMISSIONS ON BEHALF OF VARIOUS SUBMITTERS (MCDONALDS, HIBELLS, BROWNS & POPPAS PEPPERS 2009 LTD)

15 FEBRUARY 2022

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MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. Odour discharges from the applicant's poultry farm are a highly intrusive adverse effect on the air quality amenity value (and amenity values generally) of the neighbouring residents. My clients are all reasonable people who "... *do not want to be "bad neighbours*""[1] - but they can no longer - "... *tolerate the unpleasantness of odours and disturbances which we frequently experience*"[2]. Those odour effects on them "... *are real and stated with honesty and truthfulness*"[3] – and are significantly affecting their use and enjoyment of their properties, their health and wellbeing, their businesses, clients, tenants, family and friends.[4]

2. The applicant's site is surrounded by neighbouring residents from southwest to northeast; therefore, in a relatively large proportion of wind conditions there are sensitive receptors downwind from the chicken farm[5] – some as close as 44-55m away – and multiple sensitive receptors within 300m of the site – far closer than relevant recommended buffer distances[6]. The relatively small site is also situated within a Future Urban Zone (Area R) – across the road from a residential zone (Area Q)[7] – being areas required, and targeted, for New Plymouth's future urban/residential growth[8].

Summary

3. If Rule 52 of the Taranaki Regional Air Quality Plan (RAQP) applies, the application is restricted discretionary. That does not imply that consent should be granted, or in any way favour the granting of consent. The matters reserved for control or discretion are extensive, and a thorough consideration of each of them is required. This includes effects of odour and dust generally (i.e. not just effects that are offensive or

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[1] Glenis McDonald at [10]
[2] Neil Hibell at [15]
[3] Glenis McDonald at [12]
[4] See submitters evidence generally
[5] Donovan Van Kekem at [7.2]
[6] Duncan Backshall at [5.1]
[7] Cam Twigley [19]-[21]
[8] Cam Twigley [22]-[25]. Rowan Williams [2.1]-[6.3]

objectionable). The "*loss of amenity value of air*" is an explicit matter requiring consideration.[9]

4. On this basis, significant loss of amenity because of odour is enough to require consent to be declined, even without offensive or objectionable. However, the clear and consistent evidence of the neighbours is, even with all of AFT's recent improvements and its claimed adoption of "*best practice*", that the odour from AFT's operations is offensive and objectionable (or unreasonable) – including because of its frequency, duration, character and intensity.

5. Even with reduced stocking, it is unrealistic to suggest that all odour effects will dissipate or reduce to acceptable levels. There is simply insufficient certainty to warrant the grant of consent for a 16-year term to 1 June 2038, as recommended by the reporting officers.

6. If consent is to be granted, then its term should align with the expiry of the existing consent, i.e. to expire 1 June 2026. This would give AFT some four years to prove that its reduced stocking (and outdoor ranging), together with any further upgrades and management improvements, do not give rise to unacceptable odour (and dust) effects beyond its site boundaries. It would also allow any further consent application that might be made at that time (to the horror of AFT's neighbours) to be assessed against the relevant planning framework and environment at the time of expiry. This, it is respectfully submitted, is what the scheme of the RMA anticipates, rather than any "*early renewal*".

7. Should Rule 54 (rather than Rule 52) apply, the activity would be discretionary overall, and effects beyond odour such as noise would further weigh against the grant of consent beyond 1 June 2026.

Background

8. The prehearing report helpfully sets out some of the consenting history. However, there appear to be some significant contested background facts.

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[9] This appears to have been overlooked by both the applicant and reporting officer.

9. In respect of the 2011 consent (which was another "early renewal"), the McDonalds did not give their written approval. While they did not submit, a failure to submit does not remove the requirement for a consent authority to consider effects on them; yet the effects on the McDonalds did not seem to be considered at that point. It seems as if TRC considered participation by the four submitters on that application (not including the McDonalds) and their agreement to the conditions to have been sufficient to warrant the grant of consent (to the current expiry date of 1 June 2026).

10. What is missing from the summary is any record of the assurances given to neighbours at the time that operations would cease in 2026.[10] The evidence is also that AFT knew when they acquired the operation (in 2013) that the expectation was that they would cease operations in 2026.[11]

11. The neighbours have also explained, because they expected operations to cease in 2026, that they had not generally complained to TRC or AFT[12] (although some raised concerns direct with AFT,[13] and, after being told by TRC that they had to complain, more recently complaints are being made).

12. Accordingly, the consent history and limited history of complaints should not be taken in any way as supporting the appropriateness of current, and any future, poultry farming operations on the site.

Statutory framework

13. The Commissioners will be well aware in considering an application for consent under s104(1) that a consent authority must, subject to Part 2, have regard to (as relevant):

> (a) Any actual and potential effects on the environment of allowing the activity; and
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> ...

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10 Neil Hibell at [14]. Rod Brown at [2]. Nigel Williams at [3]
11 Kevin McDonald at [11].
12 Rod Brown at [3]. Sue Jensen-Gorrie at [9].
13 Kevin McDonald at [8].

(b) Any relevant provisions of-

...

(v) a regional policy statement or proposed regional policy statement;

(vi) a plan or proposed plan; and

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

14. In addition, s104(2) is of potential relevance in these proceedings:

> When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

15. These submissions focus on the legal matters arising within this framework (with the evidence largely being left to speak for itself), being:

a. the correct rule (i.e. the relevant provisions of the RAQP – s104(1)(b)(vi));

b. the "environment";

c. the permitted baseline (s104(2));

d. Part 2; and

e. the "requirements" for evidence.

The correct rule

16. Identification of the appropriate rule is an important part of any consent process. The rules are an important part of the frame within which resource consent has to be assessed: rules implement policies, which themselves implement objectives.[14]

17. The applicant (and TRC) consider the appropriate rule to be Rule 52, which applies to:

> Discharges of contaminants to air from intensive poultry farming when more than 30,000 poultry are kept at any one time, and where the poultry farm is

14 Section 67(1).

> an existing operation and a new consent is being applied for to replace or renew an existing consent.

18. A critical requirement is that a new consent is being applied for to "*replace or renew*" an existing consent. In this regard:

    a. While the application is styled as an "*early renewal*", it has not been sought on the basis that it is only to commence on the expiry of the existing consent. In that sense, it is not a renewal – it is a separate consent.

    b. The new consent is also not proposed to "*replace*" the existing consent, as the existing consent is not to be surrendered on the grant of the new consent. The new consent will exist alongside the current consent, and the consent-holder can elect which to give effect to (at least until the existing consent expires in 2026).

19. Furthermore, Rule 52 should be interpreted in light of s124 which is the statutory provision relating to "*renewal consents*". A key requirement in s124(1)(b) is that (emphasis added):

> the holder of the consent applies for a new consent for the **same activity**.

20. In this case, the current consent was granted for barn-based poultry farming only (as consent can only be granted for what is sought).

21. What is now sought to be consented is for a similar, but different, activity – being a "*free range*" poultry farming operation. If the activity was the same, then no consent would be required to authorise it – or, if there were conditions to be amended to allow the same activity to continue but subject to different limitations, then the appropriate process would be to seek a s127 variation. Refer, for example, to Body Corporate, where the Court of Appeal explained:[15] "*Section 127 permits an alteration to a condition but not an alteration to an activity*".

22. In addition, even if the application does qualify under Rule 52 (i.e., as a replacement or renewal), then it must also meet the standard that:

> … the nature and scale of the effects of the activity are **unchanged** from that of the existing consent that is to be replaced or renewed.

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15 Body Corporate 97010 v Auckland City Council [2000] 3NZLR 513, at [45].

23. It appears questionable that some effects of free range farming, particularly on the McDonalds, may differ from those of the existing consent – given the potential for a different odour and dust profile to arise from the use by the chickens of the free ranging area immediately adjoining their boundary. If this is the case, and even if the change in effects is small (in an adverse way), then Rule 52 cannot apply.

24. If Rule 52 does not apply, then Rule 54 will apply such that the application becomes full discretionary. Effects other than odour, such as noise, then would fall for consideration.

25. Resolving this question may not be critical for determining whether consent should be granted or not: given that it is the case for the submitters that consent should be declined (at least past 1 June 2026) on the basis of loss of amenity value of air/adverse odour effects alone. If noise also falls for consideration, that only compounds the inappropriateness of allowing operations to continue after 2026.

The "environment"

26. The Court of Appeal's decision in *Hawthorn*[16] is often cited in support of seeking to identify what should be taken into account as part of the "*environment*", for the purposes of s104(1)(a). In general terms, it embraces consideration of the "*future environment*", rather than simply what might exist at the time an application for consent is considered.

27. The focus in *Hawthorn* was on how certain unimplemented consents should be factored into that analysis, and the High Court has since cautioned against applying *Hawthorn* to all circumstances.[17] In that case, the High Court found that the Environment Court was wrong to exclude consideration of the application before it against the outcomes sought in key policies, in its s104D consideration, stating at [85] (emphasis added):

> Section 104D, **and indeed the RMA as a whole**, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment.

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16 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

17 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239 (HC).

28. The approach must be just as applicable to an assessment under s104, as it is to s104D. Here, the real-world approach to analysis – particularly where consent is being contemplated out to 2038 – requires consideration of the effects of the activity on the ability for surrounding landowners to develop their land in line with the anticipated future urban zoning. The best assessment of the timing of that rezoning is around 2026 (i.e., it is more likely than not that the rezoning will have occurred around then), and you can proceed on that basis for the purpose of making your decision on the application under the RMA. Assuming rezoning were to occur around that time, AFT's consent would then, for some ten to twelve years, significantly impact on the ability of neighbours to develop their land in a manner consistent with the rezoning; or, if developed, would subject a significant additional number of residential receivers to unreasonable odour.

29. A "*real world*" approach also has to be taken as to whether the current poultry farm operation is to be considered part of the environment from 1 June 2026 for the purposes of this application; as that is when the existing consent expires - and (unless this consent is granted), there will be no lawful authority for poultry farming to continue past that date. Consistent with the approach taken by the Environment Court in *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72, this application should be assessed on the basis that there is no poultry farming occurring on the site from 1 June 2026. In other words, all odour (and dust) effects from that point, must be considered as being "*new*" to an environment without them. That is the appropriate point of comparison from that point (as opposed up to that point, when it is valid to consider the effects of the new proposed activity against the effects of the existing consent). The Environment Court in the *Port Gore* case implicitly adopted, and therefore endorsed, the approach of the planners, as stated at [34] (emphasis added):[18]

> Floating on the surface of Port Gore there are three groups of mussel farms: a larger set at Melville Cove, several at Pig Bay, and – on the eastern side of Port Gore – the three existing mussel farms at Pool Head and Gannet Point (two) with which we are concerned in these proceedings. **For the purposes of these proceedings, since the mussel farms' coastal permits have expired (or at least should be treated as if they have**

[18] Noting that the Court acknowledged the exception to this in s104(2A), which it addressed when considering s7(b).

> expired), the planners agreed that we must imagine the existing environment as if the Pool Head and Gannet Point mussel farms are not there.

30. The application of a permitted baseline is addressed next.

Permitted baseline

31. AFT appears to be laying the foundation for a permitted baseline argument, in its evidence, with Mr Whiting stating at [49]:

> ... AFTL will continue to operate a poultry farm to the permitted activity standard of 30,000 birds if this resource consent application is not successful.

32. Mr McDean further states, at [3.21]-[3.23]:

> ... it is important to note that Regional Air Quality Plan (RAQP) Rule 51 allows for permitted activity air discharges from small intensive poultry farms of no more than 30,000 birds.
>
> At this limit of bird numbers TRC acknowledges that these activities where appropriately managed will not result in offensive of objectionable odour or dust effects beyond the boundary.
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> On this basis, there is a permitted baseline that exists, where regardless of the outcome of this application and following the expiry of the existing consent in 2026, poultry farming can and will continue on this site, as confirmed in paragraph 49 of Mr Whiting's evidence. The only question is whether it is with 30,000 birds or 61,000 birds and this will be determined by the outcome of this application.

33. The concept of a permitted baseline had its genesis in case law. The Court of Appeal in *Hawthorn* itself went to some lengths to distinguish between the "*permitted baseline*" and the "*existing environment*", stating at [65]-[66]:

> It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at para [29]:
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> > Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and [104D] assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.
>
> Where it applies, therefore, the "permitted baseline" analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a),

> can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

34. The High Court has further clarified the approach to be taken, building on the Environment Court's findings in the "*Lyttleton*" case, stating in *Papakura District Council v Heather Ballantyne*:[19]

> Tested against five questions recently identified by the Environment Court in *Lyttleton Harbour Landscape Protection Assn Inc v Christchurch City Council* (CA 55/06, 11 May 2006), para [21], as ways to decide whether s 104(2) ought to be invoked, the District Council argues indeed, the Court's decision to exercise the discretion cannot be justified. Those questions are these:
>
> - Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?
> - Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?
> - If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement?
> - Is the evidence regarding the proposal, and regarding any hypothetical (non-fanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?
> - Is a permitted activity within which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not to be invoked?
> - Might application of the baseline have the effect of overriding Part II of the RMA?
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> The Environment Court in that case did not suggest, however, that these questions constitute a threshold to be passed before section 104(2) can be invoked; let alone a fivefold test. They are questions drawn from the cases as instances of the ways in which the issue can arise. **They go to the single question whether it is possible and sensible to embark on a comparison, or whether that would be a notional, even fanciful, exercise. Seen in that way, they have real usefulness.** ...

35. Accordingly, considerable care needs to be taken in deciding whether or not to apply a permitted baseline. In terms of the evidential basis to support AFT's continuation at a density of 30,000, it is submitted that more than an assertion from Mr Whiting that operations will continue at the permitted density is required. For example, it is well known that viability of a poultry farm operation is tied to stocking density. No evidence has been given as to whether or not it is a "*real world*"

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19 *Papakura District Council v Heather Ballantyne* CIV 2006-404-3269 26 April, 20 December 2007 Keane J, at [85]-[86].

proposition that farming will proceed at a stocking density that is half of what the current application seeks to approve.

36. Even if farming at the permitted density is viable, in order for the effects of that activity to be discounted, they must be clearly identified. If the stocking is at half what is currently sought using four sheds, would just two sheds only be used, and, if so, which ones would they be? Or will all four sheds be used, but just at much lower densities?

37. In particular, in the face of the evidence from the neighbours, is it possible to conclude that the permitted standard will be met (Rule 51), i.e., that:

> Discharge must not result in offensive or objectionable odour, or dust at or beyond the boundary of the property.

38. The neighbours' evidence is that odour from current operations is frequently prominent even at mid-cycle (which might equate to the "worst" odours if operating at the permitted density). To be exposed to that for 12 years beyond the expiry of the existing consent, where the zoning is sure to change at around the expiry point, would still be offensive and objectionable.

39. Even if the permitted stocking density is viable, and the permitted standard is met, the effects over and above the permitted baseline must then be clearly identified and assessed, i.e. so that you can consider the effect of doubling density from the permitted density? Insufficient evidence has been provided to make this comparison.

40. Finally, even if that evidence is available, the impacts of applying the baseline to get the current application "*over the line*" on Part 2 also need to be carefully considered. It is doubtful whether the RAQP in setting the permitted activity and its standards had in mind a poultry farm operating in such proximity to existing dwellings, and continuing for 12 or so years after rezoning from rural to urban. Mr Twigley's evidence[20] also notes that the RAQP (and RPS) is overdue for review, and considers that a permitted baseline assessment is not helpful in this case for reasons he provides.

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[20] At [57]

41. This brings us to Part 2.

Part 2

42. The Court of Appeal has confirmed the application of Part 2 in the resource consent context, acknowledging it's pre-eminence in resource consent decision-making and reinstating the ability to consult it directly.[21]

43. However, Part 2 may add little to the evaluative exercise where planning documents have been competently prepared in a manner that appropriately reflects the provisions of Part 2. Care also needs to be taken about using Part 2 in such situations to justify an outcome contrary to the thrust of the relevant policies, so to as to render the relevant plans ineffective.

44. In this case, it is respectfully submitted that it is unlikely that the RAQP anticipated that its rules (including through the application of a permitted baseline) would enable the current application to be consented given the proximity to neighbouring sites, and the strong evidence of the neighbours as to the effects on them from the existing operation. The policies are also not of the "*absolute*"-type, such that consideration of Part 2 would not cut against the clear outcomes anticipated by the RAQP. To the contrary, consideration of Part 2 is necessary to ensure that the grant or refusal of the application serves the purpose of the Act.[22]

45. The High Court has recently stated, in *Tauranga Environmental Protection Society Inc v Tauranga City Council & BOP Regional Council* CIV 2020-470-31, at [86]:

> ... Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust v Marlborough District Council*, a Court will refer to part 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to part 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions attempt to confine reference to part 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

46. In these proceedings, it is submitted that consideration of Part 2 is required, the key sections (in this case) being:

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[21] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.
[22] And can be helpful to assist to interpret the relevant rules

a. s7(b) - the efficient use and development of natural and physical resources, noting that:

   i. While a cost-benefit analysis is not compulsory under section 7(b) of the RMA (even when matters of national importance are in issue), a cost-benefit analysis is very useful; - without it, an assessment of efficiency under section 7(b) tends to be rather empty.[23]

   ii. No cost-benefit analysis has been undertaken by the applicant to assist you as consent authority.

   iii. While granting consent will undoubtedly promote the applicant's economic well-being, little information has been provided as to benefits to the wider community (such as in employment), which are the more important consideration in RMA decisions.

   iv. Refusing consent will, in contrast, promote the social well-being of all the neighbours, in respect of avoiding (from 2026) adverse effects of odour including on the amenity value of the air. In terms of economic well-being, the impacts on the neighbours ability to develop after rezoning occurs in around 2026 is likely, as a matter of simple logic, to far outweigh the economic benefit of granting consent. Wider social benefits will also be secured, through the provision of employment through construction, and the delivery of well needed housing stock to the community.

   v. To the extent that there is existing investment in the poultry farming activity (relevant under s104(2A)), all recent investment by AFT should be ignored. This is because AFT undertook that investment in the full knowledge that its current consent is due to expire in 2026 (with no guarantee of renewal at that time), and that this current consent application had no guarantee of success

[23] *Port Gore*, supra, at [199]

either. In other words, all that recent investment has been at AFT's own risk.

vi. In short, s7(b) does not support the grant of consent.

b. s7(c) - maintenance and enhancement of amenity values and s7(f) - maintenance and enhancement of the quality of the environment. These sections, particularly when:

i. the "*amenity value of air*" is a matter specifically reserved for discretion;

ii. the evidence of the neighbours is clear and consistent as to their amenity and quality of environment being adversely affected; and

iii. the neighbours' evidence is supported by that of two independent air quality experts;

weigh heavily against the grant of consent.

The "requirements" for evidence

47. Finally, it is appropriate to briefly address the weighing of evidence. Often, submitters from the community and their "*lay witnesses*" feel that their evidence is downplayed in favour of the opinion evidence from so-called experts.

48. As a first point, the Environment Court is entitled to accept anything in evidence it considers appropriate: s276(1)(a).

49. Next, residents can give powerful evidence as to primary facts. They are the ones that know their environment. They see, smell, and hear things on a daily or other frequent basis, that no expert can replicate on a handful of site visits.

50. To some extent, residents are "experts" as to their own environment.

51. While in the context of mana whenua evidence, the High Court's finding or approach in *Tauranga Environmental Protection Society Inc v*

Tauranga City Council & BOP Regional Council (supra) at [65] as to evidence for a hapū, could be applied equally to the evidence of the neighbours as to the effects on them and their community:

> The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

52. Here the "*considered, consistent, and genuine view*" of the neighbours is that the proposed poultry farm will have "*significant and adverse*" impacts on the environment that they live in, which is "*of significance to them*", and on the air quality amenity values of the environment. Unless the Commissioners find a reason to question the credibility of the neighbour witnesses (and it is respectfully submitted that there is no good reason to do so), there is little room to find, as a matter of fact, that effects of the sort that the neighbours currently describe are not occurring.

Conclusion

53. Each case must be considered and determined on its merits in light of the particular facts and circumstances.

54. It is respectfully submitted that the result of this case should be one that the Commissioners believe best achieves the purpose of the RMA: the sustainable management of natural and physical resources as defined in s. 5(2) RMA.

55. If the poultry farm continues (beyond 2026) it will, in my respectful submission, have the same or very similar significant detraction from air quality amenity value (and amenity values generally) as the present farm.

56. It is recognised that there will be undoubted financial advantage to the applicant if the farm is allowed to continue.

57. On the other side of the scales are the adverse effects of the farm and its activities on the air quality amenity value (and amenity values generally) of the neighbouring residents and surrounding environment (which of course includes people).

58. Over time the continuing urbanisation of the surrounding environment has got to the point where poultry farming activities in the present location are no longer appropriate (if they ever were appropriate in that location in the first place, and it's not accepted that they were in light of the evidence of my clients).

59. Given Area's Q and R - and more recent subdivisions already completed in the surrounding environment - and recognising New Plymouth's (and its people and communities) needs - it is respectfully submitted that it is inevitable that those areas will be urbanised and used for residential (and potentially commercial/industrial) activities.

60. In short, the poultry farm is an incompatible activity within the relevant environment – an environment that has changed considerably since the farm was first established – and being an environment which is set to change further in the future (meaning that the poultry farm will be even more incompatible in its locality than it already is).

61. It is respectfully submitted that the purpose of the RMA and policy statement and relevant planning documents are best met by declining/refusing the proposal.

SWA Grieve – Counsel for Submitters
15 February 2022