

Kaipara District Council

Decision following the hearing of an application by Patrick Cullinan for resource consents under the Resource Management Act 1991

Proposal

Land use consent is sought for operation of a commercial gymnasium on the property. The proposal also includes separate commercial activities for processing and storing firewood for delivery, storage of a vehicle for event transport, and a workshop and storage facility for a local concrete foundation and fence hire business.

These resource consents are **GRANTED In PART** The reasons are set out below:

Application number:	RM190094
Site address:	106 Moir Street, Mangawhai, Lot 2 DP 139478, 1/5 Lot 5 DP 139478, 1/4 Lot 6 DP 139478, 1/3 Lot 7 DP 139478 (RT NA82D/517)
Applicant:	<i>Patrick Cullinan</i>
Hearing dates:	Thursday 28 October 2021 & Friday 3 December 2021
Hearing panel:	Mark Farnsworth MNZM
Appearances:	<u>For the Applicant:</u> <i>Mr Patrick Cullinan represented by</i> Mr Adam Booth, Consultant Planner <u>Submitters</u> Mr Aaron Cameron Ms Deidre Lennox Mr Peter Farnham <u>For Council:</u> Ms Katrina Roos, Consultant Planner Mr Mathew Kerr-Ridge Mr George Lewis, Mr Prasad Sappa (Online) <u>Hearing Administrator</u> Ms Jodi Tollemache

Hearing adjourned	3 December 2021
Commissioner’s site visit	Wednesday 27 October 2021
Hearing Closed:	1 February 2021

Hearing Note:

Initially, Auckland based Independent Hearing Commissioner Mr Alan Watson had been appointed by the Kaipara District Council (“**the Council**”) to hear and decide this application. However, with the prevailing COVID 19 created a difficult situation with Mr Watson being based in Auckland, he stepped aside and the Council appointed a Northland based Independent Hearing Commissioner Mark Farnsworth to conclude the hearing process.

Introduction

1. This decision is made on behalf of the Council by Independent Hearing Commissioner Mark Farnsworth appointed and acting under delegated authority under section 34A of the Resource Management Act 1991 (“**the RMA** or “**the Act**”).
2. This decision contains the findings from my deliberations on the application for resource consents. It has been prepared in accordance with section 113 of the RMA.
3. The application was the subject of limited notification on 19 April 2021. A total of 4 submissions were received, all in opposition of the proposal.

Summary of Proposal, Reasons for Consent and Activity Status

Proposal

4. The applicant is seeking land use consent for operation of a commercial gymnasium on the property¹. The proposal also includes separate commercial activities for processing and storing firewood for delivery, storage of a vehicle for event transport, and a workshop and storage facility for a local concrete foundation and fence hire business. The application does not include earthworks, which are the subject of a separate application to Council (reference RM210077).

Amendments to the Proposal

¹ Section 42A Report at Section 3

5. The applicant was given the opportunity to amend the application following the close of submissions². A request was made on 20 July 2021 and the response was received on 2 August 2021. The amendments provided by the Applicant included:
- Limiting the operation, or activity that creates loud and sustained noise effects to between the hours of 8am and 5pm;
 - A Traffic Management Plan (**TMP**) to be provided to Council for approval prior to the works being undertaken;
 - The applicant has already posted 20km/hour signs along part of the access, and is happy to provide more at the beginning of the Jointly Owned Access Lane (“**JOAL**”), to prevent excessive speeds that may create a dust nuisance;
 - The applicant accepts that he will be the predominant user of the JOAL post consent, and that any maintenance of it should be his responsibility whilst the commercial activities continue on the site;
 - Agreeable to the recommendations of Fire and Emergency New Zealand (“**FENZ**”); and
 - The applicant is happy to have consent granted for the existing commercial activities on the site (the gymnasium and the workshop), and for other commercial activities to be restricted (party bus and camping).

Reasons for consent

6. The Section 42A Report, which had been prepared by **Ms Katrina Roos**³, outlines⁴ the reasons for consent noting that according to the Kaipara District Plan (or “**District Plan**”), the proposal is located in the Rural Zone and subject to three overlays:
- Mangawhai Harbour Overlay;
 - Greater Growth Area Catchment; and
 - Flood Susceptible Area.
7. The proposal requires resource consent as a restricted discretionary activity as the following rules apply:
- 12.10.4 ‘Commercial and Industrial Buildings’ – the commercial activities are housed within buildings;

² *ibid* at [41]

³ Consultant, Senior Planner Cato Bolam Consultants

⁴ *ibid* at [Section 4]

- 12.10.8 'Permeable Surfaces' – impermeable surfacing associated with all activities exceeds 10%, being 15.24%;
- 12.10.18 'Traffic Intensity' – traffic movements associated with all activities exceed 60 vehicle movements per day, being approximately 118 movements per day; and
- 12.10.25 'Vehicle Access and Driveways' – the existing vehicle crossing and private access lot (JOAL) do not comply with Kaipara District Council Engineering Standards 2011 (“**ES 2011**”) for formation and the number of users, and is not proposed to be upgraded to ES 2011 in respect of formed and legal width.

Activity Status

8. Overall, the proposal has been considered as a ***restricted discretionary activity***.

Site Visit

9. A site visit was undertaken on Wednesday 27 October 2021.

Site Description and Surrounding Environment

10. Section 6 of the Section 42A Report provides a full description of the site and the surrounding environment. The application site of 1.2696ha contains an existing dwelling and a number of accessory buildings, including two single-storey, steel, multi-bay sheds used for commercial purposes. The site is elevated above Moir Street and located down a long, narrow private access gravel limestone driveway (**JOAL**) and with a single vehicle crossing shared with several other properties. Due to its location the site is not visible from public vantage points on Tara Road or Moir Street, but is adjoined by neighbouring properties with views into the site. The applicant lives on the property. External staff are present on site for the concrete foundation workshop and storage business.
11. The site is not subject to natural hazards in the Northland Regional Council Hazard Maps but is subject to a Tsunami Zone. The site is not noted as flood susceptible in the Kaipara District Plan Maps. The esplanade reserve of Bob Creek is known anecdotally to flood at high tide. A review of the *open source* mapping system *Archsite* found no recorded archaeological sites on the property.
12. The site is zoned Rural. The section 42A Report records the character of the immediate area is low density residential in character, as it is located on the western outskirts of Mangawhai Village. Surrounding properties are small un-serviced rural-residential lots with un-serviced residential lots located closer to Moir Street. Moir Street is a sealed

arterial road with a posted speed limit of 50km/hr in this location and high traffic volumes (6,000 vehicles per day). Tara Road, which adjoins the site to the south-west, has similar properties but lower traffic counts. Both roads have pedestrian footpaths. Nearby commercial activities include a retail shop and offices located at 104 Moir Street where land is zoned Residential. The adjoining watercourse Bob Creek is a tributary of the upper Mangawhai Harbour.

Site Consent History

13. An earthworks consent RM170517 was granted in January 2018⁵. Additional works have been carried out which are the subject of a new earthworks' application (reference RM210077), which is not yet decided, following the issue of a stop work by Council. The site is currently subject to a live abatement notice relating to the activities in the consent application (reference 0122014402), dated 17 September 2018. The notice requires the gymnasium on site to not be advertised for commercial use, and applies a restriction on vehicle movements to less than 60 movements per day.

14. The Section 42A Report notes⁶ that commercial activities are in breach of the following land use rules in the Kaipara District Plan:
 - 12.10.4 'Commercial and Industrial Buildings;
 - 12.10.8 'Permeable Surfaces;
 - 12.10.18 'Traffic Intensity; and
 - 12.10.25 'Vehicle Access and Driveways'.

Statutory Acknowledgements

15. The statutory acknowledgement relevant to this application is contained within the *Te Uri o Hau Claims Settlement Act 2002*. Environs Holdings Limited is a subsidiary of Te Uri o Hau Settlement Trust (caretaker of Te Uri o Hau Claims Settlement Act 2002) authorised to participate in the Resource Management Act 1991 proceedings. A copy of the application was not sent to Environs Holdings, as they have no stated interest in applications for commercial activities.

⁵ Section 42A Report at Section 5

⁶ Ibid at [12]

Relevant Statutory Provisions

16. As the application is for restricted discretionary activity, I have had to give due consideration against the provisions of section 104 and 104C of RMA, subject to Part 2.

17. The Section 42A notes⁷ that regard should be had to Section 104(1):

Section 104 (1)

When considering an application for a resource consent and any submission 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*
- (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from 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*
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

Section 104C:

- (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—*
 - (a) a discretion is restricted in national environmental standards or other regulations:*
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.*
- (2) The consent authority may grant or refuse the application.*
- (3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which—*
 - (a) a discretion is restricted in national environmental standards or other regulations:*

⁷ Section 42A Report at [45]

(b) it has restricted the exercise of its discretion in its plan or proposed plan..

18. As a restricted discretionary activity, Council's discretion is restricted to the following rules and their assessment criteria:
- *Rule 12.10.4 'Commercial and Industrial Buildings';*
 - *Rule 12.10.8 'Permeable Surfaces';*
 - *Rule 12.10.18 'Traffic Intensity'; and*
 - *Rule 12.10.25 'Vehicle Access and Driveways'.*

Relevant standards, policy statements and plan provisions considered

19. In accordance with section 104(1)(b)(i)-(vi) of the RMA, I have had regard to the relevant policy statements and plan provisions of the following documents:
20. The National Environmental Standard for Assessing and Managing Contaminants in Soil to protect Human health 2011;
21. Northland Regional Policy Statement 2016, updated May 2018; and
22. Kaipara District Plan 2013.

Submissions

23. The Section 42A Report provided a tabulation⁸ of the four submissions⁹ received.

⁸ Section 42A Report at [34]

⁹ A copy of each submission can be found as an attachment to Section 42A Report.

Name	Address	Support or oppose
Moira & Keith Jackson	112 Moir Street	Oppose
Aaron Cameron, Deidre Lennox and Peter Farnham	106A Moir Street & 106 D Moir Street	Oppose
Francesca & Nathan Purcell	34 Tara Road	Oppose
Fire Emergency NZ	Whangarei	Oppose

24. All submissions were in opposition to the application. Issues identified in the submissions include:

- Sediment discharge from JOAL;
- Noise effects from commercial traffic using the JOAL;
- Ongoing maintenance of JOAL;
- Dust nuisance from use of JOAL;
- Noise effects of commercial activities, in particular the noise from water-blasting by a commercial tenant on the site;
- Additional activities such as commercial camping and 'party bus' during peak holiday season;
- Discharges from commercial activities such as water-blasting to Tara Creek; and

- Unauthorised earthworks.

Hearing Process

25. The hearing was convened in the Mangawhai Village Office of Kaipara District Council at 0930 on Thursday 28 October 2021.
26. The hearing was adjourned for provision of further information at 1130 on Thursday 28 October 2021. My Fourth Direction dated 28 October 2021 noted:

“The Council’s Reporting Planner Ms Katrina Roos noted that given the late provision of information (received on 27 October 2021) she had been unable to due diligence to the following:
 - 1.1 *Stormwater Assessment – John Rowland & Matt Wiley, Geotechnical Engineering Services; dated 26 October 2021; and*
 - 1.2 *Noise Monitoring and Assessment – Mary Hamilton, Marshall Day Acoustics Limited, dated 26 October 2021.”*
27. I also accepted that the provision of further information from both the Council (traffic) and the applicant (amenity mitigation measures) would assist me.
28. The hearing reformed on Friday 3 December 2021. The hearing was adjourned at 1130 to allow the Applicant’s agent Mr Booth to respond to new information which was tabled by the Council.
29. At my request Mr Booth filed the Applicant’s Closing Statement on 1 February and the hearing was closed.

Summary of evidence heard

30. Ms Roos’ Section 42A Report, on behalf of Council, was circulated prior to the hearing and taken as read. Ms Roos’ recommended that the application be declined.
31. The evidence filed by the Applicant’s agent Mr Booth responded to the issues identified in the Section 42A report and the matters raised by the submitters.

Applicant’s Evidence

32. Applicant’s case was coordinated by **Mr Adam Booth**; the key points of the evidence are summarised below.

33. Mr Booth provided an overview of the proposal and a summary description of the site and the surrounding locality¹⁰.

34. The key matters addressed in Mr Booth's evidence were in summary;

In terms of the permitted baseline:

- The sheds on the site are existing and are part of the permitted baseline; and
- Sixty movements per day from the subject site are permitted and should form part of the permitted baseline.

In terms of traffic movements¹¹:

- The plan allows for 300 vehicle movements per day along the JOAL as a permitted activity. With this application included the number of anticipated traffic movements per day along the JOAL will be in the range of 150. This is still only 50% of what is permitted under the plan rules.
- The applicant is prepared to undertake the proposed upgrading as part of the consent. He has already undertaken a significant portion of the upgrading works, to increase the functionality and safety of the access. Access will be provided to the properties that share the JOAL at all times during the upgrade. There is not any proposal from the applicant to close the JOAL during upgrades. There may be minor delays of a few seconds during the works, but nothing substantial, and this should be viewed as a less than minor effect.

In terms of noise¹²:

A copy of a letter from **Ms Mary Hamilton** of Marshall Day Acoustics to the applicant dated 20 November 2019 was tabled by Mr Booth which he quoted from:

"We undertook compliance noise measurements at the notional boundary of the nearest receiver. The overall noise level (including noise from the site and other environmental noise sources) readily complied with the District Plan noise limits." It also stated "Overall, noise generated by the site activities is considered to have little adverse effect on the nearest receivers and to be reasonable in terms of the Resource Management Act."

Booth noted that at this stage, there is not any evidence to conclude that there is a breach of Rule 12.10.14 by the activities on the site, and that any noise currently emitted should be viewed as being within the permitted baseline for the site.

¹⁰ Booth EiC at Section 3

¹¹ Ibid at [6.9 – 6.19]

¹² Booth EiC at [6.20 – 6.27]

In term of Permeable surfaces¹³:

The total site coverage for impermeable surfaces on the property is currently 1936m², or 15.24% of the site. Consent is required under 12.10.8(1) for the existing site coverage, it is permitted to have 10% site coverage. Consent is only required for the additional 5.24% coverage, all of which is metal driveways and parking.

35. Booth was of the opinion that the only rules within the district plan which are breached are 12.10.8(1) Permeable Surfaces, and 12.10.18 Traffic Intensity.

36. Booth also noted¹⁴ the KDC planner had advanced the proposition that the application was contrary to Policies 5.11 and 5.13 of the RPS. Specifically:

“The proposed commercial activities are not considered consistent with policies 5.1.1 and 5.1.3 as they are ad-hoc commercial activities which are resulting in adverse character and amenity effects on the immediate surrounding environment which are at least minor, and are not supported by guaranteed stormwater infrastructure to protect receiving environments”.

37. Mr Booth offered a counter view¹⁵:

“This is already considered within the operative Kaipara District Plan. The plan was formulated with an anticipation that there would be possibilities for commercial development of both Rural and Residential zoned sites.”

38. In terms of stormwater Booth had provided a *Stormwater Assessment – John Rowland & Matt Wiley, Geotechnical Engineering Services; dated 26 October 2021*. Booth opined¹⁶ the stormwaters issues had been addressed and the proposal is in accordance with KDC Engineering Standards 2011.

39. In terms of landscaping Mr Booth provided a Memorandum, dated 11 November 2021. from **Mr Simon Cocker**, a Registered Landscape Architect. Mr Cocker assessed the potential adverse visual amenity and rural character effects that will be generated by the proposal. In particular traffic within the Site, and on the JOAL as a result of granting of the application. The increase in vehicle movements over and about the 60 existing movements is 58 movements per day. These are understood to be primarily passenger vehicle movements.

40. It was Mr Cocker’s opinion that the potential adverse rural character effect, and potential adverse visual amenity effect of the proposal will be (at most) low for all submitters. This

¹³ Booth EiC at [6.28 – 6.33]

¹⁴ Ibid at [8.8]

¹⁵ Ibid at [8.9]

¹⁶ Ibid at [8.23]

equates to a less than minor adverse effect. Cocker concluded the proposal is appropriate from a landscape and visual perspective.

41. Booth also provided an analysis¹⁷ of the site activities against the assessment criteria for Rule 12.10.18 he concluded:

“The application to allow the use of the JOAL to access the site and the associated activities, generating about 118 traffic movements per day, is consistent with the assessment criteria of Rule 12.10.18”.

42. In Section 10 of his evidence Mr Booth addressed the concerns of submitters; he noted

“The applicant has accepted that he will maintain the JOAL at his cost, for as long as the commercial activities continue on the site. This can be conditioned within the consent if needed”.

43. It was Mr Booth’s conclusions¹⁸:

- The assessment undertaken indicates that the proposal is compatible will have less than minor adverse effects on the surrounding natural and physical environment;
- The proposed mitigation measures and conditions will ensure any adverse effects on the environment or any persons will be appropriately avoided, remedied or mitigated;
- The proposal is not contrary to the provisions of the RPS and the District Plan; and
- The proposal is in keeping with the plan rules and matters for discretion

44. Mr Booth was of the opinion given the matters addressed in his evidence and taking into account the positive effects the application should be granted subject to conditions.

Submitters

45. A number of submitters (**Mr Aaron Cameron, Ms Deidre Lennox & Mr Peter Farnham**) appeared on 3 December 2021. They had not fronted the first hearing day when they were scheduled to speak. Mr Booth suggested that I should allow them the time to address their submissions. They reiterated the points made in their submissions, in particular:

- The way the JOAL is being used (noise, dust and number of vehicle movements);
- Noise¹⁹ from commercial operations on the site; and

¹⁷ Ibid at [8.24 – 8.41]

¹⁸ Booth EiC at [11.1 – 11.3]

¹⁹ Submitters noted that they noise complaints to Council ‘numerous’ times.

- The potentially expanding commercial operation are adverse affecting amenity values.

For the Council

46. As noted above Ms Roos prepared the Council's 42A Report with a recommendation that consent should be declined. In her report she addressed:

- The permitted base line²⁰;
- The receiving environment²¹;
- Future environment as anticipated under the Plan²²; and
- An assessment of effects²³.

47. In her assessment of effects, she concluded:

Vehicle access –

Overall, the effects of the upgrade works, on vehicle access for other legal users are deemed at least minor due to the construction works causing temporary inconvenience, decreasing to less than minor when the works are completed.

Traffic intensity -

The traffic assessment concludes that with the proposed improvements to the private access the traffic effects will be within acceptable limits. Council's engineer is in agreement with the traffic assessment.

Stormwater -

Overall, the stormwater effects of the proposal are considered at least minor by Ms Roos.

Landscape and visual effects –

Considering the receiving environment and permitted baseline for visual effects from buildings, surfacing, stockpiling and vehicles in the Rural Zone, and the offered mitigation; overall the visual effects of the proposal on the adjoining properties would be less than minor

Amenity

She concurred with the submitters that the adverse effects on character and amenity on immediate adjoining properties are detrimental and at least minor.

Cumulative Effects

The cumulative effects of the proposal are considered minor.

48. Ms Roos' concluded, having assessed the effects of the activity, subject to offered and recommended mitigation, and subject to compliance with conditions, that:

²⁰ Section 42 A Report at [45 - 47]

²¹ *ibid* at [49 – 54]

²² *ibid* at [55]

²³ *ibid* at [57 – 96]

- The activity will result in minor adverse effects on adjoining properties; and
- The proposal is inconsistent with the following objectives²⁴ and policies²⁵:
 Objectives: - 12.5.2; 12.5.4; 12.5.5 & 12.5.6 and
 Policies: - 12.6.3a, 12.6.3c, 12.6.5; 12.6.9; 12.6.10; 12.6.12; 12.6.13, 12.6.16 and 12.6.17.

49. Ms Roos tabled a letter from **Mr Jon Styles** Director of the *Styles Group Acoustics & Vibration* consultants who had undertaken a peer review of the Applicant’s noise assessment. Mr Styles noted:

“The assumptions in the MDA Assessments are not consistent with the level of vehicle movements that the application seeks to authorise. No noise level predictions are provided for receivers exposed to noise levels from activity vehicle movements along the JOAL, and the MDA Assessment considers only one heavy vehicle per month>

Further information is required to understand the potential noise effects during the night-time and evening periods. This includes vehicle movements in the early morning and evening periods.”

Applicant’s Right of Reply

50. The Applicant’s agent Mr Booth provided a brief written Closing Statement which addressed following matters:

- Rules breached by the application²⁶;
- The application was supported by expert specialists²⁷; and
- Comment on the S42A Report analysis and findings²⁸.

51. Mr Booth, advocated²⁹:

“Having reviewed all matters raised at the hearing and having sought professional planning advice from a planning expert, I cannot see anything else or any reason why a consent is refused for the breaches of the District Plan rules.”

Principal Matters in Contention and My Findings

²⁴ Ibid at [92]

²⁵ Ibid at [94]

²⁶ Closing Submission at [2.2]

²⁷ ibid at [2.4]

²⁸ ibid at Section 3

²⁹ ibid at [5.1]

52. After analysis of the: application; the evidence provided by the applicant and Council (including proposed mitigation measures provided by draft conditions of consent); undertaking a site visit; reviewing the Council planning officer's Section 42A Report and recommendation; reviewing the submissions, considering the further information provided and concluding the hearing process, I concur with Ms Roos³⁰ that the principal matters in contention are:
- Effects on rural character and amenity;
 - Noise effects from commercial activities;
 - Noise, dust and other nuisance effects associated with use of the JOAL;
 - Water supply for fire-fighting and other fire safety measures; and
 - Stormwater discharges from commercial activities.
53. Two issues are no longer in contention as they have been resolved and they do not need to be addressed in this decision namely:
- Stormwater discharges – there was no disagreement on the stormwater management approach to be implemented by the Applicant; and
 - The Applicant agreed to FRENZ's requirement for a water supply for fire-fighting.

Effects on Rural Character and Amenity

54. Ms Roos³¹ and the Applicant, via Mr Booth³² and Mr Cocker³³ considered the impacts of the proposal on rural character and amenity.
55. In one of her Section 42A conclusions Ms Roos³⁴ opined
- “Overall, I concur with the submitters that the adverse effects on character and amenity on immediate adjoining properties are detrimental and at least minor.”*
56. Mr Cocker in his Memorandum on landscape and amenity noted:
- “It is also important to recognise that the sensitivity of an individual depends on the ‘nature’ of a view – where that view is experienced from. Greater sensitivity is attributed to a change in the view, or of a view of a detractor when it is experienced from a dwelling, from a key and often frequented outlook from that dwelling, or from a primary and often frequented outdoor living area.”*

³⁰ Section 42A Report at [106]

³¹ Section 42A Report at [68 – 72].

³² Booth at [8.29]

³³ Cocker Memorandum dated 11 November 2021

³⁴ Section 42A Report at [72]

57. Mr Cocker provided a professional assessment of the impact of proposal on the following lots:

- Lot 5 DP125004;
- Lot 3 DP139478;
- Lot 1 DP 139478; and
- Lot 1 DP 521452.

He proffered the opinion that:

“The potential adverse rural character effects, and the potential adverse visual amenity effect experienced by these individuals will be low.”

58. **Dr Moira Jackson** in responding to the Cocker Memorandum in an email dated 1 December 2021 noted:

“The landscape architect has made incorrect assumptions regarding how we live and use our and especially in regard to the portion adjoining the shared driveway. It is not used as a rural farmed block but is part of our garden.”

59. The impacts of how the current operations are affecting the amenity of the area is one of the key submission points of the submitters.

60. My site visit demonstrated that Mr Cullinan has multiple commercial activities on site. There is the daily presence of staff and daily site activities have expanded with the progressive expansion of commercial operations on the site. Ms Roos noted this has led to a change in localised rural character, giving the site an appearance, and ambience, which is not consistent with adjoining properties.

61. While I accept the Applicant has taken measures to address visual amenity. I endorse Ms Roos statement³⁵:

“I concur with the submitters that the adverse effects on character and amenity on immediate adjoining properties are detrimental and at least minor.”

62. I also concur with both the submitters and Ms Roos, the effects of the current operations on rural character and visual amenity are minor, and I came to the view that if commercial operations are allowed to expand, potentially more than minor. I am of the view to remedy the situation commercial operations, need to retrenched.

³⁵ Section 42A at [72]

Noise effects from commercial activities

63. As noted above Mr Booth tabled a *Noise Monitoring Assessment* by Ms Mary Hamilton dated 26 October 2021. It was Ms Hamilton's conclusion:

"Overall, noise generated by the site activities is considered to have little adverse effect on the amenity of the nearest receivers".

64. Council questioned the veracity of the Hamilton assessment, as the noise recordings had not been undertaken in accordance with best practice. Council commissioned Mr Jon Styles to undertake peer review of Hamilton's assessment. Mr Styles concluded:

"Styles Group have reviewed the application to authorise several commercial activities at 106 Moir Street. We have reviewed the MDA Assessments that accompany the application and have sought clarification on several matters.

We consider it critical for the timing and duration of all noise sources on the Site to be understood. This will enable a noise rating level to be derived in accordance with NZS 6802:2008. This can then be used to determine compliance with the noise limits in Rule 12.10.14 of the ODP."

65. At the close of the hearing, I had received no further clarification on noise matters.
66. As noted above, noise key is a concern of submitters. After, listening to, and considering to their views³⁶ I came to understand that their concerns over noise being generated from site had merit.
67. In concluding her noise consideration Ms Roos opined³⁷:

"I consider that persistent noise from water-blasting and other noisy site activities on a daily basis constitutes an unacceptable level of adverse effects on adjoining neighbours which contribute to minor effects on character and amenity".

68. I would have concurred with Ms Roos' opinion if noise levels at the notional boundary of the Applicant's site had been measured (a number of times) according to best practice, and was exceeding the noise standards in the District Plan. This is information I do not have.

³⁶ Some of the views expressed had to be set aside as they related to non-RMA matters. I advised them to take those matters up with the Council.

³⁷ Section 42A at [76]

69. Mr Booth in an email dated 20 January 2020 noted:

“The application does not include any consent for a noise breach, and there has not been any evidence provided to confirm there is any noise breach on the property.”

70. While Mr Booth’s observation is right, the submitters are also right, constant commercial noise, can and is adversely impacting on adjacent residential lots. But with the information at hand, I am not able to make a definitive finding whether the adverse noise impacts resulting from the commercial operations are, minor or more than minor. I accept there is strong anecdotal evidence of adverse noise impacts and that the Council has received noise complaints.

71. The Applicant has recognised the noise problem and has offered to restrict noisy activity to restricted hours. I am of the view that the scale, and number of commercial operations on the site is a contributing major factor. Granting consent for all the activities sought could, and indeed is most likely to, potentially exacerbate the situation as the operators will want to grow their businesses. If the number of commercial activities on the site are retrenched and noisy operations restricted to Monday to Saturday the provisions (Rules) of the Operative District Plan should be more than adequate to address noise issues.

Noise, dust and other nuisance effects associated with use of the JOAL

72. Mr Booth’s evidence addressed³⁸ the Applicant’s approach to the JOAL. In summary:

- The proposed JOAL upgrade is sufficient and will provide adequate width and capacity;
- The Applicant has maintained the JOAL at his own expense, with no contribution from other users of the JOAL;
- Vehicles accessing the site are generally personal vehicles or work Utes. Occasionally a truck will deliver wood to the site; and
- Traffic movements per day, are consistent with the assessment criteria of Rule 12.10.18.

73. Ms Roos in addressing the JOAL noted³⁹:

“The traffic assessment concludes that with the proposed improvements to the private access the traffic effects will be within acceptable limits”.

74. Ms Roos was of the view:

- The Applicant’s maintenance plan is for ongoing management of the JOAL which

³⁸ Booth EiC at [8.25 – 8.41]

³⁹ Section 42A Report at [59 - 60]

would benefit other users;

- The applicant also proposes a speed limit of 20km/hr and has erected signage for this purpose;
- The proposed upgrade works to the JOAL and related offered conditions will improve the carrying capacity of the JOAL to support the commercial activities and other legal users; and
- Having regard to the upgrade works and offered conditions of consent, overall, the traffic effects would be less than minor.

75. Ms Roos went on to qualify her recommendation noting:

- The effects of the upgrade work on the JOAL for other legal users are deemed at least minor; and
- There are noise and dust (nuisance) effects on amenity values that need to be considered.

76. The submitters, in their representations and verbal statements, highlighted the adverse noise effects and the dust nuisance created by, site operations and vehicle movements, especially during the summer months. They held the strong opinion that both noise and dust were adversely impacting on amenity values and their enjoyment of their properties. They noted that while the District Plan may place limits on the number of vehicle movements per day on the JOAL, if the consents are granted vehicle movements will increase.

77. Mr Booth proffered the following perspectives⁴⁰:

“The applicant has endeavoured to reduce and mitigate any effect that the traffic movements may have on character and amenity

He has also at his expense erected the wooden fence between the JOAL and the Cameron/Lennox property, to mitigate any potential noise or dust nuisance.

The applicant does not want any dust nuisance from either his site or the JOAL, and so will endeavour to water any areas that are creating dust, to reduce this effect.

The applicant has accepted that he will maintain the JOAL at his cost, for as long as the commercial activities continue on the site.”

78. My site confirmed the JOAL is both very narrow and unsealed. While I accepted the Applicant has right to use the JOAL, the scale, nature, and potential expansion of his operations will increase the intensity of vehicle movements on the JOAL. I concur with the submitters that the current use, and the potential for increased use of the JOAL, is resulting in, and will result in, adverse effect on amenity that are more than minor.

⁴⁰ Booth EiC at [8.32 – 8.33, & 10.4 – 10.5]

Positive Effects

79. Mr Booth in highlighting the positive effects of the proposal that the commercial operations on site noted:

- *“Meets Objective 3.5 – Enabling Economic Wellbeing, is also relevant to this proposal, as it recognises that there is a reduced economic output in Northland, and as such economic activity should be encouraged, albeit in an environmentally friendly manner⁴¹.”*
- have created employment; and
- facilitated the on-going maintenance of the JOAL.

Summary of Findings – Effects

80. The scale and intensity of the commercial operations on site has a direct bearing on the number and type of vehicle using the JOAL. I accept that vehicles using the JOAL are creating adverse effects that are more than minor. I acknowledge there are positive effects as highlighted by Mr Booth. In my final analysis I concurred with Ms Roos', conclusion on cumulative effects. She noted⁴²:

It is considered that the proposed commercial activities demonstrably exceed the carrying capacity of the site to support the activities without a level of adverse effects which is detrimental to adjoining properties. The proposed upgrade works to the JOAL and related offered conditions will improve the carrying capacity of the JOAL to support the commercial activities and other legal users, but the related noise from traffic and site activities and staff being present every day for at least part of the day can't be supported.

81. As noted above the issues associated with stormwater and firewater supply had been resolved.

Relevant Statutory Documents – s104(1)(b)

80. An analysis of the objectives, policies and rules of the relevant planning documents had been undertaken by Ms Roos⁴³

National Policy Statements

81. There are no National Policy Statements which are relevant to the site or proposal

⁴¹ Booth EiC at [8.3]

⁴² Section 42A at [78]

⁴³ *ibid* at sections;10, 11 & 12

National Environment Standards for Assessing and Managing Contaminates to Protect Human Health 2001

82. The site is not identified as being a contaminated site and consent is not required under the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health.⁴⁴

National Environment Standards for Freshwater 2020

83. The National Environmental Standard for Freshwater does not apply to the application,

Northland Regional Policy Statement 2016

84. The subject site does not contain any significant features as defined by the RPS and therefore consideration of the RPS provisions is limited to matters under the following objectives⁴⁵ and policies⁴⁶

- Objective 3.2 Region-Wide Water Quality;
- Objective 3.6 Economic Activities – Reverse Sensitivity and Sterilization;
- Objective 3.11 Regional Form;
- Policy 5.1.1 - Planned and coordinated development; and
- Policy 5.1.3 - Avoiding the adverse effects of new use(s) and development.

85. Ms Roos considered⁴⁷ the proposed commercial activities are not consistent with policies 5.1.1 and 5.1.3 as they are ad-hoc commercial activities which are resulting in adverse character and amenity effects on the immediate surrounding environment which are at least minor, and are not supported by guaranteed stormwater infrastructure to protect receiving environments. While the ad-hoc classification could be argued, with the appropriate conditions, adverse effects from activities on the site could be mitigated,

Regional Water and Soil Plan for Northland 2002

86. Consent is not required for the commercial activities under the Regional Water and Soil Plan. Stormwater runoff from the commercial activities will be captured by the stormwater management system proposed to prevent discharge to Bob Creek.

Proposed Regional Plan for Northland

⁴⁴ Section 42A Report at [82]

⁴⁵ *ibid* at [85]

⁴⁶ *ibid* at [86]

⁴⁷ *ibid* at [91 - 92]

87. Consent is not required for the commercial activities under the New Regional Plan. Stormwater runoff from the commercial activities will be captured by the stormwater management system proposed to prevent discharges to Bob Creek from the site.

Kaipara District Plan

88. Ms Roos identified⁴⁸ the following applying provisions within the District Plan:
- Chapter 4 (Overlays); and
 - Chapter 12 (Rural Zone).
89. Objectives and Policies relevant to the proposal include:
- Objectives: 4.4.2, 4.4.13, 12.5.2, 12.5.5 & 12.5.6; and
 - Policies: 4.5.1, 4.5.16, 4.5.17, 4.5.20, 12.6.3a, 12.6.3c, 12.6.5, 12.6.9, 12.6.10, 12.6.12, 12.6.13, 12.6.16 & 12.6.17.
90. In her analysis of the proposal against the applying provisions of District Plan, Ms Roos determined⁴⁹:

“The proposal unacceptably compromises amenity for adjoining properties and is inconsistent with the rural-residential character of the surrounding area, as it exceeds the carrying capacity of the site to support the commercial activities without off-site effects”.

91. Mr Booth in his statutory analysis concluded⁵⁰

“The proposal is consistent with the relevant objectives and policies of the planning instruments that relate to the core issues to be considered for the application, such as character, amenity, and traffic movement and safety”.

92. Having considered: Ms Roos’ and Mr Booth’s statutory analysis conclusions and reviewed the number of applying assessment criteria under a Restricted Discretion activity status I came to conclusion that in terms of the applying objectives, polices and rules the merits of the proposal could be argued both ways. I accept there have been rule breaches and that both submitters and Council have been frustrated by the Applicant ‘pushing the boundaries’.
93. I have found that the scale and intensity of the current commercial operations on the site, including the use of the JOAL is having an adverse impact on rural character and

⁴⁸ Section 42A Report at [92 – 94]

⁴⁹ Ibid at [95]”

⁵⁰ Booth EiC at [5.4]

amenity that is more than minor. Notwithstanding this finding I am satisfied that if the commercial activities on the site are restricted, those restricted operations will be in keeping with the carrying capacity of the site and the environmental effects not more than minor. With the appropriate conditions of consent the proposal effects can be mitigated and be consistent with the applicable objectives and policies of Chapters 4 & 12 of the Operative District Plan.

Part 2 of the Act

92. Ms Roos has identified the relevant plans and stated⁵¹ that they been competently prepared in accordance with Part 2 of the Act. The Court of Appeal decision on the RJ Davidson Family Trust case⁵² has indicated that if the plan has been competently prepared with a coherent set of policies, then recourse to Part 2 may not be required. I have adopted this approach to my consideration. Granting this resource consent in part will achieve the purpose of the Act.

Decision

93. This application has caused me considerable reflection. The restricted discretionary activity status of the proposal is an indication that, subject to conditions, the proposal could well be acceptable in the environment that it is located. That, however, needs to be considered in the context of the adverse effects that are experienced by the neighbours from the operation of those activities. The neighbours have submitted in opposition to the proposal and highlighted the cumulative adverse effects of the number of activities at the site. It is apparent there is too much happening on the site and that is creating adverse effects in the neighbourhood. There is then a need on my part, in assessing the evidence, to decide whether all the activities can continue or decide which of the activities can be deemed acceptable and which are not. The following key factors have influenced my decision:

- The application is for a Restricted Discretionary Activity;
- The Applicant agreed to limiting the operation, or activity that creates loud and sustained noise effects to between the hours of 8am and 5pm;
- The Applicant will maintain the JOAL;
- The economic benefits and employment that will continue to be facilitated by commercial operations that will be permitted; and

⁵¹ Section 42A Report at [99]

⁵² *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316

- Conditions of consent will ensure that effects of the commercial operations that are permitted are sufficiently mitigated.
94. A scaled back proposal will result in minor, and acceptable, cumulative effects on the character values, and amenity values enjoyed by residents. The conditions of consent will ensure adverse effects on them will not be more than a minor nature can be sufficiently mitigated.
85. In exercising my delegation under section 34A of the RMA and having regard to the foregoing matters, sections 104 and 104C, and Part 2 of the RMA, I have determined that resource consents applied for are **granted in part** subject to the conditions set out below.
86. The following commercial activities have been granted consent:
- The processing and storing firewood for delivery; and
 - The workshop and storage facility for a local concrete foundation and fence hire business.
87. In terms of the other commercial activities that consent is sought:
- The storage of a vehicle for event transport is not considered to be an activity that requires a resource consent, largely on the basis that it is not inconsistent with the provisions of the District Plan.

Further, the following activity that is part of the application is refused consent;

- A commercial gymnasium for reasons that it is not consistent with the provisions of the District Plan that provide for commercial and industrial activities and particularly the potential traffic intensity of the activity.

Conditions - Attached



Mark C Farnsworth MNZM

Independent RMA hearing Commissioner
11 February 2022

Conditions of Consent
RM190094 – Patrick Cullinan

1. *The consented activities on site shall be carried out in accordance with the plans and all information submitted with the application formally received by the Kaipara District Council (“Council”) on 17 September 2018:*
 - *Application form, and assessment of environmental effects prepared by Pacific Coast Surveys, dated March 2019.*

<i>Plan title and reference</i>	<i>Author</i>	<i>Rev</i>	<i>Dated</i>
<i>Site survey reference 2490</i>	<i>Pacific Coast Surveys</i>	<i>3</i>	<i>March 2021</i>
<i>Site survey proposed car park layout reference 2490</i>	<i>Pacific Coast Surveys</i>	<i>3</i>	<i>March 2019</i>
<i>Sediment retention pond reference 2490 sheets 1 to 2</i>	<i>Pacific Coast Surveys</i>	<i>2</i>	<i>August 2021</i>
<i>Shared access upgrading plans</i>	<i>Engineering Outcomes</i>		<i>15 March 2021</i>
<i>Report title and reference</i>	<i>Author</i>	<i>Rev</i>	<i>Dated</i>
<i>Traffic Effects Assessment</i>	<i>Engineering Outcomes</i>	<i>-</i>	<i>11 October 2017</i>
<i>Design of Access Upgrading Commentary</i>	<i>Engineering Outcomes</i>	<i>-</i>	<i>16 March 2021</i>
<i>Noise Assessment</i>	<i>Marshall Day</i>	<i>-</i>	<i>20 November 2019</i>
<i>Noise Monitoring and Assessment</i>	<i>Marshall Day</i>	<i>-</i>	<i>26 October 2021</i>
<i>Stormwater Assessment</i>	<i>Wiley Geotechnical</i>	<i>-</i>	<i>1 November 2021</i>

Advice Note: Where there is any apparent conflict between the application and the consent conditions, the consent conditions shall prevail.

Charges

2. *The Consent Holder shall pay any subsequent further charges imposed under Section 36 of the Act relating to the receiving, processing, granting and monitoring of this resource consent within 20 days of receipt of notification of a requirement to pay the same, provided that, in the case of any additional charges under Section 36(5) of the Act that are subject to challenge, the Consent Holder shall pay such amount as is determined by that process to be due and owing, within 20 days of receipt of the relevant final invoice.*

Section 125 - Consent Lapse Date

3. *Under Section 125 of the Act, this consent lapses five years after the date it is granted unless:
 - (a) *An application under Section 125 of the Act is made to the Council before the consent lapses (five years) to extend the period after which the consent lapses and the Council grants an extension.**

Pre-Commencement Conditions

4. *Prior to the commencement of any work authorised under this consent, the Consent Holder shall provide written verification that the person responsible for carrying out construction work holds public liability insurance to the value of \$1,000,000.00.*
5. *Prior to the commencement of any work authorised under this consent, the Consent Holder shall provide written verification that the Consent Holder's engineer responsible for design and supervision of the roading works holds professional indemnity insurance to the value of \$1,000,000.00.*

Engineering Conditions

6. *Prior to commencement of construction works on the private access JOAL, a traffic management plan for user access shall be submitted to Council and approved by Council's Development Engineer.*

7. *The traffic management plan, approved under condition 6, shall apply for the duration of the construction works on the private access JOAL.*

8. *All works on the engineering plans approved under this consent and prepared by Engineering Outcomes dated 15 March 2021 are to be completed to the approval of the Council's Development Engineer, or their delegated representative. Compliance with this condition shall be determined by the following:*
 - i) *New passing bays on the shared access outside of the bends at the distance of 90m, 170, and 390-430m*
 - ii) *Two "shared space/speed advisory signs on the shared access one in each direction*
 - iii) *A convex mirror to address the visibility restriction to the North-west of the connection of the driveway connection onto the shared access 330m from Moir Street*
 - iv) *Vegetation trimming and removal north-west of the connection of the new internal site driveway to the shared access to the increase the sight distance in that direction to a minimum of 35 m*
 - v) *Upgrading of the passing bay on the internal driveway 40m from the shared access in accordance with Council Engineering Standards 2011*
 - vi) *An RG-7 sign "Keep Left" arrow on the internal driveway at the split on the approach to the crossing on the shared access.*
 - vii) *20km/hr speed limit signs in approved locations.*
 - viii) *Provision and approval of supporting documentation provided by the Consent Holder in support of the constructed works, including Producer Statements, completion certificates, works acceptance certificate, statement of compliance of as built works and as built plans, construction management plans, operation and maintenance plans and all other test certificates and statements and supporting information required to confirm compliance of the works as required by Section 3 of the Council Engineering Standards 2011.*

9. *The Consent Holder shall ensure that the following works are constructed to the approval of the Council's Development Engineer, or their delegated representative:*
 - i) *Upgrade the private access JOAL in accordance with approved engineering plans prepared by Engineering Outcomes dated 15 March 2021 and the Engineering Standards 2011.*

- ii) *Upgrade the car parking area in accordance with the approved proposed car park layout reference 2490 dated March 2019.*
- iii) *Upgrade the vehicle crossing to Moir Street to a sealed formation in accordance with sheet S03, S05 of the Engineering Standards 2011.*
- iv) *The consent holder shall ensure adequate construction monitoring of all construction works. The consent holder shall notify Council's Monitoring Engineer at key hold points for inspection. Council's engineers undertake suitable inspections during construction at key hold-points to enable them to confirm that the certification provided by the consent holder's engineer matches the design submitted.*

As a minimum, hold points shall include final inspection and approval of the vehicle crossing.

No work shall proceed beyond the above hold points until specifically approved by Council's engineers. Detailed supervision and certification upon completion as complying with the required standards by the consent holder's engineer shall be submitted to council for approval. The consent holder's engineer shall be a suitably qualified competent engineer, surveyor or contractor with recent and ongoing experience in road design and construction to the specific approval of Council.

- 10. *Within one month of the consent decision, the Consent Holder shall submit a maintenance plan for ongoing maintenance of the private access JOAL to the boundary of the site to Council and approved by Council's Development Engineer. The Consent Holder shall be responsible for ongoing implementation of the maintenance plan including all costs associated with JOAL maintenance.*
- 11. *Prior to commencement of construction works for a stormwater management system, the Consent Holder shall obtain all necessary resource consents from Northland Regional Council and Kaipara District Council in respect of site earthworks and any discharges to land or water. Copies of resource consents and confirmation of permitted activity status shall be submitted to the Monitoring and Compliance Services Team Leader for approval.*
- 12. *The Consent Holder shall construct the stormwater management system in accordance with the design specified in the stormwater report by Wiley Geotechnical dated 1 November 2021 and the plans prepared by Pacific Coast Surveys reference 2490 rev 2*

dated August 2021. The Consent Holder shall contact Council's Development Engineer on completion of the works to arrange an inspection to confirm compliance.

Note: No part of the stormwater management system other than the discharge swale to Bob Creek shall be located on Council-administered esplanade reserve on Bob Creek.

General Conditions

- 13. Within one month of the consent decision, the Consent Holder shall submit approval from Fire Emergency NZ in respect of fire safety measures for the commercial activities for the approval of the Monitoring and Compliance Services Team Leader.*
- 14. The Consent Holder shall submit written confirmation from Fire Emergency NZ that the fire safety measures approved under Condition 13 have been implemented in full.*
- 15. The waterblaster equipment shall be stored and operated within the soundproofed shed located adjacent to the western workshop shed. Waterblaster machinery shall not be operated outside the shed.*
- 16. The operating hours of all activities within the western workshop shed, other than staff meetings, and use of the waterblaster equipment within the soundproofed shed shall be restricted to 8.00am to 5.00pm Monday to Saturday, excluding public holidays.*
- 17. The operating hours of all activities associated with the breaking down of logs for firewood shall be restricted to 8.00am to 5.00pm Monday to Saturday, excluding public holidays.*
- 18. A total of fifteen car parks shall be maintained at all times on site to support the commercial activities.*
- 19. No further commercial activities are permitted on site other than the processing and storing firewood for delivery and the workshop and storage facility for a local concrete foundation and fence hire business. Should one or both of these commercial activities end and a new tenant sought, the Consent Holder shall submit information to Council's Monitoring and Compliance Services Team Leader to confirm that site activities would be the same or similar to the consented activities.*

Landscaping

- 20. The consent holder shall submit a detailed planting plan for screening of the site from view from adjoining properties at 112, 106A and 106D Moir Street. The planting plan shall include:
 - i) Prior to planting, the removal or management of all invasive weed species.**

- ii) *Works undertaken for maintenance should include watering, weed control, cultivation, control of pests and diseases, removal of litter, checking of stakes and ties, trimming, pruning, topping up mulch and other works required to ensure planting maintains healthy growth and form.*
- 21. *The planting plan required under condition 20 of this consent shall be implemented within the first planting season following the granting of consent. The consent holder shall contact Council's Monitoring Team to arrange an inspection following completion to confirm compliance.*
- 22. *The amenity planting areas on the boundaries shall be maintained in perpetuity by the owner of the site. Any dead or dying plants within the screen planting area shall be replaced with equivalent plants at least 1m in height.*

Review and Duration

- 23. *In accordance with Section 128 of the Resource Management Act 1991, the Council may undertake a review of the conditions of this consent at any time during the duration of the consent in the event of an incident or significant change of circumstances under which the activity was consented.*
- 24. *Resource Consent RM190094 shall expire on 1 March 2026 unless it has been surrendered or cancelled at an earlier date. This consent is granted with a limited duration of 5 years from the date of the decision, after which a new resource consent shall be applied for.*

Advice Notes

- 1. *The consent holder shall be required to pay to Kaipara District Council a Development Contribution under the Local Government Act 2002 of \$799.00 plus GST for each additional unit of demand for roading.*

A copy of Council's policy on Development and Financial Contributions included within the Long-Term Plan 2018/2028 can be obtained from Council offices in Dargaville and Mangawhai or downloaded from Council's website www.kaipara.govt.nz.

2. *The scope of this resource consent is defined by the application made to Council and all documentation supporting the application.*
3. *All archaeological sites are protected under the provisions of the Heritage New Zealand Pouhere Taonga Act 2014. 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 Heritage New Zealand for an authority to modify, damage or destroy an archaeological site(s) where avoidance of effects cannot be practised.*
4. *If subsurface archaeological evidence (shell, midden, hangi, storage pits, etc) should be unearthed during construction, work should cease in the immediate vicinity of the remains and the Heritage New Zealand should be contacted.*
5. *In the event of koiwi (human remains) being uncovered, work should cease immediately and the tangata whenua of Te Uri O Hau shall be contacted so that appropriate arrangements can be made.*