Before the Hearing Commissioners appointed by Hawke's Bay Regional Council & Hastings District Council

In the matter	of the Resource Management Act 1991 (**the Act**)
And in the matter	of an application by The Te Mata Mushroom Company Limited to discharge contaminants into air from a composting and mushroom growing operation and associated activities at 174-176 Brookvale Road, Havelock North
And in the matter	of an application by The Te Mata Mushroom Company Limited to expand an existing intensive rural production activity at 174-176 Brookvale Road, Hastings

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Reply of counsel for The Te Mata Mushroom Company Limited

14 November 2019

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INTRODUCTION

Hearing Panel's Direction No. 8

1 By its Direction No. 8 the Hearing Panel directed that the applicant's right of reply be submitted to the Council by Friday 8 November 2019, together with an agreed draft set of conditions in respect of the air discharge and land use consent applications.

PLANNING EXPERTS' CONFERENCING

2 To that end, the expert planning witnesses for the parties:

2.1 Met on 29 October 2019 to produce a draft set of conditions for both consent applications.

2.2 Produced a further joint witness statement and a final draft set of conditions for each application on 7 November 2019. Those documents are provided with this reply.

3 The conditions which appear without notation are agreed by the expert witnesses. Where the parties disagree, there are notes provided in comments boxes identifying where there is disagreement and the reasons for that disagreement.

AREAS OF DISAGREEMENT

4 At the conclusion of the hearing the most significant areas of disagreement between the parties' experts related to:

4.1 Conditions 3 and 9 proposed by Hawke's Bay Regional Council (**HBRC**) and Hastings District Council (**HDC**) respectively, and when it should apply. Those conditions require avoidance of offensive or objectionable odour such that it causes an adverse effect at or beyond the boundary of the site;

4.2 Whether any production increase should be allowed before all of the upgrades have been completed.

5 Those issues remain the primary matters on which the planners disagree. They are addressed in turn below.

HBRC Condition 3/HDC Condition 9

6 The proposed condition, which is recommended by all of the planners with the exception of Mr Drury, reads as follows:

> There shall be no offensive or objectionable odour to the extent that it causes an adverse effect at or beyond the boundary of the site.

7 Mr Drury favours modification of this condition and the inclusion of conditions 3A and 3B (and 9A and 9B of the HDC consent respectively) as follows:

> 3. Over the period while the upgrades outlined in Condition 9 and 10 are undertaken, plus 1 month to optimise commissioning, the activity must be:
>
> a) Undertaken in accordance with Odour Management Plan, and
>
> b) managed so as to as best as practicably possible, avoid offensive or objectionable odour to the extent that it causes an adverse effect at or beyond the boundary of the site.
>
> 3A. Following the period referred to in Condition 3, there shall be no offensive or objectionable odour to the extent that it causes an adverse effect at or beyond the boundary of the site, with the exception of on a Thursday, during which time the activity must be:
>
> c) Undertaken in accordance with Odour Management Plan, and
>
> d) managed so as to as best as practicably possible, avoid offensive or objectionable odour to the extent that it causes an adverse effect at or beyond the boundary of the site.
>
> 3B. Following the completion of all upgrades required under Conditions 9 - 11, plus 1 month to optimise commissioning, there shall be no offensive or objectionable odour to the extent that it causes an adverse effect at or beyond the boundary of the site.
>
> Advice Note: Offensive or Objectionable odour in respect to all conditions of this consent will be defined by following the procedures in Appendix 2 or 3 of the

> of the MFE '*Good Practice Guide for Assessing and Managing Odour'* (ME1278, 2016) or an alternative method agreed with the Council (Manager Compliance), but shall not include odour arising from the following:
>
> a) Design optimisation and site adjustments of odour control infrastructure and processes provided the intent and reasons for them have been provided to the Council within 24 hours of undertaking them,
>
> b) Up to 2 events per year involving design optimisation and site adjustments of odour control infrastructure and processes not meeting the notification criteria in (a) above,
>
> c) Up to 5 events per year arising machinery breakdown/unexpected operational problems.

8 Recommended conditions 3 and 3A which apply while the proposed upgrades are completed require the applicant to:

8.1 Undertake the activity in accordance with the odour management plan; and

8.2 Manage the activity as best as practicably possible to avoid offensive or objectionable odour to the extent that it causes an adverse effect at or beyond the boundary of the site.

Once all of the upgrades have been completed, the requirement that there be no offensive or objectionable odour at the boundary has full effect.

9 These proposed conditions reflect the evidence from the air quality experts that:

9.1 The stepped upgrades proposed by the applicant will progressively reduce the odour footprint from the applicant's composting operation as each step is implemented.

9.2 Until the final step (step 3) of the upgrade is implemented, there is an ongoing risk of the activity generating odours which are offensive or objectionable at or beyond the boundary of the applicant's site.

10 The applicant will accept the deletion of paragraphs (b) and (c) of the proposed advice note but asks that paragraph (a) remains. It is an exception which will apply very infrequently for design optimisation and site adjustments of odour control infrastructure and processes which must first be notified to HBRC before they are undertaken.

11 Several submitters and their experts oppose modification of condition 3 (HDC condition 9) for the following reasons:

11.1 The conditions proposed by the applicant would allow for offensive or objectionable odours beyond the boundary of the site for potentially significant periods.[1]

11.2 The revised conditions provide no certainty to the community and is akin to removing the requirement altogether.[2]

11.3 The FIDOL factors are the accepted way of accounting for one-off events.[3]

11.4 Any determination of whether an odour is "offensive and objectionable" would be undertaken in accordance with the FIDOL factors which account for a range of consideration including the frequency and intensity of odours.[4]

11.5 The FIDOL factors enable some discretion and judgement to be exercised by HBRC officers, such that an incident of odour being discernible beyond the site boundary would not of itself mean that condition 3 has been breached.[5]

11.6 It would be inappropriate for the application to be granted with a condition that is weaker than that which it would replace, particularly

[1] Submissions for Hastings District Council as submitter dated 1 August 2019, para 33.
[2] Submissions of HDC, para 34.
[3] Submissions of HDC, para 38.
[4] Summary of evidence of Philip Brown dated 1 August 2019, para 8.
[5] Evidence of Philip Brown dated 1 August 2019, para 9.

where the existing operation has been in breach of the current condition.[6]

11.7 The condition should remain in the form proposed by the reporting officers from HDC and HBRC as a 'stick' to encourage the applicant to do what needs to be done.[7]

11.8 If the consent holder is actively engaged in resolving the problem (which presumably means implementing the upgrades required in accordance with the consent conditions) it is unlikely that HBRC would exercise its discretion and prosecute the Company for breach of this condition.[8]

11.9 Any concerned neighbours are likely to have been involved in the hearing of these applications and would understand that enforcement action would be counterproductive and/or a distraction.[9]

12 Mr Drury's recommended conditions are not intended to permit or authorise the consent holder to generate offensive or objectionable odours beyond the boundary of the site; they are not a licence to offend. Rather they reflect the reality, acknowledged by all of the air quality experts, that there may be occasionally be offensive or objectionable odours experienced beyond the boundary of the site while the proposed upgrades are being implemented. They are intended to give the applicant certainty that it will not be faced with enforcement action from HBRC or neighbours while it is implementing those upgrades. In order to benefit from that immunity (from enforcement action) the applicant must be undertaking the composting activity in accordance with the odour management plan and as best as practicably possible to avoid offensive or objectionable odours at the boundary.

13 It is not being given 'carte blanche' to generate objectionable or offensive odours for 'potentially significant periods'. The so-called 'weaker' conditions

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[6] Summary of evidence of Philip Brown dated 1 August 2019, para 7.
[7] Oral submissions of Mr Casey QC at resumed hearing on 11 October 2019
[8] Verbal summary given by Mr Philip Brown at the resumed hearing on 11 October 2019.
[9] Verbal summary of Mr Philip Brown given at resumed hearing on 11 October 2019.

have a finite life. Condition 3 (and condition 9) as sought by both councils will apply when all of the upgrades have been completed.

14 The application of the FIDOL factors is entirely at the Council's discretion. This means if condition 3 is imposed and applies immediately there is no certainty for the applicant that it will not be prosecuted for occasional odour incidents which the air quality experts acknowledge may occur while the proposed upgrades are being implemented despite the applicant's best efforts.

15 As counsel explained (at the hearing in July in answer to questions) HBRC has in the past prosecuted the Company for a one-off wastewater discharge which occurred when there was an equipment breakdown with an irrigator. That prosecution did not concern odour (and so the FIDOL factors were not engaged) but HBRC plainly had a discretion as to whether to take enforcement action and if so, what that action might be. That discretion was not exercised in the company's favour, even though HBRC had been advised that the offence occurred as the result of an unforeseen equipment failure and was provided with evidence to that effect.

16 The FIDOL factors are no guarantee that HBRC will not prosecute the applicant for a one-off odour incident, whether caused by an equipment breakdown or not.

17 Further, the suggestion that HBRC is unlikely to prosecute the applicant if it is actively engaged in resolving the problem has not been borne out by the applicant's previous experience with the enforcement arm of the Regional Council. The Hearing Panel is referred to paragraphs 14-19 of counsel's opening submissions dated 31 July 2019 which set out the circumstances of HBRC's first prosecution of the company for discharges of odour. It occurred at a time when the company believed it had HBRC's cooperation and support for a process it had proposed for lodging a resource consent application for an expanded operation. Without warning, and even though the applicant was complying with the timeframes that had been proposed and (it thought) agreed with the Council, HBRC made a decision to prosecute the

company for odour discharges and sought an enforcement order which would effectively have put the applicant out of operation.

18 Then, after the applicant had lodged its application with HBRC and while it was preparing an application to HDC, HBRC prosecuted the Company a second time for odour offences.

19 Based on its history with HBRC's enforcement arm, the applicant has no confidence that HBRC would not prosecute for a breach of condition 3 occurring while the applicant was actively engaged in implementing the upgrades. Based on that track record this Hearing Panel cannot have confidence of that either.

20 As for the suggestion that any concerned neighbours are likely to have been involved in this hearing and would understand that enforcement action would be counterproductive, only a relatively modest number of neighbours appeared as submitters at the hearing. The Council's complaints database confirms that complaints have been received from a larger number of neighbours than attended the hearing. The Hearing Panel therefore cannot assume that those neighbours who have in the past complained about odour but did not attend the hearing will understand that enforcement action would be counterproductive and/or a distraction.

21 As an alternative to his proposed wording for conditions 3, 3A and 3B, Mr Drury suggests that the monitoring point be set at approximately 330 metres from the site's boundary until the upgrades are complete. His reasons are set out in full in the Planners' joint witness statement dated 7 November 2019.

22 In summary:

22.1 The applicant accepts that there ought to be a condition requiring no offensive or objectionable odour beyond the boundary as a "bottom line" for the expected performance of this activity.

22.2 However, neither the applicant, nor any of the air quality experts expect that compliance with this condition can be achieved until all of the proposed upgrades have been implemented.

22.3 A decision to impose that condition in the meantime is potentially setting the applicant up to fail and exposes the applicant to the risk of enforcement action including prosecutions in the meantime and to no purpose, given the agreed position that the complete suite of upgrades needs to be implemented in order for that condition to be complied with.

22.4 While the proposed conditions allow a "grace period" of 30 months, thereafter full compliance with condition 3 must be achieved by the applicant.

22.5 The proposed term for the consent is 20 years. That leaves a significant period of time during which the community can have certainty about the expected performance of this activity.

Increases in production

23 Mr Barrett, Ms Kydd-Smith, Mr Holder and Mr Brown all consider that there should be no increases in production until the full suite of mitigation measures has been implemented.

24 As explained in Counsel's opening legal submissions, from the Company's perspective, the difficulty with that proposition is that production would not be allowed to increase until the bale breaking machinery had been installed – which is a timeframe of 30 months from the date of grant of consent. The cost of installing the full suite of mitigation measures is over $3.5 million dollars[10]. The additional revenue from the increased production (an increase of 25% in revenue) will help to fund that expenditure.

[10] Statement of evidence of Michael Whittaker, para 32.

25 As well, the approach taken by the planners (other than Mr Drury) appears to be at odds with the recommendations made by the air quality experts.

25.1 Mr Curtis[11] and Mr Backshall[12] both recommended a rigorous validation process following the completion of step 2 before compost production is permitted to increase from 120 tonnes per week to 160 tonnes per week. Ms Freeman agreed.[13]

25.2 Mr Pene and Mr Curtis said that they could support an increase of production to 160 tonnes per week after validation of the efficacy of the odour control had been provided and if it could be demonstrated that any additional odours were no worse than the new baseline established at the completion of step 2 operating at 120 tonnes.[14]

25.3 Ms Freeman's view was that "… after the step 2 mitigation plan is implemented, the risk of offensive and objectionable odour arising from the production of 160 tonnes per week will be no different to the risk of odour arising from the production of 120 tonnes per week."[15] Mr Pene agreed with that analysis. In the summary of his position given at the resumed hearing he noted that the increase from 120 to 160 tonnes would result in a potential increase in peoples' exposure to odour; it was a change in duration rather than a change to the intensity of the odour. He considered it "probably unlikely to tip people into offensive or objectionable odour".

25.4 Dr Brady, Mr Backshall, Mr Stacey and Ms Freeman were of the view that "the relatively small increase in the frequency of odours from the bale breaking would not be a significant factor in whether the odour from the site could be considered offensive or objectionable, when compared to other existing and intensity offensiveness factors."[16]

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[11] Third supplementary statement of evidence of Andrew Curtis dated 6 September 2019, para 17.
[12] Supplementary evidence of Duncan Backshall dated 26 September 2019, para 2.9.
[13] Third supplementary statement of evidence of Tracy Freeman dated 11 October 2019, para 14.
[14] Third supplementary statement of evidence of Andrew Curtis dated 6 September 2019, para 19.
[15] Third supplementary statement of evidence of Tracy Freeman dated 11 October 2019, para 11.
[16] Minutes from expert witness conference, item 6, page 3.

26 Increasing production from 120 tonnes to 160 tonnes after step 2 has been implemented will result in a small increase in the period of time over which bale breaking occurs. Bale breaking occurs once a week on a Thursday. The odour experts agree that an additional 40 tonnes will not represent a tipping point because the relatively small increase in odour duration from the bale breaking would not alter the odour to the point where it becomes offensive or objectionable.

27 The proposed increase in production will only occur:

27.1 After Steps 1 and 2 have been implemented. Those steps involve the construction of a Phase 1 filling hall at the end of the existing Phase 1 bunkers, the total enclosure of Phase 1 and 2 activities, the construction of a third bunker and a Phase 2 filling hall and the encapsulation of the conveyor; and

27.2 Following a rigorous validation process following completion of step 2. The condition proposed by Mr Drury is similar to that developed as part of the Mercer mushrooms consenting exercise and reads as follows:

> Compost may increase to up to 160 tonnes per week after the completion of the requirements of condition 10 and once a validation report certifying that the design and operation of the upgrades (plant, ventilation systems and biofilter) comply, and are capable of ensuring ongoing compliance with conditions 21 - 23 of this consent has been provided to the Council. The validation report is to be prepared by an appropriately qualified and experienced professional.

28 Given the significant capital costs associated with the proposed upgrades (over $3.5M) it is not unreasonable for the applicant to request (or for this Panel to allow) a modest increase in production after two of the three stages of proposed upgrades have been implemented, particularly when the weight of expert opinion is that this increase in production will not be a significant source of odour.

29 At the resumed hearing, Commissioner Wickham asked whether allowing production to increase by 40 tonnes might result in management input being spread between the proposed upgrades and the increase in production. That might have been the case if the increase in production was occurring while the proposed upgrades were underway, but the increase in production is only proposed to occur after steps 1 and 2 have been fully implemented and validated. The management input to those phases of the upgrades will no longer be required by the time production increases.

Comments on other conditions

HBRC Proposed Conditions 22-23

30 Proposed condition 22 reads:

> The consent holder shall ensure that negative pressure is maintained within the Phase 1 and Phase 2 facilities and in the bale breaking and blending enclosure.

Condition 23 then requires those buildings to be held at a negative pressure differential of at least 7 Pa.

31 The comments box alongside these conditions notes the uncertainty about whether it was intended that the bale breaking and blending line would be subject to this requirement. Mr Barrett considers that this area of uncertainty could benefit from clarification from technical experts.

32 The enclosure over the bale breaking line was only ever intended to be semi-enclosed. Mr Holyoake's diagram 'Pathway to total enclosure' showed that. HBRC's proposed condition 11a) which deals with the construction and commissioning of the bale breaking machine and the enclosed conveyor system notes that 'there will be openings for the loading and unloading of substrates as part of the blending process'.

33 The applicant cannot achieve negative pressure on the conveyor enclosure and had not intended to. Conditions 22 and 23 should therefore read:

> The consent holder shall ensure that negative pressure is maintained within the Phase 1 and Phase 2 facilities.

> After installation of each of the enclosure buildings required by conditions 9 to 10, each building shall be held under a negative pressure differential of at least 7 Pa, as measured during calm wind conditions less than 1 metre per second, when containing odorous material.

HBRC Proposed Condition 44

34 Proposed Condition 44 reads:

> Within **three months** of the date of commencement of this consent, the consent holder shall install and then operate and maintain a meteorological monitoring station to measure wind speed (m/s), wind direction (degrees true) and air temperature (dry bulb and wet bulb) at the site. Temperature measurements shall be taken at 10 m above ground level. The monitor shall continuously log these meteorological conditions in real- time and be in a location that minimises the potential for obstacles to affect the accuracy of the readings and in a location that will provide data that is representative of the wind patterns of the site. *The wind speed and direction sensors shall have minimum stall and start speeds of 0.5 metres per second. Logged meteorological data shall have an averaging time of no more than 10 minutes.*

35 The italicised sentences have been recommended by Mr Holder based on advice from Dr Brady. The comments box adjacent to the condition records Mr Drury's general support for this condition provided that it is supported by technical experts.

36 The applicant has reviewed the draft wording and does not object to the inclusion of the italicised sentences.

OTHER MATTERS RAISED DURING THE HEARING

Residential development at Arataki

37 As explained in Ms Kydd-Smith's written response of 2 August 2019 and by Mr Drury during the hearing, the land in the Arataki area was rezoned from Rural 2 to Residential 3 and a Deferred Residential 3 zone in the mid to late 1990s. Te Mata Mushrooms (then under different ownership) and Arataki Honey had made submissions on the plan change requesting a buffer zone.

Te Mata Mushrooms' submission also opposed the proposed change in zoning of the land adjoining Arataki Road to Deferred Residential.

38 The Council's decision on the plan change was to create the Deferred Residential 3 zone and a 30-metre buffer strip. The decision recognised Te Mata Mushroom's operation and accepted that it generated some adverse environmental affects including the creation of odour, but went on to say:

> It is also likely that the demand for residential land will be such that it will be at least 8-10 years before houses are built along Arataki Road in the area closer to the mushroom farm, giving several years to address the adverse environmental effects which may conflict with nearby residential uses of land.

39 The land to the south west of the applicant's site has been developed for residential housing within the last decade and the aerial photographs in the application[17] confirm this. As residential development moved closer to the farm's boundary there was a noticeable increase in the number of complaints received about odour from the applicant's operation.

40 For Hastings District Council, Ms Davidson made the point that "the current residential development is a well established part of the existing environment, and it is not accepted that it has any bearing on consideration of the current application."

41 It is accepted that the current residential development is part of the existing environment. The facts remain that:

41.1 The current thinking on separation distances from mushroom farms (reflected in the Jacobs Report) is that there should be a minimum of 500 metres and up to a 1000 thousand metres between mushroom farming operations and residential activity.

41.2 The decision making of Hastings District Council back in 1996 created a situation with "the making of a classic reverse sensitivity

[17] Application for resource consent to discharge contaminants to air dated 20 December 2016, pp 14-15

situation."[18]

41.3 Judge Thompson thought that was a factor to be taken into account when he was sentencing the company in the first prosecution taken by HBRC.

41.4 There is no reason for this Hearing Panel to disregard that as a factor in its decision making here.

42 You are not being asked to disregard effects on houses that are already there. You are simply being asked to take into account the reality of the Company's situation. The applicant is not saying that it should be allowed to generate offensive and objectionable odours because it was there first. It intends to implement staged upgrades to achieve full compliance, but it needs time to do that. There will be improvements in the odour effects generated in the intervening period until full enclosure is complete, at which point the applicant expects to have successfully internalised the odour effects of its composting operation.

Section 105 RMA

43 For CDL Land New Zealand Limited, Mr Lawson referred to the requirements of s105 of the RMA noting that[19]:

> In opening, counsel for the applicant did not even mention the s105 imperatives and nowhere does Mr Drury attempt to address them.

44 As to that:

44.1 There was a full discussion of the s105 requirements in the Company's application to HBRC.[20]

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[18] Hawke's Bay Regional Council against v Te Mata Mushroom Company Limited, CRI-2015-020-551, at [7].
[19] Synopsis of submissions for CDL Land New Zealand Limited dated 1 August 2019 at [27]
[20] Application for resource consent to discharge contaminants to air dated 20 December 2016, pages 25 and 38

44.2 Mr Barrett's Section 42A Report also addressed those requirements[21]. His conclusion was that:

> While RMA s105 provides additional matters for the decision maker to have regard to, these do not prevent the proposed activity being granted, subject to the outstanding issues identified by this report being resolved.

44.3 Mr Drury and Mr Barrett had reached therefore reached same conclusion in relation to matters in section 105 to which a consent authority must have regard.

44.4 The approach taken in counsel's opening submissions was to identify and address the points of difference between the parties rather than spending time addressing the application of statutory provisions about which there was no dispute.

Applicant's past history

45 Mr Lawson made the point that an applicant's history can be taken into account under s104(1)(c) of the RMA. He referred to the following cases in support of that proposition:

45.1 *New Zealand Suncern Construction Ltd v Auckland CC*[22] which held that prior conduct of an applicant can have some peripheral relevance in terms of other matters considered necessary to determine an application.

45.2 *Hinsen v Queenstown Lakes DC* [23] where the Environment Court held that the weight to be given to those matters is for the statutory purpose, not as a punitive measure and not to override any of the explicit criteria.

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[21] Section 11 of his Report, paras 226 – 227

[22] [1997] NZRMA 419

[23] [2004] NZRMA 115 (EnvC) at [26]–[30]

46 He did not refer to *Walker v Manukau CC*[24], a case in which Judge Skelton observed:[25]

> … we adhere to the view that past conduct of an applicant is a matter of enforcement and does not provide a legitimate ground for refusing to grant a resource consent. It may become relevant in deciding the adequacy of conditions if there is evidence that earlier conditions have not proved to be satisfactory. However the making of an application for a resource consent and the hearings that follow both before a consent authority and this Court on appeal should not be allowed to become a trial of an applicant.

47 The applicant accepts that despite a programme of ongoing and continuous improvement to address the odour arising from its operation, it has not been able to satisfy the condition of its existing consent requiring that there be no offensive or objectionable odour beyond the boundary. Given that history it is accepted that consent conditions should be imposed:

47.1 Requiring design plans to be certified prior to commencement of the upgrades (HBRC proposed condition 18);

47.2 Detailing design and performance requirements for the enclosed buildings and ventilation systems (HBRC proposed conditions 21-23);

47.3 Requiring as-built certification within 3 months of completion of all of the upgrades (HBRC proposed condition 35);

47.4 Requiring the applicant to engage an appropriately trained independent person to undertake regular ambient odour monitoring in the vicinity of the site (HBRC proposed condition 47);

47.5 Enabling HBRC to initiate an independent peer review process if there are ongoing occurrences of verified non-compliance with condition 3 (HBRC proposed condition 50); and

47.6 A review condition (HBRC proposed condition 55).

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[24] EnvC C213/99

[25] Page 6

Applicant has not been 'cavalier'

48 Mr Lawson for CDL and Mr Casey QC for Hastings District Council submitted that:

48.1 The applicant had "a cavalier approach to its obligations under the regional, district and resource management planning requirements";[26]

48.2 It hadn't been serious about improvements until it was required to seek consent;[27] and

48.3 The only driver for these consent applications was that the applicant wanted to increase production and so has to "clean up its back yard".[28]

49 Respectfully those submissions completely disregard the extensive efforts the applicant had already made over the last 5 years to 'clean up its back yard' prior to lodging these consent applications[29]. Those efforts and the attendant cost are hardly evidence of a cavalier approach.

50 As far back as 2015, the applicant acknowledged that significant upgrading work needed to be done in order to address odour issues on an ongoing basis. It started a dialogue with Hawke's Bay Regional Council to set a timeframe for an application to be lodged to implement improved odour mitigation methods as part of an application to increase production. Even at that early stage, and without knowing exactly what works would be required, the Company understood that the best practicable odour control solution would likely involve significant capital expenditure. The increased production was a way of funding that expenditure so that the work could be done sooner. The driver was the improvement in odour control; increased production was part of the solution.

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[26] Synopsis of submissions for CDL Land

[27] Verbal submissions made by Mr Casey QC at resumed hearing on 11 October 2019

[28] Verbal submissions made by Mr Lawson at resumed hearing on 11 October 2019

[29] Opening submissions of counsel for TMMC Limited dated 31 July 2019 at para [9]

Relevance of Applicant's financial circumstances

51 The personal circumstances or financial difficulties of an applicant are not a relevant planning issue nor justification for allowing adverse effects of a proposal on the surrounding environment.[30]

52 The applicant here is not saying that it is in financial difficulty. Rather it is pointing to the significant costs of the proposed upgrades and explaining why an increase in production is needed to help fund those upgrades and ensure they are implemented as soon as possible.

Full Enclosure – Bale Breaking

53 At the resumed hearing Commissioner Wickham asked whether it was possible to fully enclose the bale breaking enclosure.

54 The response from the applicant's witnesses was that:

54.1 A door, flaps or an opening were required in order to bring bales and manure into that space.

54.2 That could not be remedied by providing a bigger space and enclosing it because front-end loaders would still need access to that space.

54.3 The flaps proposed along the sides of the enclosure will act as a wall except when they are open and they will only be open when materials (bales and/or manure) are being brought into that space.

Replication of conditions in HBRC's and HDC's consents

55 As explained at the resumed hearing, there are assessment criteria in the Hastings District Plan which refer to amenity and specifically to odour. The applicant accepts that it is appropriate for the consent from HDC to contain a condition regarding odour control in order to address effects on amenity.

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[30] *Taylor v Waimakariri DC* C022/96 (PT)

56 Mr Casey QC suggested that conditions regarding air quality issues, detailed design criteria and staging should be dealt with in HBRC's air discharge consent and that HDC's land use consent did not need to deal with those matters. The applicant agrees. The proposed suite of conditions for both consents recommended by the planners broadly reflects that approach.

The *NZ Mushrooms* case

57 At several points during the hearing, reference was made to *Waikato Environmental Protection Society Inc v Waikato Regional Council* [31] (otherwise known as the NZ Mushrooms case).

58 In that case, the Court discussed how it should resolve the tension between the need to enable ongoing operation of the composting plant on the one hand and to adequately mitigate its effects on neighbours, on the other. It discussed two decisions which identified some general principles:

> [185] The first of these is *Winstone Aggregates and Others v Matamata Piako District Council* where the Court identified the following principles which are relevant in this case.
>
> - In every case activities should internalise their effects unless it is shown that they cannot do so.
> - There is a greater expectation of internalisation of effects of newly established activities than of older activities.
> - Having done all that is reasonably achievable, total internalisation of effects within the site boundary will not be feasible in all cases and there is no requirement in the RMA that that must be achieved.
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> [186] The second decision is *Wilson and Rickerby* v *Selwyn District Council* where the Court derived the following principles from earlier authorities:
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> - That the test for odour is objective;
> - That there is a duty to internalise adverse effects as much as reasonably possible;
> - That it is accepted that in respect of odour the concern is to ensure that odour levels beyond the boundary are not

[31] [2008] NZRMA 431

unreasonable (being the same as offensive or objectionable or significant adverse effects);

- That in assessing what is reasonable one must look into the context of the environment into which the odour is being introduced as well as the planning and other provisions (location).

[187] Applying the principles identified in this case, we note the following:

- There is no absolute requirement for internalisation of odour effects although that is to be preferred.
- This is an older existing activity where it may not be feasible to achieve complete internalisation because of shortcomings with the site. Having said that however it must be borne in mind that the activity was granted consent to establish on the site in 1984 and was reconsented in 1995 subject on each occasion to a requirement that there be no offensive odours offsite. Accordingly one of the bases for the activity's existence was a condition which has persistently been breached. Furthermore there is a *new* element to the activity due to the proposed expansion of the existing activities which will potentially increase the extent of the existing effect.
- In this particular case we consider that a most important consideration is the third principle identified in *Wilson and Rickerby*, namely that the concern must be to ensure that odour levels beyond the boundary are not to be unreasonable (being the same as offensive or objectionably or significant adverse effects).

In none of those cases to which we were referred was it suggested that particular activities might be permitted to discharge offensive or objectionable odours. We consider that the *bottom line* in this case is that the composting facility may not continue to discharge offensive or objectionable odours.

59 Finally, the Court considered what degree of certainty it must have that the mitigation measures would be successful. It stated:[32]

> We have also considered whether or not it is necessary to *guarantee* that the mitigation measures which might be put in place ensure that there is no escape of offensive and objectionable odours from the site or whether some lesser form of mitigation which might or might not achieve that would be acceptable. We do not think that RMA requires that there be an absolute guarantee that mitigation measures are successful. Where there is

[32] Para 200

> doubt it may be appropriate to use techniques such as those available under s128 so that mitigation matters can be revisited. However, for similar reasons to those set out above (para 199) we do not think that is appropriate in this case. We consider that in this instance there needs to be a high degree of certainty for all parties. Mrs Freeman has identified that there remains an element of risk as to whether or not her proposed mitigation measures would be successful in eliminating odour nuisance from the site. In our view it is not appropriate for the neighbours to have to accept that risk.

60 Applying those factors to this case:

60.1 This is an older existing activity on a site which has some shortcomings.

60.2 The activity has an existing consent which includes a condition requiring that there be no offensive odours offsite. The applicant acknowledges that there have been breaches of that condition in the past.

60.3 Through these applications the Company is meeting its duty to internalise adverse effects as much as possible. It has taken on board concerns expressed by the air quality experts and at the Hearing Panel's invitation the applicant has submitted an amended proposal incorporating total enclosure of Phases 1 and 2 of the composting process.

60.4 Once the upgrades have been completed, the applicant believes that its activity will comply with conditions 3 and 9 (proposed by HBRC and HDC respectively).

60.5 Mr Barrett agrees. In his updated Section 42A Report, he concludes that[33]:

> The proposed mitigation measures will progressively reduce the potential for adverse offsite odour effects, and once fully established, is likely to reduce this potential to an acceptable level. Provided the system is appropriately designed, constructed, operated and maintained, once mitigation measures are completely

[33] Updated Section 42A Report, para 27

> implemented and the total enclosure system is in place, the discharge is unlikely to cause offensive or objectionable odour effects beyond the boundary.

There is more certainty here that the proposed mitigation measures will be successful in eliminating odour nuisance from the site.

CONCLUSION

61 The proposal now before this Hearing Panel contemplates the total enclosure of Phases 1 and 2, which is the solution that the air quality experts agreed would be necessary to achieve an outcome where there is likely to be no offensive or objectionable odour beyond the boundary of the site.[34]

62 At the resumed hearing, several of the parties' air quality experts expressed concern about the lack of detailed design information provided by the applicant. Those concerns have now been addressed by the proposed conditions of consent:

62.1 Requiring design plans to be certified prior to commencement of the upgrades (proposed condition 18);

62.2 Detailing performance criteria in relation to enclosure and air extraction (conditions 21 – 24) and biofilter design and performance (conditions 28 – 30);

62.3 Requiring as-built certification within 3 months of completion of all of the upgrades (HBRC proposed condition 35).

63 The two issues on which the experts differ are condition 3 (wording and when it should apply) and whether a compost production should be allowed to increase before all of the upgrades are complete.

64 This reply has addressed both issues. There is no argument that condition 3 (and condition 9) should apply once all upgrades are complete because it provides a 'bottom line'. But that does not mean it should apply without

[34] Second Joint Witness Statement following conferencing of air quality experts dated 1 August 2019, para 11(b).

qualification in the meantime – particularly when the air quality experts agree that the applicant may not be able to satisfy that condition on an ongoing basis while the upgrades are being constructed. The applicant should not be put at risk of enforcement action, particularly when HBRC has shown no inclination to cut the applicant any slack even when it was actively engaged in resolving the problem.

65 As for the modest increase in production, Mr Curtis, Mr Backshall, Mr Pene and Ms Freeman supported an increase of production to 160 tonnes per week after validation of the efficacy of the odour control had been provided and if it could be demonstrated that any additional odours were no worse than the new baseline established at the completion of step 2 operating at 120 tonnes.[35] Ms Freeman and Mr Pene agreed that an increase in production would increase the duration of the bale breaking activity but not the intensity of the odour and as unlikely to increase the risk of offensive or objectionable odour.

66 On that basis of that evidence, in my respectful submission, this Panel should grant the consents sought by the applicant subject to the conditions recommended by the planners[36] and allow a minor increase in production after Step 2 has been completed and its efficacy demonstrated.

14 November 2019

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[35] Third supplementary statement of evidence of Andrew Curtis dated 6 September 2019, para 19.
[36] Where there are differences Mr Drury's approach is preferred