

3 September 2015

«Name»

«Address»

Dear Sir/Madam

**Application for Resource Consent - Z Energy Limited - RC4942(L): Decision**

I refer to the above application which was considered at the Regulatory Hearings Committee meeting held on 10<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup> and 22<sup>nd</sup> of August 2015. Council's decision is reproduced as follows:

**Decision of Regulatory Hearings Committee – Section 113 of the Resource Management Act 1991**

**Decision Summary**

The decision is to refuse consent to the service station application on the basis that:

- The actual and potential adverse environmental effects created by the establishment and operation of the proposed activity will be more than minor;  
  
and,
- Granting consent to the proposal would be contrary to the objectives and policies of the Operative Western Bay of Plenty District Plan.

**Full Decision**

**1. Introduction**

- 1.1 The application by Z Energy is for the establishment and operation of a "Highway Service Centre" comprising a service station, truck stop and associated convenience shop at 780 State Highway 2, Paengaroa.
- 1.2 The subject site is located approximately 2km north of the existing rural settlement of Paengaroa and adjacent to the SH2/SH33 interchange at the eastern end of the recently completed Tauranga Eastern Link highway (TEL).
- 1.3 Overall, the proposal is a non-complying activity as the site is zoned Rural under the Operative Western Bay of Plenty District Plan, a zone which makes no provision for service stations.
- 1.4 The application was subject to public notification, with 13 submissions received: one neutral, two in support and 10 in opposition. One opposing submission, from

Johannes van den Berg, was received two days after the submission closing date. With the applicant's approval, an extension of time was granted, enabling that submission to be accepted.

1.5 The Committee heard the application on 10, 11 and 13 August 2015. Appearances at the hearing included:

- Legal counsel (Rachel Devine) and nine witnesses for the applicant;
- Legal counsel (Lara Burkhardt) for the Paengaroa Rural Growers Association and eight witnesses;
- Mike Chapman, Chief Executive NZ Kiwifruit Growers Inc;
- Linda Ross, of 45 Conway Road, Paengaroa.

1.6 In addition to the foregoing appearances, tabled documents were presented at the hearing on behalf of:

- New Zealand Transport Agency – in the form of letter from Mr Doug Spittle apologising for his inability to attend the hearing;
- Mr Alan Newby, of Newby Farm, who was also unable to attend the hearing. The Chairperson read out Mr Newby's opposing submission in full.

1.7 Committee members undertook an unaccompanied inspection of the subject site and surrounding area on the afternoon of 13 August 2015 following presentation of the applicant's right of reply.

## **2. Relevant Statutory Provisions (RMA Section 113(1)(aa))**

### **2.1 RMA section 104D**

The application falls to be assessed as a non-complying activity. As such either one of the two "gateway tests" as set out under RMA section 104D(1) must first be met by the proposal, prior to further consideration being given under RMA section 104. The two tests under RMA section 104D(1) are:

- (a) *The proposal will create no more than minor adverse environmental effects;*
- (b) *The proposal is not contrary to the objectives and policies of the relevant plan or proposed plan.*

### **2.2 RMA section 104**

If either of the foregoing section 104D tests is passed, full consideration is able to be given under RMA section 104 in which the sustainable management of resources purpose of the Act as set out in Part 2 is the overriding consideration. Other relevant section 104 matters to which regard is to be had are:

- (a) *actual or potential environmental effects, provided that any effects also able to be created by permitted activities may be disregarded (the "permitted baseline");*
- (b) *relevant provisions of the National Environmental Standard relating to contaminants in soil and effects on human health;*

- (c) *relevant provisions of the Bay of Plenty Regional Policy Statement (RPS);*
- (d) *relevant provisions of the Operative Western Bay of Plenty District Plan;*
- (e) *relevant provisions of the Operative Bay of Plenty Regional Water and Land Plan;*
- (f) *any "other matters" considered relevant and reasonably necessary to determine the application.*

### **3. Relevant Statutory Planning Documents (RMA Section 113(1)(ab))**

The relevant planning documents are set out in foregoing section 2.2.

### **4. Principal Issues that were in contention (RMA Section 113(1)(ac))**

The principal issues arising from the application that were in contention, as identified through evidence from the applicant, submitters and the Council planning consultant's pre-circulated RMA section 42A hearing report were:

- Whether the actual or potential adverse environmental effects created by the proposed activity would be more than minor. Effects of particular relevance were those relating to:
  - Reverse sensitivity;
  - Rural character and amenity values;
  - Noise.
- The extent to which the granting of consent to the proposal would be contrary to the objectives and policies of the Operative District Plan.

### **5. Summary of Evidence Heard and Findings on Principal Issues in Contention (RMA Section 113(1)(ad) & (ae))**

#### **5.1 Environmental effects**

##### **5.1.1 Reverse sensitivity**

Reverse sensitivity is defined in Chapter 3 of the District Plan as meaning:

"The vulnerability of an existing lawfully established activity to other activities in the vicinity which are sensitive to adverse environmental effects that may be generated by such existing activity, thereby creating the potential for the operation of such existing activity to be constrained."

In the context of the current application, the potential for reverse sensitivity to be created is through the proposed establishment of the new service station activity, the operation of which may result in complaints by staff or customers of the new service station relating to horticultural management practices (in particular the use of agrichemical sprays) undertaken on adjacent orchard properties. Such complaints



have the potential to constrain the continued reasonable and lawful operation of horticultural uses on these properties.

#### Applicant's case

In summary, the applicant's case was that:

- Regardless of the proposal to establish a service station on the subject site, the operation of the established kiwifruit orchards existing on adjacent land is already constrained by the requirement to comply with strict regulatory standards relating to the application of agrichemical sprays. The sensitivity of the receiving environment and the orchardists' obligations to minimise spray drift will not change as a result of the proposed service station;
- The existing shelterbelts and the proposed new 7.2m high artificial shelter will reduce the potential for spray drift to enter the subject site, thereby minimising the likelihood of adverse effects being perceived by people on the site;
- The obligation to respond to any complaints about perceived spray effects is a normal part of orchard operations and management practices and is not in itself an adverse effect.

#### Opposing submitters' case

- Since the original PSA outbreak, orchardists' legal requirements in respect of spray regimes and other orchard management practices have increased markedly;
- Potential reverse sensitivity effects created by establishment of the proposed service station cannot be adequately mitigated or managed;
- Being a 24/7 operation, the service station proposal will attract many more people to the subject site thereby increasing the potential for reverse sensitivity effects to be created through staff/customer complaints;
- The kiwifruit industry is of great importance to the district, regional and national economies and needs to be protected from risk, even where that risk may be seen by some to have a low probability of materialising;

#### Council consultants

- The opinion of the Council consultant planner, Russell De Luca, on the risk of reverse sensitivity effects occurring changed slightly following legal submissions and evidence presented on behalf of and by the opposing submitters. In particular he amended his assessment of the magnitude of such actual or potential effects from "minor" to "more than minor" although he still considered the likelihood of such effects actually occurring to be "possible" rather than "probable".
- The opinion of the Council horticultural consultant, Allister Holmes, was essentially unchanged from that expressed in his horticultural peer review report on the application. In particular he remained of the view that it would

be virtually impossible to remove the risk of "secondary" spray drift occurring and that any discernible odour from such drift experienced by people at the subject site would inevitably result in complaints, thereby creating adverse reverse sensitivity effects.

### Finding

We find that, notwithstanding implementation of the mitigation measures proposed by the applicant (in particular the erection of 7.2m high artificial shelter around the internal boundaries of the subject site), secondary spray drift from adjacent orchards will not be eliminated and is likely to reach the subject site, resulting in more than minor adverse reverse sensitivity effects being created by the establishment and operation of the proposed service station. In particular, development of the service station will significantly increase the number of people on the subject site, thereby increasing the risk of complaints relating to the actual or perceived health risks caused by agrichemical spraying undertaken on the adjacent kiwifruit orchards. In our view, such complaints have the clear potential to result in more than minor reverse sensitivity effects being created through the increased risk of undue additional constraints being imposed on the operation and management of the neighbouring orchards. We further find that in the event that such constraints occur they will have the potential to reduce the financial viability of the existing orchard operations and in turn adversely impact on the local economy.

#### 5.1.2 Effects on rural character and amenity values

##### Applicant's case

The applicant's landscape architect witness, Mr Pryor, gave evidence on the landscape and visual effects of the proposed service station. His opinion was that the environment in the vicinity of the subject site is "highly modified", particularly by the recently completed State Highway works and the establishment of the heavy vehicle weigh station in close proximity. As a result, he concluded that:

"The visual amenity and quality of the environment surrounding the site will not be adversely affected by the development and overall the effects will be no more than minor."

##### Opposing submitters' case

Ms Nicholas, a planner who presented evidence on behalf of the Paengaroa Rural Growers Association, was of the view that the proposed service station would be "out of character and scale in the rural environment and is contrary to the anticipated scale and nature of rural activities." She concluded that "the service centre will not be characteristic of a rural area and will significantly change the effects on adjacent sites."

##### Council consultant planner

Mr De Luca's opinion as expressed in his pre-circulated hearing report was that development of the service station would "transform the existing character of the site from one of a rural nature to one which is patently urban." This view was reiterated in his supplementary evidence presented at the hearing in which he also acknowledged that the existing rural environment in the vicinity of the subject site



was "not pristine". Mr De Luca further stated that in his opinion the significance of the existing "Fruitlands" shop as an established commercial activity had been overstated in the applicant's legal submissions and evidence and that "there is no similarity between the nature, scale and intensity of the existing activity and that of the proposed service station."

#### Finding

We find that the applicant's view of the existing environment was somewhat narrowly expressed and that we have a broader view of the surrounding environment ( see aerial photograph submitted in evidence by Ms Burkhardt). The proposed service station "prime" sign for example will be clearly visible some distance from the subject site. We also find that the existing "Fruitlands" shop on the subject site blends in to the existing rural environment and being akin to a "rural selling place" is of a nature anticipated under the Rural Zone provisions of the District Plan. We found from our site inspection that the existing weigh station opposite the subject site is visually insignificant given the established earth bund and associated screen planting which we note has not yet reached its full mitigation effect. In contrast, we find that development of the proposed service station would "industrialise" the subject site and have a more than minor effect on the character of the existing rural environment and on the amenity values currently prevailing in the locality.

#### 5.1.3 Noise

##### Applicant's case

Mr Hegley, the applicant's noise expert witness, concluded that in the context of the existing environment, operation of the proposed service station would comply with the permitted activity standards of the District Plan. He added that in his opinion if houses were erected on the either of the currently vacant immediately adjoining horticultural properties (Singh and Endeavour Kiwifruit), either existing highway traffic noise would mask any noise from the service station or, in respect of potential house site locations where such masking would not occur, appropriate mitigation in the form of the erection of higher acoustic fencing would achieve compliance with the applicable District Plan rules. Such higher fencing could be erected without the need for adjoining neighbour approval or a resource consent if set back sufficiently from the boundary of the subject site.

##### Opposing submitters

Ms Burkhardt submitted that "establishment of the service station would constrain the future legitimate use" (ie the erection of a dwelling) of the Singh and Endeavour Kiwifruit properties. In the opinion of Ms Nicholas (planning expert witness) the possible erection of houses in complying locations which would expose the occupants to excess noise levels from the service station could ultimately lead to reverse sensitivity effects, indicating that "the subject site is not suitable for the proposed activity."

##### Council consultant planner

Mr De Luca reiterated the concern expressed in his pre-circulated hearing report that either the choice of available house sites on the Endeavour Kiwifruit property would be constrained by the establishment of the service station or that additional mitigation measures would need to be put in place on the subject site following the erection of a house on the Endeavour Kiwifruit property in a location where noise from the service station would exceed District Plan permitted activity standards.

#### Finding

We find that the foregoing scenarios create at least the potential for more than minor noise effects to be experienced by the occupants of a complying house erected on the Endeavour Kiwifruit property. At best, the operator of the service station would then be required to "retro-fit" further noise mitigation within the subject site. At worst (and in the absence of such additional mitigation being installed) Council would be put in the position of having to take appropriate enforcement action against the service station consent holder.

#### 5.1.4 Conclusion as to adverse environmental effects

Overall, our finding is that the actual or potential adverse environmental effects created by the establishment and operation of a service station on the subject site will be more than minor.

#### 5.2 Whether proposal contrary to District Plan Objectives and Policies

- 5.2.1 We agree with and adopt the content of section 8.2 of Mr De Luca's pre-circulated hearing report in which he sets out, what in his opinion, are the most relevant District Plan objectives and policies relating to the current application. We also agree with his view that:

"The primary focus of Section 18 [of the District Plan] is ..... on protecting, maintaining, enhancing and realising the productive potential of rural land."

We note that there was general agreement amongst the expert planning witnesses as to which are the relevant District Plan objectives and policies.

#### 5.2.2 Applicant's case

The applicant contended that the proposal is consistent with the objectives and policies of the District Plan, when those provisions are "considered as a whole". As we understood it, this contention is primarily based on the applicant's view that there is "a functional and legitimate need for the service station to be located at the proposed site". [Refer District Plan Chapter 18, Objective 3 and Policies 10 & 11.] As set out in Ms Devine's opening legal submissions, this need relates to the strategic location of the site in the context of the adjacent State highway network, in particular the newly completed TEL and the associated SH2/SH33 interchange at the eastern end of that new highway. A service station at this location enables the needs of the travelling public to be met without "having to travel out of their way into the Paengaroa Township or to Rangiora Business Park to find a service station."

In addition, the loss of productive rural land created by the establishment of the service station would be minimal and any actual or potential adverse effects on "the



efficient use and development of rural land for primary production" can be appropriately avoided, remedied or mitigated. [Refer Chapter 18 Objectives 2 & 4, Policies 1 & 4.] With respect to reverse sensitivity effects relating to the use of agrichemical sprays on adjacent orchard properties, this was achieved through the erection of the proposed 7.2m high artificial shelter along the internal boundaries of the subject site.

Further, in the context of the already compromised character of the existing rural environment within which the subject site is situated, consent to the proposal would "maintain the character and amenity values associated with the low density rural environment." [Refer Chapter 18, Objective 5.]

The foregoing views were similarly expressed in the evidence of Ms McKitterick, the applicant's expert planning witness.

With respect to the issue of "need", the evidence of Mr Dryburgh ("Z" Asset Manager) was that the service station was required to:

- replace volume already lost or will soon be lost from the Z Energy Network;
- provide a directly available refuelling service for customers using the TEL;
- support the trucking fleet and primary producers in the region.

#### 5.2.3 Opposing submitters' case

Ms Burkhardt submitted that the economic significance of the productive rural land resource within the western Bay of Plenty sub-region cannot be underestimated and that the horticultural industry in particular needs to be protected from non-rural based activities, such as the proposed service station, which do not have a functional or other legitimate need for a rural location.

Ms Nicholas' evidence supported this submission, in particular that the proposed location of the service station on a rural-zoned site is contrary to the District Plan. She also expressed the view that even if there was a legitimate need for service station in the locality, its establishment on the selected site would "threaten the viability of the primary productive use of [adjacent] versatile land. Therefore, granting consent would be directly contrary to the objectives and policies in the Plan."

#### 5.2.4 Council consultant planner

As expressed in his supplementary evidence presented at the hearing, Mr De Luca remained of the view that the applicant had not demonstrated any "functional or other legitimate need" for the out-of-zone establishment of a non-complying activity service station on the subject site. In the absence of any policy basis for the proposal, the application was "contrary to the overall thrust of the objectives and policies of the District Plan". With respect to the issue of "need", Mr De Luca's opinion was that:

"the applicant's stated "need" to establish a service station activity on the selected rural-zoned site focusses primarily on Z's own economic needs rather than on the needs of the wider community, in particular the travelling public. Currently, the existing service stations at Pongakawa (BP and at Paengaroa (GULL provide for the needs of motorists, including truck drivers, travelling on the State Highway network.



Pongakawa BP is adjacent to the Tauranga/ Whakatane highway while Paengaroa GULL is adjacent to the Tauranga/ Rotorua highway. No detour off either State Highway is required to access these existing service stations and the recently completed TEL has not changed that. I also note that if there is sufficient demand, these existing service stations can readily extend their current operating hours.

"I do not therefore agree with the applicant's contention that construction of the TEL has created new circumstances which justify consent to the proposed service station as a non-complying activity in the Rural Zone."

#### 5.2.5 Findings

We find that the applicant has not demonstrated that there is a "functional or other legitimate need" for the establishment of a service station on the subject site. In particular, the existing service stations at Paengaroa (2.5kms from the proposed Z site) and Pongakawa (8.6kms from the proposed Z site) meet existing motoring needs and in our opinion have the capacity to meet any future needs. There is no necessity for motorists to "travel out of their way" to access either of these existing facilities. As noted by Mr De Luca, that assertion by the applicant is not supported in reality and the recent completion of the TEL does not change that fact. In short, no need has been shown for the establishment of an additional motor fuel dispensing facility in the specific area proposed in the application.

We agree with Ms Nicholas and find further that even if there was a genuine need for the out-of-zone location of a service station in the general locality, the site selected by the applicant is unsuitable, given what we consider to be the inherent conflict (in particular through reverse sensitivity effects) with existing productive rural land uses on adjacent properties.

Our overall finding is therefore that the granting of consent to the proposed service station would be contrary to the relevant District Plan objectives and policies

## 6. Conclusion

Given our findings that the service station will create more than minor actual or potential adverse environmental effects and that the granting of consent to the proposal would be contrary to the objectives and policies of the District Plan, the application fails to meet either "threshold test" of section 104D of the RMA and must therefore be refused consent without the necessity for any further consideration under section 104.

However, we do note that any such further consideration would likely have the same result. In particular we consider that the proposal is contrary to the urban and rural growth management provisions of the Bay of Plenty Regional Policy Statement. We also agree with Mr De Luca, as expressed in the concluding section 13 of his hearing report that:

"in the absence of any distinguishing features, consent to the application is likely to create a planning precedent with the ultimate potential to undermine the integrity of the District Plan", and

"the proposal is contrary to Part 2 of the Act as it will not promote the sustainable management of natural and physical resources."

If you wish to appeal against Council's decision or any part of it, you have 15 working days from the date on which this decision is deemed to have reached you to lodge an appeal with the Environment Court, PO Box 7147, Wellesley Street, Auckland. Advice from a solicitor is recommended for any person considering lodging an appeal.

Yours faithfully

Michelle Parnell

**Democracy Support & Administration Officer**

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