

THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC **157**

ENV-2009-WLG-000053

IN THE MATTER of an appeal pursuant to section 120 of  
the Resource Management Act 1991

BETWEEN LIVING IN HOPE  
INCORPORATED  
Appellant

AND TASMAN DISTRICT COUNCIL  
Respondent

AND GARDENS OF THE WORLD  
LIMITED  
Applicant

Court: Judge B P Dwyer  
Commissioner J R Mills  
Commissioner H M Beaumont  
Heard: 7 – 10 February 2011  
Appearances: C Fowler and J Wheeler for the Appellant  
J C Ironside and A C Besier for the Respondent  
N A McFadden and G Engelbrecht for the Applicant

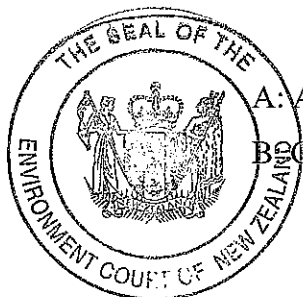
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DECISION

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Decision issued: **14 JUN 2011**

A: Appeal dismissed, consent upheld subject to amended conditions.  
B: Costs reserved.



## Introduction

[1] Living in Hope Incorporated (LIH) appeals against a decision of Tasman District Council (the Council) granting consents to Gardens of the World Limited (GOTWL/the Applicant) to establish and operate a crematorium and associated activities on the corner of Paton Road and Clover Road East at Hope (the site), on the Waimea Plain near Richmond.

[2] The Council granted two resource consents to the Applicant:

- Firstly, a land use consent:

*To establish and operate a crematorium and associated place of assembly, memorial garden and ticket kiosk (RM090538);*

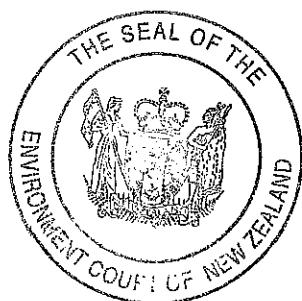
- Secondly, a discharge to air consent:

*To discharge the combustion products from a gas-fired crematorium to air (RM090539).*

[3] Those aspects of the proposal which require resource consent are:

- The establishment and operation of a crematorium (including the discharge of cremator gases to air) with an associated 25 person capacity chapel, a total building area of 360.4 m<sup>2</sup>;
- Establishment of a memorial garden for the interment of ashes which would be open to the public between 9 am and dusk, 7 days a week;
- Establishment of 13 additional car parking spaces for staff and visitors;
- Operation and establishment of a ticket kiosk (40m<sup>2</sup>) for the tourist gardens known as Gardens of the World, with the sale of a limited range of non-alcoholic refreshments such as tea and coffee. Hours of operation would be 9 am to half an hour before dusk, seven days a week;
- Establishment of a small scale directional sign.

[4] The GOTWL proposal required consent as a discretionary activity. When the application was notified by the Council, a total of 220 submissions were received. 166 submissions supported the application and 54 submissions opposed.



[5] The Council decision (to which we have had regard pursuant to s290A RMA) addressed the following issues in determining to grant consent:

- Mercury discharge;
- Reverse sensitivity;
- Land productivity;
- Traffic;
- Parking;
- Noise, amenity and rural character;
- Positive effects.

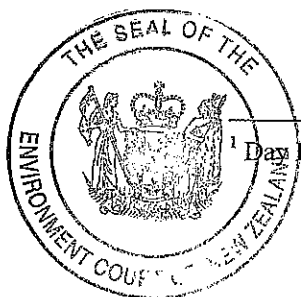
We will similarly consider those matters in this decision. There was no evidence before us seriously challenging the grants of consent to the ticket kiosk and directional sign. Having considered the Council decision, we simply adopt it in respect of those aspects of the application.

### **Background**

[6] GOTWL is the owner of the 3.84 hectare site. The Applicant company is in turn owned by persons associated with the business of P Day and Son Limited, funeral directors in Nelson for over 80 years.

[7] Days presently operate funeral homes from three premises at Nelson, Motueka and Waimea. There is a small cremator in operation at the Motueka facility, consented about 15 years ago. We were told by Mr FH Day (Director of P Day and Son Limited) that the Motueka cremator ... *is situated in the heart of a residential zone, and there has never been a complaint about its operation or the service it provides.*<sup>1</sup> (Mr Day's emphasis)

[8] Mr Day advised that, other than the Motueka crematorium, the only facility for cremation in the Nelson area is a crematorium operated by the Nelson City Council at Wakapuaka. Mr Day described this facility as *Victorian*. It dates back to the 1940s with an upgrade in the 1970s.



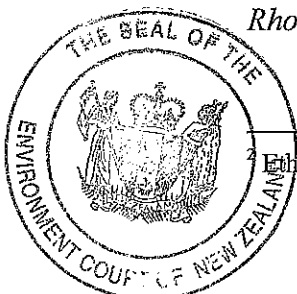
<sup>1</sup> Day EIC at [1.2].

[9] When Days obtained resource consent to establish their funeral home at Waimea, consent was also sought to establish a crematorium, but that aspect of the application was declined. Consequently, families using the Waimea (and presumably Nelson) funeral homes have to travel to either the Day crematorium at Motueka or the Council crematorium at Wakapuaka to attend any subsequent cremation. Mr Day considered that was an imposition on families at a time of grief and emotion.

[10] Mr Day detailed the company's efforts over the last two or three years to find a site to establish a crematorium closer to the Waimea funeral home. A number of sites were considered in Industrial, Residential and Commercial zones. These were found to be unsuitable for various reasons. On the one hand, it was considered that Industrial and Commercial zones generally did not provide the ambience and tranquility which the facility required. On the other hand, Mr Day recognised the difficulties of convincing neighbours that a Residential zoned site was appropriate, notwithstanding his view that there are no environmental risks or impacts on amenity from the operation of a crematorium.

[11] Eventually, the present site in the Rural zone of the Tasman District, was identified. The site is situated near Hope, which is in close proximity to Richmond and easily accessed from Richmond, Waimea and Nelson. Days had previously conducted two funeral services on the site, known as Gardens of the World, and formed the view that it would be ideal for the establishment of a crematorium with a small chapel facility and a memorial garden. The site was purchased and this application is the outcome.

[12] Gardens of the World was created by Mr and Mrs G F Etherington, long-term orchardists and nurserymen at Hope, and conceived by them as public gardens on a grand scale. Mr Etherington described<sup>2</sup> the Gardens as consisting of *...a New Zealand garden, oriental garden, a "white garden", American garden, European garden, African garden, Australian garden, a central promenade with fountain, roses, herbs and herbaceous plants, and an amphitheatre area with trees and Rhododendrons.* Mr Etherington (now 75 years old) had placed the property on the




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<sup>2</sup> Etherington EiC at [2].

market in the hope that somebody else would continue his *dream and bring it to fulfillment*. He considered that time had run out for him to continue with the venture.<sup>3</sup>

[13] The Gardens of the World complex occupies a 2.6 hectare rectangular shaped portion of the site. The site runs roughly northwest/southeast. The northwestern boundary of the site fronts onto Paton Road, the southwestern boundary fronts Clover Road East and the northeastern boundary adjoins a vineyard called the Greenhough Vineyard. These three boundaries have mature shelterbelts which largely obscure views from the road and neighbouring properties into the Gardens. Internal plantings subdivide a series of well defined, separate, secluded garden areas and the amphitheatre. With the exception of the carpark area on Clover Road East, there are very limited, if any, views into the Gardens from the adjoining roads or nearby properties. Even the carpark is largely surrounded by planting.

[14] The developed gardens extend to a point approximately halfway along the northeastern and southwestern boundaries of the site. At this point, the southwestern boundary of the property leaves the road and follows the top of a bank which cuts across the landform. This boundary tapers so that the southern portion of the site forms something of an elongated, narrow neck of about 1.2 hectares. There is a substantial dwelling house in this area, together with a large glasshouse, nursery, sheds and workshop buildings.

[15] Much of the land in the neck is occupied by mature grapefruit trees. This portion of the site is more open in visibility than the Gardens. There is a mature conifer shelterbelt along the northeastern boundary which provides some visual barrier between the site and the Greenhough Vineyard. A casuarinas shelterbelt runs along the southwestern boundary providing a strong visual barrier. There is presently no planting along the southeastern boundary which adjoins farmland.

### **The Proposal**

[16] The crematorium/chapel building is to be located at the northern end of the neck near the Gardens. The grapefruit trees are to be removed and the neck is to be laid out with a lake, memorial gardens and forest-type planting up to 7m high in a

Sherrington EiC at [7].



similar style to the Gardens of the World. The memorial gardens will be used as a place for interment of ashes amongst the plantings. The conifer shelterbelt on the northwestern boundary will be supplemented with Cyprus species and the southeastern boundary will be planted with a Cyprus hedge so that, as with the Gardens, this portion of the site will be fully enclosed.

[17] The crematorium/chapel building itself does not require consent as it complies with the permitted activity rules of the Tasman District Plan (the District Plan) for buildings. The structure is to have a maximum height of 5.5m above ground level with the emission stack extending a further 1m above the roof. The height for permitted activity buildings in the zone is 7.5m. The proposed building complies with all setback requirements and total site coverage by all buildings (including existing buildings) after construction of the crematorium/chapel, will be less than half that which is permitted under the District Plan. It is the *commercial activity* aspect of the crematorium/chapel and kiosk as well as the sale of memorial plots which require resource consent.

[18] Commercial activity is defined in the District Plan as meaning... *the use of land and buildings for the display, offering, provision, sale or hire of goods, equipment or services, and includes shops, markets, showrooms, restaurants, takeaway food bars, professional, commercial and administrative offices, service stations, motor vehicle sales, tourist accommodation, the sale of liquor and associated parking area; but excludes recreational and community activities and home occupations.* The parties agreed that the Applicant's activities constituted the *sale of services* which required discretionary activity consent.

[19] At first glance, the limited size of the building and restriction of the chapel to a 25 seat facility seemed surprising. However, the reason for that became apparent on consideration of the evidence.

[20] The proposed chapel is intended to be used primarily for the conduct of committal services and small private funerals. The term *committal service* refers to a brief service undertaken immediately before cremation of the deceased. Mr Day explained that such services are commonly attended by very limited numbers of



persons (generally close family) as compared to public funeral services which may be attended by a wide range of family, friends, associates and acquaintances. Mr Day observed that committal services involving Māori deceased were likely to have higher numbers of attendees because it was culturally important for whanau to accompany the deceased for final committal but even so, the 25 seat facility was all that was required for this aspect of a funeral.<sup>4</sup>

[21] Mr Day gave evidence as to the numbers of cremations which his company had undertaken in Nelson for the years 2006-2010 (for the period April to March):

- 2006 – 308 cremations;
- 2007 – 281 cremations;
- 2008 – 400 cremations;
- 2009 – 339 cremations;
- 2010 (to 24 November) – 325 cremations.

Most of those cremations have taken place at the Motueka crematorium. Mr Day envisaged that if the Hope crematorium was established approximately 80 percent of the cremations (somewhere between 250 and 300 cremations per year) would take place at the Hope facility.

[22] The application was advanced on the basis of a volunteered condition that no more than 365 cremations per annum would take place at the crematorium and the air discharge consent was granted subject to such a condition. Mr Day testified that cremations would be carried out during the day between 9am and 6 pm. Cremations will be limited to three per day unless there are special circumstances. Mr Day said that it was his experience as a funeral director that approximately half of cremations were undertaken with no family in attendance and half were attended by family.

### **Living in Hope**

[23] LIH opposes the grants of consent to the Applicant. It is an incorporated society with about 50 members who live in the vicinity of the site. Some of those persons are rural lifestylers and some are persons who rely on the land resource for their livelihood. LIH's position is one of implacable opposition to the proposal.

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<sup>4</sup> Day EiC at [2.5] and NoE at 26.



There was no suggestion in LIH's case of there being any *middle ground* by way of grant of consent subject to amendments or additions to the Council imposed conditions.

[24] In his submissions for LIH, Mr Fowler identified what he said were the four *key issues* in this case, namely:

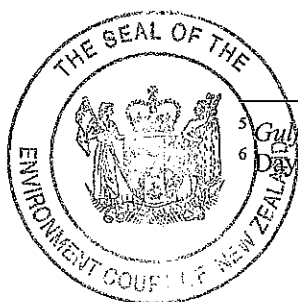
- Effects of crematorium and related activities on rural amenity and character. He identified these effects as including visual amenity, noise and traffic effects;
- Effect of the crematorium discharge to air on viticulture production and winery sales;
- Effects of non-rural land use in the Rural Zone, including loss of high productive value land and reverse sensitivity; and
- Lack of demand and associated public benefit from the crematorium facilities.

We will address those topics in the sequence they have been identified except for the last issue of demand which we do not propose to discuss in any detail. GOTWL is not required to establish a need or demand for its facilities<sup>5</sup> and in any event the evidence of Mr Day<sup>6</sup>, which was not challenged in that regard, did establish a community need for the crematorium.

### **Preliminary legal issues**

[25] Before addressing the key issues identified by Mr Fowler we consider two legal issues which emerged during the hearing, namely:

- The status of the resource consent granted to Mr and Mrs Etherington to establish the Gardens of the World facility in the first place, more particularly what was allowed by that consent;
- Additional conditions to this consent volunteered in response to the Council hearing.



<sup>5</sup> *Gulf District Plan Association Inc v Auckland City Council* A 101/2003.  
<sup>6</sup> Day EIC at [6] and [9].

*The Gardens of the World consent*

[26] Mr and Mrs Etherington began planning the development of Gardens of the World during the 1980s. They prepared plans showing the gardens and picnic areas, the lake and related facilities. The Etheringtons intended to have shows/concerts in the amphitheatre area and weddings and other functions were to be undertaken in the Gardens. There were to be a reception centre and parking facilities.

[27] When enquiry was made at the Council, it transpired that planning permission was needed for some aspects of the proposal. Accordingly, in August 1991 the Etheringtons made application under the Town and Country Planning Act 1977 for a consent in these terms:

*To establish and operate tourist gardens on the balance land in Certificate of Title 8A/112 containing approximately 4.8ha of which some 2.6ha will form the tourist gardens together with facilities for weddings and other functions, and various outdoor entertainments and attractions, including permission to erect a reception centre of up to 230m<sup>2</sup> and to create carparks for up to 80 cars, or 50 cars plus 4 buses.*

[28] The application document went on to identify the reasons for the application in these terms:

*No consents have been required for the contouring and planting of the tourist gardens to date, but the commercial operation thereof as such will require planning consent. The specific layout of gardens, plantings and the details of ancillary structures, pond and stream, and carparking areas are fully described on the landscaping plans filed herewith, and the detail of the proposed reception area is also shown on the architect's plans filed herewith.*

Consent was granted to the Etheringtons' application on 26 November 1991 (the 1991 Consent).

[29] It was GOTWL's position in these proceedings that the 1991 Consent allowed the undertaking of commercial activities on the site with associated visitors, vehicle movements and noise. GOTWL did not concede that the crematorium/chapel



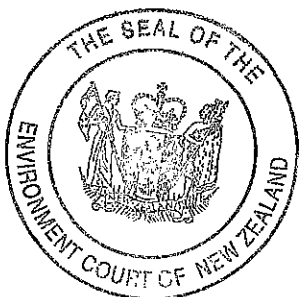
activities would generate adverse effects at all, but to the extent which such activities might be considered adverse in this rural area, they were consistent with the activities already approved on the adjacent Gardens (we accept that those comments do not apply to the discharge to air aspect of the activity).

[30] Mr Fowler for LIH, queried whether or not commercial outdoor activities were authorised at the Gardens by the 1991 Consent at all.

[31] The 1991 Consent (as issued) relevantly provided as follows:

*That pursuant to Section 105 of the Resource Management Act 1991, Council grants consent to Etherington Investments Limited to construct and use a reception centre to be used in conjunction with a tourist gardens incorporating facilities for weddings and other functions, subject to the following conditions:*

- (1) That the reception centre be sited and erected in accordance with the plans submitted and that it be registered as a place of public assembly for a maximum occupancy of 80 people.*
- (2) That the kitchen facilities be installed to the standard required under the Food Hygiene Regulations and the premises be registered under those Regulations prior to their use.*
- (3) That the hours of operation of the reception centre be limited to between 10.00 a.m. and 11.00 p.m. and no sale of liquor licence be permitted.*
- (4) That the sewerage disposal system be based on a septic tank for anaerobic digestion with an aeration chamber for the treatment of effluent prior to disposal of the final effluence by subsurface irrigation and such system be to the satisfaction of the District Environmental Health Officer.*
- (5) That a potable water supply be provided to the satisfaction of the District Environmental Health Officer.*
- (6) That at least 50 carparks and 4 bus parks be provided and marked out in general accordance with the plan submitted. The parking area and access is to be an all weather dust proof surface to Council's satisfaction.*



- (7) *That road widening of 2m (1m either side) be undertaken from the Clover Road/Paton Road intersection to ten metres past the proposed entrance exist (sic) onto the subject site to the District Road Engineer's satisfaction. This is to be done at the applicant's expense.*
- (8) *That the entrance/exit onto the proposed site be designed and constructed to the satisfaction of the District Road Engineering taking into special consideration sight lines and width.*
- (9) *That the use of the property be so controlled that the maximum uncorrected hourly equivalent noise levels (Leq) measured at any point ten metres from a residentially used building on any adjacent site shall not exceed the following levels:*

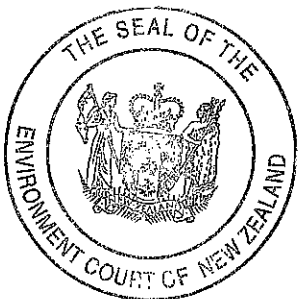
*Daytime – 50dBA*

*Nighttime – 40dBA*

*Definitions:*

*The following definitions shall apply:*

- a) Daytime – between 0700 hours and 2200 hours.*
- b) Nighttime – between 2200 hours and 0700 hours weekdays, after 1800 hours Saturday and on Sundays and on Public Holidays.*
- c) Leq – the level of steady noise which contains the same amount of sound energy as a varying noise contains over the measuring interval of one hour.*
- d) dBA – the sound level obtained when using a sound meter having its frequency response "A" weighted.*
- (10) *That the applicant meet the requirements of the Council with regard to all Building and Health By-laws, Regulations and Acts.*
- (11) *All works shall be constructed in strict accordance with Code of Practice for Engineering Works and are to be to the District Engineer's satisfaction. The Tasman District Council is to be contacted prior to the commencement of any engineering works on this subdivision.*



Reasons for the Decision

- 1) *The site is considered suitable for the proposed activity subject to the proposed conditions being implemented. The Council considered that the proposed reception building will complement the tourist garden development.*
- 2) *The effects of the activity are considered to be acceptable. In reaching this conclusion the Council was guided by examining the additional impacts that the proposal would have on top of those that would occur in relation to the tourist gardens which were considered a permitted activity.*
- 3) *The proposal gives effect to policies in the Regional Planning Scheme regarding tourism.*

Notes to Applicant

- 1) *The Applicants are advised that they must obtain all necessary resource consents from the Nelson Marlborough Regional Council before the operation commences.*
- 2) *With respect to Condition 3, this condition does not restrict the ability of the site to be used by a caterer with an endorsed off-licence or by a host providing liquor at a wedding for example.*

[32] The wording of the 1991 Consent led to Mr Fowler submitting that the activity which was granted consent at that time was the reception centre alone, not the tourist gardens nor any associated outdoor commercial activities. He gave four reasons for that interpretation:<sup>7</sup>

- The approved activity was captured in the words ... *to construct and use a reception centre* ...and the balance of the resolution simply described how that facility would be used in conjunction with the tourist garden;
- The *Reasons* for the decision included the comments ... *that the proposed reception building will complement the tourist garden*

<sup>7</sup>Fowler opening submissions at [28].



*development ...and that ... the Council was guided by examining the additional impacts that the proposal would have on top of those that would occur in relation to the tourist gardens which were considered a permitted activity (emphasis added);*

- Comments made to the Council Hearings Committee (and referred to in the minutes of the Council meeting) by its planner at that time (Mr J Hextall) that *the District Scheme does not exclude commercial activities in the Rural A Zone* but that the proposed reception centre went beyond what could be considered a building ancillary to the garden. Mr Fowler contended that the planner appeared to treat other commercial activities relating to the tourist gardens as permitted;
- The conditions of consent *clearly focused* on the reception centre and related services.

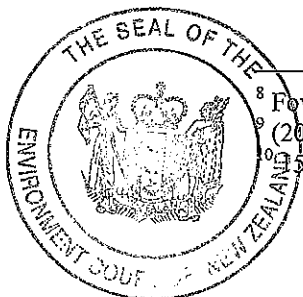
[33] In summary, it was LIH's contention that the 1991 Consent granted consent only to the reception centre, not the tourist gardens nor any associated outdoor commercial activities, as those were regarded as being permitted under the then relevant District Scheme. Mr Fowler conceded that such an interpretation of the District Scheme as to the permitted nature of commercial activity was not correct, but nevertheless contended that the incorrect interpretation limited the consent which the Council intended to grant.<sup>8</sup>

[34] All Counsel made detailed submissions on interpretation of the 1991 Consent and agreed that there was some ambiguity in the consent as granted. Counsel agreed that where there is ambiguity in consent documents, it is appropriate to have regard to the application documents in interpreting the consent. Reference was made to the High Court decisions in *Red Hill Properties Limited v Papakura District Council*<sup>9</sup> and *JIT Hillend Investments Limited v Queenstown Lakes District Council*<sup>10</sup> in support of that proposition.

<sup>8</sup> Fowler opening submissions at [30].

<sup>9</sup> (2000) 6 ERLNZ 157.

<sup>10</sup> 5 December 2009 HC (Invercargill), CIV-2009-425-479.



[35] We consider that when regard is had to the consent document itself and the various papers which form part of the application, the extent of the consent granted in 1991 becomes readily apparent.

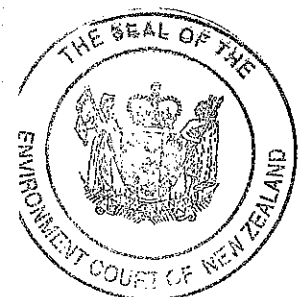
[36] Firstly (and significantly), we note that the Council decision did not refuse any part of the Etheringtons' application for land use consent in respect of operation of Gardens of the World. Pursuant to s 105(1)(b) RMA (applicable at the time of consent) the District Council had power to either grant or refuse the application. It purported to grant the consent which had been sought.

[37] Secondly, we do not accept the proposition that the Council was working under a misapprehension that no consent was required to undertake commercial activities in the tourist gardens.

[38] On considering the relevant provisions of the District Scheme, it is clear that establishment and operation of the tourist gardens (per se) was a permitted activity at the time consent was granted. Predominant uses (permitted activities) provided for in the District Scheme included:

- Farming of any kind (Ordinance 301.1);
- Horticulture, Floraculture, Vineyards and Nurseries (Ordinance 301.2);
- Parks, playgrounds, scenic and other reserves (Ordinance 301.4);
- Land recontouring as part of development for horticultural use (Ordinance 301.10);
- Buildings (excluding dwelling houses) accessory to the use of land permitted herein (Ordinance 301.14).

[39] We were not referred to the definitions section of the District Scheme but we consider that it is clear that the activities described above clearly encompass the tourist gardens. That is consistent with the observation contained in Reason 2 of the 1991 Consent as to the permitted activity status of the tourist gardens.



[40] However, the Etheringtons did not apply for consent to establish tourist gardens. They were aware that they were entitled to establish Gardens of the World as of right. The reasons for applying for planning consent set out in the consent document make that clear:

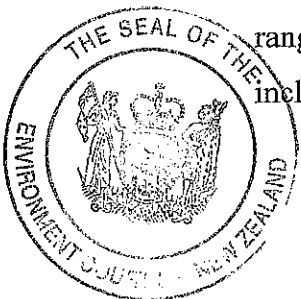
*No consents have been required for the contouring of the tourist gardens to date, but the commercial operation thereof as such will require planning consent.*

[41] The application never sought consent to establish the tourist gardens as that activity was permitted. The activity for which consent was sought was the commercial operation of the tourist gardens, namely the charging of fees to members of the public to visit and to hold weddings and other functions. Those were not permitted activities and the application recognized that.

[42] The acknowledgement in the 1991 Consent that the tourist gardens were permitted is consistent with the application itself and does not evince any intention on the part of the Council not to grant consent to the commercial activities for which consent had been sought.

[43] It was contended by Mr Fowler, that Mr Hextall's advice to the Council Hearings Committee that commercial activities were not excluded from the Rural A Zone, supports the proposition that the Council had formed the mistaken view that resource consent was not required for the commercial activities and therefore omitted to grant consent to the commercial activities. That contention is based on a misinterpretation of Mr Hextall's comments as reported in the meeting minutes and taking those comments out of context.

[44] The misinterpretation involves taking Mr Hextall's comment that commercial activities were not excluded from the zone as being the same thing as saying that commercial activities were permitted activities. In 1991, the District Scheme had a range of provisions applicable to commercial activities in the Rural A Zone. These included:



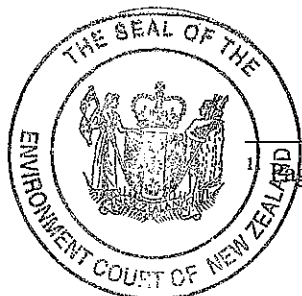
- Farm produce stalls and *Pick Your Own* produce sales – predominant (permitted) activity – Ordinance 301.8;
- Community market place – conditional (discretionary) activity – Ordinance 302.2;
- Farm produce stalls on State Highways – conditional (discretionary) activity – Ordinance 302.3;
- Cottage craft industry and home occupations with provision for the sale of goods – conditional (discretionary) activity – Ordinance 302.4;
- Licenced premises, motels and licenced restaurants at the Riwaka Hotel – conditional – (discretionary) activity – Ordinance 302.9.

Mr Hextall's observation that commercial activities were not excluded from the zone accurately reflects these provisions of the District Scheme. His comments do not constitute advice to the committee that the commercial activities aspect of the application was permitted, simply that such activities were not excluded from the zone altogether.

[45] That becomes even more apparent when the context in which Mr Hextall gave that advice to the Council is considered. We have not looked at the submissions which were filed in respect of the Etherington application but it is apparent on perusal of the minutes of the Council meeting that use of land in the Rural zone for commercial activities was one of the issues in contention at the hearing in 1991. The minutes<sup>11</sup> contain this note:

*Mr B A Fullick spoke to his objection expressing concern at the proposed commercial activities. He said that this commercial activity was not a fitting use within the locality.*

[46] Mr Hextall's comment appears to be in response to the proposition that commercial activities were not a fitting use of this rural locality. He was merely observing that commercial activities are not excluded from the Rural zone. That is a completely different proposition to asserting that commercial activities are permitted activities as it is now suggested.



[47] In the *Red Hills Properties* case, Rodney Hanson J observed:<sup>12</sup>

*I see it as desirable when interpreting a resource consent to have regard to any relevant background information which may assist the tribunal to determine what the consent authority using the words might reasonably have been understood to mean by them.*

[48] The minutes of the Council meeting from which the 1991 Consent issued presumably fall into the category of *any relevant background information*. It is background information which we would use only rarely and reluctantly. The Council minutes are not a transcript of the evidence heard by the Council. They do not provide a verbatim record of everything that was said at the hearing, but are the recording officer's summary of the information presented to the Council. There are obvious issues as to its fullness and accuracy. We have addressed the contents of the minutes in this instance as they are being used some 20 years later by LIH to bolster its contention that consent was not intended to be granted to the commercial activities undertaken on the site. When objectively considered, the minutes do not establish that at all.

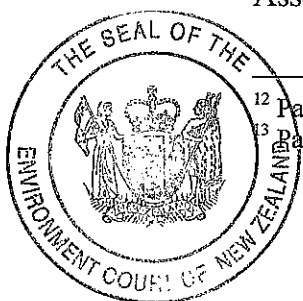
[49] That view is reinforced when regard is had to the conditions imposed by the Council in granting the 1991 Consent. Notwithstanding Mr Fowler's contention that the conditions of consent were ...*clearly focused on the reception centre building*<sup>13</sup> ... it is apparent upon objective consideration that they have wider application than that.

[50] Conditions 1, 2 and 3 are specific in applying to the reception centre. The other conditions are applicable to the consent application overall. That is particularly apparent when regard is had to Condition 6 requiring the provision of at least 50 car parks and four bus parks. In his submissions, Mr McFadden noted that this provided parking for up to 300 persons and asked the question why would a 300 person capacity carpark be required for a reception centre limited to 80 persons? The answer to Mr McFadden's rhetorical question is found in the Environmental Impact Assessment which formed part of the Etherington application.

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<sup>12</sup> Para 45.

<sup>13</sup> Para 28.4 Fowler opening submissions.



[51] The EIA identified the following beneficial effects of the proposal (inter alia):

(4) *Entertainment* – *The range of entertainment for the wider community will be increased by this proposal both as a beautiful tourist garden, but also from time to time by special entertainments usually of an outdoor nature. The gardens will also provide another venue for special interest groups to run their functions.*

(5) *Special Functions* – *The proposal is to provide an extra and better venue for functions such as weddings with an emphasis on the outdoor setting, but at a later stage with excellent facilities in a modern function centre.*

[52] The EIA then went on to assess adverse effects of the proposal. The following relevant comments are found regarding those matters:

*The only possible adverse effect on the neighbourhood and/or wider community is that the project will attract more traffic. No accurate estimates can be given to any degree of certainty. Parking is to be provided for 50 cars and 4 buses. This is a theoretical maximum only and is unlikely to be attained except on rare or special occasions such as when a special attraction is being held. Studies by the Applicant indicate that up to 5 cars, (10 people) can be expected as a maximum attendance at any time.*

And further:

(e) *Any discharge of contaminants into the environment, including any unreasonable emission of noise and options for the treatment and disposal of contaminants:*

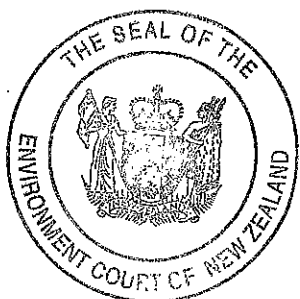
*There are no contaminants envisaged from the proposal apart from the treatment of sewage on site. The theoretical maximum numbers of people anticipated on site are:*

*50 cars x 2 = 100*

*4 buses x 50 = 200*

*Total 300 persons*

*This is a theoretical maximum only and the average would be ten persons.*



[53] Condition 6 is clearly intended to address the parking requirements for outdoor functions substantially exceeding the 80 person capacity of the proposed reception centre and establishes conclusively that the Council was granting consent to more than just a reception centre.

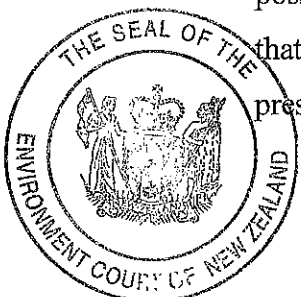
[54] Interpreting the 1991 Consent as being limited to establishment of a reception centre requires a narrow and legalistic interpretation of the Consent document considered in isolation from the application documents on which it was based. When regard is had to the background documents (particularly the application for planning permission) it is apparent that the 1991 Consent granted (inter alia) consent to the carrying out of commercial activities, including use of the Gardens for outdoor entertainments and special functions.

[55] The consequence of the above findings is that the existing environment, against which we are to assess the effects of the crematorium/chapel proposal, is one which includes the outdoor activities at Gardens of the World. It was accepted by all parties that the existing environment did not include the proposed reception centre, which was allowed as part of the 1991 Consent, as that facility has not been constructed and its consent has lapsed.

#### *Variation of 1991 Consent*

[56] Regrettably a further issue arises out of the 1991 Consent. It is apparent on reading the Council decision on this current resource consent application, that the Council Hearings Commissioners heard evidence about allegedly unsatisfactory operation of Gardens of the World pursuant to the 1991 consent. Similar issues were raised in some of the evidence put to us by LIH.

[57] After the conclusion of the Council hearing the Commissioners issued a memorandum to the parties. The memorandum expressed concerns as to what the Commissioners considered were inadequacies in the conditions imposed on the Gardens of the World operation by the 1991 Consent. The memorandum set out possible constraints on activities already carried out in the Gardens and suggested that such constraints could be volunteered by the Applicant as an amendment to the present application.



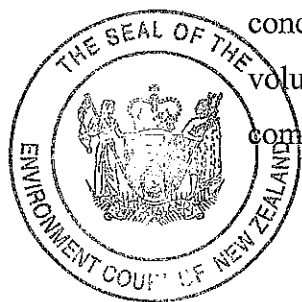
[58] We understand from the Council decision that a number of submitters had raised these matters at the Council hearing. After issue of the Commissioners' memorandum, GOTWL filed a memorandum from Mr McFadden volunteering a range of constraints on activities undertaken pursuant to the 1991 Consent to be imposed as conditions of this consent.

[59] The constraints which Mr McFadden volunteered included:

- Limiting the maximum number of participants to 225 at any event;
- Restricting the numbers of night time events;
- Restricting the numbers of electronically amplified events;
- Restricting the numbers of events exceeding 100 participants to no more than 25 per year;
- Requiring management of traffic when more than 100 attendees were anticipated at any function;
- Restricting ticket sales to presale only; and
- Requiring an upgrade of the capacity of the carpark.

Mr McFadden amended the present application to include those restrictions, but also gave an undertaking to apply under s127 RMA to vary the conditions of the 1991 Consent accordingly.

[60] It will be readily apparent that with one possible exception (which we will address in due course), the imposition of conditions of the kind set out above, are not related in any way to the effects of this current proposal to establish a 25 seat crematorium/chapel and memorial gardens which will operate between 9.00am and 6.00pm (or dusk in the case of the memorial gardens). It seems that the Council Hearings Commissioners opportunistically seized upon the current application as a medium to rectify allegedly unsatisfactory aspects of the 1991 Consent. GOTWL has apparently acquiesced in that process fearing an otherwise unfavourable outcome to its application. Certainly, the Commissioners could not have imposed such conditions on this consent without that acquiescence. However, even if the volunteered conditions constitute *Augier* conditions or some form of environmental compensation there are a number of real difficulties with these conditions.



[61] Firstly, the conditions which purport to control the operations of events including weddings, funerals, concerts and other private and public functions are outside the scope of the current application. There was no suggestion in the application that the proposal extended to control of the wider and unrelated operation of Gardens of the World. More parties may possibly have submitted on the application had that been the case.

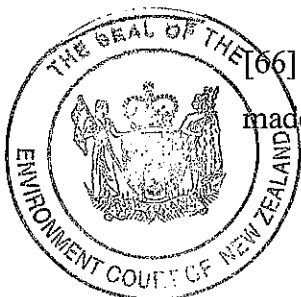
[62] Secondly, the conditions imposed, on their face, can only apply to the activities allowed by the current application, namely establishment of the crematorium/chapel etc. Events such as those identified in the preceding paragraph are allowed by the 1991 Consent which has its own set of conditions.

[63] Thirdly and related to both the preceding issues, the GOTWL application did not purport to be nor does it constitute an application to vary or cancel the terms of the 1991 Consent. Mr McFadden's undertaking to the Commissioners that an application would be made to vary that consent and the Commissioners' acceptance of that undertaking seem to be a tacit acknowledgement of that proposition.

[64] The outcome of the process adopted by the Commissioners is that operations of Gardens of the World now appear to be subject to two sets of conflicting conditions (if this current approval stands). Firstly, those purportedly imposed in this approval and secondly, those contained in the 1991 Consent, which may or may not ultimately be amended to be consistent with the conditions imposed in this approval. That latter outcome cannot be guaranteed one way or the other.

[65] It appears clear to us that if there was to be any variation of the terms of the 1991 Consent that ought to have been done by a specific application pursuant to s127 RMA with the Council having appropriate regard to public notification requirements, the provisions of s127(4) and the like. However, those matters are not for us to determine or direct.

[66] We are aware that an application to vary the 1991 Consent could have been made as part of the current application. Even though the amendments to conditions



proposed by GOTWL do not arise out of the current proposal, they could have been volunteered as a form of environmental compensation or as a positive environmental effect of the current proposal by way of *Augier* conditions. However those things were not done. Instead, the conditions in question appeared only after the Council hearing. In our view the conditions are beyond the scope of the application and in any event unsupportable because they are in conflict with the still current and operative conditions of the 1991 Consent.

[67] The issue of a proposed amendment to the 1991 Consent was drawn to the attention of the Court by way of a memorandum from Counsel for the Council dated 18 October 2010. At that time this appeal was on track for a hearing in early 2011. The memorandum suggested that there were two ways in which the question of amending the 1991 Consent might be addressed as part of these appeal proceedings, namely:

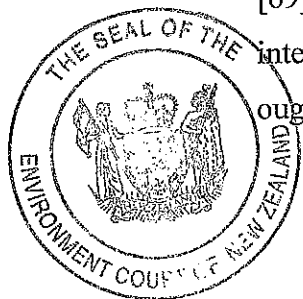
- To place the current appeal on hold until the 1991 Consent was varied and/or any appeal filed in respect of the application for variation had *caught up* with this appeal; or
- To proceed with hearing the current appeal and (if consent was upheld) to issue an interim decision which would become final once the 1991 Consent had been varied in accordance with the suggested conditions.

[68] Those matters were the subject of a pre-hearing conference in October 2010. Having heard the parties, the Court issued the following minute dated 28 October 2010:

*I record that if the Court considers it appropriate to grant consent in this matter, then we will proceed by way of interim decision to enable co-ordination of the conditions of consent with the conditions of an existing 1991 consent.*

This minute was issued without the Court having had the opportunity to consider the evidence which would be presented in these proceedings.

[69] Consideration of the evidence led to the Court revisiting the matter of an interim decision. It appeared to the Court that if we reached a conclusion that consent ought be granted to the current proposal, even when its effects were considered



cumulatively with the Gardens of the World's present activities, then it would be inappropriate to hold up the grant of consent pending determination of any application for variation of the 1991 Consent. Similarly, there would be no need to require Mr McFadden to honour the undertaking given to the Hearings Committee to apply to vary the 1991 Consent.

[70] We signaled our view to the parties during the course of these proceedings and asked them to identify any prejudice which might be occasioned to them should we determine to issue a final decision on this appeal rather than an interim decision and to not hold Mr McFadden to his undertaking.

[71] No party identified any prejudice, however Mr Fowler for LIH requested that GOTWL be held to the undertaking. Mr McFadden formally advised the Court that his client would in fact abide by the undertaking given to the Hearings Committee notwithstanding that the Court might not require it.

[72] In the light of those findings we now turn to address three key issues as to the merits of this application identified by Mr Fowler, namely (in summary):

- Rural character and amenity;
- Discharge to air;
- Non-rural land use.

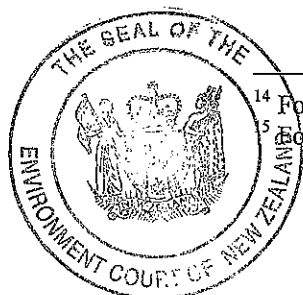
**Effects on rural amenity and character (including traffic and noise)**

[73] Mr Fowler submitted that there would be adverse effects on rural amenity and character if the application is approved and that the proposed activities must be considered in combination with the activities already permitted and/or authorised on the site.<sup>14</sup> He focused on visual effects, noise and traffic. In his further submissions he said:<sup>15</sup>

*For completeness, it is considered that cumulative effects remain a key issue in this case if the Court decides that the 1991 consent authorises commercial outdoor activities.*

<sup>14</sup> Fowler opening submissions at [46].

<sup>15</sup> Fowler further submissions at [43].



[74] Mr Ironside, for the Council, agreed that the effects had to be assessed in the context of what is lawfully able to be done on the site. Given the volunteered conditions to the 1991 consent, the Council supported the grant of consent to this proposal and considered that the effects would be *barely discernable*.<sup>16</sup>

[75] It was GOTWL's position in these proceedings that the crematorium/chapel was a *low key* operation with limited (if any) adverse effects and that those effects must be assessed in the light of the existing environment, which included Gardens of the World operating in accordance with the 1991 Consent.

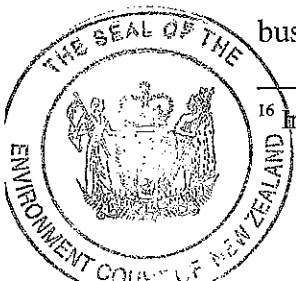
[76] We have already determined that the 1991 Consent allows outdoor events and functions undertaken as commercial activities at the Gardens of the World. Accordingly we consider the effects of this proposal in the context of the existing environment as defined by permitted activities and activities undertaken in accordance with the 1991 Consent.

*The existing environment*

[77] The Gardens of the World complex was opened to the public in 1994. Not unnaturally, the extent of use of the Gardens for a range of activities has grown since their initial establishment as plantings have been completed and matured and as public knowledge of their existence and qualities has become more widespread. The Gardens are open to members of the public on payment of an admission fee. They are visited and enjoyed throughout the year by residents and tourists. In addition, they are regularly hired out for a range of events including picnics, concerts, weddings and funerals.

[78] Mr Etherington gave evidence as to the numbers of events held in the Gardens over the period 1998 – 2008 (prior to sale to GOTWL). Exhibit 1 was a schedule which he had prepared identifying the number of functions per year, number of weddings per year and the number of events (functions and weddings) when more than 40 persons attended the Gardens. He did not know how many events involved more than 100 people although considered most weddings and a few of the bus tour groups to be easily over 100. He explained that the recorded figures were for

<sup>16</sup> Ironside opening submissions at [5].



paying adults only as children were admitted free of charge. Similarly, school and pre-school picnics and parties and charity functions were not recorded.<sup>17</sup>

[79] The highest number of recorded functions (other than weddings) held in any one year was 51 (in 2003) with an average of 37 per annum. The highest number of weddings held at the Gardens in any one year was 24 (in 2005) with an average of 14 per annum. The highest number of recorded events (functions and weddings) in any one year was 68 (in 2003) with 30 of those attracting over 40 persons to the site. The average number of recorded events attracting more than 40 persons was 21 per annum.

[80] Other evidence as to activities undertaken on the site, while owned by the Etheringtons and since it was purchased by GOTWL, was given by Ms T M Zimmerman. Ms Zimmerman is a member of LIH and lives on Clover Road East across the road from the carpark area of the Gardens. She has resided on this property for the past 14 years and was an *at home Mum* through the period 1997 to 2004. Ms Zimmerman considered that the Gardens had been *used very little for outdoor functions* prior to 2009 and she estimated an average of 10 weddings and 10 other functions per year.<sup>18</sup>

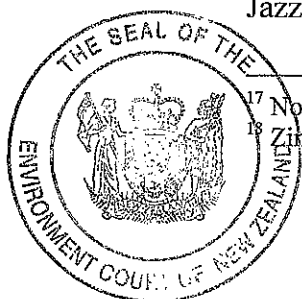
[81] Ms Zimmerman considered the new owners to have ramped up their marketing and activity at the site. She detailed funerals where the existing carpark had been unable to cope with all of the attendees' vehicles resulting in cars parking along the roadside. In two other instances the grapefruit orchard in the neck of the property was used for carparking.

[82] Additionally, there have been weddings and functions with amplified music, one of which involved yodeling and fireworks at 10 pm. Church fundraising events happened in the Gardens and at Christmas 2010 a *Carols in the Gardens* function was held as a fundraiser for children's services at Nelson Hospital. This function involved families picnicking in the Garden area and being entertained by the Nelson Jazz Club, a string quartet and the Salvation Army Band, with the function

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<sup>17</sup> NoE at 70–72.

<sup>18</sup> Zimmerman EiC at 2–3.



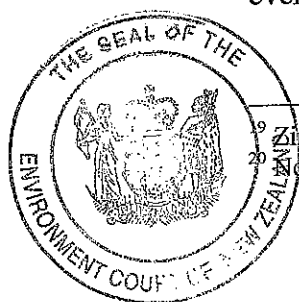
concluding at 8 pm. The amphitheatre at the Gardens provides a highly attractive venue for this sort of function. Ms Zimmerman described the traffic arrangements for the Carols' function as *chaos*.<sup>19</sup>

[83] During cross-examination Mr Etherington confirmed that there had been an increase in activity at the site commenting *it certainly will be an increase but I had hoped for that, in any case, if I had kept it*. He accepted that most events were held in the summer months rather than spread throughout the year.<sup>20</sup>

[84] We note from Mr Etherington's figures that his busiest period was 2002 to 2006 with 60 to 70 events per year, 20 to 30 of these having in excess of 40 persons present. There had been a steady decline in events since 2006 under the Etheringtons' management. Given that most of the larger events were weddings, many would have involved more than 100 persons. This level of use is greater than that observed by Ms Zimmerman although her observations are consistent with the estimated number of events involving more than 100 adults. This is not surprising given that the site is well screened and smaller events may go unnoticed.

[85] While we have no figures for the use of the site since 2008 we have no reason to doubt Ms Zimmerman's observation that activity has increased with the new ownership. However the events described (including weddings, funerals and concerts) are allowed by the 1991 Consent and appear to be within the scope of that consent. The effects due to traffic and noise are subject to conditions regarding the provision of car parking and defining maximum noise levels.

[86] While there is no condition in the 1991 Consent limiting the number of people who may attend an event on the site, the scope of activities was signaled by the application documents, stating an intended theoretical maximum of 300 for entertainments and special functions. We accept that some events, such as the *Carols* in 2010, may attract more than 300 people and that numbers attending any particular event may be difficult to predict. Even based on Ms Zimmerman's evidence



<sup>19</sup> Zimmerman EiC at 6–8.

<sup>20</sup> EiC at 15–16.

however, there appear to be very few events/functions which have exceeded 300 persons.

*Traffic and road safety*

[87] Mr R I Aubrey (a surveyor and member of LIH) purported to give expert evidence about the adequacy of Clover and Paton Roads and raised issues of traffic safety. He considered events at the Gardens raised the potential for conflict between users of the site and for serious accidents at the intersection of Paton Road and Clover Road West. He contended that Paton Road was inadequate for existing traffic volumes and considered the adverse cumulative effects of traffic from the Gardens and proposed crematorium/chapel to be *major*. Mr Aubrey attached a Council safety audit and NZTA accident records in support of his concerns. He painted a somewhat bleak picture of the state of the nearby roading system.

[88] Ms Zimmerman recognized the two distinct operations on the site and was concerned about overlap, that is, when a large scale funeral is held in the Gardens followed by a cremation at the proposed chapel/crematorium.<sup>21</sup>

[89] Mr D D Petrie (a traffic engineer called by GOTWL) considered that the additional traffic generated by the proposed crematorium/chapel and memorial gardens (estimated at between 23-52vpd<sup>22</sup>) is readily able to be accommodated within the roading network and that the parking demands were able to be met on site.<sup>23</sup> He searched the NZTA database for statistics relating to accidents on Clover and Paton Roads in the vicinity of the site. There have been four accidents in the last five years, all of which were related to inexperience or alcohol, rather than any inherent problems with the road environment.<sup>24</sup> Mr Petrie did not think that nearby roads or intersections would reach capacity or be unsafe as a consequence of the additional traffic generated by the crematorium/chapel.<sup>25</sup>

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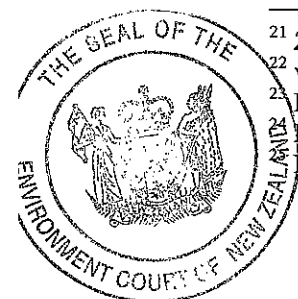
<sup>21</sup> Zimmerman EiC at 4.

<sup>22</sup> vpd = vehicles per day.

<sup>23</sup> Petrie EiC at [5].

<sup>24</sup> Petrie EiC at [13].

<sup>25</sup> NoE at 54-55.



[90] Mr G P Clark (Transportation Manager for the Council) was concerned that more funeral services will take place in the Gardens than at present as a result of establishment of the crematorium/chapel, with a consequent increase in occasions of elevated traffic numbers. He considered the resulting traffic to be difficult to predict and recommended a traffic management plan be prepared to address parking and road safety.<sup>26</sup> During cross-examination he used the example of the recent *Carols* event at the Gardens where very good measures were put in place to manage traffic and provide additional parking.<sup>27</sup>

[91] When asked about accidents in the area Mr Clark did not consider road factors to be significant. He said:<sup>28</sup>

*... typically the crashes we have along Paton Road relate to speed and alcohol. There is also an element of youthful driving, I suppose you would call it, some would call it boy racer mentality...*

[92] In response to questions from the Court, Mr Clark confirmed that he agreed with Mr Petrie that the very low volume of crematorium traffic could be accommodated within the current environment with less than minor effects. His concern was with the potential for an increase in the number of large funerals undertaken at the Gardens due to the nearby presence of the crematorium. He agreed that this possibility could be covered by a review clause related to traffic problems as a result of a marked increase in the number of funerals.<sup>29</sup>

[93] Mr Day addressed the matter of potential for increase in the number of funerals held on site due to the convenience of having the crematorium in close proximity to the Gardens. He did not consider any increase would be great, partly because of weather concerns (particularly over the winter) and partly due to the impact of technology, with a demand for PowerPoint presentations, sound systems and live streaming of funerals around the world which cannot be accommodated at the Gardens.<sup>30</sup>

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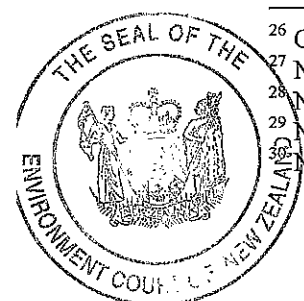
<sup>26</sup> Clark EiC at [15]–[20].

<sup>27</sup> NoE at 170.

<sup>28</sup> NoE at 168.

<sup>29</sup> NoE at 175–177.

<sup>30</sup> NoE at 31.

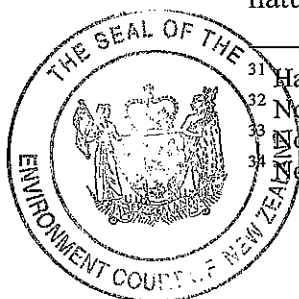


[94] Ms J S Harley (a planner called by the Council) considered that the cumulative effects of the proposed activities in combination with the existing activities were likely to be significant if the events and functions permitted under the 1991 consent were to remain unrestricted. However her concerns had been resolved by the volunteered restrictions to the 1991 consent conditions.<sup>31</sup> She clarified that her concerns with respect to cumulative effects were only in relation to traffic.<sup>32</sup>

[95] In response to questions from the Court, Ms Harley confirmed that any increase in funerals at the Gardens, which might lead to traffic problems, could be dealt with through a specific review condition. She did not think the concern was so great that consent should be declined. She explained that the Council's approach to traffic had been in response to concerns expressed by submitters and the Council would have been *irresponsible to ignore that and just deal with the crematorium traffic*.<sup>33</sup> Ms Harley agreed that the potential for traffic conflict between the crematorium and the Gardens, when a large event was being held, could be managed by the consent holder.<sup>34</sup>

[96] We accept the evidence of Mr Clark and Mr Petrie that the traffic generated by the crematorium/chapel can readily be accommodated without safety concerns. Both of them pointed to the capacity of Paton Road and Clover Road East to accommodate at least 1500 vpd as compared to their existing flows of 852 vpd and 657 vpd respectively.

[97] Mr Aubrey's evidence was of no assistance to the Court. Such experience he might have acquired in traffic matters as a surveyor and land development consultant was coloured by his lack of impartiality as a member of LIH. His conclusions as to the causes of three fatalities which have occurred on Paton Road over the past nine years were based on assumptions. Mr Aubrey attached a NZTA Crash List Detail Report for 2000-2010 to his evidence to support his contention as to the unsafe nature of roads in the vicinity. The report encompassed an area well beyond the



<sup>31</sup> Harley EiC at [30].

<sup>32</sup> NoE at 210–211.

<sup>33</sup> NoE at 230–232.

<sup>34</sup> NoE at 223.

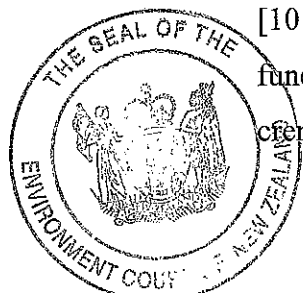
environs of the site and appeared to establish that the overwhelming cause of those accidents which had occurred in this area were driver/vehicle factors rather than roading factors. We prefer the considered evidence of Messrs Petrie and Clark by a substantial margin.

[98] We agree with Mr Clark that the establishment of the crematorium/chapel might lead to more funerals taking place at the Gardens, followed by a cremation at the proposed facility. The factors of proximity of the crematorium/chapel and ownership of Gardens of the World by a funeral directing business create an obvious synergy. Mr Day considered that any such increase would be limited. Only experience will determine the extent of any increase and the extent to which it is brought about by the presence of the crematorium/chapel. Day's ownership of itself might bring about an increase in use of the Gardens for funerals in the long term, irrespective of whether or not the crematorium/chapel proceeds.

[99] We find that there would be no adverse effects due to the small increase in traffic generated by the crematorium/chapel and memorial gardens, even when considered in conjunction with Gardens' traffic. The very small number of cars needed to convey mourners to the 25 seat crematorium/chapel will have no discernable impact on nearby roads and will have ample parking available in the dedicated car park which the Applicant is to provide.

[100] The likelihood of cremations regularly coinciding with large functions at Gardens of the World seems remote in any event, although we accept that it may possibly happen from time to time. Cremations are to take place between 9.00am and 6.00pm, whereas functions such as the *Carols* are often twilight/evening events. GOTWL controls activities on both parts of the site and it is in its own interest to minimize clashes as much as possible. It seems unlikely that a funeral director would wish to conduct a service in the chapel/crematorium while a band is playing in the Gardens.

[101] However, even if it is accepted that there will be an increase in the number of funerals held at Gardens of the World due to their proximity to the crematorium/chapel, the 1991 Consent allows the use of the Gardens for that



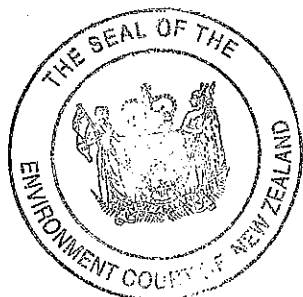
purpose. The 1991 Consent required the Gardens to provide parking for up to 300 people attending any of the various outdoor functions (including funerals) which could be held there. Ms Zimmerman provided evidence about a number of funerals and other functions at the Gardens since Days took ownership. She did not identify that any of the funerals involved more than 300 attendees.

[102] We accept that there is some possibility of there being a consequential increase in the numbers of funerals at the Gardens following the establishment of the chapel/crematorium and thus some possibility of increased instances of parking spillover. We see that as largely an amenity concern in presenting a temporary nuisance to local road users. That potential effect may be managed by appropriate conditions on the consent for this proposal.

[103] The primary control on traffic effects of the crematorium/chapel itself, is the small size of the chapel which is designed to accommodate only 25 people, as we previously observed. Condition 8 of RM 090538 specifically limits the seating capacity to 25 persons. It was difficult to reconcile the likely traffic effects of a small number of mourners moving to and from a service with the traffic concerns expressed by LIH, even if there was some other event at Gardens of the World at the same time.

[104] A further condition which provided for monitoring of the number of funerals involving larger numbers of people (in excess of 200, being the problem figure identified by Ms Zimmerman) would address the potential problems of regular large funerals. If there are such funerals occurring in conjunction with the operation of the crematorium/chapel and traffic problems are experienced, then the consent holder should be required to produce traffic management plans. This could be achieved by inserting an additional condition after present condition 16 of RM090538, if consent is granted:

17. *The consent holder shall monitor the number of funerals held at the adjacent Gardens of the World that are followed by a cremation at this facility. The approximate number of people attending such funerals shall be recorded. The records shall be forwarded to the Council every six months for the first three years of the crematorium operation. If there are*



*more than 5 of such funerals per year, that individually involve more than 200 people, the Council may review the conditions of consent to require the provision of a traffic management plan for the site.*

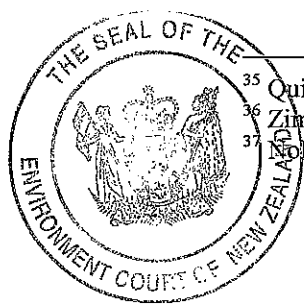
### Noise

[105] Mr T G Quickfall (a planner called by GOTWL) considered that noise effects from the proposed activities would be no more than minor and would meet the permitted activity standards in the District Plan.<sup>35</sup> Mr Quickfall said that any cumulative effects could only be those arising from people visiting the crematorium/chapel (25 people and about 8 cars) and the memorial gardens (about 3 cars at any one time).

[106] Ms Zimmerman was concerned about noise from the site and in particular from amplified events.<sup>36</sup> Much of her evidence dealt with the existing activities on the site and the increase in events since 2008. Her concerns appeared to bear no relationship to funeral and cremation activities whatever. Although funerals usually have a musical component, that is commonly restrained in nature and limited in duration. Cremations are to be limited to 9.00am-6.00pm so that any musical component of funerals associated with the crematorium will be similarly limited to those hours.

[107] Mr D G Caradus (the Council's Environmental Health Officer) had no concerns about the operation of the proposed crematorium/chapel with respect to noise. He also confirmed that he could not recall, over his 13 years of involvement with environmental noise, any complaints about noise from a funeral service.<sup>37</sup>

[108] Mr Caradus had checked the Council records and reported that three complaints were made on Saturday 18 December 2010 about noise from a live band on the site. The Council's contractor investigated and determined that the noise was unreasonable at the complainant's property. The Council records also contained a letter, written in April 2010, noting a history of noise. Prior to this no complaints had



<sup>35</sup> Quickfall EIC at [6.3].

<sup>36</sup> Zimmerman EIC at 8.

<sup>37</sup> NoE at 199-200.

been received about noise from this site although there were a number of complaints about noise occurring on neighbouring properties.<sup>38</sup>

[109] Mr Caradus noted the volunteered conditions to the 1991 Consent that would restrict the number, duration and type of events (with respect to number of persons and use of amplified music). He considered that these conditions would be effective in reducing the potential for nuisance noise generated from the activities on site.<sup>39</sup>

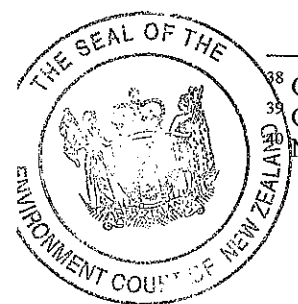
[110] In response to questions from the Court, Mr Caradus confirmed that the proposed conditions of consent were more restrictive than those that would apply to the neighbouring properties with respect to rural activities such as trimming hedges. He considered it difficult to define rural activities although accepted that the District Plan did list examples.<sup>40</sup>

[111] As with the issue of traffic, concerns about noise are largely, if not entirely, related to existing activities on the site and the fear that these activities may increase. While we accept that there is the potential for existing activities to generate nuisance noise we do not consider that it is appropriate to deal with this issue through the current consent application. There is no relationship whatever between the noises allegedly generated by amplified bands, yodeling, fireworks, drunken laughter and loitering youths complained about by Ms Zimmerman and the funeral/cremation activities proposed by the Applicant on the site.

[112] We find that there would be no adverse effects from the noise generated by the proposed crematorium/chapel. Condition 12 of RM 090538 imposes noise standards on the cremation/chapel activity and there is no suggestion that the activity cannot comply with those standards. We do not consider it appropriate to limit typical rural activities, such as hedge trimming or lawn mowing which might be undertaken on the site, by capturing these within the noise condition imposed on this consent. If the consent is upheld, Condition 12 should be amended to add:

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<sup>38</sup> Caradus EiC at [13]–[14].  
<sup>39</sup> Caradus EiC [16]–[18].  
<sup>40</sup> NoE at 199.



*Except that this condition does not apply to noise from any intermittent or temporary rural activity, including noise from: mobile horticultural and agricultural equipment; forestry and tree harvesting activities.*

*Effects on rural amenity generally*

[113] Mr R M Langbridge (GOTWL's landscape witness) had prepared the landscape plan for the memorial gardens which will be developed as an extension to Gardens of the World. Established trees and existing shelter belts are largely retained and additional perimeter planting is proposed.<sup>41</sup> Mr Langbridge noted that the Gardens had been present for some 18 years and *partially defined* the locality. He considered the immediate area, with the Gardens and a cluster of houses, to be *peri-urban* rather than rural in nature.<sup>42</sup>

[114] The crematorium/chapel building is proposed to be located some distance from the road and would be screened by the planting. Mr Langbridge considered the building to be of a domestic scale and the development to have no effect on the amenity values of the area.<sup>43</sup> He considered the trees and landscape of the area to have a high absorption capacity and the site to be able to cope with this level of development without any impact on the prevailing character values.<sup>44</sup>

[115] In contrast, Mr S A Richards (a member of LIH and a landscape design consultant) considered the proposed development to extend the rural residential character further out into the rural area. He regarded the increased traffic movements as introducing commercial character and the signage to provide a visual cue of *non-soil based operations*. Overall he considered the development to be inappropriate and unsympathetic with the established rural character and amenity of the area.<sup>45</sup>

[116] In addition to her concerns about traffic and noise, Ms Zimmerman expressed concern about the presence of the crematorium itself:<sup>46</sup>

<sup>41</sup> Langbridge EiC at [3.1]–[3.3].

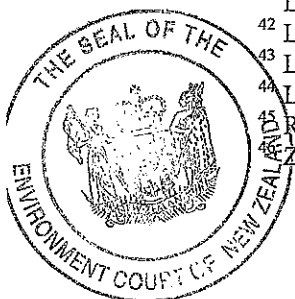
<sup>42</sup> Langbridge EiC at [5.2]–[5.10].

<sup>43</sup> Langbridge at [7.1]–[7.3].

<sup>44</sup> Langbridge at [6.1]–[6.3].

<sup>45</sup> Richards EiC at [6.1]–[6.6].

<sup>46</sup> Zimmerman EiC at 9.



*On a personal level I am uncomfortable living next to where people are cremated. I find the GOW proposal depressing and unattractive in nature. I would prefer not to be constantly saddened by the thought of the activities taking place across the road from me and feel my amenity will be affected.*

[117] Mr M D Allan (a planner called by LIH) considered the *presence of non-rural activities operating from the site* to be an adverse effect on rural amenity, even if the activity was screened from view.<sup>47</sup> He accepted that the visual effects of the proposed buildings would be minor and mitigated by the proposed tree planting.<sup>48</sup> Mr Allan initially identified noise and traffic as significant adverse effects, in particular cars parking outside of the site, and noted that the proposal threatens to undermine *community cohesion*.<sup>49</sup> We understood the concept of community cohesion to be that the level of community opposition to any given proposal indicates that the proposal's adverse effects significantly outweigh any benefit from it. Regrettably, Mr Allan did not address the issue of whether or not that community opposition should be well founded.

[118] During cross-examination Mr Allan accepted that the proposal did have benefits for the wider community by providing an appropriate setting for people to farewell family and friends. However he did not consider those benefits to be significant. He accepted that in his assessment of the proposal, he had focused on the adverse effects on those living in the immediate vicinity.<sup>50</sup> He also accepted that a chapel and gardens were common features which could be expected in a rural zone. He explained that it was the crematorium and the commercial nature of the operation that made it contrary to what was expected.<sup>51</sup>

[119] Mr Allan also accepted that the proposed chapel, crematorium and memorial gardens, on their own, would not have adverse effects with respect to noise or traffic safety.<sup>52</sup> We understood Mr Allan to accept that the crematorium/chapel building would be largely unseen from the surrounding area. His concern with respect to rural

<sup>47</sup> Allan EiC at [45].

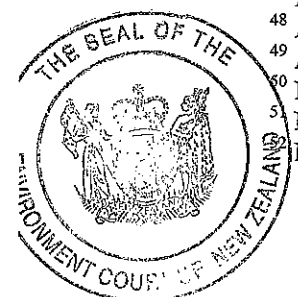
<sup>48</sup> Allan Rebuttal at [10].

<sup>49</sup> Allan EiC at [47].

<sup>50</sup> NoE at 332-334.

<sup>51</sup> NoE at 335.

<sup>52</sup> NoE at 348.



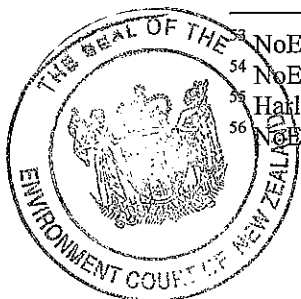
amenity was people's knowledge of the *non-soil based* activity being undertaken on the site given the visual cues of signage, vehicle and people movements.<sup>53</sup> In response to questions from the Court Mr Allan accepted that there were non-soil based activities which could be expected and deemed appropriate in the Rural zone, for example, a country church.<sup>54</sup>

[120] Ms Harley considered the proposed landscaping to be positive with respect to visual amenity and the proposal to be *not out of character* with the surrounding rural/residential properties. The crematorium/chapel will be screened from view. Given the large size of the property, the location of the buildings and the extensive screening she had no concerns with respect to reverse sensitivity issues.<sup>55</sup>

[121] Mr Langbridge was also questioned about the potential for reverse sensitivity with the crematorium/chapel operation being affected by surrounding rural activity. He agreed that the tranquility of the memorial gardens was important for visitors but he did not think absolute silence was required. He did not think that mowing, spraying or trimming operations on the neighbouring vineyard would detract from that tranquility.<sup>56</sup>

[122] We observed that Gardens of the World forms a distinctive pocket of formal landscaping, largely enclosed by dense perimeter planting, within a rural/residential enclave, in turn surrounded by farming, horticultural and viticultural land use. There is no doubt that the Gardens contribute positively to both the amenity and character of the locality. Their use by casual visitors and for other events is well established. The memorial gardens will complement and extend the existing gardens and the chapel/crematorium is visually contained within the site.

[123] Primary production is not the only land use which can be expected in rural areas. Rural areas contain private residences, schools, churches (and often church yard cemeteries), community halls and commercial activities not necessarily related



<sup>53</sup> NoE at 350 and 361.

<sup>54</sup> NoE at 366–367.

<sup>55</sup> Harley EiC at [61]–[70].

<sup>56</sup> NoE at 39.

to primary production. For example, cafes and galleries are part and parcel of a vibrant and varied rural landscape, particularly in close proximity to urban areas such as this. We see no reason to regard a particular activity or building as detracting from rural amenity simply because it is not related to primary production or soil based activities as Mr Allan contended.

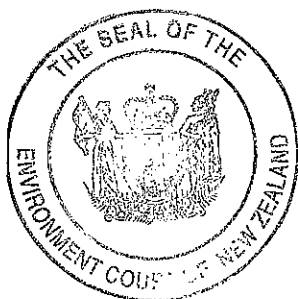
[124] We accept that some people are uncomfortable with death and dying and do not wish to live in close proximity to a funeral home or crematorium or cemetery. Ms Zimmerman expressed precisely that opinion. Some may even find a hospice difficult. However such facilities are an essential part of every community. We do not consider that discomfort on the part of some individuals to the mere presence alone of a particular facility amounts to an adverse effect on amenity values. If that was the case, any proposal would be vulnerable to the discomforts of its opponents no matter how irrational or ill founded those discomforts might be.

[125] We find that the proposed memorial gardens would be beneficial to local amenity values and that the crematorium/chapel would have no adverse effects on amenity. Nor do we consider reverse sensitivity to be a significant concern. Gardens of the World has been operating and hosting both weddings and funerals for a good number of years, without complaining about or seeking to curtail rural activities in the surrounding area. We note that the review condition imposed on the consent includes an assessment of any reverse sensitivity effects that might arise. The proposal is complementary to the adjacent Gardens of the World and would provide a necessary and extremely attractive facility for the wider community.

### **Discharge to Air**

[126] The proposed gas fired cremator will discharge contaminants to the air through a short stack. We heard evidence as to the nature of those discharges and as to their potential effects from four witnesses;

- Mr JG Iseli – an air quality scientist called by GOTWL;
- Mr R Pilgrim – an air quality scientist also called by GOTWL;
- Mr AW Smith – a horticultural advisor with experience in agrichemical application called by LIH; and



- Mr LD Pigott – a scientist and Coordinator-Natural Resources for the Council.

[127] Mr Iseli described the cremator as an advanced unit designed for sensitive areas. The two chamber design reduces emissions of combustion products (including smoke) compared to conventional boilers or furnaces. An opacity monitor combined with automatic correction of operation, triggered at 15% opacity, ensures smoke emissions are minimal.<sup>57</sup>

[128] Mr Fowler submitted that the discharges would have adverse effects on surrounding agricultural production, particularly viticulture.<sup>58</sup> While acknowledging that it was not possible to say conclusively that contamination of wine would or would not occur he submitted that any contamination would have significant adverse effects including non-compliance with regulations, loss of organic certification, consequent economic losses and wider implications for the wine industry in the region and beyond.<sup>59</sup> Mr Fowler went on to contend that even the presence of a crematorium in proximity to local vineyards would irreparably damage the image of the vineyards and the region.<sup>60</sup>

[129] Mr Ironside submitted that there were three issues raised with respect to the discharge of contaminants to air – first the risk of mercury contamination, second, the perception of contamination, and third, the resulting decisions of consumers of wine.<sup>61</sup>

[130] Mr McFadden submitted that the level of possible mercury emission from the crematorium would be very low and not such as to give rise to any adverse effects----- that are more than minor.<sup>62</sup>

<sup>57</sup> Iseli EiC at [2.3]–[2.5].

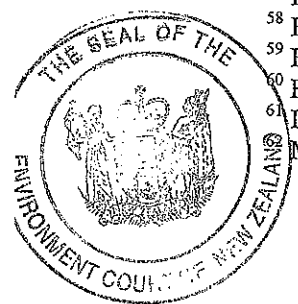
<sup>58</sup> Fowler opening submissions at [63].

<sup>59</sup> Fowler opening submissions at [65].

<sup>60</sup> Fowler opening submissions at [72].

<sup>61</sup> Ironside opening submissions at [30].

<sup>62</sup> McFadden opening submissions at [7.18].



*Discharge of contaminants to air*

[131] The air quality witnesses had conferred<sup>63</sup> and agreed that predicted discharges of sulphur dioxide and particulate matter from the cremator would not result in adverse effects on crop production and nor would there be any visible emissions. They also agreed that the predicted concentrations of mercury in soil (from the discharges and subsequent deposition) would be acceptable provided that a proposed soil monitoring programme was implemented. They did not agree on the risk of adverse effects from mercury with respect to the organic status of crops and BioGro<sup>64</sup> standards. They considered the BioGro limit for mercury in food to be 0.01 mg/kg.

[132] The operation of the crematorium is limited by the proposed conditions of consent<sup>65</sup> to a maximum of 365 cremations per year and a maximum of three per day, unless there are special circumstances. Mr Iseli based his assessment of effects on 365 cremations per year for annual average contaminant concentrations and 3 cremations per day for daily averages. He stated that he had used conservative emission rates to model the dispersion of contaminants.<sup>66</sup>

[133] Mr Iseli used an atmospheric dispersion model to predict the ground level concentration (GLC) of contaminants. He noted that the predicted maximum GLC would occur within 30m of the crematorium/chapel and would decline rapidly beyond this point with increasing distance from the stack. Given his conservative assumptions, he considered that the concentrations modelled were likely to be over-predicted. Mr Iseli acknowledged that the model results had limited precision with respect to the exact location and value of the maximum GLC. He considered the level of precision to be adequate given that the predicted concentrations are much less than the relevant air quality guidelines and standards.<sup>67</sup>

[134] In response to questions from the Court, Mr Iseli advised that as a matter of practice, extraneous items (for example, transistor radios) which are sometimes

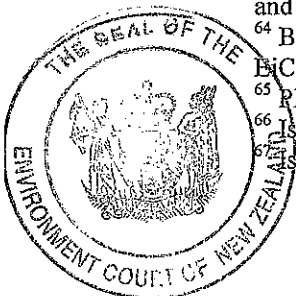
<sup>63</sup> Agreed statement, air quality experts, dated 7 February 2011 signed by Messrs Iseli, Smith, Pilgrim and Pigott.

<sup>64</sup> BioGro New Zealand Limited is an organic certification agency as explained by Mr Greenhough EIC at [21].

<sup>65</sup> Planners' joint statement, dated 4 February 2011.

<sup>66</sup> Iseli EIC at [4.1]–[4.11].

<sup>67</sup> Iseli EIC at [6.1]–[6.7].



placed with the deceased, should be removed from caskets if they were dangerous or may cause contaminant emissions.<sup>68</sup>

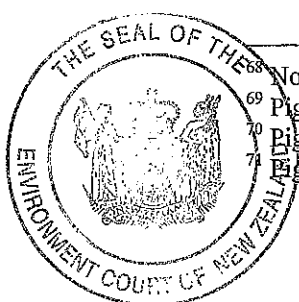
[135] Mr Pigott considered the critical contaminants from cremator discharges to be particulates and metals, notably mercury.<sup>69</sup> He was satisfied with both the model chosen by and the modelling assumptions made by Mr Iseli. He agreed with Mr Iseli that the GLCs were likely to be an overestimate.<sup>70</sup> Mr Pigott considered that the discharges would not significantly degrade the ambient air quality, that discernable odour from the discharges was highly unlikely and that the discharge point itself was well screened. He concluded that the discharges would not be contrary to the objectives and policies of the District Plan.<sup>71</sup>

[136] The predicted levels of contaminants are well within the National Air Quality Standards and Ambient Air Quality Guidelines and would be barely discernable above typical rural background concentrations. No visible smoke is expected during operation of the cremator. Accordingly we accept that there are no concerns with respect to public health and no effects on the health or visual amenity of even the closest residents.

[137] While the modelled contaminant emissions are well within the standards and guidelines we consider that the conditions of consent could be improved to ensure that any such emissions are minimised.

[138] Accordingly we consider that if consent was to be granted, Condition 12 of Resource Consent RM090539 should be amended to read:

*12. The consent holder shall take all reasonable steps to reduce and minimise the quantity of materials combusted that are likely to generate unacceptable emissions. Any handles and nameplates that are made from chlorinated plastic or solid metal shall be removed from the casket exterior prior to cremation. Any extraneous items*



<sup>68</sup> NoE at 99–100.

<sup>69</sup> Pigott EiC at [25].

<sup>70</sup> Pigott EiC at [78]–[82].

<sup>71</sup> Pigott EiC at [88]–[93].

*(such as radios, mobile phones, alcohol, golf balls etc) shall be removed from the casket prior to cremation.*

[139] Condition 13 of the same consent should also be amended to read:

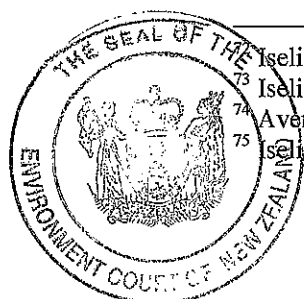
*13. The consent holder shall not discharge any contaminant to air at a rate or a quantity such that it is liable to be hazardous or toxic or noxious at or beyond the boundary of the property. The discharge shall not cause odour or particulate matter that is offensive or objectionable beyond the boundary of the property on which the consent is exercised.*

#### *Discharge of mercury*

[140] The possibility of mercury contamination of crops from the cremator discharges was a vigorously debated issue in these proceedings. LIH contended that mercury contamination could occur through the deposition of mercury onto the crops or the soils of neighbouring properties. It was common ground that mercury is a component of cremator discharges. The source is mercury amalgam in dental fillings, which is vaporised by cremation.

[141] In undertaking his calculations, Mr Iseli used an average emission rate of 2.1 g mercury per cremation.<sup>72</sup> The dispersion modelling predicts a maximum (averaged over one year) ground level concentration of mercury of  $1.4 \times 10^{-3} \mu\text{g}/\text{m}^3$  at the property boundary compared to the NZ Ambient Air Quality Guideline of  $0.33 \mu\text{g}/\text{m}^3$  (for inorganic mercury).<sup>73</sup>

[142] Mr Iseli compared the mercury emission from one cremation event to that expected from the operation of a coal-fired boiler. He calculated that burning 16 tonnes of Waikato sub-bituminous coal<sup>74</sup> (that is, the fuel used in a 4.3 MW boiler operating for 24 hours) would release an equivalent amount of mercury. He observed that the consented discharge from the nearby Brightwater dairy plant boiler would release 5.3 g of mercury per day.<sup>75</sup>



<sup>72</sup> Iseli EIC at [4.9].

<sup>73</sup> Iseli EIC at [6.15] and Table 1.

<sup>74</sup> Average mercury content 0.13 mg/kg dry weight of coal.

<sup>75</sup> Iseli EIC at [6.37].

[143] Mr Pigott referred to a recent inventory of mercury in New Zealand<sup>76</sup> that estimated the contributions from natural and anthropogenic sources of mercury emissions. Cemeteries and crematoria accounted for 4.2% of the total emissions and all anthropogenic sources accounted for 48%. Natural sources include volcanoes, geothermal areas and volatilisation from soils.<sup>77</sup>

[144] Mr Smith objected to the use of an average value for mercury emissions.<sup>78</sup> He was concerned that a single cremation event, emitting a larger than usual amount of mercury, under particular atmospheric conditions, could cause contamination that would be damaging to the neighbouring crops and vineyards.<sup>79</sup>

[145] Mr Iseli agreed that some cremations could have higher levels of mercury depending on the number of mercury amalgam fillings. However, he maintained that the use of an average mercury value is appropriate as the effects relate to long term exposures and guidelines are based on long term averages.<sup>80</sup>

[146] We will return to the issue of the use of average emission rates and the potential for contamination from single events after considering the potential effects of mercury deposition on crops and soils.

*Mercury accumulation in soils and on crops*

[147] Mr Greenhough grows grapes on the neighbouring property to the north-northeast of the proposed crematorium. The Greenhough vineyard is in the third and final year of conversion to organic status through BioGro. Mr Greenhough noted that his neighbour, to the north, also has a vineyard in the process of conversion to BioGro. He considered the close proximity of the crematorium to have the potential to impact the vineyards' organic status through mercury contamination of fruit. He was also concerned at the potential impact with respect to marketing of his wines.<sup>81</sup>

<sup>76</sup> Mercury inventory of New Zealand 2008, Ministry for the Environment Technical report prepared by Pattle Delamore Partners Limited 2009.

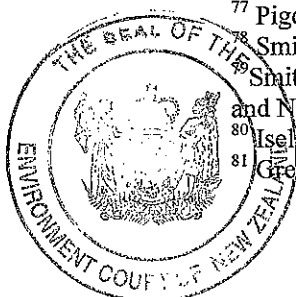
<sup>77</sup> Pigott EiC at [67]–[69].

<sup>78</sup> Smith EiC at [17]–[18].

<sup>79</sup> Smith EiC at [19] and [28]; Agreed statement, air quality experts, dated 7 February 2011 at [2.3]; and NoE at 317.

<sup>80</sup> Iseli rebuttal at [2.7].

<sup>81</sup> Greenhough EiC at [21]–[28].



[148] Mr Smith was similarly concerned about potential accumulation of mercury on grapes and other produce in the area. He considered that if any mercury was detected that product would fail to comply with organic standards and the organic status of the producer would be withdrawn with dire financial consequences.<sup>82</sup>

[149] Mr Iseli presented the results of research<sup>83</sup> into mercury in soil around three crematoria in New Zealand showing the increase in soil mercury concentrations to be correlated with the total number of cremations undertaken. On the basis of that research, he considered that the proposed cremator running at 300 cremations per year for 35 years could increase the soil mercury concentration, at approximately 30 m from the stack, by about 0.06 mg/kg.<sup>84</sup> The background soil mercury concentration at the site has been determined to be 0.06 mg/kg compared to a New Zealand mean of 0.085 mg/kg in surface soils.<sup>85</sup>

[150] Mr Iseli also drew on research into soil and crop concentrations around crematoria in the UK where considerably larger numbers of cremations are carried out, approximately 10 times the rate expected for the proposed facility. The measured concentrations of mercury in soils around these crematoria were small and not considered to be significantly elevated above background levels.<sup>86</sup> The mercury content of crops in the vicinity was also very small, generally below or close to the detection limit of 0.005 mg/kg fresh weight.<sup>87</sup>

[151] Mr Iseli concluded that accumulation of mercury in the food chain as a result of discharges from the proposed cremator would be negligible and that the discharges would not cause the mercury limit in the BioGro standard to be exceeded.<sup>88</sup>

<sup>82</sup> Smith rebuttal at [5].

<sup>83</sup> Nieschmidt K and Kim N D 1997. *Effects of mercury release from amalgam dental restorations during cremation on soil mercury levels of three New Zealand crematoria*. Bull Environ Contam Toxicol 58: 744–751: 1997.

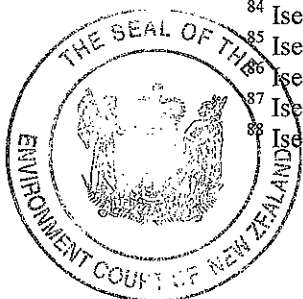
<sup>84</sup> Iseli EiC at [6.21].

<sup>85</sup> Iseli EiC at [6.20] and [6.26].

<sup>86</sup> Iseli EiC at [6.27].

<sup>87</sup> Iseli EiC at [6.30].

<sup>88</sup> Iseli EiC at [9(i)].



[152] During cross examination Mr Iseli agreed that the taller stacks at the UK crematoria were a factor to consider in making the comparison. He also noted building downwash effects but he considered the most important factor in predicting mercury concentrations to be the number of cremations performed. Taking into account the better dispersion from the taller stacks and a ten times greater emission rate for mercury he estimated the concentrations in the vicinity of the proposed crematorium would be about a third of those measured in the UK.<sup>89</sup>

[153] Mr Iseli accepted that the UK research did not specifically monitor grapes and acknowledged that there could be differences in mercury deposition between different types of crop.<sup>90</sup> During cross examination he explained that the highest concentration of mercury on berries at the UK site was 0.006 mg/kg and, given his expectation that concentrations of approximately one third could be expected at the proposed site, there was a considerable safety factor (that is 0.002 mg/kg compared to the BioGro limit of 0.01 mg/kg).<sup>91</sup>

[154] Mr Pilgrim had reviewed Mr Iseli's evidence and concluded that there would be negligible effects on soil mercury levels outside the site and that any mercury on crops would be indistinguishable from background levels.<sup>92</sup> During cross examination he acknowledged the lack of New Zealand data for mercury levels on grapes and explained why he remained confident that the BioGro standard for grapes would not be compromised. Mr Pilgrim went through the factors he had considered in reaching his conclusions:<sup>93</sup>

- The UK studies;
- The absence of any information showing mercury as a contaminant in grapes or wine;
- The small size of the cremator;
- The modern design of the cremator;
- The restriction on the number of cremations;
- The conservative mercury emission rate used;

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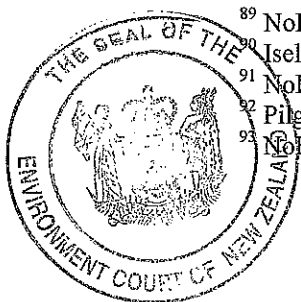
<sup>89</sup> NoE at 96–97.

<sup>90</sup> Iseli rebuttal at [2.11].

<sup>91</sup> NoE at 97.

<sup>92</sup> Pilgrim EiC at [4.3]–[4.4].

<sup>93</sup> NoE at 116–118.



- The amounts and behaviour of mercury vapour and mercuric oxide particulate in the atmosphere;
- The low concentration of mercury in soil at the site;
- The low stack and downwash effects keeping the impacts local and within the site.

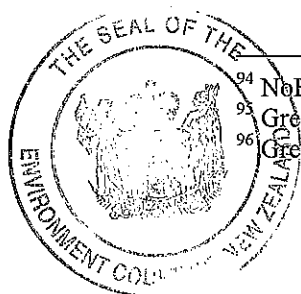
[155] In response to questions from the Court, Mr Pilgrim acknowledged that there could be some risk that BioGro limit for mercury might be exceeded but he believed the likelihood to be so low that he had stated it would not happen. He accepted that grapes were exposed to any potential airborne contamination for a longer period than berries (as assessed in the UK study) and this might make them more vulnerable. He was not able to quantify the risk of exceeding the BioGro limit but considered it to be at the very lowest of probabilities. He agreed that no-one could categorically say it cannot happen.<sup>94</sup>

[156] Mr Greenhough challenged the conclusion of Mr Pilgrim that mercury was not a significant contaminant of wine. He considered that the lack of information on mercury levels in wine in the research literature simply showed that wine was made from grapes that had not been exposed to mercury contamination. He contended that there was no conclusive evidence to show that deposition of mercury from the proposed cremator discharge would be negligible and below the maximum residue limit of 0.01 mg/kg under BioGro regulations.<sup>95</sup>

[157] Mr Greenhough referred to the BioGro Organic Standard A 4.2 for pesticide residues and heavy metals in food and water<sup>96</sup>. The Standard states that maximum permissible residue levels (MRL) and maximum permitted levels of heavy metals are based on 10% of the levels listed in the New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standard and the Australia New Zealand Food Standards Code (ANZFSC) respectively. Where a residue or contaminant is not listed then the default MRL for the residue is 0.1 mg/kg and, therefore, 0.01 mg/kg for the BioGro standard.

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<sup>94</sup> NoE at 125–126.  
<sup>95</sup> Greenhough EiC at [32]–[34].  
<sup>96</sup> Greenhough EiC Appendix B.



[158] Helpfully Mr Greenhough also appended BioGro Organic Standard A 4.3 for heavy metal in soils and composts. This notes that some heavy metals are essential to plants and animals in trace amounts but can be toxic at higher concentrations. The standard lists the limit for mercury in soils as 1 mg/kg.

[159] Mr Smith was unconvinced by the UK data for crops and considered that much higher concentrations of mercury were possible.<sup>97</sup> He rated throughput as a less important factor, citing the higher mercury concentrations observed around the smaller (fewer cremations) of the two UK crematoria.<sup>98</sup>

[160] In response Mr Iseli agreed that the concentrations around the smaller UK crematorium were approximately double the larger one, however he considered all of the results to be very low and within the range of background concentrations for uncontaminated sites. He did not consider the variability in mercury levels in soil and vegetation samples to be surprising given the difference in stack heights and downwash effects between the two crematoria.<sup>99</sup>

[161] In response to questions from the Court, Mr Iseli expanded on his evidence with respect to the correlation between the number of cremations and any resulting mercury contamination of soils and vegetation. He considered the total number of cremations (since the crematorium commenced operation) to be important with respect to predicting soil concentrations. However for plants the primary source of uptake is from the air, rather than from the soil, and it is therefore the number of cremations per year that is important.<sup>100</sup>

*Discussion and findings on mercury accumulation*

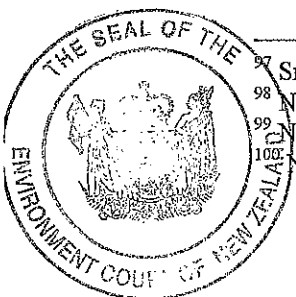
[162] It is clear from the both the New Zealand and UK studies that mercury contamination is related to the number of cremations carried out in any given instance. The total number of cremations over a period of years is the most important factor for long term accumulation in the soil. We accept Mr Iseli's evidence that the

<sup>97</sup> Smith rebuttal at [3]–[4].

<sup>98</sup> NoE at 286–287 and Agreed statement at [2.5].

<sup>99</sup> NoE at 304–306.

<sup>100</sup> NoE at 308–309.



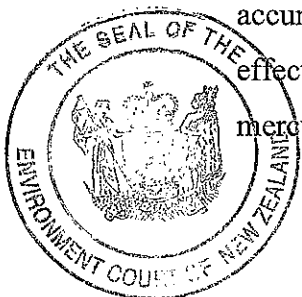
number of cremations per annum is more important when considering effects on crops.

[163] The research undertaken in the UK gives a good indication of the order of magnitude of mercury contamination which can be expected from cremator discharges. While there was some variability in the both the soil and vegetation mercury concentrations in the UK research, this was adequately explained by Messrs Iseli and Pilgrim. Such variability is not unexpected and does not undermine the credibility of the research results. In particular, we note that in all of the UK cases the mercury levels were very low and within the range of background concentrations for uncontaminated sites.

[164] We accept Mr Iseli's evidence that the use of an average mercury emission rate over a year is an appropriate basis to assess potential contamination effects. That evidence is consistent with the UK and New Zealand research. Individual cremation events, or even an unusual series of events, are extremely unlikely to lead to any discernable increase in mercury levels as asserted by Mr Smith. We consider this to be the case even for cremation of a body with extensive mercury amalgam dental work under the most adverse of atmospheric conditions.

[165] The research from the UK into mercury levels on vegetation and crops is directly relevant. While not specific to grapes it does give an indication as to the order of magnitude of contamination that has been observed in the vicinity of crematoria overseas operating at a substantially higher rate than this proposed crematorium. There is good data on mercury in soils around crematoria operating both overseas and in New Zealand. Accordingly we accept that it is highly unlikely that mercury levels would ever be above the default BioGro residue limit of 0.01 mg/kg in the grapes or the BioGro standard of 1 mg/kg in soils.

[166] Given the restrictions on the number of cremations in the proposed conditions (no more than three in any one day and no more than 365 in a year) we find that the accumulation of mercury in the soils is likely to be so small as to be negligible in its effect beyond the property boundary. Similarly we find that the deposition of mercury on crops beyond the boundary is likely to be barely discernable, if it is



discernable at all. However before coming to a finding on the significance of the effect of any mercury contamination of crops we must consider the sensitivity of the neighbouring vineyard, as an organic grower, and address the relevant standards for wine.

[167] We agree with Mr Greenhough that the absence of data on mercury as a contaminant in wine does not necessarily mean that mercury is not a potential problem. Absence of evidence should not be taken as evidence of absence. It may be that mercury has not been detected in wine alongside other metals for reasons of cost, difficulties with detection limits or other logistical constraints on the research.

*Compliance with the Food Standards*

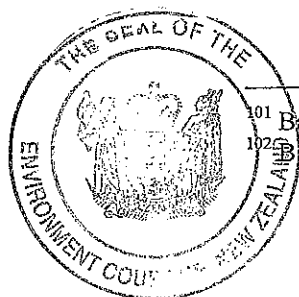
[168] Dr J Barker (General Counsel for New Zealand Winegrowers) gave evidence for LIH. He has experience in the regulation (including wine composition and limits for contaminants) and certification of export wine and is knowledgeable about the operation of the national and international wine market.

[169] Dr Barker did not consider the BioGro default maximum residue limit of 0.01 mg/kg to apply to mercury in wine. He considered the presence of mercury in wine to be regulated by Standard 1.4.1 (the Standard) of the Australia New Zealand Food Standards Code (ANZFS). He stated that as no numerical limit had been set, due to the low risk of mercury being present in significant concentrations, the Standard required mercury levels to be *as low as reasonably achievable (ALARA)*.<sup>101</sup>

[170] The Standard provides:<sup>102</sup>

**Purpose**

*The Standard sets out the maximum levels (MLs) of specified metal and non-metal contaminants and natural toxicants in nominated foods. As a general principle, regardless of whether or not a ML exists, the levels of contaminants and natural toxicants in all foods should be kept As Low As Reasonably Achievable (the ALARA principle).*



<sup>101</sup> Barker EiC at [25]–[27].

<sup>102</sup> Barker Appendix B Standard 1.4.1 of the Australia New Zealand Food Standards Code.

[171] During cross examination, Dr Barker confirmed that he considered the ALARA principle to be a regulatory limit and the word *should* in the Standard ought to be interpreted to mean *must*.<sup>103</sup> This reflected his primary evidence that if the ALARA principle was not met by a particular wine...*then the adjoining winegrowing areas will be at risk of regulatory non compliance*.<sup>104</sup>

[172] Dr Barker agreed with Mr Pilgrim that mercury was not usually found in wine and cited the 2009 New Zealand Total Diet Survey results in which no mercury was detected in any of the wines sampled. The detection limit was 0.001 mg/kg.<sup>105</sup> Dr Barker went on to say... *it follows that the presence of any detectable level of mercury in wine would be of concern from a regulatory perspective because such presence may not be as low as reasonably achievable*.<sup>106</sup> In response to questions from the Court Dr Barker modified his position and stated that any mercury above background levels would be a problem with respect to ALARA.<sup>107</sup>

[173] Dr Barker referred to the New Zealand Drinking Water Standard<sup>108</sup> of 0.002 mg/L (Mr Pilgrim<sup>109</sup> noted the 2008 revision of the standard to 0.007 mg/L) and the ANZFSC limit for packaged water of 0.001 mg/L for mercury. He acknowledged that wine is different to water but commented that these limits were much less than the putative BioGro standard.<sup>110</sup> He quoted overseas standards for mercury in wine ranging from 5 mg/kg in Turkey to 0.05 mg/L in Malaysia and Viet Nam.<sup>111</sup>

[174] Two international incidents of contamination of wine were described by Dr Barker as examples of the potential damage to the reputation of the New Zealand wine industry which mercury contamination of the Greenhough wine could cause. These involved ethylene glycol and natamycin.<sup>112</sup> We note that neither of these substances are naturally occurring contaminants.

<sup>103</sup> NoE at 265–266.

<sup>104</sup> Barker EiC at [33].

<sup>105</sup> Barker EiC at [28].

<sup>106</sup> Barker EiC at [29].

<sup>107</sup> NoE at 281–282 and 284.

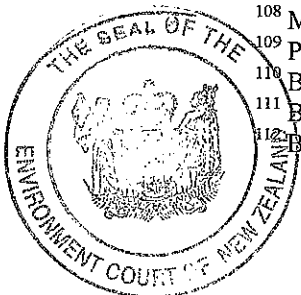
<sup>108</sup> Ministry of Health 2005 Drinking Water Standard.

<sup>109</sup> Pilgrim EiC at [56].

<sup>110</sup> Barker EiC at [31]–[32].

<sup>111</sup> Barker rebuttal at [10].

<sup>112</sup> Barker EiC at [41]–[45].



[175] The report on the Total Diet Survey cited by Dr Barker makes a distinction between elements (such as mercury) and agricultural chemical residues.<sup>113</sup>

*Elements are naturally occurring and ubiquitous in our environment. As such, if the concentration of a certain element in food was 'not detected' it is highly likely that it is present, but at levels less than the limit of detection.*

*Agricultural compounds are applied to specific crops, often under specific conditions or only at certain times... This specificity suggests that residues will only be present in specific foods, rather than as ubiquitous contaminants present in all food groups. In addition, many compounds are known to break down rapidly in the environment. Therefore, for most agricultural compounds in most foods, a 'not detected' result is likely to represent a true zero result.*

[176] Mr Pilgrim considered the ALARA approach to be *not unreasonable provided it is sensibly administered*. He noted that mercury is widespread in the environment and the concentration of mercury in produce would depend on soil and airborne mercury loads from both natural and anthropogenic sources. Mr Pilgrim considered the very low predicted maximum ground level concentrations of mercury from the proposed crematorium to be well within non-urban natural levels and therefore not of concern with respect to Standard 1.4.1.<sup>114</sup>

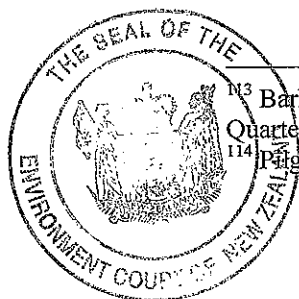
#### *Discussion and findings with respect to the Food Standard*

[177] The ALARA principle contained in the Standard is clearly just that, a principle. Interpreting any breach of the principle as creating regulatory non compliance with the Standard as Dr Barker suggested is problematic for at least two reasons:

- Firstly it requires the word *should* (*should be kept As Low As Reasonably Achievable*) to be read to mean *must*. They are not one and the same. *Should* means that a particular outcome is desirable whereas *must* means that achieving that outcome is mandatory;

<sup>113</sup> Barker EiC at [28] refers to New Zealand Food Standards Authority, Total diet survey 2009 Quarter 2 Analytical report at 9 and 25.

<sup>114</sup> Pilgrim Reply at [5.4].



- Secondly, if Dr Barker's interpretation is accepted, the identification of any contaminant or natural toxicant in food at a higher level than *as low as reasonably achievable* would mean regulatory non compliance, even if the contaminant or toxicant did not exceed the maximum level specified in the Standard.

[178] There is no justification in the Standard for elevating ALARA to a prohibition on any particular contaminant or natural toxicant for which no numerical limit has been defined. Nor does it make any sense to do so particularly for naturally occurring substances or globally distributed pollutants. Mercury is both a naturally occurring element and a global pollutant. Traces of mercury are likely to be present in many foods although seldom at levels sufficient to cause concern (seafood being a notable exception).

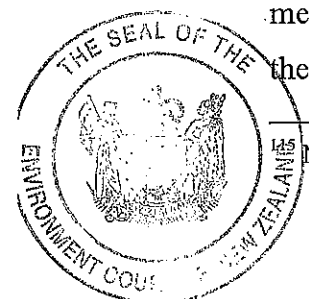
[179] We agree with Dr Barker that the BioGro default limit of 0.01 mg/kg may not be appropriate for mercury in wine. Mercury is not an agricultural compound and the default maximum residue limit of 0.01 mg/kg may not be directly applicable. Background levels are likely to be considerably below this concentration given that no mercury was detected above 0.001 mg/kg in the wines sampled for the Total Diet Survey.

[180] Dr Barker had no answer as to how BioGro might set a numerical limit with respect to the ALARA principle and the unknown background concentrations for mercury in wine.<sup>115</sup> Nor do we. We do however note that a limit of 0.01 mg/kg for mercury in wine is stricter than any of the overseas limits quoted by Dr Barker. It is also very close to the revised Drinking Water Standard for mercury of 0.007 mg/L. As such it does provide a useful benchmark.

[181] We find that the detection of mercury in grapes or wine would not result in non-compliance with the Standard or BioGro requirements as was suggested by LIH. Detection on its own is not enough. Nor would the simple unadorned detection of mercury necessarily result in damage to the reputation of the Greenhough vineyard, the region or the New Zealand wine industry. Mercury is a naturally occurring trace

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NoE at 282.



element. It is the level of mercury compared to typical background concentrations that is the issue.

[182] We have found that the small number of cremations allowed per year and the low stack height will result in negligible accumulation in soils and barely discernable (if discernable at all) deposition of mercury on crops beyond the boundary. Given that the modelling shows the maximum ground level concentrations of mercury would be within the site, and that concentrations will fall off rapidly with distance, we consider it even more unlikely that wine produced from grapes harvested across the vineyard, would contain mercury levels noticeably elevated above typical background values.

*The question of potential adverse effect from mercury contamination*

[183] Section 3 RMA defines *effect* as including... (f) *any potential effect of low probability which has a high potential impact*. Mr Fowler submitted that it is not possible to say conclusively and without doubt that contamination of wine produced near the crematorium could not occur but it is certain that if contamination does occur, the adverse effects would be significant. Those adverse effects could include non-compliance with regulations, loss of organic certification, consequent economic losses and wider implications for the wine producing region.<sup>116</sup>

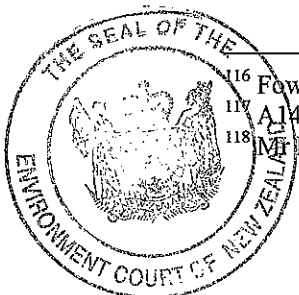
[184] Mr Fowler drew our attention to *Jack Shaw Limited v Western Bay of Plenty District Council*<sup>117</sup> dealing with the potential adverse effects of dust from a proposed quarry operation on neighbouring orchards. The Court in that case was concerned that particular wind conditions could move pumice dust onto nearby kiwifruit orchards despite a water sprinkling/management system proposed. Mr Fowler cited the following portions of the decision:<sup>118</sup>

[60] ...*We find ourselves unable to deny with full confidence the existence of a plausible potential for significant effects to occur to those submitters from the proposed activity. It may be that scientific research will demonstrate in the future that pumice does not have a deleterious effect on kiwifruit to the same extent as road dust or earth-moving dust.*

<sup>116</sup> Fowler opening submissions at [65].

<sup>117</sup> A14/2000.

<sup>118</sup> Mr Fowler did not quote the passages in full, just those portions he considered to be relevant.



*But as matters stand, that proposition has not been satisfactorily established either in expert literature on the subject or other reported analysis.*

*[61] ... Having weighed all the evidence, both lay and expert,...we conclude that the proposal would place the Belk Road submitters under a risk of material detriment – albeit one of low probability in the light of practical steps proposed by Dr Jones bearing on dust suppression and associated quarry management.*

*[68] ... Put briefly, the operations have become established as of right and are important sources of livelihood for the relevant owners. Those owners are entitled to expect that they will not be subjected even to a low probability risk of dust sourced from a neighbouring activity of the kind and size proposed that could damage their kiwifruit crops and cause significant economic loss.*

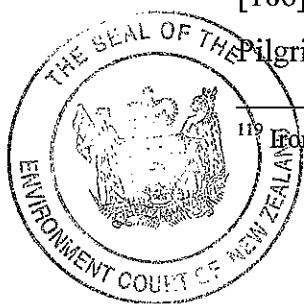
*[69] On the state of present scientific knowledge as to the effect of pumice dust on kiwifruit, we find that the proposal carries an off-site risk, albeit reduced to one of low probability...But as stated, that risk is not one that the objecting orchardists should have to bear in the circumstances.*

Mr Fowler submitted that the case demonstrated that a potential effect of low probability but high potential impact can be enough to decline the consent.

[185] Mr Ironside submitted that the risk of mercury contamination exceeding the BioGro standard is so low that it does not qualify to be assessed as a potential effect. He considered LIH to *be raising the spectre of risk* rather than establishing a real risk.<sup>119</sup>

[186] Mr McFadden pointed to the comprehensive evidence of Messrs Iseli and Pilgrim and their conclusion that the effects of the crematorium would be

<sup>119</sup> Ironside opening submissions at [31]–[35].



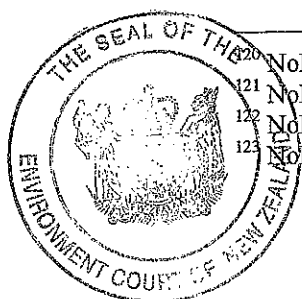
insignificant. In particular he referred to Mr Iseli's summary during cross-examination that.<sup>120</sup>

*I still stand by my original view that the concentrations of mercury in vegetation at neighbouring properties would be very small, so small that they would be well within the stringent BioGro limit for mercury in crops, and so small that they would be indistinguishable from typical background concentrations that could affect or could occur in vegetation elsewhere.*

[187] Evaluating an effect of low probability which has a high potential impact involves two enquiries. Firstly an assessment of the degree of probability of the effect and secondly an assessment of the seriousness of the impact. Dealing with the second matter first, Mr Quickfall and Mr Allan agreed that the loss of organic status would be a significant adverse effect.<sup>121</sup> We accept that contamination of the Greenhough vineyard by crematorium discharge which led to loss of organic certification would unquestionably be an effect of high impact for Mr Greenhough and potentially the wider wine industry for the reasons identified by Dr Barker.

[188] That leaves us to assess the degree of probability of the crematorium discharge (more specifically mercury) contaminating the Greenhough vineyard to such an extent as to bring about those effects. The evidence of the three air quality scientists who appeared before us (Messrs Iseli and Pilgrim for the Applicant and Mr Pigott for the Council) was that any discharge of mercury onto neighbouring properties would be at extremely low levels which would be indistinguishable from background concentrations in soil and vegetation.

[189] Mr Smith did not accept the findings of the air quality scientists although he acknowledged their expertise with respect to discharges, particularly from cremators.<sup>122</sup> He confirmed in cross-examination that he has no qualifications in the field of dispersion modelling or air quality, although he considered that he had expertise and experience in air and dust deposition on horticultural crops.<sup>123</sup> The



<sup>120</sup> NoE at 90–91.

<sup>121</sup> NoE at 147–148 and Allan EiC at [63]–[64].

<sup>122</sup> NoE at 297.

<sup>123</sup> NoE at 293.

questions which he asked and concerns he raised were comprehensively considered and answered by Messrs Iseli and Pilgrim.

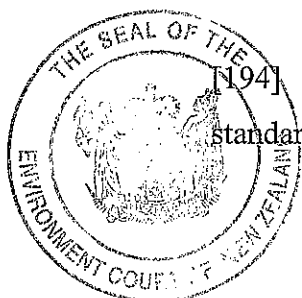
[190] Mr Iseli has a Masters degree and 17 years experience as an air quality scientist. He has particular experience in assessing the effects of cremators. Mr Pilgrim has a Bachelors degree and a Diploma in Air Pollution Control. He has some 45 years experience in air pollution control and air quality including extensive experience with cremators. The evidence of both witnesses was comprehensive and reasoned. It was not contradicted by any witness with expertise in the science of air quality. The Council's air quality witness, Mr Pigott, concurred with their evidence.

[191] We understand the natural concerns of Messrs Greenhough and Smith as to the possibility of contamination of the Greenhough vineyard by the crematorium discharge. We have approached our assessment of the evidence of Messrs Iseli and Pilgrim highly conscious of the potentially serious effects on the Greenhough vineyard and winery if contamination was to occur. Having done so we accept the conclusions which they have reached, summarised in para [188] (supra).

[192] A significant finding of the Court in the *Jack Shaw* case was that it was...*unable to deny with full confidence the existence of a plausible potential for significant effects to occur* (our emphasis). In this case the only credible evidence from appropriately qualified witnesses was that mercury contamination detectable above background levels would not occur, which we have accepted. We concur with Mr Ironside's submission that the LIH witnesses have raised the spectre of risk rather than identifying and demonstrating any real (plausible) risk.

[193] While we accept Mr Fowler's submission that it is not possible to have absolute certainty that contamination would not occur we do not consider that absolute certainty is required under RMA. Such a test would probably be satisfied rarely if ever. We make our determination on the basis that no plausible risk of contamination was identified in the evidence which we heard.

[194] This case can be distinguished from the situation in *Jack Shaw* in that the standard operating conditions for the crematorium are most unlikely to result in



significant mercury contamination across the boundary. No particular precautions or additional safeguards, as proposed with respect to dust control in *Jack Shaw*, are to be put in place to reduce mercury emissions. Thus there is no similar scenario associated with the failure of such systems that could result in a significant incident of contamination. The contamination issue here is one of the potential cumulative effects of mercury emissions from a number of cremations over a considerable period of time.

[195] A further and even more significant distinguishing feature with *Jack Shaw* is that in that case there was no scientific research at all as to the possible effects of pumice dust on kiwifruit. In that unknown situation, the Court was not prepared to put the adjoining orchardists to the low probability (but still plausible) risk of dust contamination arising from the possible failure of dust suppression systems or quarry management. The Court accepted that there was a probability of risk, albeit low<sup>124</sup>.

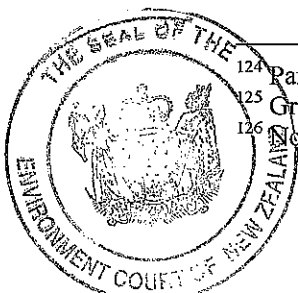
[196] In this instance there is no dispute that mercury contamination could be harmful if it was to occur at high levels, but the uncontradicted evidence of the expert witnesses was that operation of the crematorium would not lead to mercury contamination which was distinguishable beyond background levels. It is the absence of any plausible risk which is the distinguishing factor.

[197] Mr Greenhough produced a letter from BioGro confirming that it may undertake testing of wine and/or grapes if there was reason to suspect cross boundary contamination.<sup>125</sup> We note that the proposed conditions of consent include monitoring of soil mercury levels and Mr Greenhough has agreed that sampling may be undertaken on his property.<sup>126</sup> The monitoring would indicate if significant mercury was being discharged and accumulating in vicinity of the crematorium or within the vineyard, notwithstanding the evidence of Messrs Iseli and Pilgrim. While not analysing the grapes or wine directly, soil monitoring would indicate the presence (or absence) of cross boundary contamination of mercury above the levels predicted.

<sup>124</sup> Para [192], *supra*.

<sup>125</sup> Greenhough EiC Appendix E.

<sup>126</sup> EiC at 325–326.



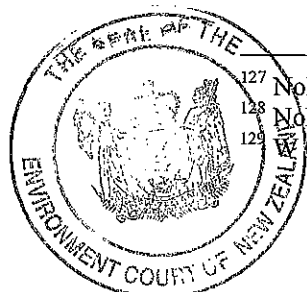
[198] In response to questions from the Court the experts agreed that trigger levels for mercury in soil could usefully be included in the consent conditions. Mr Iseli considered a level of 0.5 mg/kg would indicate that concentrations were higher than predicted and should trigger a more in-depth monitoring programme. He noted that background levels in soil would need to be determined prior to commissioning as he was unsure of the history of the site and was concerned that pesticides containing mercury may have been used.<sup>127</sup> Mr Pilgrim considered that a lower trigger level of 0.25 mg/kg should prompt additional monitoring.<sup>128</sup>

[199] The proposed monitoring of mercury levels in soils would effectively act as an early warning system should the mercury load from emissions be greater than that predicted. We agree with Mr Pilgrim that a conservative trigger level of 0.25 mg/kg mercury in soil should be set with an associated response condition requiring a more in depth monitoring programme. A second trigger level of 0.50 mg/kg should also be set and linked to a review of the conditions of the consent.

[200] We have also considered *Orica Mining Services New Zealand Limited v The Franklin District Council*<sup>129</sup> where the Court declined consent for the manufacture and storage of explosives including ammonium nitrate emulsion (ANE) and observed:

*[49] While an explosion of the ANE tank is of low-probability, it is nevertheless foreseeable. Should there be an explosion, its significant, even severe, effects must mean it is to be considered an 'effect' under the RMA.*

*[65] We have traversed what we see as the proposal's adverse effects on its environment – principally the low-probability but high-impact risk it imposes upon structures and people within its zone of influence, and the pervasive concern that some people would reasonably have about its presence.*



<sup>127</sup> NoE at 101–102.

<sup>128</sup> NoE at 122–123.

<sup>129</sup> 032/2009.

[201] The scenario considered by the Court in *Orica Mining* was one of a single particular event rather than an effect which might become apparent over a period of time and can be identified by appropriate monitoring. We also note that the impact in *Orca Mining* was very high indeed and included both damage to property and personal injury. We note further that the Court regarded a *pervasive concern* as an effect, but in a situation where the low probability of an explosion was foreseeable as compared to the probability of mercury contamination which we have found to be not plausible in this instance.

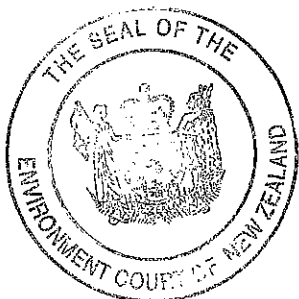
[202] We agree that contamination of wine and/or the loss of organic certification would be very significant for Mr Greenhough and other wine producers in the locality. However we have accepted the evidence that the probability of mercury contamination to the point where those things happen is very low indeed, in fact so low as to be realistically without substance. We do not consider the issue of potential mercury contamination to be such that consent should be declined, particularly given that the risk can be avoided by the proposed soil monitoring with improved trigger and response conditions.

[203] We consider that if consent is granted, condition 16 of RM 090539 should be amended by adding:

*In addition, the consent holder shall take all reasonable steps to collect at least two individual soil samples from the property immediately to the north (presently the Greenhough vineyard) prior to giving effect to the consent.*

[204] We also consider that if consent is granted, condition 18 of RM 090539 should be amended by adding:

*If any soil sample has a mercury concentration of more than 0.25 mg/kg then the consent holder is to undertake further monitoring, within the following six months, to determine the extent of elevated mercury levels. If any soil sample has a mercury concentration of more than 0.50 mg/kg then the Council may initiate a review in accordance with condition 20.*



*The presence of the crematorium and perceptions of contamination*

[205] Mr Fowler further submitted that even if contamination did not occur to detectable levels there is a high risk that significant economic effects would still occur due to the mere presence of the crematorium.<sup>130</sup>

[206] With respect to fears of contamination and the risk for the local and regional wine industry Mr Ironside drew our attention to *Shirley Primary School*:<sup>131</sup>

*To fall within s3(f) of the Act as a potential effect of low probability and high potential impact an effect must not simply be an hypothesis: there must be some evidence supporting the hypothesis.*<sup>132</sup>

*... fears can only be given weight if they are reasonably based on real risk.*<sup>133</sup>

[207] Mr Greenhough stressed the importance of *terroir* defining *the soil, place and people* in the story of a wine. He was concerned that the crematorium would be perceived as tainting the wine, being the antithesis of *clean and green* and contrary to organic management. He considered the establishment of the crematorium next door to be a problem for the marketing of his wines in the future.<sup>134</sup>

[208] We have found that the contaminants from the proposed crematorium are well within the relevant standards and guidelines. The experts have agreed that, with the exception of mercury, there would be no potential adverse effects on crop production from the cremator discharge. We have found that any potential effect of contamination by mercury affecting organic certification is so low as not to be plausible and even that very low potential may be further reduced by amended conditions as to monitoring.

[209] If mercury was completely absent from the existing environment there may be an argument that introducing it could give rise to perceptions of contamination. However there are already both natural and anthropogenic sources of mercury in the

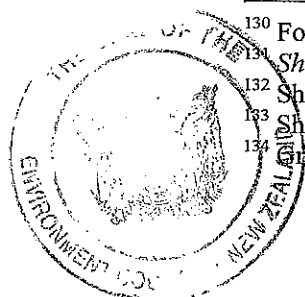
<sup>130</sup> Fowler opening submissions at [70]–[72].

<sup>131</sup> *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66.

<sup>132</sup> *Shirley Primary School* at [147].

<sup>133</sup> *Shirley Primary School* at [193].

<sup>134</sup> *Greenhough EiC* at [35]–[41].



local environment and there is no sound basis for expecting a significant or even discernable increase in mercury levels at the neighbouring properties. The Brightwater dairy boiler, greenhouse boilers and other combustion activities using coal and/or natural gas are all sources of mercury in the region.

[210] While we acknowledge the concern expressed by some members of the community and the nervousness of vineyard owners with respect to organic certification, the scientific evidence is compelling. The risk of mercury contamination occurring above typical background levels is very low indeed and the monitoring will provide a safeguard against unanticipated effects.

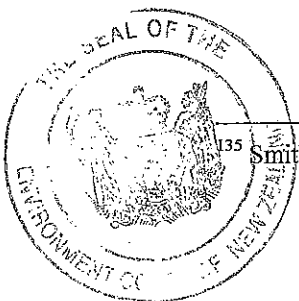
[211] We do not deny that some people may perceive a crematorium discharge to be a significant source of contaminants. However we repeat our earlier comments as to the need for perceptions to be rationally based. We have taken into account the importance of *terroir* in the wine industry. However we do not consider the generation of ill founded perceptions to be an adverse effect as defined by s3 RMA.

### **The protection of productive soils**

[212] Mr Fowler submitted that the proposal before us was contrary to those provisions of the District Plan directed at protection of the productive potential of the soils of the District as it would prevent the future productive use of the site. It appeared to be common ground<sup>135</sup> that the soils on the site are of high productive value.

[213] There were two aspects of the LIH case on productivity:

- A contention that the proposal constituted *fragmentation* of the site together with a loss of its productive potential due to the occupation of fertile soils by buildings; and
- The suggestion that use of the site by the memorial gardens (and as we understood it, by the Gardens of the World themselves) was not a productive use of this rural land.



<sup>135</sup> Smith Rebuttal at [10]; Bealing EiC at [3.1]; Bennison EiC at [6] & [7].

[214] Mr Allan stated:<sup>136</sup>

*I consider the establishment on Part 2 of the site of a commercial activity that has no dependence on the productive value and versatility of the soil resource will cause permanent fragmentation of rural land.*

Mr Allan adhered doggedly to that view until late in the proceedings, however Mr Fowler resiled from that position and accepted that the proposal would not result in land fragmentation as defined in the District Plan because there is no subdivision proposed.<sup>137</sup> We agree with Mr Fowler's inevitable concession.

[215] Mr. Allan also contended that<sup>138</sup> .....*For all intent and purpose, future opportunities for any conventional productive land use would be permanently removed...*should the application be approved.

[216] Mr R Bennison (a valuer and farm management consultant) gave evidence for GOTWL that the area of land (0.7 hectares from a total of 3.8 hectares) lost to production to buildings etc as a result of this proposal (including existing buildings) is fairly typical of development on smaller rural blocks.<sup>139</sup> He explained that as lots became smaller a higher percentage of the total site was required for non productive uses such as buildings and roads.<sup>140</sup> We accept Mr Bennison's evidence which was not contradicted.

[217] Mr A Burton (a resource scientist employed by the Council with expertise in soil conservation and land management) gave evidence that on average, for rural blocks of between 3 and 4 hectares on the Waimea Plains, 52 percent is used intensively and 9 percent is under buildings.<sup>141</sup> This evidence was derived from a pilot study of the Waimea Plain which Mr Burton has undertaken to assess the cost and practicality of land cover mapping of the District. The sample area for the pilot study is on the same soil type and land class as the site.<sup>142</sup> We accept Mr Burton's evidence which was not contradicted.

<sup>136</sup> Allan EiC at [61].

<sup>137</sup> Fowler Opening submissions [85].

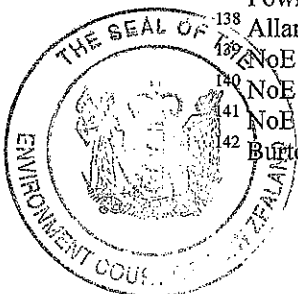
<sup>138</sup> Allan EiC at [60].

<sup>139</sup> NoE at 82.

<sup>140</sup> NoE at 82.

<sup>141</sup> NoE at 188.

<sup>142</sup> Burton Rebuttal at [5].



[218] LIH suggested that the presence of the improvements associated with the crematorium and chapel would preclude the site being developed for conventional production in the future. Mr SA Richards (a member of and witness for LIH) claimed that<sup>143</sup> ... *Placement of additional buildings and establishment of a memorial garden will remove the opportunity of this highly productive land to be utilised for legitimate rural activities.*

[219] Mr Bennison was asked about the possibility of a return to conventional production. His answer was that *while practically feasible it was economically unlikely*. He noted that as a result of the recent sale of the property, the market had reflected the value of the Gardens of the World and as a result that land use was likely to remain.<sup>144</sup>

[220] Mr Bennison's comment was based on what he identified as the high intrinsic value of the Gardens as a garden landscape and seed source, as well as the market value of the site. These factors made the possibility of the site being returned to conventional horticulture remote in his opinion.<sup>145</sup> We agree with Mr Bennison. The suggestion that the valuable, mature and beautiful Gardens of the World might be bulldozed and converted to some form of conventional horticulture seems so remote as to be highly unlikely in fact, although we cannot absolutely rule it out.

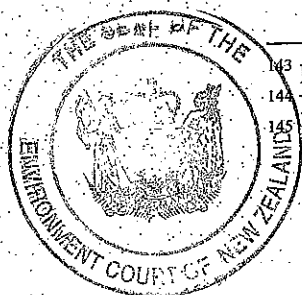
[221] We do not accept that this application constitutes fragmentation of this rural land resource. Nor does it preclude the likelihood of the land being used for some other form of horticultural use. That likelihood is remote in any event because of the development which has already taken place on the site.

[222] Mr Richards' contention that the GOTWL proposal will remove the opportunity for this highly productive rural land to be used for... *legitimate rural activities...* brings us to the issue of whether or not the proposal does in fact involve a non-productive use of the site. Examination of the relevant provisions of the

<sup>143</sup> Richards EiC at [7].

<sup>144</sup> NoE at 85.

<sup>145</sup> Bennison EiC at [16] & [17].



District Plan reveals that the position of LIH and Mr Richards about productive use of the site is based on a misunderstanding of the District Plan requirements.

[223] Objective 7.1.2 of the District Plan is to:

*Avoid the loss of potential for all land of existing and potential productive value to meet the needs of future generations, particularly land of high productive value.*

[224] Policy 7.1.3.2 is to:

*Avoid remedy or mitigate the effects of activities which reduce the area of land for soil based production purposes in rural areas.*

[225] Two definitions in the District Plan assist in interpretation of the Objective and Policy:

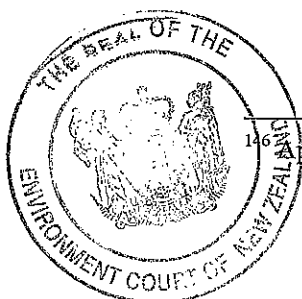
- Productive Value is defined as meaning...*the inherent or existing ability of the land to produce plant or animal biomass, arising from its natural and physical features, and includes measures of productivity and versatility.*
- Productivity in relation to land is defined as meaning... *the inherent or existing ability to produce any type of plant or animal biomass over a given period or area.*

[226] It is apparent that the District Plan concepts of *productive value* and *productivity* are directed at protecting land for the production of plant (or animal) biomass. That is exactly what is happening at Gardens of the World now. The activities presently undertaken on the site represent a specialised form of production of plant biomass and are to be substantially replicated in the memorial garden. Those activities are a use of the productive value of the land in terms of the District Plan.

[227] Mr E J Appleton (a nurseryman of 41 years experience) gave evidence on behalf of GOTWL as to the value of trees and noted that:<sup>146</sup>

- They provide timber, shelter and shade;
- They have considerable amenity value;

<sup>146</sup> Appleton EiC at [2].



- They provide food for people and birds;
- They fulfil an important catchment function;
- They are an important carbon sink;
- They are a renewable resource for building.

[228] The memorial garden could be established as of right. It is the commercial use of the memorial garden with the sale of burial plots for urns which requires resource consent. It was not suggested to us that the activity of interspersing cremation urns between the tree plantings in the memorial gardens would diminish the productivity of the land in any way. Indeed it seems clear that the success of the memorial garden as a burial area is entirely dependant on the successful establishment of the plantings which are to create the appropriate environment.

[229] We assume that Mr Richards' reference to use of the land for *legitimate rural activities* reflects a view that the site should be used for some more conventional form of agriculture or horticulture. However the District Plan does not direct a landowner to grow cabbages in preference to cabbage trees, it simply seeks the production of plant biomass. In any event, the evidence for GOTWL established that there is such a conventional form of horticultural production undertaken at the Gardens.

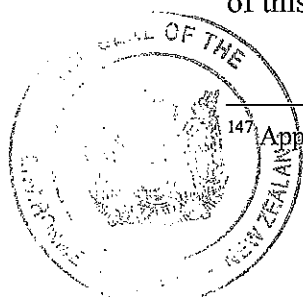
[230] Mr Appleton testified that his nursery business collects seeds from all around New Zealand.<sup>147</sup> Gardens of the World contains tree species which are rare in New Zealand and (in some cases) world terms and is an important source of seed for his nursery. Mr Appleton's evidence was not challenged. We are satisfied that this collection of seed is a productive use of the site not only in terms of the District Plan but also in any conventional horticultural sense. Establishment of the memorial gardens will increase plant biomass on the site and establish more trees for seed production.

[231] In summary, we make the following findings as to the impact of the approval of this application on the productive value of the site:

- Land fragmentation will not occur;

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<sup>147</sup> Appleton EIC at [4]–[9].



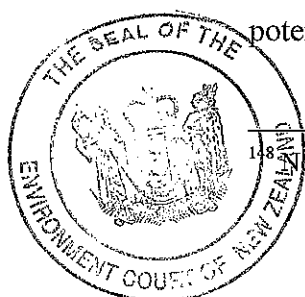
- The current use of the site by Gardens of the World is a use of its productive value as that term is defined in the District Plan;
- This particular productive use of the site will be expanded if the application is granted, through development of the memorial gardens which will add to plant biomass;
- The use of the site by the gardens aspect of the memorial gardens is a permitted activity;
- The site could physically be returned to more conventional forms of agricultural/horticultural production (even if this application is approved) but that is a remote possibility in any event due to both the market and intrinsic values of the site;
- The proportion of the site to be covered by improvements (crematorium/chapel, carpark) and thereby lost to production is less than half of what is permitted by the District Plan. The level of such development will be similar to that of other small rural blocks in this vicinity. That area of the site used for productive purposes will substantially exceed the 52% average for intensive use on sites of this size on the Waimea Plain.

For all of these reasons we conclude that approval of the application will have a less than a minor adverse effect on the productive value of the site, if there is any adverse effect at all.

#### **On the volunteered conditions affecting the 1991 Consent**

[232] Finally, we return to the matter of the conditions volunteered by GOTWL in response to the Hearings Commissioners memorandum, affecting operation of the 1991 Consent.

[233] Mr Quickfall considered the volunteered conditions to limit the activities that could otherwise take place at the Gardens. He observed that the community *Carols* event would not have been held had such conditions been in place thus constraining potential benefits and opportunities that the Gardens may have.<sup>148</sup>



<sup>148</sup> See at 145–146.

[234] Mr Allan relied on Ms Zimmerman's evidence to contend that the nature, size, duration and frequency of events has increased on the site.<sup>149</sup> He compared 1991 Consent documentation and the history of activities at the site to the volunteered conditions to the 1991 Consent. He concluded that the volunteered conditions would allow a significantly greater level of activity than actually authorised by that consent.<sup>150</sup>

[235] The volunteered conditions seek to restrict the operation of the 1991 Consent with respect to the nature, frequency and scale of events that may take place on the site. For example, the overall maximum of 225 persons is less than the *theoretical maximum* of 300 quoted in the original application. The provisions restricting amplified music are in addition to new noise limits. We have some reservations about the practicality and enforceability of the noise provisions. More significantly, we do not consider that the conditions imposed on this current application can restrict activities undertaken pursuant to the 1991 Consent for the reasons we previously stated. Although GOTWL adheres to its undertaking to apply to vary the 1991 Consent to make its conditions consistent with this consent, there can be no guarantee of that outcome.

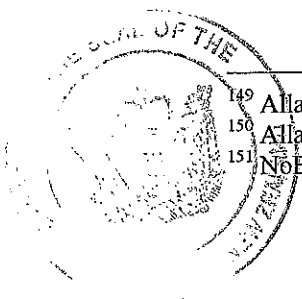
[236] Mr Ironside considered the Council approach to the operation of the 1991 Consent and the complementary aspects of this proposal to be *sensible and rational and pragmatic to have more certainty about the way in which the combined site, the two aspects of the site, might be run*,<sup>151</sup> the Council witnesses' principal concern being traffic.

[237] The volunteered conditions are not necessary in order to clearly define the existing environment. With one possible exception, they are not required to deal with any potential cumulative effects of this application. We consider that the Council Hearings Committee was wrong to deal with concerns about the operation of the Gardens in this manner. The actions of the Hearings Commissioners put

<sup>149</sup> Allan EiC at [30].

<sup>150</sup> Allan EiC at [52].

<sup>151</sup> NoE at 155.



unreasonable pressure on the Applicant to *voluntarily* restrict its operations under the 1991 Consent in order to obtain consent for the proposed activity.

[238] It will be clear from our earlier findings that the only part of the volunteered conditions which might be related to the proposed crematorium/chapel is the upgrade of the carpark at the Gardens. Such an upgrade would result in more efficient use of the space and fewer occasions on which cars would park outside the site. This would mitigate any possible consequential effects of overflow parking due to any increase in the number of large funerals at the Gardens as the result of synergy between the Gardens and crematorium/chapel operation.

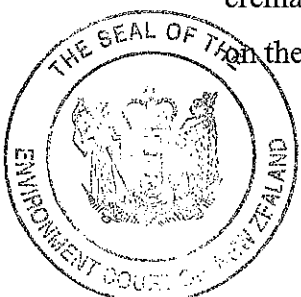
[239] Following the release of this decision GOTWL may wish to volunteer the upgrade of the carpark as an *Augier* condition to this consent. We leave this matter to GOTWL and the Council to consider and decide. We do not require such a condition as the review condition which we have recommended addresses this matter, however if GOTWL is still prepared to offer the condition on a *belt and braces* approach then it may form part of the conditions of any consent.

[240] We consider the remaining volunteered conditions to be unhelpful and potentially confusing, giving rise to uncertainties in monitoring and enforcement of activities within the Gardens due to their inconsistency with the conditions of the extant 1991 Consent. We do not consider that they were within the scope of the initial application for these consents. The restrictions and constraints proposed would also limit the potential benefits to the wider community of this facility.

[241] Accordingly Condition 1 ought be amended to delete the reference to the volunteered amendments if consent is granted to this proposal.

### **Evaluation and Decision**

[242] We consider that establishment and operation of the proposed crematorium/chapel and memorial garden would have no significant adverse effects on the environment, even when considered cumulatively with the effects arising from



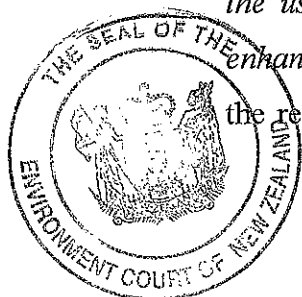
operation of the 1991 Consent. There was no evidence that the ticket kiosk and proposed sign would have any adverse effects whatsoever.

[243] The road network is able to comfortably handle the limited amount of additional traffic generated by the crematorium/chapel. Addition of a review condition to cover the possibility of a significant increase in large funerals at the Gardens with associated traffic problems caused by the synergy between the two operations, removes the potential for any adverse effects arising from that. Thus the proposal is consistent with District Plan objective 11.1.2 seeking *a safe and efficient transport system* and related policies 11.1.3.4 *to avoid, remedy or mitigate adverse effects of traffic on amenity* and 11.1.3.7 *to ensure adequate and sufficient parking*.

[244] There are no adverse effects due to noise. The noise conditions should ensure that landscaping and gardening work on site, generally permitted in the Rural zone, is exempt from the conditions applying to the operation of the crematorium/chapel. This is consistent with District Plan policy 5.1.3.14 *to provide flexibility ... to allow for a wide range of effects on amenities which are typically associated with rural activities, and which may vary considerably in the short or long term* and the permitted activity noise rule 17.6.2.1(d) for the Rural 1 zone exempting noise *from any intermittent or temporary rural activity*. The proposal is consistent with policy 5.1.3.9 *to avoid, remedy or mitigate effects of noise and vibration ... beyond the boundaries of the site*.

[245] The memorial gardens would be beneficial to local amenity values and the crematorium/chapel is well screened. While there is some discomfort as to the crematorium activity on the part of some local residents there are no adverse effects on overall rural character and amenity. The proposal is complementary to the adjacent Gardens of the World and provides an attractive facility for family and friends to farewell and to remember their dead.

[246] The general amenity provisions of the District Plan include objective 5.1.2 *on the use and enjoyment of land* and objective 5.2.2 seeking the *maintenance and enhancement of amenity values*. The proposal is consistent with these objectives and the related policies with respect to emissions, discharges, signage, and privacy for



rural dwellings. Objective 7.4.2 focuses on *rural character and amenity values*. The proposal is consistent with this objective and related policies seeking a wide range of productive rural activities, maintenance and enhancement of rural character, and seeking to protect health and amenity values for rural residential areas.

[247] The risk of consequential effects on nearby vineyards from the discharge of contaminants (particularly mercury) is so low as to be realistically without substance. The discharge will be consistent with District Plan Objective 34.2.0 seeking to *maintain existing air quality* and supporting policies with respect to human health, amenity values and contamination of adjacent sites. We acknowledge that the Greenhough vineyard, using organic production techniques, constitutes a particularly sensitive receiving environment. The conditions of the consent should be amended to contain the additional monitoring provisions we have identified<sup>152</sup>.

[248] Establishment and operation of the crematorium/chapel and associated parking will have no adverse effect on productivity of the site beyond what is permitted by the site coverage rules of the District Plan. Establishment of the memorial gardens will lead to an increase in plant biomass on the site.

[249] The proposed crematorium/chapel and memorial gardens will enable the community to provide for an important aspect of its social and cultural well-being. The use of the site sustains and enhances its natural and physical resources, the life-supporting capacity of the ecosystem is unhindered, and the proposal adequately avoids, remedies and mitigates any adverse effects.

[250] No party raised any s6 matters of national importance, nor suggested that there were any national policy statements which required consideration in this case. We concur with Mr McFadden that this is an efficient use of the natural and physical resources of the site, particularly given the complementary nature of the adjacent Gardens of the World. Amenity values are enhanced by the creation of the memorial gardens.



<sup>152</sup> Paras [104] and [204] supra.

[251] Overall the sustainable management of natural and physical resources is better served by the grant of consent, with amended conditions to ensure that the actual and potential effects are adequately managed. The appeal is dismissed and the consent granted by the Council is upheld accordingly, subject to amended conditions to reflect the comments contained in this decision.

[252] We direct the Council to file amended consent documents, incorporating conditions reflecting this decision, for execution under seal within 15 working days of the date of this decision. Prior to preparation of those documents, the Council shall confer with GOTWL regarding incorporation of the car parking condition discussed in paras [238] and [239] (supra). If GOTWL is agreeable to the inclusion of such a condition in RM 090538, then the Council shall include such a condition accordingly. In that case the draft consent is to be accompanied by a memorandum from GOTWL confirming that it agrees to imposition of the condition.

**Costs**

[253] Costs are reserved. If GOTWL or the Council wish to seek costs they are to do so in accordance with para 4.5.6 of the Court's Consolidated Practice Note 2006. Any response from LIH and replies from the costs applicants similarly to be in accordance with the Practice Note.

DATED at WELLINGTON this 14<sup>th</sup> day of June 2011

For the Court:

B P Dwyer  
Environment Judge

