

IN THE MATTER OF the Resource Management Act 1991
AND

IN THE MATTER OF an application by Rural Tails Limited to Waikato District Council under section 88 of the Resource Management Act 1991 for land use resource consent to establish a 120 Dog Daycare facility in a Rural Zone, at 11 Ridge Road, Tuakau (being Lot 5 DP 133049).

Decision following the hearing of an application by Rural Tails Limited to Waikato District Council for a non-complying activity land use (Rural Zone) resource consent under the Resource Management Act 1991.

Proposal

To establish a 120 Dog Daycare facility in a Rural Zone, at 11 Ridge Road, Tuakau (being Lot 5 DP 133049) with associated building, infrastructure, carparking, signage and landscape / screen planting - Council reference LUC0529/18.

The application was heard at Tuakau on 21 February 2019.

The resource consent sought is **REFUSED**. The reasons are set out below.

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| Hearing Commissioners: | Mr David Hill |
| Application numbers: | LUC0529/18 |
| Applicant: | Rural Tails Limited |
| Site addresses: | 11 Ridge Road, Tuakau |
| Legal descriptions: | Lot 5 DP 133049 |
| Site area: | 4.198 ha |
| Zoning: | Rural Zone – Waikato District Plan (Franklin Section) 2013 |
| Lodgement: | 18 June 2018 |
| S92 and on hold: | 2 July 2018 |
| Acoustic report commissioned: | 10 September 2018 |
| Traffic assessment review commissioned: | 12 September 2018 |
| S91 on hold: | 1 November 2018 |
| S91 uplifted: | 13 November 2018 |

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| Limited notification: | 27 November 2018 |
| Submissions closed: | 17 January 2019 |
| Hearing commenced: | 21 February 2019 |
| Hearing closed: | 4 March 2019 |
| Appearances: | <p><u>The Applicant – Rural Tails Limited:</u> Mr T Naidoo Ms L Kisten Mr S Naidoo Ms K McGregor</p> <p><u>Submitters:</u> Ms N Buxeda - Counsel and Mr T Gray - Law Clerk, for: Mr P Prendergast Ms S Findlay Mr D Oostdam Mr M Flynn Mr R Doyle Ms A de Valk</p> <p><u>Council:</u> Ms B Parham - Counsel Ms K Thomson – s42A author - BTW Mr N Hegley - Hegley Acoustic Consultants Mr A Black - Transportation Engineer - Gray Matter Mr J Wright - Consents Team Leader – West Mr M Brown - Land Development Engineer – Consultant Ms L Wainwright - Committee Secretary</p> |

Summary Decision:

1. Pursuant to section 104 and 104B of the Resource Management Act 1991, the non-complying activity land use consent application is refused.

Introduction

2. This decision is made on behalf of the Waikato District Council (Council) by Independent Hearing Commissioner Mr David Hill, appointed and acting under delegated authority under section 34A of the Resource Management Act 1991 (the RMA).
3. This decision contains the findings from my deliberation on the application for resource consent and has been prepared in accordance with section 113 of the RMA.
4. The application was limited notified to 6 identified owners/occupiers of adjacent properties on 27 November 2018, with submissions closing on 17 January 2019. Ten submissions were received in time – all in opposition - and 6 submitters wished to be heard. A summary of those submissions is provided in section 4 of the s42A report. That summary was not disputed and is adopted for present purposes.

5. No late submissions were received.
6. A s104(3)(a)(ii) RMA written approval from the owner/occupiers of 7 Ridge Road was initially provided but withdrawn on 7 January 2019. Effects on those persons are therefore to be considered.
7. The s42A RMA hearing report was prepared for Council by Ms Karleen Thomson, consultant planner, and made available to parties on or about 30 January 2019. Ms Thomson's overall recommendation was to grant the land use consent sought with the draft conditions she provided.
8. Ms Thomson's report was informed by a commissioned acoustic report from Mr Nevil Hegley of Hegley Acoustic Consultants Ltd and commissioned technical peer review by Mr Alastair Black (transportation engineer) of Gray Matter Ltd. These reports were deemed necessary by Council, I understand, as the applicant did not provide an expert acoustic assessment, and the traffic impact assessment was prepared by the applicant, Mr Naidoo, himself in his professional capacity as a civil engineer.
9. The matter was heard in Tuakau on 21 February 2019, and closed on 4 March 2019 following receipt of a final set of proposed conditions (largely agreed between the applicant and Council – but not by submitters who remained opposed).
10. A site visit was undertaken on 21 February 2019, noting that the Commissioner was familiar with the general area of Ridge Road from a previous quarry extension application determined.

Site description

11. As noted in the s42A report¹:

The subject site is a 4.198ha generally flat rural lot that contains a dilapidated shed on site. The site is located at the Pokeno Road end of Ridge Road, approximately 3km east of the Pokeno township. It is surrounded by a mix of rural residential lots and rural lots, the nearest neighbour is located approximately 90-95 metres from the eastern boundary. The location of the dilapidated shed on site is on a slight rise, with the land falling away to the rear and the east

12. That description was not disputed.

Summary of proposal and activity status

13. The application proposes a purpose-built, self-contained facility for up to 120 dogs with no provision for outdoor activities/play. The facility will involve up to 7 full-time staff and operate from 7am to 7pm Monday-Friday.
14. At this stage of the concept design, a rectangular, concrete block building of 432m² (27m x 16m with a maximum height of 5.5m) with double-glazed aluminium windows and doors is proposed. The building will accommodate all facilities including a time-out section, two indoor garden-style dog defecation areas, and access control double entry system. The applicant proposes that final architectural design details will be provided at building consent stage.

¹ S42A report section 1.2 page 7
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15. Ten external, sealed car parks are proposed with provision for overflow parking. Two 12-dog transportation vans (for collecting and returning dogs) are also proposed, reducing the amount of traffic to and from the site.
16. A new vehicle access /entrance and 240m x 6m driveway is proposed running parallel with the existing right of way.
17. Stormwater will be collected in 2 x 15,000 litre detention tanks for use on site, with rain gardens managing runoff from impervious surfaces.
18. The applicant proposes to make application to the Waikato Regional Council for wastewater consent at a later date. This was a matter of concern to Council, which issued a s91 RMA determination, subsequently uplifted. That matter is discussed further below.
19. An indicative landscape plan was lodged, with the applicant indicating that a formalised plan prepared by a qualified landscape architect would follow the granting of consent.
20. Two signage boards are proposed, being no more than 1m in height and no more than 600mm in width.

Activity Status

21. The site is zoned Rural in the Waikato District Plan: Franklin Section 2013 (the District Plan).
22. The application lodged was for a restricted discretionary activity (RDA) on the basis that, while a dog daycare facility is not specifically identified in the District Plan, an analogous activity, rule 23A.1.3(8) *Boarding kennels and breeding kennels or catteries and dog training grounds*, specifies an RDA status with the associated matters of discretion stated in 23A.4.2.7.
23. Ms Thomson disagreed with that conclusion, referencing the District Plan definition (as follows):

BOARDING KENNELS AND BREEDING KENNELS OR CATTERIES means an activity carried out undercover within one or more permanent structures or BUILDINGS for the purpose of accommodating overnight more than a total of six dogs or six cats on the site for boarding or the breeding of three or more litters on any site, but does not include the keeping of dogs that assist in the management of a farm is also an ancillary activity to FARMING and other rural activities or for domestic purposes.
24. She therefore determined that the activity is a non-complying activity under rule 23A.1.5.2, as an activity not provided for by the said rules.
25. Having considered the matter I agree that non-complying is the appropriate activity status. That, of course, is not fatal to the application as s104(5) of the RMA permits the granting of an application for a different activity status to that for which application was made.

26. However, I am surprised that having had the correct activity status determined, the applicant seems not to have been required to and did not provide an appropriately updated assessment against that higher threshold – relying on the s42A author to perform that task. Indeed much of this application has, somewhat unusually in my experience, effectively been filled-in by Council – which is a matter I return to in my conclusion.
27. I also note that Part 52 of the District Plan states the information requirements for any resource application. While issue was not taken on the matter of completeness of application for a non-complying activity in terms of Part 52, the fact that it was necessary for Council to determine that additional reporting should be commissioned raises questions in that regard – as does the very conceptual nature of much of the application.
28. The Waikato Proposed District Plan (PDP), Stage 1 of which was notified in July 2018, has no relevant, operative rules or rules that have legal effect. As such, I have not considered the rules of the PDP. Under s104 RMA the objectives and policies of the PDP are to be considered and duly weighted. Under that Plan the site is also zoned Rural.
29. As noted above, no concurrent Regional Council consent has been applied for but would be required.

Permitted Baseline

30. With respect to any s104(2) RMA “permitted baseline”, Ms Thomson concluded that as a glasshouse of 400m² or a farm building could be constructed as a permitted activity, then a partial baseline could be applied to the “scale and bulk” of the building. She concluded that other aspects of the activity, including generated vehicle movements, are not comparable to permitted activities.
31. While I agreed with Ms Thomson that those elements *could* be disregarded per s104(2) of the RMA, I am not inclined to do so. Firstly, because little actually turns on the question of the building’s effect; secondly because it is practically meaningless to attempt to identify the 32m² that offends the apparent 400m² threshold² so that an effect can be considered; thirdly because a glasshouse presents a materially different kind of building to that proposed; and lastly because atomising effects in this way for a non-complying activity runs the risk of overlooking real effects in the absence of a final or near-final design (and which has not been provided). I also note that while a building could be designed to be all but indistinguishable from a “normal” farm building, no such definitive proposition was before the hearing.
32. For those reasons I decline to adopt any permitted baseline.

Procedural and other matters

33. No procedural matters were raised for consideration.

² “apparent” in that the 400m² permitted standard was not specifically identified.
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Relevant statutory provisions considered

34. In accordance with section 104 of the RMA I note that I have had regard to the relevant statutory provisions, including the relevant sections of Part 2, sections 104 and 104D.

Relevant standards, policy statements and plan provisions considered

35. In accordance with section 104(1)(b)(i)-(vi) of the RMA, I have had regard to the relevant policy statement and plan provisions of the documents noted below – the relevant provisions of which are not explicitly assessed in the application AEE, but were addressed in section 9.0 of Ms Thomson's s42A hearing report.
36. Having reviewed the provisions identified by Ms Thomson, and particularly the objectives and policies, I confirm and adopt them. No other party disputed these matters and therefore, in the interest of brevity, they are not specifically discussed further or the details repeated in this decision. Those provisions are contained in the following statutory documents:
- Waikato Regional Policy Statement 2016;
 - Waikato District Plan – Franklin Section 2013;
 - Proposed Waikato District Plan 2018.
37. While the Te Ture Whaimana o Te Awa o Waikato – the Vision and Strategy for the Waikato River and the Waikato-Tainui Environmental Plan were referred to, those documents have little material relevance to this land use consent application.
38. Council considered the relevance of the Resource Management (National Environmental Standard for Managing Contaminants in Soil to Protect Human Health) Regulations 2011 and determined that the proposed change of use was unlikely to engage soil-related human health matters. I accept that conclusion.
39. I do not consider any other matter to be relevant and reasonably necessary to determine the application in accordance with section 104(1)(c) of the RMA.

Summary of evidence / representations / submissions heard

Rural Tails Limited

40. **Mr Tyrin Naidoo**, a civil engineer, made an opening representation on behalf of the company and his wife, Ms Lana Kisten, the sole director of Rural Tails Limited. Mr Naidoo provided a brief history of the land purchase, development intention (this proposal), a paraphrase of the RMA provisions, and concluded that the application met the test of s104D RMA because its adverse effects were no more than minor.
41. No witnesses were called.
42. I note in passing that at the hearing Mr Naidoo indicated, in response to submitter concerns, that he was prepared to accept a condition specifying a requirement for a minimum percentage of dogs (indicatively 60%) to be transported by means of the proposed dog-transport vans in order to limit the number of private vehicle movements to and from the site. He also accepted Council's proposed condition precedent

preventing the operation of the facility until the regional wastewater consent is secured and implemented.

Council

43. The s42A RMA Hearing Report by Council's reporting officer, **Ms Karleen Thomson** (a consultant planner), was circulated prior to the hearing and taken as read. Ms Thomson produced an Addendum to that report by way of a statement of evidence in response to the applicant's pre-circulated evidence and matters arising during the hearing.
44. Ms Thomson confirmed that her fundamental position - i.e. to grant consent - was unchanged but changed her conclusion with respect to Objective 17C.2.1 and associated policies 17C.2.2 of the operative District Plan and Objective 5.1.1 and associated Policy 5.3.3 of the Proposed Plan.
45. That *operative* objective limits industrial / commercial activities in the rural zone to those having a clear connection with or providing services to rural activities, with the associated policies promoting the location of non-rural activities into towns or villages.
46. The relevant *proposed* Plan objective and associated policy requires the avoidance of commercial activities in the rural zone that do not have a functional connection with the rural environment.
47. Ms Thomson concluded that, on reflection, the application was contrary to those provisions – although not to the Plans overall.
48. Ms Thomson also provided further amendments to her earlier draft conditions, generally requiring more specificity and adding monitoring thresholds for the activity (as discussed further below).
49. **Ms Bridget Parham**, counsel for Council, made legal submissions in response addressing two matters raised during the hearing:
 - (a) Background to Council's s91 RMA decision and its uplifting. She noted that the applicant had opposed the requirement to seek a wastewater discharge consent from the Regional Council and that subject to a condition precedent on that requirement, Council had agreed to cancel the s91; and
 - (b) Confirmation that in determining the s104D(1)(a) RMA threshold, consideration of effects as proposed to be mitigated (rather than effects prior to mitigation) are what is required.
50. **Mr Alastair Black**, transportation consultant to Council, had provided the technical peer review of the traffic impact assessment. In that review he concluded that, despite some identified technical deficiencies, the application gave rise to a low risk of adverse transport effects provided a number of conditions that he sought to be imposed were imposed. Mr Black confirmed that overall conclusion at the hearing, adding that when the number of vehicle movements at the Pokeno/Whangarata/Ridge Road intersection reach a threshold of approximately 200 per hour, it is likely that significant realignment would be required for traffic safety reasons. However, that threshold was not reached by the present proposal and the requirement that 60% of dogs be conveyed by the proposed dog transporter.

51. **Mr Nevil Hegley**, acoustic consultant to Council, had provided the Council-commissioned acoustic assessment report. In that assessment he had taken the pragmatic step of adopted the more detailed rural zone noise rule from the Proposed District Plan (even though that has no legal effect as yet) as the operative Plan only requires that the noise at the notional boundary (20m from any dwelling outside the site) in the rural zone be avoided, remedied or mitigated (with no metrics provided).
52. Mr Hegley's assessment concluded that at the nearest notional boundary (being a potential dwelling off the southern boundary of the site at either 7A, 7B or 7C Ridge Road (inadvertently referenced as McCready Road by Mr Hegley) at some 35m from the proposed building), and with 120 dogs present and up to 10 barking at any one time then, depending on the ventilation system in use, the noise would be up to 43dB L_{Aeq} . With some 60 vehicles expected to arrive on site over the day, the additional noise was estimated to increase to 46dB L_{Aeq} . The only house additionally affected by vehicle noise on Ridge Road (7 Ridge Road) was assessed as increasing from 49dB $L_{Aeq(24\text{ hr})}$ to 51dB $L_{Aeq(24\text{ hr})}$. Those levels were at the upper limit of the permitted noise standard in the Proposed District Plan – and Mr Hegley recommended that those metrics be formally set as a condition on any consent granted.
53. At the hearing Mr Hegley confirmed that he had conducted noise assessments on some 20-30 dog pounds of comparable size and that, in his experience with a well managed facility, it was unusual for more than 10 - 15 dogs to be barking at the same time. Mr Hegley stressed that the key to dog noise control was management. He had not assessed the hypothetical situation reflecting a loss of management control.
54. Mr Hegley agreed that changing traffic conditions on the southern boundary indicated that additional noise screening should be considered.
55. Finally, Mr Hegley noted the importance of the ventilation system to noise abatement but was comfortable leaving that to the building design and consent stage to ensure that the overall building design would meet the standards imposed.

Submitters

56. **Ms Nicole Buxeda**, appeared as counsel for all ten submitters. In her legal submissions Ms Buxeda advised that the submitters' position was that the level of adverse effect from allowing the application was so uncertain in terms of the key adverse traffic and noise effects, which she contended were more than minor and neither avoided, remedied or mitigated, that the only option open to the Commissioner was to decline the application.
57. With respect to the operative District Plan, Ms Buxeda submitted that, properly constructed, the objectives and policies for the rural zone are not supportive of the proposed activity because the proposal does not maintain or enhance the existing rural character and amenity, is not of an appropriate size and scale, is neither connected to nor provides services to rural activities, does not support productive use and capacity of rural land, and is more appropriately located in a business zone.
58. Ms Buxeda also raised the s91 RMA matter, noting that submitters had raised concerns about the potential for wastewater disposal discharges to flow onto their land given the soil types, topography and local knowledge about rainfall events. Ms Buxeda

was critical of Council for not explaining the reasons for uplifting the s91 requirement – in view of the need to fully understand the adverse effects of an application – and was not persuaded that the integrated matters of concern to submitters would or could be addressed by the sequential processes now in train. Council's proposed imposition of a regional wastewater discharge consent condition precedent did not cure that concern.

59. Ms Buxeda submitted that, as Commissioner, I have discretion to place the application on hold under s91 RMA. I am not persuaded. On its face that provision appears only available in advance of a hearing commencing rather than at the hearing. However, even if that interpretation is found to be in error, Council has already exercised the discretion and determined the issue (regardless of whether that course of action is considered appropriate or not) and it would be inappropriate (and, arguably, an abuse of process) for me to “double dip” the same.
60. Ms Buxeda provided a draft set of additional conditions, noting that this did not imply any concession on the part of the submitters, who maintained their opposition to the application and the relief sought, being to decline the application.
61. Ms Buxeda introduced the following submitters, who made further representations on their submissions:
 - **Peter Prendergast** – 29 Lawrence Road; who expanded on his concerns about wastewater constituents / contaminants and disposal, noting the issue of surface water runoff during winter rains and tabled an aerial photograph of the site and its surrounds with hand-drawn topographical lines at 1m intervals demonstrating the way in which the land falls away from the road;
 - **Susan Finlay** – 7 Lawrence Road, who commented on the nature of the local rural character and amenity, noting that she had 4 alpacas and 2 dogs herself, and had renovated an outdoor living space on the western side of her dwelling facing the subject site;
 - **Dick Oostdam** – 7B Ridge Road; who expressed concerns for the risk of contamination affecting his relocated high tech cymbidium orchid nursery business;
 - **Roland Doyle** – 7A Ridge Road; who spoke to the amenity of the area and expressed concern about the “quasi-industrial” nature of the proposed activity, and Natalie Doyle tabled a statement read by Ms de Valk;
 - **Michael Flynn** – 15 Lawrence Road; who spoke about the lifestyle amenity the family enjoys; and
 - **Anna de Valk** – 15 Lawrence Road; who, among other things, recounted anecdotal research she had conducted with two other dog daycare facilities in Karaka and Ramarama (also on the basis of her personal experience as a vet nurse with training in animal husbandry and behaviour, and transporting dogs in vans). She advised that she understood from those inquiries that the typical dog daycare facility was of the order of 25 dogs; that she doubted the figure of only 10 dogs out of 120 barking at any one time (even with good management control); that she doubted the practicality of transporting 12 dogs in a van together noting that

she understood current practice to limit such to no more than 3 dogs; that it takes dogs a while (up to 2 hours) to settle on arrival; and that a staff:dog ratio of between 1:5 and 1:8 is usual. Ms de Valk also read a prepared statement by Mr Kyung Koo Han of 7C Ridge Road, who was absent overseas.

The Section 104D RMA tests

62. Turning first to the matter of the two non-complying activity gateway tests of section 104D RMA - one of which must be satisfied in order for the application to be considered for granting.

Section 104D(1)(a) – adverse effects will be minor

63. In terms of section 104D(1)(a) of the RMA regarding the adverse effects on the environment, the two matters of most concern related to traffic effects (essentially arrival, parking and departure issues) and noise.

Traffic and transportation effects

64. As noted above, Mr Naidoo prepared his own traffic impact assessment and concluded that any adverse effect would be no more than minor.
65. Mr Black's peer review for Council, while correcting certain figures such as the probable maximum number of daily vehicle movements, concluded that with the redesigned entrance/exit and some modifications to the overflow parking area proposed, traffic safety issues would be resolved. He did not share submitters' concerns about the increase in traffic volume on Ridge Road as the road currently carries less than its design capacity, with traffic volumes on the southern section expected to be under 1,000veh/day (although noting some edgebreak and other existing pavement maintenance issues for Council's attention). As previously noted, Mr Black recommended additional conditions to address issues he had raised – such as increased parking bay widths to accommodate short-term turnaround parking and a minimum of 10 overflow car parks. Those condition amendments were acceptable to Mr Naidoo.
66. While I accept Ms Buxeda's submission that, regardless, an additional effect is created by the increase in vehicle movements, I do not find that effect to be more than minor from a traffic management and safety perspective. I put to one side, for the moment, the matter of amenity effects potentially created by the arrival, parking and departure of multiple users – especially in the morning and evening peaks.
67. I note also that if the condition proposed to require 60% of all dogs to be transported by the operator's vans is imposed, then the maximum number of vehicle movements per day / peak periods falls well below the number adopted for assessment purposes – albeit with 120 dogs that still entails upward of a maximum of $4 \times 48 = 152$ private vehicle movements/day plus the dog transporter movements.
68. For the record I note that submitters did not adduce expert traffic / transportation evidence.
69. I find that traffic management, network efficiency, and safety effects can be appropriately mitigated such that the adverse effect will be no more than minor.

Dog noise

70. The applicant did not provide an acoustic assessment with the application. That assessment was commissioned by Council, with the approval of the applicant, and provided by Mr Hegley as noted above.
71. The applicant's argument, using Mr Hegley's assessment, is essentially that because a building can be built to a standard that excludes or reduces noise at a defined point to less than the applicable noise standard, that matter need not be interrogated further under the RMA once the appropriate noise standard and reference point is agreed and set. The detail, especially with respect to the ventilation system, can be left for the building consent to ensure design compliance.
72. Furthermore, as the dogs will not be provided with an outdoor facility the only external noise will then occur as dogs are conveyed from and to the car parks.
73. Submitters were sceptical about the ability of the proposed conceptual facility to control noise – and were concerned that detailed information about the building, its ventilation system, and general openings was not before the hearing. Furthermore they raised doubts about the suggestion that people arriving with (or fetching) their dogs, in concert with others at the same time, would not result in bouts of barking and general noise in and around the car park areas.
74. The test of section 104D(1)(a) RMA requires that the decision maker is satisfied that the adverse effects of the activity on the environment "*will be minor*", not "may be" or "could be". With the information provided at this point, that test cannot be met for noise. Furthermore, I am not satisfied that such a central matter should be left to a different (building) consent process to determine. I accept that, technically, any building can be designed to control noise if no expense is spared. Indeed, an enclosed internal vehicle reception facility could also be integrated into the design. However there is no certainty attached to such a conceptual prospect. – and the attendant risk of noise nuisance is not a matter that the immediate community should have to bear. As the management of dog noise is a key adverse effect element of the proposal, I would have expected a more detailed consideration of building design to be before the hearing.
75. As also discussed latter in this decision, the lack of evidence about dog management for a facility of this scale was concerning.

Finding

76. I find that the section 104D(1)(a) RMA gateway test is failed on the grounds of uncertainty and confidence with respect to the facility and the management of dog noise effects. The level of detail is simply insufficient to enable me to conclude that the adverse effects will be minor.

Section 104D(1)(b) – activity contrary to the plan

77. No planning evidence was produced by the applicant.
78. As noted Ms Thomson accepted that while the activity was contrary or partially contrary to two objectives and their associated policies of both relevant Plans, her overall conclusion was that this did not constitute being contrary *to the Plan*.

79. Ms Buxeda submitted in disagreement.
80. The issue to be determined, therefore, is whether the two objectives/policies are so central to the directive provisions for the Rural Zone that they constitute a material tipping point.

The Operative District Plan

81. In terms of the 9 key objectives stated for the rural zone under section 17C.2.1 of the District Plan, the only one that seems to bear directly on this application is:
9. *To provide for local social, cultural and economic non-residential activities of an appropriate size and scale that maintain and/or enhance rural character, rural productivity and the wellbeing of the people and communities of, and visitors to, the district.*
82. This is given further detailed expression under Policy 17C.2.2 and particularly policy 3 which states:
3. *Limit the range of industry and service activities that can be established in the Rural and Coastal Zones to those that have a clear connection to, or provide services to, rural activities (including FARMING, forestry, HORTICULTURE, INTENSIVE FARMING) or marine farming/fishing activities, and avoid activities which do not rely on or support the productive use and capacity of rural land or the marine environment, and/or are more appropriately located in a Business Zone.*
- 3A. *In addition to Policies 1, 2 and 3 above, enable the people and communities of the district to provide for their social, cultural, economic and environmental wellbeing in a way that is compatible with and/or enhances the rural economy and character of the area. The scale, intensity, context and character of non-residential activities should support rural activities, the rural economy (including tourism) and maintain and/or enhance rural or natural character or a cultural association with the area. This is to be achieved by:*
- *directing and managing non-residential activities that, because of their scale, intensity and characteristics, have little association with the rural and coastal areas, are contrary to the long term rural goals for maintaining rural character, and/or are more appropriately located within the metropolitan urban limits of Auckland or within the district's towns or villages;*
 - *avoiding activities that do not rely on or support the productive use and capacity of rural land, or do not have an association with the character, amenity, communities, recreation and tourism, character or attributes of the district;*
 - *enabling a diversity of rural business activities that have a clear and genuine connection with the resources, communities or the character and amenity of the rural areas of the district, with a focus on:*

- *agriculture and horticulture produce packing, processing and appropriate manufacturing of goods;*
- *history, culture, health and wellbeing;*
- *festivals and events, food and beverages;*
- *outdoor recreation and pursuits, nature, rural and wilderness experiences, and relaxation activities;*
- *artistic endeavour, creative industries (including filming) and handicrafts;*
- *home occupations;*
- *rural business support and innovation;*
- *appropriate retail activities associated with produce stalls, farmers markets, home occupations, nurseries, artistic endeavour, agriculture and horticulture, produce, goods processed from the site's resources and appropriate retail ancillary to rural activities on the site; and*
- *tourism that is appropriate to the district and its communities.*

83. On its face it is not evident how this proposed dog daycare activity fits with either the objective or the policy in that, as noted by Ms Buxeda, it has no obvious relationship to or with rural character, activities or economy, and is, more typically, located in urban areas. It certainly cannot be said to “have a clear and genuine connection” with the matters identified. But is it “contrary to”?
84. What is to be taken from the fact that the Plan enables “boarding kennels and breeding kennels or catteries and dog training grounds” as a restricted discretionary activity in the rural zone, and that “child care and learning centres” (which, arguably, have similar operating hours and potential for traffic and noise effects as the proposed activity – but sharing with the former the requirement for outdoor play areas) is also a non-complying activity?
85. While I heard no planning evidence on the matter, and therefore need to tread carefully, it would appear that there is a discernible demarcation line. Boarding facilities clearly need “grassed” outdoor areas and larger spaces, and are typically found in rural or peri-urban areas. They are also capable of supporting the rural community, albeit used also by “townies”.
86. Child care centres, on the other hand, are typically found in urban areas (often in or at the edges of non-residential zones) because, needing some (but not necessarily grassed) outdoor play areas, noise and traffic issues can be significant. Indeed the Plan provides for them in the Rural-Residential zone as a discretionary activity and in the Village and Village Business zones as a permitted activity.
87. Dog daycare facilities also typically, I understand, do not need grassed outdoor areas – indeed tend to be located in commercial/industrial areas, typically in enclosed buildings.
88. However, it is important to note that neither dog daycare nor child daycare as an *activity* is prohibited in the rural zone. The matter is left to be determined against the objectives, policies and rules of the Plan. As Policy 3A notes, it is the *scale, intensity, context and character* that are important. It would be difficult on that reading, for

instance, to suggest that a dog daycare minding say 8-10 dogs in the same location would be an issue. It is precisely the scale, context and characteristics of this proposal that are in question.

89. Finally, I note that Ms Buxeda placed emphasis on the second bullet point of Policy 3A and the injunction word “*avoiding*”. We are all cognisant of the import of that word post-King Salmon. However, in this context we cannot be confident that no one in the rural community would derive support from or associate with the proposed activity or similar (setting aside for the moment matters of scale etc). And I note Ms Thomson’s point that the land here has already been subdivided to the point where rural productive use and values are effectively compromised.
90. I am not, therefore, inclined to accept that avoidance is required with respect to the *activity* of dog daycare in the rural zone. Whether, because of its scale etc, that imperative conjoins with the first bullet point *directing* such activities toward an urban location seems more to the point.

The Proposed District Plan

91. With respect to the Proposed District Plan, Ms Thomson concludes that the application is contrary to Objective 5.1.1 and Policy 5.3.3.
92. Objective 5.1.1 states:

5.1.1 Objective – The rural environment

Objective 5.1.1 is the strategic objective for the rural environment and has primacy over all other objectives in Chapter 5.

- (a) *Subdivision, use and development within the rural environment where:*
- (i) *high class soils are protected for productive rural activities;*
 - (ii) *productive rural activities are supported, while maintaining or enhancing the rural environment;*
 - (iii) *urban subdivision, use and development in the rural environment is avoided.*

93. Policy 5.3.3 states:

5.3.3 Policy – Industrial and commercial activities

- (a) *Rural industries and services are managed to ensure they are in keeping with the character of the Rural Zone.*
- (b) *Avoid locating industrial and commercial activities in rural areas that do not have a genuine functional connection with the rural land or soil resource.*

94. The Plan defines commercial activities as follows:

Commercial activity

Means activities involving the sale or distribution of goods and services.

95. It would, I think, be difficult to argue persuasively that dog daycare - at least at the scale proposed – has a genuine functional connection with the rural land or soil resource. Working dogs may be kennelled; they would rarely be daycared I suspect.
96. Given the explicitly stated primacy of the strategic objective (as currently proposed but not yet heard and determined) and the injunction in Policy 5.3.3(b) I agree with Ms Thomson that the proposed activity is clearly contrary. However I disagree that one can then suggest that being contrary to the overriding strategic rural objective is not thereby contrary to the Plan. It must be the case – albeit those provisions have yet to be tested through hearing. While the situation might be clarified by refinements to the proposed rules in due course – for example by establishing acceptable thresholds - at this point those rules have no legal effect and the avoidance policy seems absolute.

Finding

97. I find, on balance, that the application *activity* will not be contrary to the objectives and policies of the operative District Plan, which allows for its effects to be determined relative to clear directions and a high non-complying activity hurdle.
98. On the other hand I find that the application activity is contrary to the objectives and policies of the Proposed District Plan.
99. However, because of the nascent stage of the Proposed District Plan, I find overall that the application squeezes through the gateway test of s104D(1)(b) and can be assessed under section 104 RMA.

Principal issues in contention

100. The principal issues in contention remaining (and clearly the key determinative issues) were:
 - (a) Whether allowing the activity as proposed would avoid, remedy or mitigate all relevant adverse effects; and particularly
 - (b) Whether the reasonably expected rural amenity would be maintained by the proposed activity.
101. These issues are discussed in the following section.

The activity's adverse effects

102. As noted above, at some scale the proposed activity would undoubtedly find congruence with the general planned expectations of and for the Rural Zone. The question is whether at 120 dogs that is the case.
103. Of concern is the fact that, as the applicant acknowledged at the hearing, they have neither expertise nor experience with dog daycare at this scale, notwithstanding their clear enthusiasm for dogs and the same, and that the facility would be operated by as-yet unidentified experienced staff. No evidence was provided about the feasibility of operating with 120 dogs and the ability to actively manage the effects of such a large number. The only such sizeable facility noted apparently operates from an essentially commercial area in Parnell, Auckland, but no detail was provided.

104. Latterly Council has proposed an acoustic monitoring condition break-point at 6 months and/or at 80 dogs whichever first occurs – but with little apparent justification for that number; a number that still appears considerably larger (anecdotally) than the average dog daycare facility.
105. Furthermore, no evidence was provided about the way in which dogs in numbers behave when being delivered to or collected from such facilities – particularly in terms of the positioning of the two car parking areas when potentially 20 simultaneous arrivals / departures (in addition to the transport vans) might feasibly occur at peak times.
106. With respect to on-site traffic and adjacent amenity, and based on 60% of dogs being transported in the dog transporters, 24 transporter van trips (assuming an unlikely minimum of 12 dogs per trip for 72 dogs) and 152 private vehicle trips per day would be involved, five days every week. That this level of site traffic is out of scale with normal rural activities goes without saying and is an effect that is not readily amenable to mitigation. No compromise has been reached with immediate neighbours that might predispose one to an alternate conclusion – the absence of which would, in all likelihood, continue to be a source of considerable irritation (even without the matter of potential dog noise).

Finding

107. I find that the level of detail in the application is such that no confidence can be had that the level of adverse effect on the rural amenity expected by neighbours will be sufficiently avoided, remedied or mitigated. Reliance upon good intentions and secondary approval processes is no substitute at this stage. As submitters having reasonably raised the issues, the burden lay with the applicant to answer those issues directly and persuasively.

Draft Conditions

108. In order to try to find a way through the matters of uncertainty, Council helpfully proposed some amended draft conditions that included:
 - (a) A condition precedent concerning the regional wastewater discharge / disposal consent that is required – effectively preventing the daycare activity from operating until that had been granted and implemented;
 - (b) Acoustic monitoring at 6 months or 80 dogs, whichever occurred first – and, if the former, further monitoring when a total of 80 and then 120 dogs is reached;
 - (c) Requirements for management plans, car park dog-proof fencing, a dog register, minimum percentage use of dog transporter, and provisions for dog management.
109. The need for these additional proposed conditions simply, I find, underscores the fact that the application contains material inadequacies and uncertainties – which the locally-affected community is entitled to have greater assurance about. While that consideration by Council is helpful, it does not cure that basic deficiency.

Section 104 and Part 2 RMA

110. I have considered the matters required under s104 of the RMA and have concluded that the actual and potential effects on the environment of allowing the activity cannot, with confidence, be considered able to be managed appropriately in the rural zone. I accept that the activity in itself and at some undefined lesser scale is not necessarily inappropriate.
111. No s6 RMA matters of national importance or s8 (Treaty of Waitangi principles) were identified as being directly engaged by this application.
112. Of the s7 RMA other matters to which particular regard is to be had, I consider the following relevant:
- (b) the efficient use and development of the physical (land) resource;
 - (c) the maintenance and enhancement of amenity values; and
 - (f) maintenance and enhancement of the quality of the environment.
113. Those matters were rehearsed in the respective documentation, evidence, submissions and representations and regard to them has been had in this decision.
114. When put into the wider context of the Part 2 sustainable management purpose of the RMA and the function of territorial authorities, I am not satisfied that the application will promote the sustainable management purpose of the RMA and will not adversely affect the wellbeing of residential neighbours.

Decision

115. In exercising delegated authority under section 34A of the RMA and having regard to the foregoing matters, sections 104, 104B and 104D and Part 2 of the RMA, the land use application by Rural Tails Limited to establish a 120 Dog Daycare facility in a Rural Zone, at 11 Ridge Road, Tuakau (being Lot 5 DP 133049) with associated building, infrastructure, carparking, signage and landscape / screen planting - Council reference LUC0529/18 – is refused for the reasons discussed in this Decision (and as summarised below).

Summary reasons for the decision

116. After having regard to the actual and potential effects on the environment of allowing the proposed activity and taking into account the relevant statutory and statutory plan provisions, I find that consent for the proposed activity should be refused for the reasons discussed throughout this decision and, in summary, because:
- (a) The level of detail provided means that the adverse rural amenity effects of the proposed activity on residential neighbours cannot, with sufficient certainty, be considered avoided, remedied or mitigated;
 - (b) The acoustic evidence is predicated on building and dog management assumptions that remain too uncertain, reliant upon secondary approval or engagement processes, with attendant risk of underestimating potential adverse effects;

- (c) Imposing partial adaptive management conditions is not appropriate given that the uncertainties have potentially significant adverse effects; and
- (d) Refusing consent is consistent with the sustainable management purpose and principles of Part 2 of the RMA, and the relevant provisions of the statutory plans.

A handwritten signature in black ink that reads "David Hill". The signature is written in a cursive style with a large, sweeping initial 'D'.

David Hill

Independent Hearing Commissioner

Date: 22 March 2019