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**Attention: Commissioner Alan Withy**

Dear Sir

**Application by Kiwifruit Investments Ltd for Shelterbelts: 0147/22**

1. The Minute and Hearing Directions dated 19 January 2023 requests that Counsel for the Applicant and Submitter provide legal arguments around the position recommended by the s42A Reporting Officer regarding Application 0147/22, that it should be approved on a non-notified basis.

2. We have sought clarification that it is the Shelterbelt application that has triggered that request and this letter assumes that starting point.

3. As a matter of law, we consider that the decision on notification is not of itself a decision that can be the subject of legal submission from either the Applicant or the Submitters. Rather it is a matter that must be decided by the Consent Authority and can only be challenged by way of Judicial Review. However, we understand that the basis for the request relates to the factual and legal frameworks that relate to the application of Rule 4.4.2.58 – Tree Planting.

4. We have reviewed the legal opinion provided by Tompkins Wake dated 13 January 2023 and agree with that opinion. We agree that there is a difference between a 'sleep out' and a 'dwelling' for the purposes of the District Plan and that is why they are separately defined and described. A sleepout is an 'accessory building' and a 'dwelling' is a dwelling. Moreover, if the District Plan sought to capture all residential buildings within Rule 4.4.2.58, the rule would have included the wording 'residential activity' as opposed to 'dwelling', which has its own definition under the District Plan.

5. In addition to the matters covered in the Tompkins Wake opinion we note that different setbacks apply to accessory buildings and dwellings. Accessory buildings that are less than 100m$^2$ in area must be set back from internal site boundaries a minimum distance of 10m (Rule 4.4.2.2(c) within the Rural Zone). Whereas dwellings on sites greater than 1ha must be set back a minimum of 15m, and Dwellings on sites of 1ha or less need to be setback a minimum of 10m.

6. We understand that the Jennings property is less than 1ha, however the house is existing and was originally built when the property was part of the larger surrounding farm. This smaller lot, including its dwelling, was created as a result of a subdivision where any effects on the neighbouring land at that time would have been considered.

7. The purpose of the larger setback is to ensure that there is no adverse amenity effect on the rural neighbour and presumably to avoid reverse sensitivity effects. We are unclear whether there was a simultaneous land use consent granted with the prior subdivision resource consent for the Jennings sleepout given that it appears to be closer than 10m to an internal boundary. In any event, it is clear that the District Plan anticipates that accessory buildings, including sleepouts, can be closer than dwellings to internal boundaries within the Rural Zone. In our submission that differentiation recognises that there are different effects for the rural neighbours.

8. With reference to the deck areas surrounding the submitters' dwelling and the swimming pool, these areas do not form part of the 'dwelling' as the District Plan excludes these features from its definition of 'building', and they are consequently excluded from relevant setback rules.

9. The other matter we wish to note is that the Submitters have sought a narrow interpretation of Rule 4.4.2.58 regarding the interpretation of "No trees within a…*shelterbelt which are or are likely to grow to more than 6m in height shall be planted closer than any of the distances specified below*:" The interpretation advanced for the Submitters by Mr Lang in his letter dated 5 October 2022 was for a literal approach which requires the shelter belt species to be of a kind that do not grow higher than 6m. Previously, Council processing officers applied this rule to allow shelterbelts so long as they were maintained to a height of no greater than 6m.

10. The Tompkins Wake opinion dated 7 October 2022 also considered the words of Rule 4.4.2.58 and its reference to 'Planting' and 'planted' and applied the plain and ordinary meaning of those words to agree that the rule permitted only species that would grow to less than 6m high.

11. In our submission, it would now be inconsistent to apply Rule 4.4.2.58, or other setback rules in the District Plan such as Rule 4.4.2.2, other than by considering the plain and ordinary meaning of the words and their context within the rule framework. As set out in the Tompkins Wake opinion, there is a difference between an accessory building and a dwelling as accessory buildings can be positioned 10m from an internal boundary in the Rural Zone. Rule 4.4.2.58 specifically references a setback to a dwelling and no other buildings. The rule does not reference residential activities to capture a setback to all residential buildings.

12. There is no setback applying to a shelterbelt when planted any distance from a sleepout/accessory building. There is a 30m setback required for a shelterbelt from a dwelling.

13. The Applicant proposes a shelterbelt that will be 30m from the Submitters' dwelling and the location of the sleepout/accessory building is irrelevant to that measurement.

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Partner