SR 255760
Luti : 1048648
file please

Dave Armour
Resource Management Solutions Ltd

8 John St,
Titahi Bay,
PORIRUA
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PROJECT HQL/01/61

25 September 2012

Brett Smith
(Senior) Consents Planner
Development Planning and Compliance
Wellington City Council
PO Box 2199
WELLINGTON

Dear Brett

GRANTED APPLICATION FOR EXISTING USE RIGHTS CERTIFICATE 39 HORIKIWI QUARRY LIMITED, 39 HOROKWI ROAD, HOROKIWI.

COUNCIL REFERENCE SERVICE REQUEST NO: 255760

Ross Baker has requested that Philip Milne (Barrister), and I review the existing use certificate as issued by the Wellington City Council, including the Notice of Decision, 15 August 2012, and the formal decision, correspondence dated 10 September 2012.

Philip has advised that in his opinion the Notice of Decision appropriately addresses, and considers matters under sections 139A, and 10(1)(a)(i), 10(1)(a)(ii), 10(2), and 10(3) of the Resource Management Act. However, he has advised that the formal issue of the decision by way of your letter dated 10 September does not meet the requirements of sections 139A (1) (b), and (c) of the Act which requires inter alia that the *certificate* as issued includes a description of the use of the land, and that the character, intensity and scale of the use of the land on the dated on which the certificate is issued is specified.

I therefore request that the Council review the format of the decision in issuing the existing use certificate in order to satisfy the requirements of section 139A of the Act. To assist the Council I have prepared, and append a possible format for the decision to issue the existing use certificate (the current decision remains valid and part of the process). The draft certificate is directly based on material in the application

Yours Faithfully

Dave Armour

Encl

Copy to Philip Milne Barrister and Independent Commissioner
Ross Baker Manager Horokiwi Quarries Limited.

CERTIFICATE OF EXISTING USE IN RELATION TO LAND OWNED AND USED BY HOROKIWI QUARRIES LIMITED

1. The Decision

Pursuant to section 139A of the Resource Management Act 1991, the Wellington City Council hereby certifies that the uses of land as described below were uses allowed by section 10 of the Resource Management Act as at the 10 September 2012.

2. The Address and Location

39 Horokiwi Road, Horokiwi. The land is identified in the following plan prepared by CPG Consultants Horokiwi Quarries Limited Overview Aerial and Features Overview.

3. Legal Description

Part Section 18 Harbour District; Lot 1 DP 58444; Section 1 Survey Office 23514; Lot 1 DP 6640; Part Section 16 Harbour District; Lot 1 DP 20888; Lot 8 DP 28139; Lot 2 DP 415604; and Lot 4 DP 415604

4. The Activities

The activities are all those activities of a working quarry and associated activities, as follows;

a. Stripping.

b. Blasting.

c. Transport of excavated material.

d. Crushing, screening, and washing.

e. Stockpiling.

f. Transport from the site

g. Ancillary activities

These are described in Appendix 1.

5. Specification of the character, intensity and scale of those uses at the date of issue of the certificate.

The *character* of the use is all those elements of a working quarry as described above (4).

The most appropriate measure of *intensity and scale* is considered to be the tonnages of material produced, and numbers employed at the quarry. Appended to this decision is a yearly breakdown of tonnages of material produced at the quarry between 1999, and 2011(Appendix 2).

Employment at the quarry has remained constant at 13- 15 personnel over the last 20 years and is predicted to remain at the same level for the foreseeable future.

Appendix 1

Description of the use of the site as at 1st May 2012.

Stripping

Stripping in the quarry is handled by a combination of the following methods:

- Excavating, dozing and loading of overburden material into the trucks to the market for use as fill; and
- Scrapers are sometimes hired on a contract basis and the overburden is stripped and placed in dumps in various places in the quarry; and
- Overburden is sometimes pushed over the side of the bench faces using a dozer or excavated and loaded into trucks and carted to identified dumps.

These activities currently occur at Mita Peak for its full width and also at the eastern end and on top of the Crown Hill.

Areas of likely future stripping and/or quarrying on the site within the next 5 years are also shown on CPG Plan identified as Plan 3 in Annexure B

Blasting

Blasting is used when working the lower benches within the quarry. Material requiring blasting is blue rock and very solid brown rock (only partially oxidized). When a large blast is needed a contract driller is hired to drill between 30-40 holes at depths between 10-20 metres. Powergel is normally used as the holes normally contain groundwater. Amex is used if holes are dry. Initiation of the blast varies depending on conditions from red cord, down hole detonators to Nonnel. HQL owns its own drilling rig and compressor.

Transport of excavated material

Material from the face is carted to the crushing plant by either HQL owned rock dumpers (30 – 45 tonne capacity) or by road trucks on a hire basis.

Crushing, screening and washing

There are three fixed crushing and screening plants at the Quarry. The Sand and Chip Plant is used for the production of sand, aggregates and specification materials. The Basecourse Plant is used for the production of general purpose products. The Primary Plant is used to process rock direct from the face and to provide feed material for the main plant and on occasions the Basecourse Plant.

The location of the crushing and screening and washing plants is shown on attached Plan **3** in Annexure **B.**

Stockpiling

Primary stockpiling at the Quarry is carried out using a stacking conveyor. All other material from the plant is taken from bins by dump truck. All stockpiles within the Quarry are formed on level ground with sufficient room to allow maneuverability of vehicles. When tipping over a face or the edge of a stockpile a bund at the edge must be present. Material is to be tipped at least three metres from the edge and then pushed over using a loader or a bulldozer. Access ramps are at an angle compatible for the stockpiling equipment and are kept bunded on the sides to the height of the axle of the tipping vehicle. The lead up to the tipping vehicle is sloped upwards and kept well compacted. Tipping over the edge is allowed when the ground is stable, and when a bund and marker flags are present. Undercutting of stockpile is not allowed and loading out is not permitted when vehicles are tipping on the top of the stockpiles unless it is well away from the loading area.

There are approximately 30 different categories of stockpiles. The current location of stockpiles is shown on the CPG Plan, Plan 3 in Annexure B. In the future stockpiling will also occur in the areas shown on this Plan.

Transport from the Site

Transport of material from the quarry is carried out by either road trucks contracted by HQL or by customers picking up material for their own use. All materials and sands are sold by weight.

The procedure for the pick up of material is as follows:

- Incoming vehicles go onto the weighbridge.

- Relevant information, which includes the Tare Weight, is entered into the weighbridge computer system.
- Outgoing vehicles go into the weighbridge and the gross weight is entered.
- The weighbridge system produces two dockets – one for the customer and one kept by the quarry.

Ancillary activities

The following ancillary activities take place on the site.

- Exploration
- Movement and loading of materials
- Vehicle storage and maintenance
- Asphalt production
- Emulsion production and handling
- Operation of landfills and dumps
- Drilling and blasting.
- Processing of materials i.e. crushing and screening of the material
- Quality testing of aggregates; and
- Sales over the weighbridge both sales to industry groups and private sales
- All other activities normally associated with a quarrying operation of this type.

Appendix 2

Tonnages of material produced for years ending 31st December for the last twelve years are as follows;

Tonnnes Produced	Years(June 30)
450,000	2011
418,000	2010
487,000	2009
692,000	2008
552,000	2007
432,000	2006
461,000	2005
513,000	2004
342,000	2003
368,000	2002
386,000	2001
410,000	2000
411,000	1999

Average tonnage over the 5 years ending 31 December 2011 was 519,800 tonnes. Average tonnage over the next 5 years, including the present, is expected to remain at similar levels.

Appendix 3

CPG Plan Horokiwi Quarries Ltd Quarry Overview Aerial & Features Overview Project No 023465 Sheet Sw930 Revision A. 24 May 2010.

Note: Aerial photographic provided by AAM (Australian Aerial Mapping). They flew ortho and oblique images in March 2009. Contours and surface features by CPG ltd.

Revision	App	Date
A Additional aerial tiles added	BDG	24-05-10

Surveyed	VARIES (PHOTO DATE SHOWN)	
Designed	D. GROWCOTT	21-05-2010
Drawn	D. GROWCOTT	21-05-2010
Reviewed	N. HARTHOLOMEW	21-05-2010
Approved	B. GAWN	21-05-2010

CPG New Zealand Ltd
23 Taranaki Street
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wellington@nz.cpg-global.com

Client
HOROKIWI
QUARRIES LTD

Project Title
QUARRY
OVERVIEW

Sheet Title
AERIAL & FEATURES
OVERVIEW

Scale (A0 Original) 1:1500

30 15 0 30 60 90 m

Project No	Sheet	Revision
023465	SW930	A

Absolutely Positively Wellington
Me Heke Ki Pōneke
Wellington City Council

FILE

10 September 2012

Resource Management Solutions Ltd
8 John Street
Titahi Bay
PORIRUA 5022

Service Request No: 255760
File Reference: 1048648

Attention: Dave Armour

Dear Dave,

Application for Existing Use Certificate Granted

Service Request Type:	Existing Use Rights Certificate
Site Address:	39 Horokiwi Road, Horokiwi
Legal Description:	Part Section 18 Harbour District; Lot 1 DP 58444; Section 1 Survey Office 23514; Lot 1 DP 6640; Part Section 16 Harbour District; Lot 1 DP 20888; Lot 8 DP 28139; Lot 2 DP 415604; and Lot 4 415604

I write in relation to your application for an Existing Use Rights for the quarrying operation on the site at 39 Horokiwi Road, Horokiwi.

The application was considered by officers acting under delegated authority on 15 August 2012. The application has been assessed under section 139A of the Resource Management Act 1991, and is approved.

A full copy of the Decision Report is attached. If you would like to discuss this application further please contact me on the number below.

Yours Sincerely

Brett Smith
(Senior) Consents Planner
Development Planning and Compliance
Wellington City Council
Phone: 801 3211
Fax: 801 3165

Dave Armour
Resource Management Solutions Ltd

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PROJECT HQL/01/61

26 July 2012

Erin Whooley
Consents Planner
Development Planning and Compliance
Wellington City Council

Dear Erin

REQUEST TO ISSUE EXISTING USE CERTIFICATE PURSUANT TO SECTION 139 OF THE RESOURCE MANAGEMENT ACT 1991 HOROKIWI QUARRIES LIMITED 39 HOROKIWI ROAD; HOROKIWI; STATUS OF THE QUARRY ACTIVITY UNDER RELEVANT MAKARA COUNTY DISTRICT PLANNING SCHEMES

COUNCIL REFERENCE SERVICE REQUEST 255760

I refer to your request as to further information as to the status of the quarry activity under relevant Makara County District Planning Schemes; and can summarise the status of the activity as follows.

- Prior to 1955 the quarry land was unzoned;
- The Makara County District Section (Area 3) was publicly notified on the 8th August 1955, and made operative on the 1st of April 1960. Horokiwi Quarry was within the 'Rural District' under the District Planning Scheme. Predominant uses within the Rural District did not include 'winning and processing of materials'. The Rural District also included a category of activity being land which could be used for identified purposes with 'the

consent of council'. This category did not include 'winning and processing of materials'. A copy of the planning map is enclosed.

- The Hutt County District Scheme Review was made operative on the 31st March 1973. I cannot confirm the date it was publicly notified. Within the Rural A and B Zones the 'winning and processing of materials' was a conditional use.
- The City of Lower Hutt District Scheme Review which was made operative on the 26 September 1977, did not include the quarry land (reference Planning Map No 10). The quarry land was included in the 1979 Review of the Wellington City District Plan (Planning Map 8A).

I also include, by way of background information, a copy of a decision of the Town and Country Planning Appeal Board, and consent order dated 9th of February 1977. The decision and consent order of the Town and Country Planning Appeal Board was in relation to an appeal by Horokiwi Quarries against a decision of the Lower Hutt City not to allow the Company's objection to allow the right to win and process quarry material as a predominant or conditional use in the Rural B Zone . Horokiwi Quarry's particular interest related to land owned by the Company on the north side of Horokiwi Road adjacent to the existing quarry. The decision of the Board makes specific reference to the extent of the existing quarry operation.

I can also confirm that the evidence of the then Managing Director of Horokiwi Quarries Limited to the Lower Hutt City Council in support of this objection referred to the quarry activity as commencing "*about 1934 and has been carried out continuously ever since*".

I would be happy to discuss further with you.

Yours Faithfully

Dave Armour

COPY TO

Ross Baker
Manager Horokiwi Quarries Limited

Philip Milne Barrister/Independent Commissioner

IN THE MATTER of the Town and Country Planning Act 1953

and

IN THE MATTER of an appeal under Section 26 of the Act

BETWEEN HOROKIWI QUARRIES LIMITED

Appellant

AND LOWER HUTT CITY COUNCIL

Respondent

BEFORE THE NUMBER TWO TOWN AND COUNTRY PLANNING APPEAL BOARD

Messrs W.J.M. Treadwell S.M. (Chairman)
R.J. Calvert
H.M. Besley
R.S. Martin

HEARING at Wellington on the 9th day of February 1977.

COUNSEL Mr E.F. Page for Appellant.
Mr T.A. Roberts for Respondent.

INTERIM DECISION

This is an appeal pursuant to the provisions of section 26 of the Town and Country Planning Act 1953 against a decision of a respondent council disallowing an objection designed to allow the right to win and process quarry material as a predominant or conditional use in the Rural B Zone. The appeal also concerned disallowance of an objection to permit the appellants, after development of the quarry, to store on the land containers and buildings accessory thereto.

The appellants at present operate a quarry which was previously in the Hutt County. The area of land owned by the appellants is now partly in the Lower Hutt City and partly in the Wellington City. Horokiwi Road is the boundary between the two local authorities and the appellant is permitted to carry on quarrying operations as a conditional use in the Wellington City but is now precluded from so doing in the Lower Hutt City because of the provision of the proposed scheme change.

The proposed change covers an area of approximately 1088 acres which is almost entirely rural in character. The area owned by the appellant company is on the perimeter of the new zone where the Lower Hutt City meets the Wellington City. The objective of the sceheme change is to preserve the rural character of the area. The respondent council have to a certain extent compromised zoning in the Horokiwi Road area by allowing a 10 acre subdivision near the top of the Road which road climbs up an escarpment which faces the

T.C.P.A 1977 court decision

harbour then generally runs along a ridge. The road is at the moment generally maintained by the appellant company which is actively quarrying the area of land contained within the Wellington City. The Board was somewhat surprised that residential development of this type should be permitted in this particular locality and was concerned that this development had been permitted on what appeared to be a barter system whereby the subdivider obtained the right to subdivide in exchange for ceding land to the council for reserve purposes. It therefore ill behoves the council to object to further quarrying in the area on the basis that it may in some way prejudice the residential amenities which should never have been created in the first place.

The Board is satisfied on the evidence that there is a quarry established in this area which is providing materials for use by local authorities. The Board is satisfied that its location is such as to service local authorities with metal at economic rates having regard to the road transport distances from the quarry to the source of consumption. It is accordingly in the public interest to facilitate the orderly development of a well established enterprise. It is also in the public interest to continue the operation on its present site provided adequate amenity safeguards can be provided. It is in many ways better to accept the presence of such an enterprise in a position which may not be ideal and to facilitate its continued development in that situation than to establish such an enterprise anew in an area where it may be planned for but may be physically unexpected. The Board would have also observed that respondent council appear to have ignored reality having regard to the fact that the quarry is recognised on one side of the road by the Wellington City and prohibited on the other by the Hutt City.

The appeal is accordingly allowed by way of interim decision. The parties are to place before the Board a schedule of land which is to be incorporated in the proposed new zone. This land schedule is to recognise the right of the appellant to quarry upon land already owned by the appellant on the Lower Hutt City side of Horokiwi Road. The operation is to be permitted pursuant to a schedule by way of conditional use and the land area set aside for the permitted use is to exclude escarpment faces which might have a visual impact when viewed from the direction of the Wellington Harbour. The Board accordingly awaits a suggested land definition, and failing agreement between the parties, the matter will be settled by the Board.

Dated this 22nd day of JUNE 1977.

THE SEAL OF THE

A 5002

No 305/76

IN THE MATTER of the Town and Country Planning Act 1953

and

IN THE MATTER of an appeal under Sectic 26 of the Act

BETWEEN HOROKIWI QUARRIES LTD

Appellant

AND LOWER HUTT CITY COUNCIL

Respondent

BEFORE THE NUMBER TWO TOWN AND COUNTRY PLANNING APPEAL BOARD

Messrs W.J.M. Treadwell S.M. (Chairman)
R.J. Calvert
H.M. Besley
R.S. Martin

Hearing at Wellington on the 9th day of February 1977

CONSENT ORDER

The Board, having read the memorandum dated 6 September 1977 filed by the parties herein, hereby orders by consent that the above appeal against the Lower Hutt City Council District Scheme review No. 1 be allowed in the following manner and to the following extent :

A. By inserting in Ordinance II Clause 3 the following subclause (b) :-

(b) "The winning and processing of materials occurring naturally on the land known as: -

(1) 4 Acres, 3 roods 2 perches being part of section 17 Harbour district and all the land in Certificate of Title Volume 149 Folio 267 (Wellington Registry)

(2) 43 Acres, 2 roods 23.4 perches being part of section 18 on the Public Map of the Harbour district and all the land in Certificate of Title Volume 59 Folio 93"

B. By amending the heading of Sub-clause (4) of the draft Ordinance to read : -

"Bulk and Location Requirements - General"

C. By inserting a new Sub-clause (5) in ordinance II Clause 3 as follows:-

"(5) Bulk and Location and Other Requirements for the Winning and Processing of Naturally Occurring Materials."

(a) Any application for approval to a conditional use to permit the winning and processing of materials occurring naturally in the land referred to in Sub-clause (3) (b) above shall be accompanied by plans illustrating the extent of the proposed operation and its eventual effect on the terrain and showing : -

(i) Vehicular access points, vehicular routes within the

site, the general distribution of buildings and plant areas where overburden is to be placed and/or quarried material is to be stored, significant areas of bush or other vegetation and other major physical features.

(ii) The existing contours of the site and the proposed final contours.

(iii) The phasing of development and the areas proposed to be worked in five yearly periods with the first period dating from the commencement of operations.

(b) Any conditional use approval that may be granted by Council shall include conditions which will ensure that : -

(i) No work shall be undertaken on that part of the land that faces Wellington Harbour (and which forms part of the fault escarpment running along the foreshore from Kaiwharawhara to Korokoro) that would have any detrimental visual effect on the said land.

(ii) The vegetative cover on the land referred to in (i) above, and on any other land not affected by the proposed workings shall be preserved and if necessary enhanced by additional planting of suitable trees and shrubs.

(iii) Any overburden that is removed shall be placed in such a manner as to prevent any unsightly appearance from beyond the boundaries of the site.

(iv) Control of any watercourses on the land and the control of runoff from the land shall be to the satisfaction of the Council and of the Wellington Regional Water Board.

(v) The location of all vehicular access points shall be to the satisfaction of the City Engineer.

(vi) All operations on the land shall be conducted in such a manner as to ensure that Horokiwi Road is not obstructed at any time.

(vii) Before any operations are commenced on the site, the applicant shall submit to Council a preliminary rehabilitation plan showing appropriate landscaping and planting to be carried out when each part of the area has been worked out, so as to blend the rehabilitated area with surrounding areas. No work shall be commenced on the site prior to such plan being approved by Council.

(viii) Not less than six months prior to completion of working of each phase of the overall development, the applicant shall submit to Council for approval a final rehabilitation plan for the relevant phase which shall conform generally with the approved preliminary rehabilitation plan and shall show in detail the landscaping, planting and any other work proposed to be carried out so as to blend the rehabilitated area with surrounding areas.

(ix) Work in accordance with the approved rehabilitation plan shall be completed to Council's satisfaction as soon as practicable after completion of the winning of material from the relevant area has ceased.

(x) A performance bond in an appropriate sum determined by Council will be required at the commencement of each phase of the development to ensure that rehabilitation of that phase is completed to Council's satisfaction.

(xi) The land and buildings shall be maintained at all times in a neat and orderly manner to Council's satisfaction.

The appellant had also requested the right after the full development of the quarry to store containers on the land and erect buildings accessory thereto. The type of container is that used for the transport of goods primarily by sea.

In its interim decision the Board omitted to make a determination in respect of that aspect of the appeal. The Board disallows the appeal in respect of containers for the following reasons.

1. Until the land has been exhausted for quarry purposes the use for the storage of containers is premature.

2. That container storage requires a large amount of land together with a considerable amount of heavy traffic movement and is a matter requiring detailed consideration at district if not regional level.

3. In the absence of detailed evidence establishing the appeal site as a site suitable for the storage of containers in the context of land and services available in the district the Board is not disposed to zone land for that purpose.

DATED this 2nd day of November 1977.

THE SEAL OF THE TOWN AND COUNTRY PLANNING BOARD No. 2

.....
Chairman

"District Planning Map"
July 1959
from applicant with land
parcel highlighted.

Absolutely POSITIVELY Wellington
Me Heke ki Pōneke
Wellington City Council

PO Box 2199, Wellington 6140, New Zealand

New Zealand
Permit No. 2199

Permit

SECTION No3 DISTRICT PLANNING MAP JULY 1958
APPROVED SECTION OF DISTRICT SCHEME

DETAIL A

ROBERTS 802 Ft.

MARCHANT

KOROKORO WATERCATCHMENT AREA

LINDEN Stn.

TAWA FLAT Stn.

TAKAPU Stn.

BOROUGH OF TAWA FLAT

MAGEE 1226 Ft.

HOROKIWI

RIDING

DETAIL B

DETAIL C

HUTT ROAD

PT. 22

PT. 23

PT. 13

PT. 10

PT. 5

LEGEND

- RURAL ZONE
- RESIDENTIAL ZONE
- LIGHT INDUSTRIAL ZONE
- RESERVE FOR PUBLIC USE
- RESERVE FOR RECREATION & OPEN SPACE
- RAILWAY
- ROADS — Existing — Proposed
- STREAMS
- MAIN TRAFFIC ROUTE-ING SYSTEM
- BOUNDARY OF SECTION OF DISTRICT SCHEME
- DISTRICT BOUNDARY
- PROPOSED RESERVE FOR RECREATION & OPEN SPACE

KEY MAP

SCALE 21 CHAINS TO 1 INCH (approx.)

HOROKIWI QUARRIES LIMITED

Horokiwi Road
PO Box 38037
Petone
Sales: 04-568 3441
Fax: 04-568 3440
Emulsion Div: 04-569 2839

Erin Whooley
Consents Planner
Development Planning and Compliance
Wellington City Council
!01 Wakefield Street
PO Box 2199
WELLINGTON 2199

Dear Erin

REQUEST FOR FURTHER INFORMATION APPLICATION FOR A CERTIFICATE OF COMPLIANCE 39 HOROKIWI ROAD,HOROKIWI.

COUNCIL REFERENCE SERVICE REQUEST NUMBER 255760

In response to your request for further information dated 1 June 2012 I enclose the following;

1. Report and plans prepared by Hudson Moody, Director of Survey and Planning Spencer Holmes providing clarification of the historical landownership for the quarry operation at Horokiwi;

2. Correspondence from Dave Armour which discusses the quarry activity in relation to relevant planning instruments since the inception of the quarry; and

3. A report from Philip Milne Barrister which addresses legal issues in relation to the further information request including lawful establishment, the extent of the application site, and confirmation that all activities referred to have been carried out since the use was established.

I look forward to an opportunity to discuss these matters further with you.

Yours Faithfully

Ross Baker

Philip Milne
Barrister
Waterfront Chambers
Wellington
philip.milne@waterfront.org.nz

Legal assessment

16 June, 2012
Erin Whooley
Consents Planner
Wellington City Council

HOROKIWI QUARRIES LIMITED: APPLICATION FOR CERTIFICATE CONFIRMING EXISTING USE RIGHTS

1. I am instructed to act for Horokiwi Quarries Limited ("HQL) in relation to this application. Mr Baker and Mr Armour will respond in relation the further information which you have requested. I will confine my comments to some legal issues. My comments are to supplement the response to the further information request.

Lawful establishment

2. Mr Armour will do his best to outline any relevant consent requirements applicable in the 1930s and since then. However, the key fact is that the quarry has been operating since prior to the RMA and the current District Plan with the full knowledge and acceptance of the relevant Councils. There has never been any suggestion that the quarry was not lawfully established or that it has ceased operate lawfully. The Council letter attached to the application confirms its acceptance of existing use rights at least in relation to the land not covered by the mining permit. There has been no enforcement action by the current council or the Hutt council.

3. In my view, HQL and the Council are entitled to rely on this history, unless there is some indication to the contrary. The activity of quarrying was clearly established prior to the Town and Country Planning Act 1977 and would have been subject to existing use rights under that legislation. There was of course no process of obtaining a certificate of compliance to confirm such rights. Instead (as was also the case under the RMA) it was more a matter of other parties challenging existing use rights rather than the holder having to prove them. It is clear than owners can rely on ss 17 and 18 Interpretation Act 1999 to save rights which arose under the TCPA77 or the preceding 1953 Act: *Stretton v Rodney DC EnvC A068/00*

4. I am unaware of whether there were any planning approval requirements under the former planning Schemes. However, even if there were, HQL would not have had to obtain such an approval if it was lawfully established prior to the date of that scheme.

5. In summary, in my view the lack of any challenge to its operation since it was established from the City Council or the prior controlling councils, give rise to a *rebuttable presumption* that the activity was lawfully established. In my opinion there

is no requirement that HQL prove lawful establishment. Accordingly if Mr Armour is unable to ascertain the planning position prior to 1991, that is no bar to the grant of the certificate.

Extent of the application site

6. HQL will provide the information you have requested regarding the purchase date of various parcels. I simply make the point that the extent of the site is defined by the application. My understanding is that all of the land to which the application relates was either owned or under the control of HQL at the time the District Plan was notified and at the time the relevant rules became operative. However, Mr Armour will confirm the position. There is certainly no requirement that all of the land which is the subject of the application needs to have been owned by HQL or any predecessor when the activity was first established. For the purpose of comparing effect the relevant point of time is when the current rules came into effect.

7. The key issue is whether

The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:

8. Within this context, I note that the test is not whether the operation was active on any particular parcel of land at the relevant time, nor indeed whether it had commenced on that parcel. It is the nature of quarries that their activity progressively extends over time. This proposition is confirmed by the case law referred to below.

9. In *Re Omya NZ Ltd* [2004] NZRMA 104 (EnvC). The Court noted that: *If the land is rightly regarded as a unit, and it is found that parts of its area have been physically used for the purpose in question, it follows the land as a whole was used for that purpose*. In the current circumstances the land which is the subject of the mining licence must be regarded as part of the overall Horokiwi quarry site (the same planning unit).

10. The Court also noted that: *If some part of the land was used for mining or extractive purposes, the fact that the balance of the land was held in reserve and intended for future use does not derogate from the fact that, in law, the whole of the land was used for mining or extractive purposes.*

Confirmation that all activities referred to have been carried out since the use was established

11. You refer to section 10 (1) (a) (ii), which I have quoted above. The comparison required under this provision is between the activities currently occurring and those occurring at the time the current rules came into effect. Although it is necessary for the Council to satisfy itself that the activity of quarrying was lawfully established (as to which see above) the comparison of effects does not require that each sub component was in existence at the time the activity was established.

12. The case law is clear, that what is required is a comparison of the *effects* of the overall activity on the overall site currently against the effects at the time the relevant

(current) rules came into effect. Accordingly there is no need for HQL to establish that each sub activity was occurring in the 1930s or indeed in the 1980s.

13. Within that context, I have asked Mr Baker to respond primarily in terms of the activities in existence in the early 1990s rather than those in existence in the 1930s. In support of this position I refer to the relevant case law:

14. The Courts have interpreted the date of inquiry as follows:

> *The word "rule" in s 10(1) and in s 10(1)(a)(i) means a rule currently in force (as opposed to a superseded rule). It is not the rule which first required the activity to have a resource consent had it not been for existing use rights. The existing use rights must be assessed by reference to the activity and its effects at the time the current rule, and not the initial rule, came in to force:* Rodney DC v Eyres Eco-Park Ltd (2007) 13 ELRNZ 157; [2007] NZRMA 320 (CA).

> [13]
> We start our analysis by considering the first reference to "rule" in the introductory wording of s 10(1). There is no doubt that this has the same meaning as the term "rule" in s 9(1): see [10] above. It must mean a rule which is currently in force, because land use cannot contravene a rule which is no longer in force.
> [14]
> Once that conclusion is reached, it seems to us to be clear that the reference to "the rule" in s 10(1)(a)(i) and (ii) must have the same meaning, because it is clear from the context that the use of the shorthand "rule" refers back to the reference to "a rule in a district plan or proposed district plan" in the introductory wording to s 10(1). That leads us to conclude that the existing use right must be assessed by reference to the activity on the land, and the effect of that activity, at the time the current rule (here the 2000 rule) came into force, not at the time the initial rule (the 1988 rule) came into force.
> [15]
> We therefore conclude that both the Environment Court and the High Court erred in their interpretation of s 10. The adoption of the position taken in the Environment Court and the High Court would require that the term "rule" in s 10(1)(a)(i) and (ii) (the 1988 rule), be given a different meaning from the term "rule" in the introductory wording to s 10(1) (the 2000 rule). That seems to us to be an untenable interpretation.
>
> Allan J granted leave to appeal to this Court on two questions of law. We now set out those questions and our answers to them:
> "1.
> Was the High Court in error to conclude that for the purposes of s 10 of the Resource Management Act 1991 the relevant date for assessment of the character, intensity and scale and of the effect of the use of land is the date of notification of the first plan containing a rule with which the activity in question would be in contravention? Does the subsequent notification of new rules require re-assessment of the character, intensity and scale of the effects of the use of the land in question?
> 2.
> Was the High Court in error to conclude that a reduction in the character, intensity and scale of effects of a use of land has no statutory consequence upon the protection afforded by s 10(1)(a)(ii), except in the circumstances described in paragraph [104] of the High Court judgment? "
> [23]
> Question 1 is in fact two separate questions. We answer each of those questions "yes". However, we should explain in greater detail our answer to the first of those questions. As is apparent from our analysis at [16] above, the extent and effect of the use as at the date of the coming into force of the initial rule (i.e., at the time s 10 is first brought into play) will never be entirely irrelevant. It will be a matter of factual significance because it defines the existing use right as at the time of the first plan for the purposes of determining whether the current use is "lawfully established" in terms of s 10(1)(a)(i).
> [24]
> However the primary consideration will be the extent and effect of the use as at the time the most current rule came into force. That will normally be the yardstick against which the actual use and the effects of that use must be measured for the purposes of s 10(1)(a)(ii). The only situation where it will not be the yardstick will be where the use at the time the most current rule came into force was not "lawfully established" as explained in [16].

15. There is no requirement in subsection (1) for the activity to have remained lawful throughout. The focus is on *lawful establishment*. However, the effect of the *Eyres Eco-Park* decision is that the use must have been lawful at the time the current rules were notified as proposed rules. In other words it is not enough that it was lawfully established it must also have remained lawfully in existence at the time of the new rules.

16. The Court of Appeal stated the following:

> *As is apparent from our analysis at [16] above, the extent and effect of the use as at the date of the coming into force of the initial rule (i.e., at the time s 10 is first brought into play) will never be entirely irrelevant. It will be a matter of factual significance because it defines the existing use right as at the time of the first plan for the purposes of determining whether the current use is "lawfully established" in terms of s 10(1)(a)(i).*

17. The key finding of the Court was that:

> *That leads us to conclude that the existing use right must be assessed by reference to the activity on the land, and the effect of that activity, at the time the current rule (here the 2000 rule) came into force, not at the time the initial rule (the 1988 rule) came into force.*

18. The basis of the Court's decision was that:

> *There is no doubt that this has the same meaning as the term "rule" in s 9(1): see [10] above. It must mean a rule which is currently in force, because land use cannot contravene a rule which is no longer in force. .... Once that conclusion is reached, it seems to us to be clear that the reference to "the rule" in s 10(1)(a)(i) and (ii) must have the same meaning,*

19. The *Eco-Park* decision confirms that the comparison of effects must be assessed by reference to the activity and its effects at the time the current rule, and not the initial rule, came in to force. The other relevant case referred to above is *Re Omya NZ Ltd* [2004] NZRMA 104 (EnvC) (extract from Brookers).

> An existing use right to mine a geological resource, mined gradually over 34 years, was not extinguished merely because mining had not yet extended onto a separate certificate of title held under a different royalty: In reaching that decision the following matters were relevant:
> (a)
> The circumstances of the case as they existed on the relevant dates;
> (b)
> Whether the land was capable of identification as far as possible in a way which avoided detailed investigation and complicated disputes of fact;
> (c)
> "Use" can involve active or passive use and that physical use of a whole planning unit, which does not necessarily relate to formal property boundaries, is not necessary for a finding of existing use rights;
> (d)
> If the land is rightly regarded as a unit, and it is found that parts of its area were physically used for the purpose in question, it follows the land as a whole was used for that purpose; and
> (e)
> If some part of the land was used for mining or extractive purposes, the fact that the balance of the land was held in reserve and intended for future use does not derogate from the fact that, in law, the whole of the land was used for mining or extractive purposes.

20. I hope these comments are of assistance.

Yours faithfully

Philip Milne

Barrister: Waterfront Chambers

Waterfront Chambers . Level 5 Legal House 101 Lambton Quay . P O Box 5494 Wellington 6145
Mobile 21 803 327 . Reception 499 6653 . *www milnelaw.co.nz* . philip.milne@waterfront.org.nz

document2

SpencerHolmes
engineers · surveyors · planners

PO Box 588
Wellington 6140
Level 6, 8 Willis Street
Wellington New Zealand
Ph 04 472 2261
Fax 04 471 2372
email admin@spencerholmes.co.nz

19 June 2012

Horokiwi Quarries Ltd
PO Box 38-037
Wellington Mail Centre
Lower Hutt 5045

Attention : Ross Baker

CFRS

Dear Ross,

Horokiwi Quarries Ltd Land Ownership – 39 Horokiwi Road

We understand that Council have requested clarification of the land ownership for the quarry operation at Horokiwi with a view to ascertaining the dates that the various land parcels were acquired by Horokiwi Quarries Ltd (HQL).

Please find attached a copy of plan S12-0538-01/A showing the various land parcels owned by HQL. For reference purposes, we have labelled the parcels A1, A2, B, C, D1, D2, E, F & G. Parcels A1 & A2 are held in the same certificate of title as are parcels D1 & D2. In total there are 9 parcels held in 7 titles.

We have searched the historical title records for each parcel at LINZ and have established the date which ownership transferred to HQL. The dates are annotated below each title reference. We note that a boundary adjustment has occurred at the northernmost extent of the land ownership and that CT 460109 has issued for Lots 2 & 4 DP 415604. Prior to this, the land shown as Lot 4 was previously part of Lot 6 DP 28139 which has been owned by HQL since 17 July 1967.

There appears to be further historical quarrying activities associated with Parcels D1 & D2. For example, the chronology of these parcels is as follows :

- 29th August 1924 – CT WN314/252 issued for Lot 1 DP 6640 (Parcel D1) in the names of George Haigh, timber merchant and James Martin, quarry manager.
- 11th April 1929 – Transfer to Hutt River Shingle Co Ltd.
- ?? January 1930 – lease to River Shingle & Sand Ltd.
- 2 February 1953 – Proclamation 4712 taking Lot 1 DP 6640 (parcel D1) for quarry.
- 29 July 1957 – Proclamation 5840 taking Section 1 SO 23514 (parcel D2) for quarry.

- 6 January 1959 - Order In Council 423014 authorising the removal of stone, gravel and shingle sale from the site.
- 8th December 1992 – CT WN42A/635 issued for the land in Procs 4712 & 5840 being both Lot 1 DP 6640 & Section 1 SO 23514.
- 9 July 1993 – CT WN 42A/635 was purchased by HQL.

There is clearly evidence of quarrying operations on Lot 1 DP 6640 dating back to at least 1953 when it was taken by the Crown for quarrying purposes.

We will be pleased to provide anything further that you may require.

Yours faithfully
Spencer Holmes Limited

Hudson Moody

Hudson Moody
Director of Survey & Planning

cc **Resource Management Solutions Ltd**
8 John Street
Titahi Bay
Porirua 5022
Attention : Dave Armour

SpencerHolmes
engineers - surveyors - planners

N

Lot 2
DP 415604
1.5819ha
CT 460109
(Lot 2 & Lot 4 DP 415604)
HQL 10 November 2009

A1

A2
Lot 4
DP 415604
12.6870ha
(Formerly WN F3/322
Lot 6 DP 28139)
HQL 17 July 1967

LOT 1 DP 6640 - FORMERLY CONTAINED IN CT WN314/252
1929 TRANSFER TO "HUTT RIVER SHINGLE CO. LTD"
1932 LEASE TO "RIVER SHINGLE & SAND CO. LTD"
1953 PROCLAMATION 4712 - TAKEN FOR QUARRY PURPOSES
1959 ORDER IN COUNCIL AUTHORISING SALE AND REMOVAL OF STONE, GRAVEL & SHINGLE

B
Lot 8
DP 28139
8.1597ha
WNF3/324
HQL 17 July 1967

D1
Lot 1
DP 6640
10.1209ha
WN42A/635
HQL 9 July 1993

C

Section 1
SO 23514
1.8461ha

SECTION 1 SO 23514 - FORMERLY CONTAINED IN CT WN83/209
1957 PROCLAMATION 5840 - TAKEN FOR QUARRY PURPOSES
1959 ORDER IN COUNCIL AUTHORISING SALE AND REMOVAL OF STONE, GRAVEL & SHINGLE

WN42A/635
HQL 9 July 1993

D2

Lot 1
DP 20888
0.8094ha
WN844/20
HQL 10 July 1959

E

F
Lot 1
DP 58444
24.5550ha
WN27C/600
HQL 22 November 1985

Pt Section 18
Harbour District
2.2007ha
WN83/209
HQL 5 July 1990

HOROKIWI RD

HUTT RD

G
Pt Section 16
Harbour District
19.2067ha
WN36C/290
HQL 10 April 1991

THE DATE SHOWN BELOW EACH TITLE REFERENCE IS WHEN HOROKIWI QUARRIES LTD ACQUIRED OWNERSHIP OF THE LAND

0 100 200 300 400 500 600

Spencer Holmes Ltd
Level 6 - 8 Willis Street
PO Box 588
Wellington NZ
Ph (04) 472 2261
Fax (04) 471 2372
survey@spencerholmes.co.nz

HOROKIWI QUARRIES LTD
EXTENT OF LAND OWNERSHIP

CAD FILE	120538 v2 - S12-0538-01
DATE	18 June 2012
SCALE	1:6000
DRAWING NUMBER	S12-0538-01
REV	A

Dave Armour
Resource Management Solutions Ltd

8 John St,
Titahi Bay,
PORIRUA
Ph: 2368609
Cellph: 021 503 187
Fax: 2360051
Email: rarmour@xtra.co.nz

23 June 2012

Horokiwi Quarries Ltd
PO Box 38-037
Wellington Mail Centre
Lower Hutt Mail Centre 5045

Attention Ross Baker

Dear Ross

RELEVANT PLANNING INSTRUMENTS HOROKIWIQUARRIES LIMITED: APPLICATION FOR CERTIFICATE CONFIRMATION EXISTING USE RIGHTS.

I understand that Wellington City Council has requested further information showing that the quarry activity has been considered to be either a permitted activity (or equivalent) or has had an appropriate consent or equivalent since the start of the quarry operation under relevant planning instruments. I can advise as follows.

I note the correspondence of the Wellington City Council confirms that the site of the quarry fell within the jurisdiction of the Hutt County District until 1908, at that time jurisdiction switched to Makara County. In 1962 the quarry site went back to the Hutt County as part of the Makara Riding. In 1974, under local authority changes, the Makara Riding amalgamated with Wellington City Council. It is therefore submitted that in considering the historical status of the quarry, and the issue of existing use right, the relevant district planning instruments would have been those under the jurisdiction of the Makara Riding of Hutt County Council.

A review of relevant Hutt County meeting minutes, as held by Wellington City Archives, confirms that in 1955 there were no relevant planning instruments in place for the Makara Riding of Hutt County Council. As quarrying activity was established on the site well before this date existing use rights are confirmed.

I am currently seeking additional information from Wellington City Council, and Hutt City Council Archives on the notification, and operative date of the Hutt County Makara Section District Scheme, and the notification date of the Makara Section Review which was made operative in March 1973.

Yours Faithfully

Dave Armour

COPY

Absolutely Positively Wellington
Me Heke Ki Pōneke
Wellington City Council

1 June 2012

Horokiwi Quarries Ltd
PO Box 38037
Wellington Mail Centre
Lower Hutt 5045

Service Request No: 255760
File Reference: 1048648

Attn: Ross Baker

Dear Ross,

Request for Further Information

Service Request Type: Certificate of Compliance
Site Address: 39 Horokiwi Road, Horokiwi

I am writing in relation to your application for an Existing Use Rights Certificate. In order to allow full assessment of your application, the following information is requested in relation to the application. This information will help the Council determine whether the Existing Use Rights Certificate can be issued in accordance with the Resource Management Act.

I note that you are seeking approval under s10(1)(a). Accordingly, per the tests you have outlined in the application, we need information to satisfy each of the following;

a) the use was lawfully established before the rule became operative or the proposed plan was notified
b) the effects of the use are the same or similar in character, intensity and scale.

Item 34 of your assessment details that the quarry activity began in the 1930's. Please provide details showing that either the activity has been considered to be either a permitted activity (or equivalent) or has had an appropriate consent (or equivalent) since the start of the quarry operation.
Note: for assistance I can confirm that the site fell within the jurisdiction of Hutt County District until 1908, when it switched to Makara County. In 1962 it went back to Hutt County District and stayed this way until 1973 when the site became part of the Wellington City Council area.

Your application submits that the entire quarry site should be considered as having existing use rights for the quarry activity. In principle this is accepted, however, due to the number of land parcels that make up the quarry site, please confirm at which point the quarry owned / purchased the land parcels.

Once the date for which the quarry operation has began across the land parcels has been ascertained, then the date for which rules are relevant can be applied.

In relation to section s10(1)(a)(ii); you have provided detailed descriptions of the 'character' of the quarry activities which are currently undertaken at the site (as at 1 May 2012). Please confirm that these activities have been undertaken since the activity began (date to be determined, per above). The information submitted regarding 'intensity and scale' of the quarry should be dated back to when the activity began (date to be determined, per above).

WELLINGTON CITY COUNCIL
101 Wakefield Street,
PO Box 2199,
Wellington 6140, New Zealand
P +64 4 499 4444
F +64 4 801 3138
Wellington.govt.nz

It would be appreciated if the information can be provided in a concise format, with all relevant information which justification rests on (etc local authority / legislation extracts) simultaneously cross referenced. It does not appear that all Computer freehold registers have been provided – perhaps the response to relating to when the land parcels were purchased (as relevant) will clarify this.

If you require any further clarification or would like to discuss any matters raised, please contact me on the number below.

Yours sincerely,

Erin Whooley
Consents Planner
Development Planning and Compliance
Wellington City Council

Phone: 801 4305
Email: Erin.Whooley@wcc.govt.nz

CC. Dave Armour, Resource Management Solutions Ltd, 8 John Street, Titahi Bay, Porirua,

Please use one staple only. Remove all others

Docs No: 2050236

Scanning Cover Sheet

Service Request No: ~~RC 255760~~ 255760 Date: 8/5/12

Scanning Code:
Refer Doc # 735051 V2
(Document Name)

APP

Designated Wufi 1048648 Item No:

Link Number
(if applicable)

Name of Person
Requesting Scanning: Leslie Armond Phone: 4298

To be filled in for Filing Purposes:
Select one of these options:

1) Property File ☒ Or 2) Building Envelope ☐

Or

3) Allocate to Erin Whooley

Peer Reviewer Brett.

Additional Files Required

Address:	39 Horakinui Road, Horokiwi		
Type:	Land Use / Subdivision	Fee Paid:	$1040 chg
Description:	Existing use right certificate in relation to its operation on a land owned by it		
Pre-apps SR & Name	–	RC SR & Name	–
Concerned Neighbours:	–		
Complexity:	2		

Duplicate proposal

Absolutely POSITIVELY Me Heke Ki Pōneke Wellington City Council Wellington

14 May, 2012

Horokiwi Quarries Ltd
PO Box 38037
Wellington Mail Centre
Lower Hutt 5045

Service Request No: 255760
File Reference: 1048648

Attn: Ross Baker

Dear Ross,

Acknowledge Receipt of Application for an Existing Use Right Certificate - Service Request No. 255760

Service Request Type:	Certificate of Compliance
Site Address:	39 HOROKIWI ROAD, Horokiwi

Thank you for your application received by the Council on 8 May 2012. I will be the planner assessing and making a decision on your application.

Process

Your application has been accepted and I will undertake a site visit shortly. If you have any dogs, locked gates or other obstacles that I should be aware of, please contact me to discuss a suitable time for the visit. After I have visited the site I will contact you if further information or clarification is required. Following this process a decision will be issued.

Fees

Please note that the fee you have paid is an initial fee. Additional charges may be payable depending on the actual and reasonable costs incurred in the processing of your resource consent application (as per section 36(3) of the Act). These will be invoiced following the issue of the decision.

Payment of additional fees is due by the 20th of the month following the date of the invoice. If payment is not made by this date, the consent holder will be required to pay the following:

- An additional/administrative fee, of $300 of 10% of the overdue amount (which ever is the lesser);
- All costs and expenses (including debt collection or legal fees) incurred by the Council in seeking to recover the over due amount; and
- Daily interest (rate of 15% per annum) from the date of default.

Correspondence

Your application has been given a reference 'Service Request Number (255760)'. It is useful if you quote this number in all correspondence to the Council regarding this application.

If you have any queries about the application please contact me on the number below.

Yours sincerely

Erin Whooley
Consent Planner
Development Planning and Compliance
Wellington City Council
Phone: 801- 4305

HOROKIWI QUARRIES LIMITED

Horokiwi Road
PO Box 38037
Petone
Sales: 04-568 3441
Fax: 04-568 3440
Emulsion Div: 04-569 2839

7 May 2012

Bob Barber
Team Leader Compliance and Monitoring
Wellington City Council
PO Box 2199
WELLINGTON

Dear Sir

HOROKIWI QUARRY, 39 HOROKIWI ROAD, HOROKIWI; REQUEST TO ISSUE EXISTING USE CERTIFICATE PURSUANT TO SECTION 139 OF THE RESOURCE MANAGEMENT ACT 1991

On behalf of Horokiwi Quarries Ltd enclosed is an application by Horokiwi Quarries Limited that requests the Wellington City Council to issue an existing use certificate relating to its operation on land owned by it at the Horokiwi quarry site 39 Horokiwi Road, Horokiwi.

The application comprises the following;

1. The formal application;
2. Annexure B the plans that support the application;
3. Annexure C the basis for the application; and
4. Annexure D the report of Boffa Miskell; Horokiwi Quarry Mining Licence Area Landscape and Visual Assessment to support an application for a certificate of compliance in relation to existing use rights.

Horokiwi Quarries Ltd has been assisted in the preparation of the application by Philip Milne Barrister who has provided advice that he considers the current and future operations on the site as defined in the application are covered by existing use rights provided that the visual impacts of the operation have remained the

Application

HOROKIWI QUARRIES LIMITED

Horokiwi Road
PO Box 38037
Petone
Sales: 04-568 3441
Fax: 04-568 3440
Emulsion Div: 04-569 2839

same or similar in scale, intensity and character as those which existed prior to the relevant rules coming into force. Mr. Boyden Evans has confirmed that this requirement is met.

Although the Company appreciates that there is not legal requirement to obtain a Certificate of Compliance it seeks to do so in order to avoid any further suggestion that a resource consent is required. I note that the application only relates to the parts of the site which have been quarried and the future operations over the next 5 years or so within the site as defined. It does not extend to adjoining land owned by HQL however that may be the subject of a further application if that area is developed in the future.

Yours Faithfully

Ross Baker Company Manager
Horokiwi Quarries Limited.

Request to issue existing use certificate

Pursuant to section 139 of the Resource Management Act 1991

To Wellington City Council

Horokiwi Quarries Limited 11 Main Road Fairfield Dunedin 9018 requests the Council to issue an existing use certificate relating to its operation on those parts of the land owned by it at the Horokiwi quarry site 39 Horokiwi Road, Horokiwi 5016 as more particularly described below:

This application relates to "the site"; being all of the following lots as shown on the Plan Titled 'Parcels owned by Horokiwi Quarries Ltd' identified as 'Plan 1'. Included in **Annexure B**.

- CT WN27C/600 Lot 1 DP 58444 WN27C/600
- CT WN83/209 Part Section 18 Harbour District
- CT WN42A/635 – Lot 1 DP 6640 & Section 1 SO 23514 (subject to a mining licence embodied in CT WN1200/22

Horokiwi Quarries Limited (HQL) is the owner and occupier of all the land listed above. It also owns adjoining land being:

- Lot 8 DP 28139WNF3/324 which has an area of 8.1597 hectares

This land which is also shown on Plan 1, is not proposed for quarrying in the next 5 years, but is intended for quarrying and associated activities in the future. The lots comprising the application site are;

- Part Section 16 WN 39B/283, WN 36c/290
- Part Section 17 WN 149/267
- Part Section 8 WN 59/83
- Lot 1 DP 20888 WN 844/20; and
- Lot 6 DP 28139 WNF3/322

Horokiwi Quarries Limited requests the issue of a certificate which

- Describes its use of the site for quarrying and ancillary activities; and

- States that those uses of the site were uses allowed by section 10 of the Resource Management Act on the date which the Council issues the certificate; and

- Specifies the character, intensity, and scale of the use on the date on which the Council issues the certificate.

Horokiwi Quarries Limited requests that the certificate be issued in the form and with the contents as generally set out in Annexure A (subject to any modifications, which may be agreed with the Council after lodgment of this application.)

The grounds for this request are set out in Annexure C. Annexure B contains plans of the site and adjoining land owned by the Applicant, and includes the following plan prepared by CPG, Horokiwi Quarries Ltd Quarry Overview Aerial & Features Overview', identified as Plan Three. Annexure D is a Landscape and Visual Impact assessment report prepared by Mr. Boyden Evans of Boffa Miskell Limited. Annexure E is a copy of correspondence from the Wellington City Council dated 19 February 2010 which accepted that Horokiwi Quarries Limited was entitled to continue quarrying activities on the mining permit land until at least that permit expired in July 2012.

Address for Service

Mr. Ross Baker Company Manager

Horokiwi Quarries Limited

PO Box 38037

Wellington.

Annexure A

Certificate of existing use in relation to land owned and used by Horokiwi Quarries Limited

Pursuant to section 139A of the Resource Management Act 1991, the Wellington City Council hereby certifies that the uses of land as described below were uses allowed by section 10 of the Resource Management Act as at: (specify date of the certificate)

Legal Description of the land to which this certificate applies

This certificate relates to "the site" which is shown as 'hatched' on the plan titled 'Parcels owned by Horokiwi Quarries Ltd', identified as 'Plan 2'.on the plan attached as part Annexure **B**, including all of the following lots:

1) CT WN27C/600 - Lot 1 DP 58444 WN27C/600
2) CT WN 83/209 - Part Section 18 Harbour District (2.2007ha)
3) CT WN42A/635 - Lot 1 DP 6640 & Section 1 SO 23514 (subject to a mining licence embodied in CT WN1200/22)
4) Part Section 18 Harbour District
5) Section 1 SO 23514 WN42A/635
6) Lot 1 DP 6640 WN42A/635 WN1200/22 Quarry Site New Zealand Gazette 1953 page 9

General description of the land to which this certificate applies

The Quarry is accessed off Horokiwi Quarry road (39 Horokiwi Road, Horokiwi) and is located in two stream catchments that drain through the Wellington Fault Scarp and into the Wellington Harbour. Rock extraction is undertaken in the

catchments of Horokiwi and Newlands Streams and landfill activity is undertaken in the smaller Boddlilies Stream to the west and in the upper reaches of the Horokiwi Stream.

Mining of rock is carried out on the sides and at the base of moderately steep hills, which from the north to south are referred to as; the Crown Quarry, Mita Peak, Main Hill, and Pavements Hill. The southern side of Pavements Hill forms part of the Wellington Fault Scarp. (See **Annexure B** Plan 3 for details)

The vegetation on the unquarried the hill slopes in the vicinity of the quarry, is similar to that in many other parts of Wellington. It is young secondary native vegetation that has regenerated on land that was until recently in pasture and grazed. Much of this regenerating native vegetation, particularly on the slopes is only approximately 40 years old. The regenerating forest is predominantly mahoe, kawakawa and nikau with emergent kohekohe, karaka and rewarewa.

There are no registered historic sites or archaeological sites registered on the land.

Description of the use of the site as at 1st May 2012.

Stripping

Stripping in the quarry is handled by a combination of the following methods:

- Excavating, dozing and loading of overburden material into the trucks to the market for use as fill; and
- Scrapers are sometimes hired on a contract basis and the overburden is stripped and placed in dumps in various places in the quarry; and
- Overburden is sometimes pushed over the side of the bench faces using a dozer or excavated and loaded into trucks and carted to identified dumps.

These activities currently occur at Mita Peak for its full width and also at the eastern end and on top of the Crown Hill.

Areas of likely future stripping and/or quarrying on the site within the next 5 years are also shown on CPG Plan identified as Plan 3 in Annexure B

Blasting

Blasting is used when working the lower benches within the quarry. Material requiring blasting is blue rock and very solid brown rock (only partially oxidized). When a large blast is needed a contract driller is hired to drill between 30-40 holes at depths between 10-20 metres. Powergel is normally used as the holes normally contain groundwater. Amex is used if holes are dry. Initiation of the blast varies depending on conditions from red cord, down hole detonators to Nonnel. HQL owns its own drilling rig and compressor.

Transport of excavated material

Material from the face is carted to the crushing plant by either HQL owned rock dumpers (30 – 45 tonne capacity) or by road trucks on a hire basis.

Crushing and screening

There are three fixed crushing and screening plants at the Quarry. The Sand and Chip Plant is used for the production of sand, aggregates and specification materials. The Basecourse Plant is used for the production of general purpose products. The Primary Plant is used to process rock direct from the face and to provide feed material for the main plant and on occasions the Basecourse Plant. The location of the crushing and screening plans is shown on attached Plan **3** in Annexure **B.**

Stockpiling

Primary stockpiling at the Quarry is carried out using a stacking conveyor. All other material from the plant is taken from bins by dump truck. All stockpiles within the Quarry are formed on level ground with sufficient room to allow maneuverability of vehicles. When tipping over a face or the edge of a stockpile a bund at the edge must be present. Material is to be tipped at least three metres from the edge and then pushed over using a loader or a bulldozer. Access ramps are at an angle compatible for the stockpiling equipment and are kept bunded on the sides to the height of the axle of the tipping vehicle. The lead up to the tipping vehicle is sloped upwards and kept well compacted. Tipping over the edge is allowed when the ground is stable, and when a bund and marker flags are present. Undercutting of stockpile is not allowed and loading out is not permitted when vehicles are tipping on the top of the stockpiles unless it is well away from the loading area.

There are approximately 30 different categories of stockpiles. The current location of stockpiles is shown on the CPG Plan, Plan 3 in Annexure B. In the future stockpiling will also occur in the areas shown on this Plan.

Transport from the Site

Transport of material from the quarry is carried out by either road trucks contracted by HQL or by customers picking up material for their own use. All materials and sands are sold by weight.

The procedure for the pick up of material is as follows:

- Incoming vehicles go onto the weighbridge.
- Relevant information, which includes the Tare Weight, is entered into the weighbridge computer system.
- Outgoing vehicles go into the weighbridge and the gross weight is entered.

- The weighbridge system produces two dockets – one for the customer and one kept by the quarry.

Ancillary activities

The following ancillary activities take place on the site.

- Exploration
- Movement and loading of materials
- Vehicle storage and maintenance
- Asphalt production
- Emulsion production and handling
- Operation of landfills and dumps
- Drilling and blasting.
- Processing of materials i.e. crushing and screening of the material
- Quality testing of aggregates; and
- Sales over the weighbridge both sales to industry groups and private sales
- All other activities normally associated with a quarrying operation of this type.

Specification of the character, intensity and scale of those uses as at the date of issue of the certificate.

The *character* of the use is all those elements of a working quarry as described above.

The most appropriate measures of '*intensity and scale' is* considered to be the tonnages of material produced and numbers employed at the quarry.

Employment at the quarry has remained constant at 13-15 personnel over the last 20 years and will remain at similar levels over the next 5 years.

Tonnages of material produced for years ending 31st December for the last twelve years are as follows;

Tonnnes Produced	Years(June 30)
450,000	2011
418,000	2010
487,000	2009
692,000	2008
552,000	2007
432,000	2006
461,000	2005
513,000	2004
342,000	2003
368,000	2002
386,000	2001
410,000	2000
411,000	1999

Average tonnage over the 5 years ending 31 December 2011 was 519,800 tonnes. Average tonnage over the next 5 years, including the present, is expected to remain at similar levels.

Tonnes Produced

Annexure B

1. Plan One 'Parcels Owned by Horokiwi Quarries'.

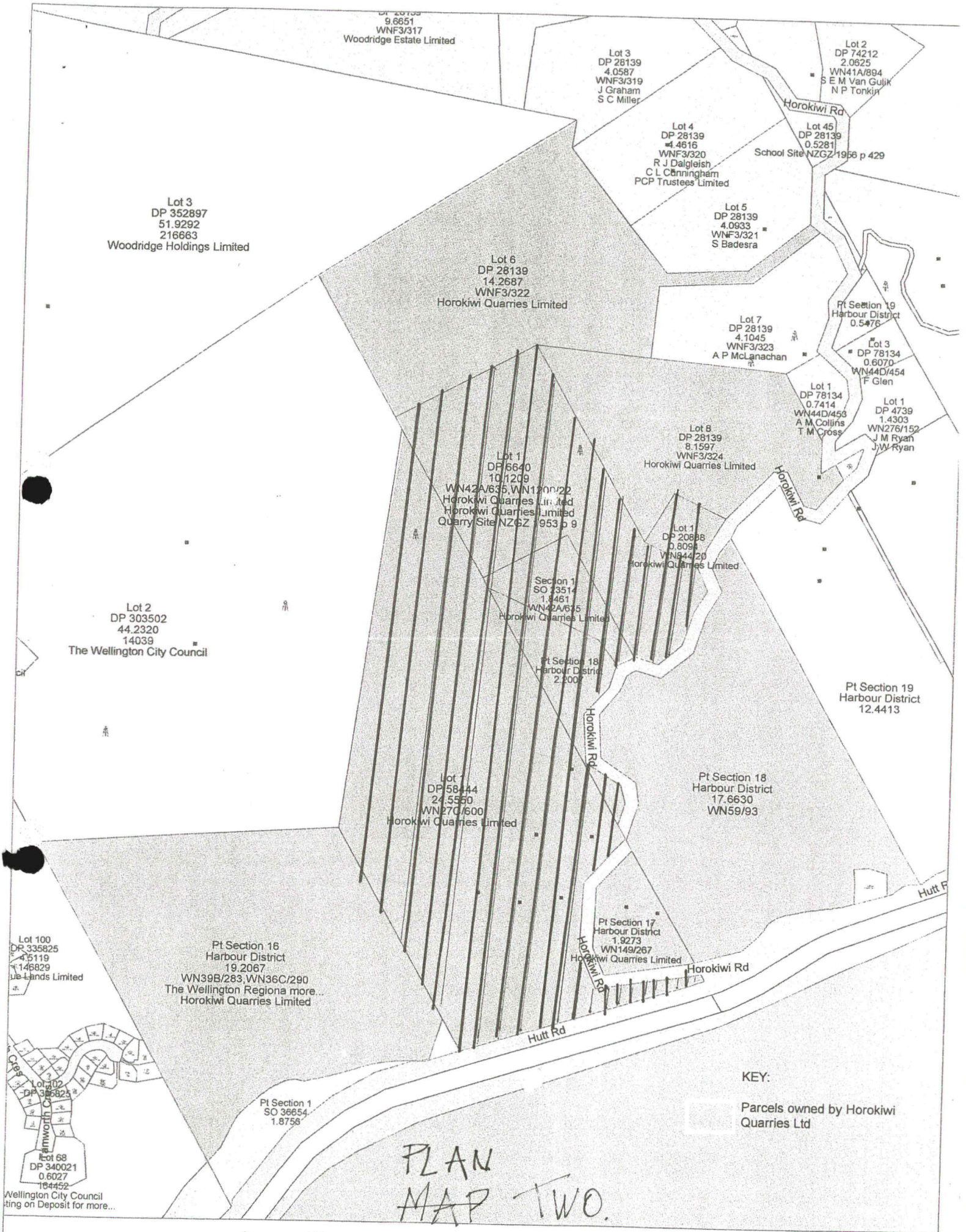
2. Plan Two 'The Site' identified as the hatched area on 'Parcels Owned by Horokiwi Quarries'

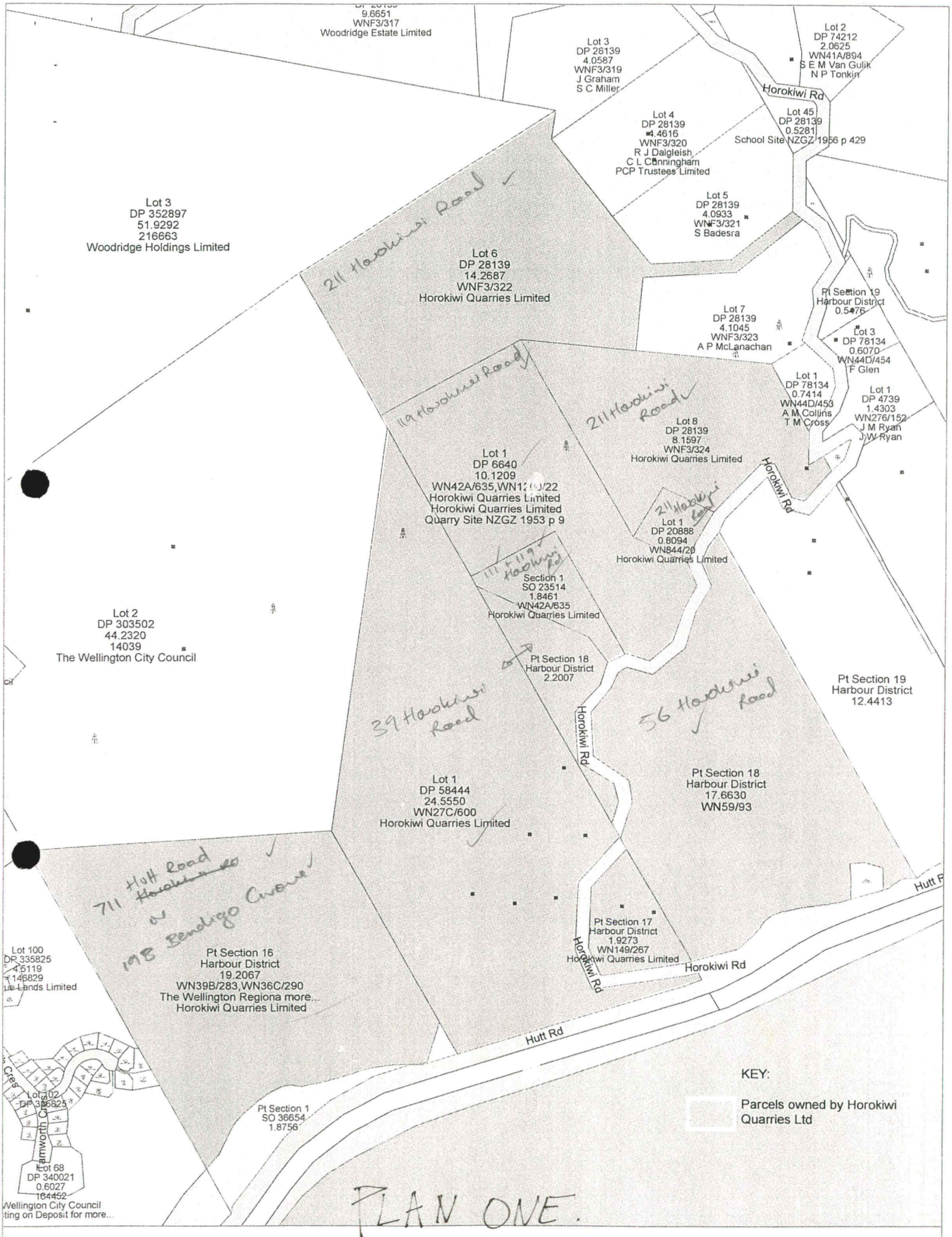
3. Plan 3 CPG Plan 'Horokiwi Quarries Ltd Quarry Overview Aerial & Features Overview' series SW930 Revision A, dated May 2010.

4. Minerals Mining Permit 53910 Horokiwi Quarries Limited.

5. Certificates of Title.

C.T's


9.6651
WNF3/317
Woodridge Estate Limited
Lot 3
DP 28139
4.0587
WNF3/319
J Graham
S C Miller
Lot 2
DP 74212
2.0625
WN41A/894
S E M Van Gulik
N P Tonkin
Horokiwi Rd
Lot 4
DP 28139
4.4616
WNF3/320
R J Dalgleish
C L Cunningham
PCP Trustees Limited
Lot 45
DP 28139
0.5281
School Site NZGZ 1956 p 429
Lot 3
DP 352897
51.9292
216663
Woodridge Holdings Limited
Lot 5
DP 28139
4.0933
WNF3/321
S Badesra
Lot 6
DP 28139
14.2687
WNF3/322
Horokiwi Quarries Limited
Pt Section 19
Harbour District
0.5476
Lot 7
DP 28139
4.1045
WNF3/323
A P McLanachan
Lot 3
DP 78134
0.6070
WN44D/454
F Glen
Lot 1
DP 78134
0.7414
WN44D/453
A M Collins
T M Cross
Lot 1
DP 4739
1.4303
WN276/152
J M Ryan
J W Ryan
Lot 8
DP 28139
8.1597
WNF3/324
Horokiwi Quarries Limited
Lot 1
DP 6640
10.1209
WN42A/635,WN1200/22
Horokiwi Quarries Limited
Horokiwi Quarries Limited
Quarry Site NZGZ 1953 p 9
Horokiwi Rd
Lot 1
DP 20888
0.8094
WN844/20
Horokiwi Quarries Limited
Section 1
SO 33514
1.8461
WN42A/635
Horokiwi Quarries Limited
Lot 2
DP 303502
44.2320
14039
The Wellington City Council
Pt Section 18
Harbour District
2.2007
Pt Section 19
Harbour District
12.4413
Horokiwi Rd
Lot 1
DP 58444
24.5550
WN27C/600
Horokiwi Quarries Limited
Pt Section 18
Harbour District
17.6630
WN59/93
Hutt R
Pt Section 17
Harbour District
1.9273
WN149/267
Horokiwi Quarries Limited
Horokiwi Rd
Horokiwi Rd
Lot 100
DP 335825
4.5119
146829
Lands Limited
Pt Section 16
Harbour District
19.2067
WN39B/283,WN36C/290
The Wellington Regiona more...
Horokiwi Quarries Limited
Hutt Rd
Lot 102
DP 335825
Lot 68
DP 340021
0.6027
164452
Wellington City Council
ting on Deposit for more...
Pt Section 1
SO 36654
1.8756
KEY:
Parcels owned by Horokiwi Quarries Ltd
PLAN
MAP TWO.
QuickMap
Custom Software Ltd
0
100
200
300
400
500
600
700
800
900m
Any person wishing to rely on the information shown on this map must independently verify the information
Scale 1:7056
Topographical and Cadastral map derived from LINZ data. Printed: 16/09/2009 10:47.



QuickMap
Custom Software Ltd

Any person wishing to rely on the information shown on this map must independently verify the information

Scale 1:7056 Topographical and Cadastral map derived from LINZ data. Printed: 16/09/2009 10:47.

COMPUTER FREEHOLD REGISTER
UNDER LAND TRANSFER ACT 1952

Search Copy

R.W. Muir
Registrar-General
of Land

Part-Cancelled

Identifier	**WN83/209**
Land Registration District	**Wellington**
Date Issued	01 September 1896

Prior References
WN59/92

Estate	Fee Simple
Area	4.0469 hectares more or less
Legal Description	Part Section 18 Harbour District

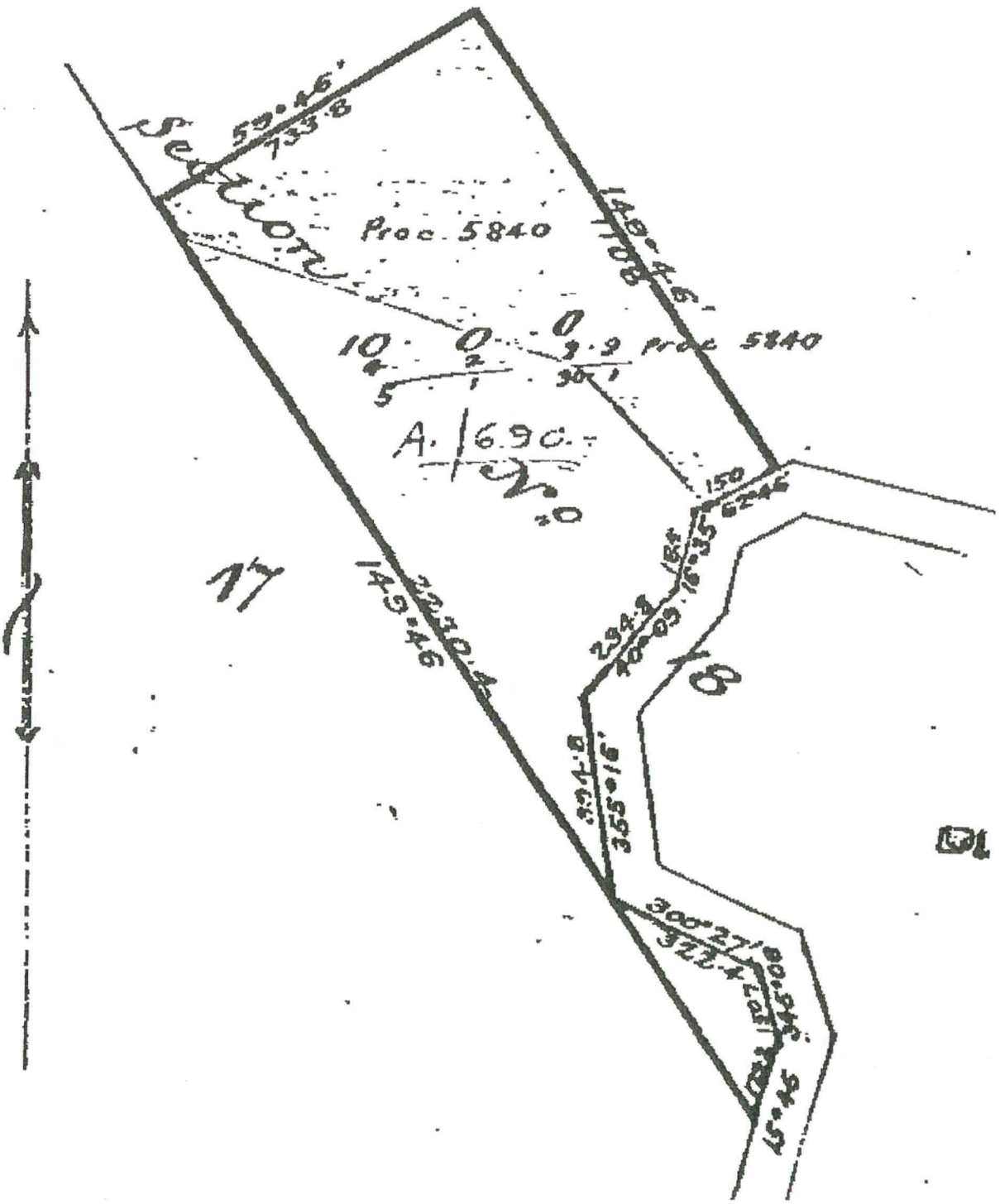
Proprietors
Horokiwi Quarries Limited

Interests

5840 Proclamation taking part (4 acres 2 roods 9.9 perches) for a quarry on and after 29th July 1957 - produced 14.08.1957 12.00 pm and entered 21.10.1957 at 2.37 pm

Image Quality due
to Condition
of Original

658853.1 consultation



COMPUTER FREEHOLD REGISTER
UNDER LAND TRANSFER ACT 1952

Search Copy

R. W. Muir
Registrar-General
of Land

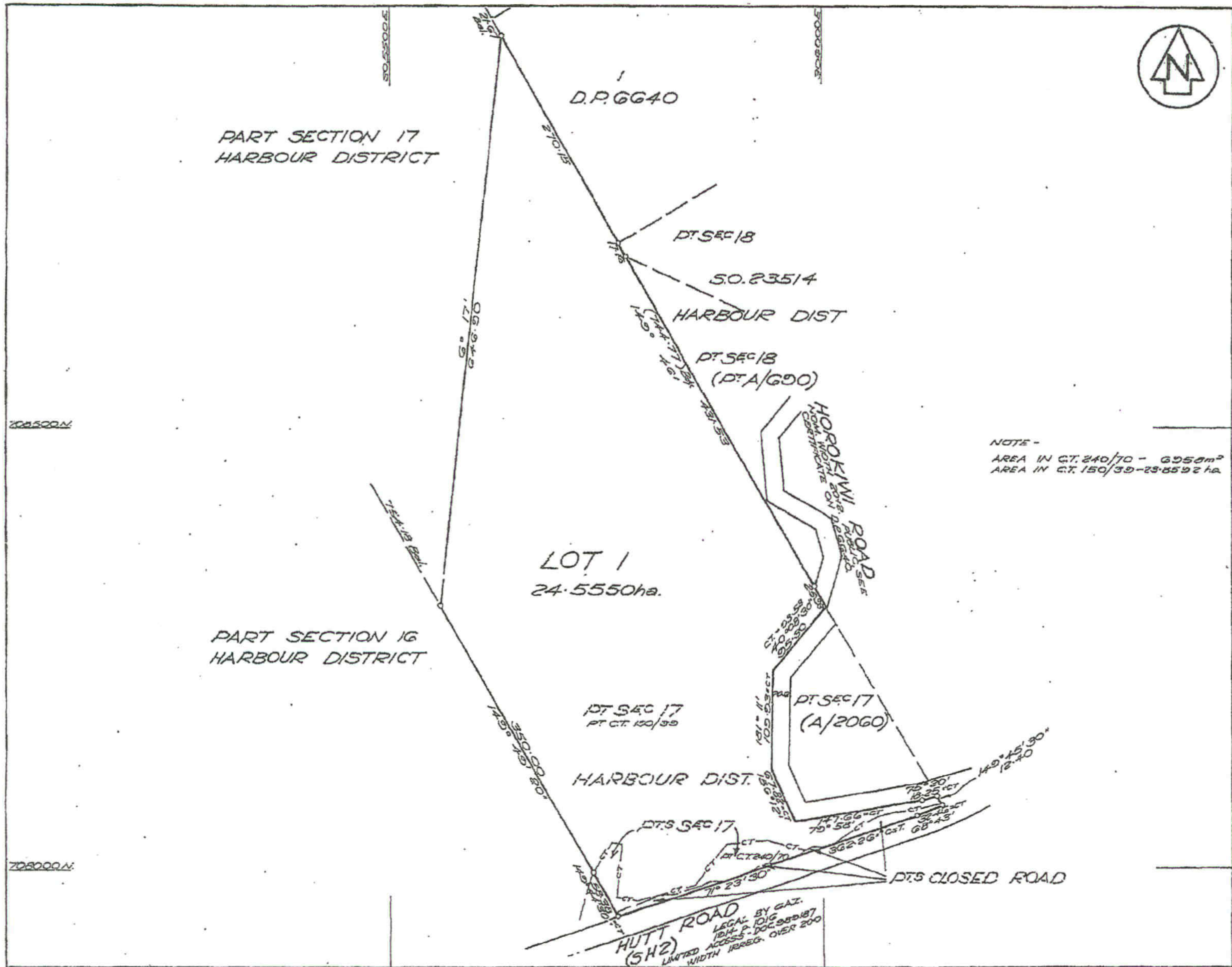
Identifier	**WN27C/600**
Land Registration District	**Wellington**
Date Issued	14 October 1985

Prior References
WN150/39 WN240/70

Estate	Fee Simple
Area	24.5550 hectares more or less
Legal Description	Lot 1 Deposited Plan 58444

Proprietors
Horokiwi Quarries Limited

Interests
989187 Gazette Notice declaring portion of No 2 State Highway to be a limited access road
Subject to a natrual gas right (in gross) over part marked I on DP 88158 in favour of Nova Gas Limited created by Transfer B789740.1 - 26.6.2000 at 9.00 am



APPROVED

Approvals

THE COMMON SEAL OF WAITAKI NZ REFRIGERATING LIMITED WAS AFFIXED HERETO IN THE PRESENCE OF:

[signature] DIRECTOR

[signature] SECRETARY

WAITAKI NZ REFRIGERATING LIMITED THE COMMON SEAL OF CHRISTCHURCH

REGISTERED PROPRIETORS

PURSUANT TO A RESOLUTION OF THE WELLINGTON CITY COUNCIL PASSED ON THE 28th DAY OF June 1985 APPROVING PURSUANT TO SECTION 305 OF THE LOCAL GOVERNMENT ACT 1974 THIS SURVEY PLAN AND CERTIFYING THAT THE PLAN IS IN ACCORDANCE WITH A CONSENT GRANTED UNDER PART IV OF THE TOWN AND COUNTRY PLANNING ACT 1977 THE COMMON SEAL OF THE WELLINGTON CITY COUNCIL WAS AFFIXED HERETO IN THE PRESENCE OF:

[signature] Deputy TOWN CLERK

PURSUANT TO SEC. 306 (1)(f)(i) OF THE LOCAL GOVERNMENT ACT 1974 I HEREBY CERTIFY THAT ALL THE CONDITIONS SHOWN ON OR REFERRED TO ON THE SCHEME PLAN OF SUBDIVISION HAVE BEEN COMPLIED WITH TO THE SATISFACTION OF THE WELLINGTON CITY COUNCIL.

DATED AT WELLINGTON THIS 3rd DAY OF July 1985

[signature] Deputy TOWN CLERK

Total Area 24·5550ha.

Comprised in PT C.T. 240/70 & PT C.T. 150/39

I, BRENT PRESTON PLAYER of WELLINGTON Registered Surveyor and holder of an annual practising certificate hereby certify that this plan has been made from Surveys executed by me or under my direction; that both plan and Survey are correct and have been made in accordance with the regulations under the Surveyors Act 1986

Dated at WELLINGTON this 20TH day of JUNE 1985 Signature [signature]

Field Book 5570 p. 56-65 Traverse Book 411 p. 44-46

Reference Plans A/690, A/2060, D.P. 6640, D.P. 28139, A/2369, A/2370, ...

Examined [signature] Correct [initials]

Approved as to Survey

13/9/85 [signature] Deputy Chief Surveyor

Deposited this 14th day of [illegible] 1985

[signature] Asst District Land Registrar

File

Received 31/7/85

Instructions

58444

LAND DISTRICT WELLINGTON SURVEY BLK.& DIST. XIII BELMONT NZMS 261 SHEET No. R27/3-2	LOT 1. BEING SUBDIVISION OF PARTS SECTION 17 HARBOUR DISTRICT AND PARTS CLOSED ROAD	LOCAL AUTHORITY WELLINGTON CITY Surveyed by TSE GROUP CONSULTANTS LTD. Scale 1:3000 Date JUNE 1985

Printed by Intlejohns Instruments Ltd Wellington, New Zealand

Hutt Valley 137

LF Stirling Surveyor-General Department of Lands and Survey, Wellington

[redacted] [redacted]

L&S FORM H 53

COMPUTER FREEHOLD REGISTER
UNDER LAND TRANSFER ACT 1952

Search Copy

R.W. Muir
Registrar-General
of Land

Identifier	**WN42A/635**
Land Registration District	**Wellington**
Date Issued	08 December 1992

Prior References
PROC 4712 PROC 5840

Estate	Fee Simple
Area	11.9670 hectares more or less
Legal Description	Section 1 Survey Office Plan 23514 and Lot 1 Deposited Plan 6640

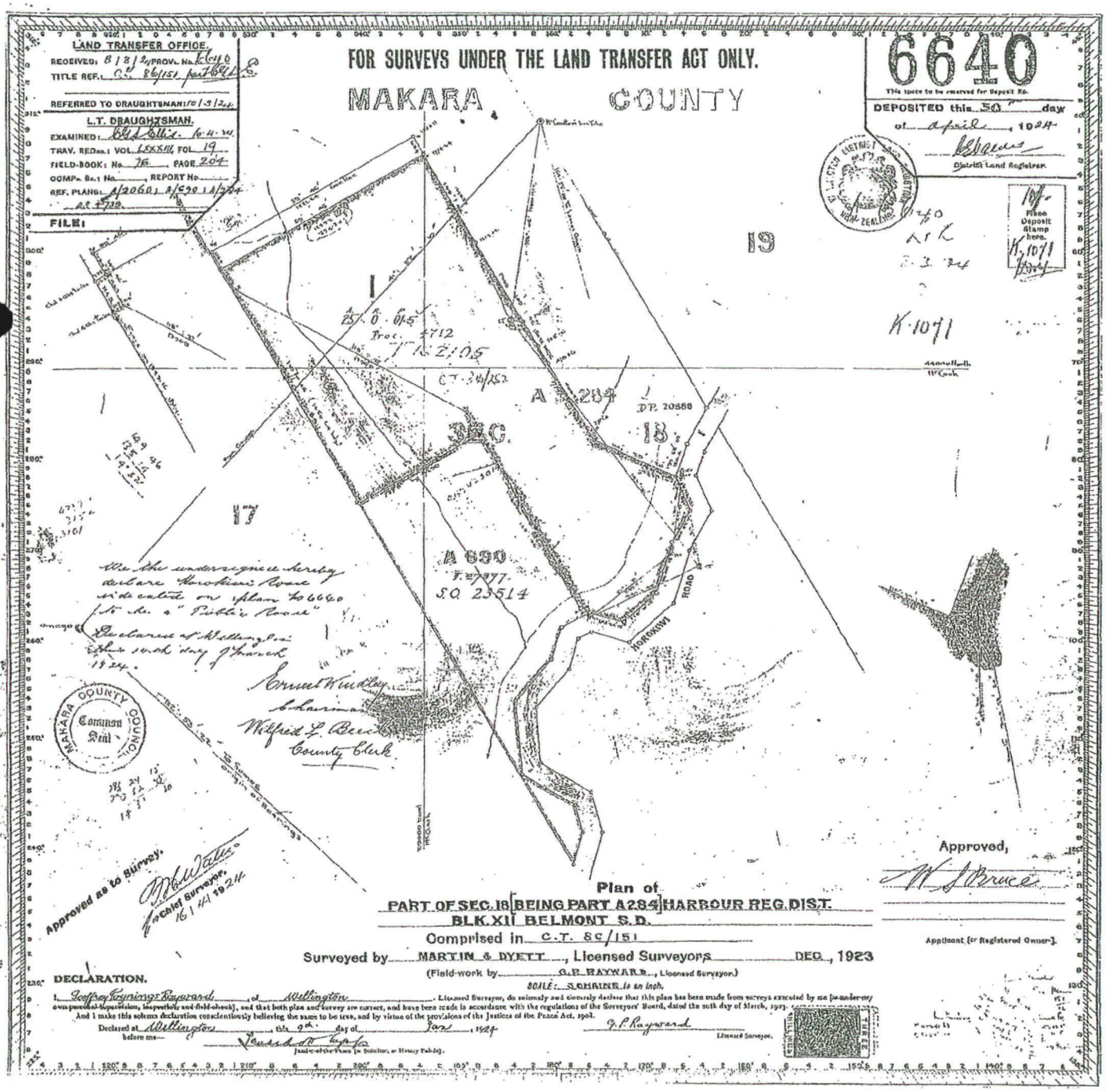
Proprietors
Horokiwi Quarries Limited

Interests

423014 Order in Council authorising the removal of stone, gravel and shingle upon and under the within land - 6.1.1959 at 1.30 pm

Mining Licence embodied in Register WN1200/22 - 24.8.1992 at 12.30 pm

D2
P1



Plan of

PART OF SEC. 18 [BEING PART A 284] HARBOUR REG. DIST.
BLK. XII BELMONT S.D.

Comprised in C.T. 86/151

Surveyed by MARTIN & DYETT, Licensed Surveyors DEC., 1923

(Field-work by G.P. RAYWARD, Licensed Surveyor.)

SCALE: 5 CHAINS to an inch.

DECLARATION.

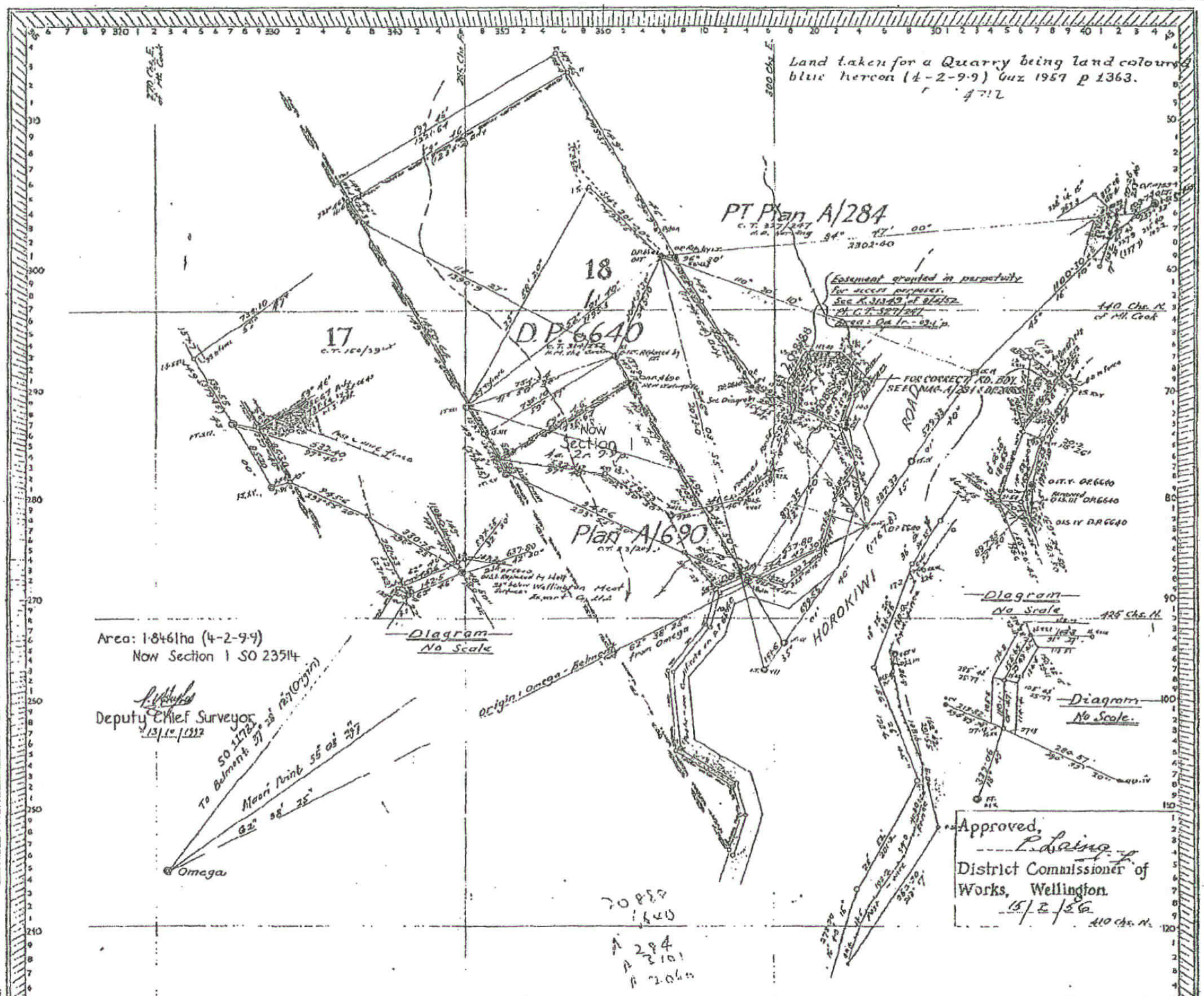
I, Geoffrey Cuninge Rayward, of Wellington, Licensed Surveyor, do solemnly and sincerely declare that this plan has been made from surveys executed by me [or under my own personal supervision, inspection, and field-check], and that both plan and survey are correct, and have been made in accordance with the regulations of the Surveyors' Board, dated the 20th day of March, 1923.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Justices of the Peace Act, 1908.

Declared at Wellington this 9th day of Jan, 1924 before me—

G.P. Rayward Licensed Surveyor.

Justice of the Peace [or Solicitor, or Notary Public].



Received	13/1/56
File	9/951
Instructions	
Reference plans	A/284, A/690, DP 4739, 6640
Field book	3528 p. 120-127
Traverse book	133 p. 156-158
Examined by	L.L.A.S. 7.2.56
Recorded	28.3.56
Plan in order for approval	9/3/56

PLAN OF PT LAND IN PLAN A/690 BEING PT SEC. 18 HARBOUR DIST.; ALSO EASEMENT OVER PT PLAN A/284 BEING PT SEC. 18 HARBOUR DIST.

SURVEY BLK. & DIST. BLOCK XII BELMONT S.D.

LAND DISTRICT WELLINGTON LOCAL BODY MAKARA COUNTY

Scale: 3 Chains to an inch. Surveyed by W. H. Coulter Date: October, 1955

I, William Henry Coulter of Wellington Registered Surveyor and holder of an annual practising certificate, hereby certify that this plan has been made from surveys executed by me; that both plan and survey are correct and have been made in accordance with the regulations under the Surveyors Act, 1938

Dated at Wellington this 4th day of January 1956

W.H. Coulter
Registered Surveyor

Approved
Chief Surveyor. 9/3/56

23514

AMENDED PLAN

R. G. Dick, Surveyor-General, Head Office, Lands & Survey Dept. Wellington.

R. E. Owen, Government Printer, Wellington

COMPUTER INTEREST REGISTER UNDER LAND TRANSFER ACT 1952

Search Copy

R.W. Muir
Registrar-General
of Land

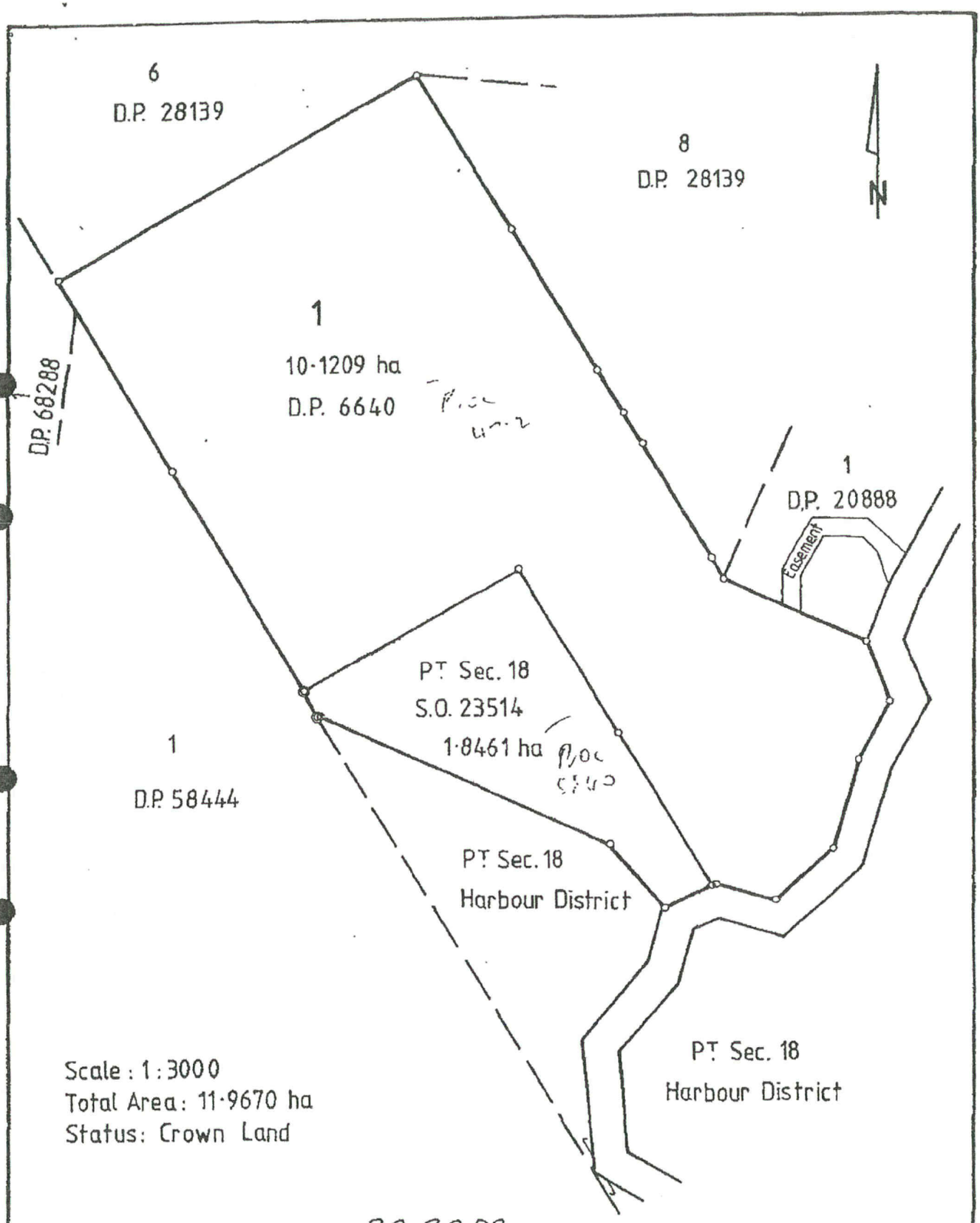
Identifier	**WN1200/22**
Land Registration District	**Wellington**
Date Registered	24 August 1992 12:30 pm

Prior References
PROC 4712 PROC 5840

Type	Licence under s140 Mining Act 1971
Area	11.9670 hectares more or less
Legal Description	Lot 1 Deposited Plan 6640 and Part Section 18 Harbour District

Proprietors
Horokiwi Quarries Limited

Interests



32 3202

MINING LICENCE APPLICATION

Wellington Land District

Horokiwi Quarries Ltd

Lot 1 D.P. 6640 and PT Section 18 Harbour District

Note: Aerial photographic provided by AAM (Australian Aerial Mapping). They flew ortho and oblique images in March 2009. Contours and surface features by CPG ltd.

Revision	App	Date
A Additional aerial tiles added	BDG	24-05-10

Surveyed	VARIES (PHOTO DATE SHOWN)	
Designed	D. GROWCOTT	21-05-2010
Drawn	D. GROWCOTT	21-05-2010
Reviewed	N. BARTHOLOMEW	21-05-2010
Approved	B. GAWN	21-05-2010

Verify all dimensions on site before commencing work. Priorities figured dimensions over scaling. Refer all discrepancies to the drawing office.

CPG
CPG New Zealand Ltd
23 Taranaki Street
Wellington 6141
Phone 04 384 2029
Fax 04 384 5065
wellington@nz.cpg-global.com

Client
HOROKIWI
QUARRIES LTD

Project Title
QUARRY
OVERVIEW

Sheet Title
AERIAL & FEATURES
OVERVIEW

Scale (A0 Original) 1:1500

30 15 0 30 60 90 m

Project No	Sheet	Revision
023465	SW930	A

Ste

05 10 2012 ATM

Ministry of Economic Development
Manatū Ōhanga
NZ Petroleum & Minerals

Crown Minerals Act 1991

(Section 25)

Minerals Mining Permit 53910

I, LARRY KEVIN ROLENS, Director, Petroleum, New Zealand Petroleum & Minerals, acting pursuant to section 25 of the Crown Minerals Act 1991 and acting pursuant to delegated authority under section 41 of the State Sector Act 1988, grant to:

HOROKIWI QUARRIES LIMITED

the exclusive right to mine for aggregate in the land described in Schedule 2.

This mining permit is granted for a term of 40 years commencing on the date specified below.

This permit is granted subject to the Crown Minerals Act 1991 and all regulations made under that Act, and the conditions of the permit.

DATED this 19th day of April 2012

Ken Rolens

Larry Kevin Rolens

[redacted] Mining Permit

1306141

Schedule 1

General Conditions

GOOD EXPLORATION AND MINING PRACTICE

1 The permit holder shall explore and delineate the mineral resource potential of, and mine, the land to which the permit relates in a systematic and efficient manner and in accordance with this permit and good exploration and mining practice.

COMPLIANCE AND CONSENTS

2 In carrying out activities under this permit, the permit holder must:

(a) comply with the Crown Minerals Act 1991 and all other relevant legislative requirements; and

(b) obtain any consents and approvals required under the Resource Management Act 1991 and any other Acts.

WORK PROGRAMME COMMITMENTS

3 Where the permit holder is required to commit to work pursuant to the permit, the permit holder must establish to the satisfaction of the Chief Executive of the Ministry of Economic Development ("**Secretary**") that the permit holder can fulfil that commitment.

SUBCONTRACTING

4 The permit holder is not discharged from any obligation arising under this permit by contracting a third party to perform the relevant obligation.

FEES AND ROYALTIES

5 The permit holder shall pay annual fees and any other applicable fees relating to this permit, in accordance with the relevant regulations.

6 The permit holder shall be liable for payment of a royalty to the Crown calculated in accordance with Part 9 of the Minerals Programme for Minerals (Excluding Petroleum) 2008 and Schedule 4.

7 The permit holder shall report and pay royalties in accordance with the relevant regulations.

REPORTING

8 The permit holder shall submit reports to the Secretary in accordance with the relevant regulations.

Schedule 2

The Land to Which the Permit Relates

Land Area: 11.95 hectares

Regional Council: Wellington Regional Council

Territorial Authority: Wellington City Council

Description of Land Area:

All that area of land as shown on the attached map and more particularly identified in the spatial database held by the Secretary.

Schedule 3

Minimum Work Programme

1 The permit holder shall to the satisfaction of the Secretary carry out the following work programme:

(a) stripping of topsoil and over burden and stockpiling, backfilling or other disposal as appropriate using earthmoving machinery as necessary;

(b) unless otherwise approved in writing by the Secretary, mining of aggregate to a minimum of 25,000 tonnes using blasting methods and earthmoving machinery as necessary;

(c) resource appraisal as appropriate; and

(d) rehabilitation as appropriate.

Schedule 4

Royalties

POINT OF VALUATION

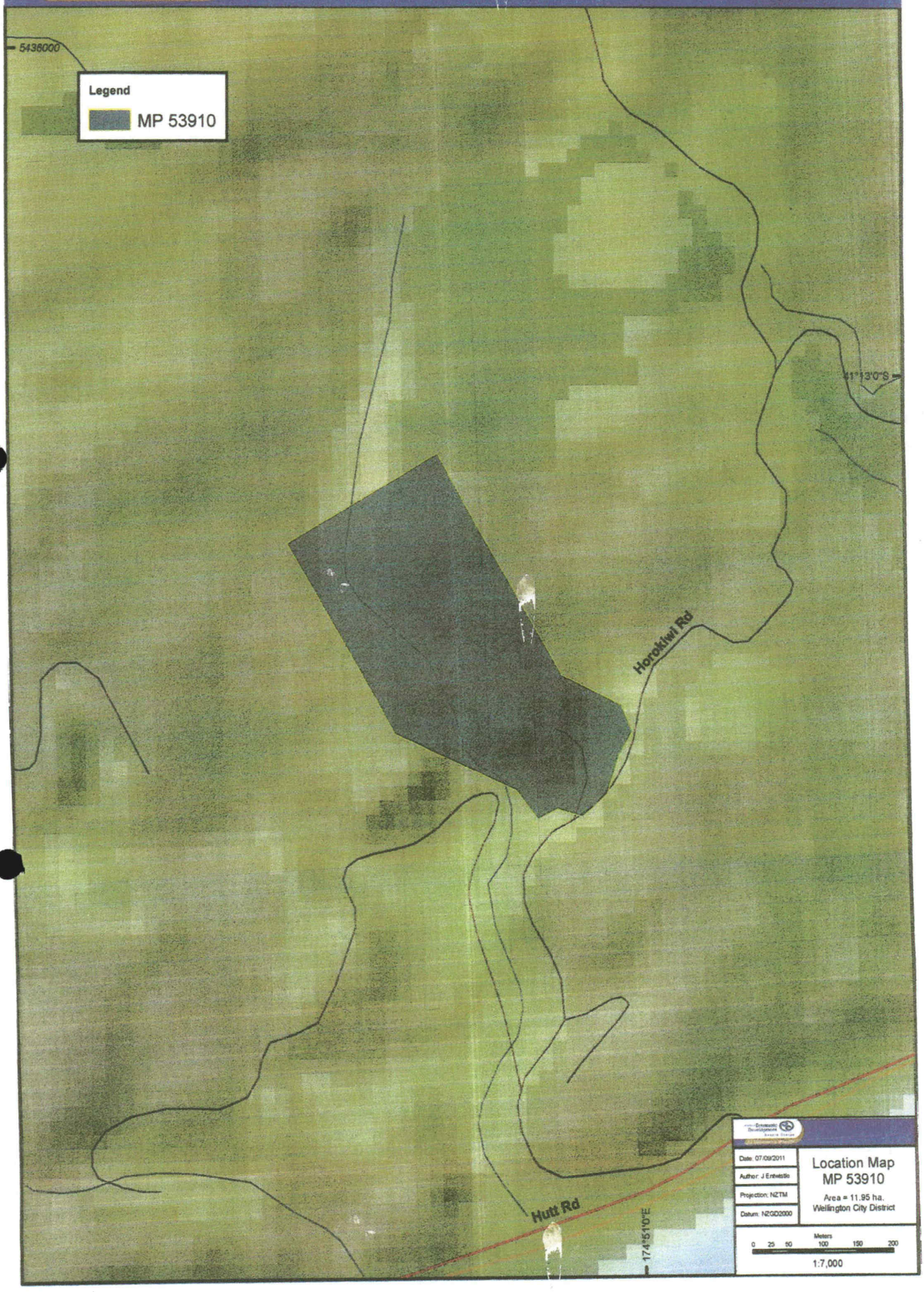
1 The point of valuation for royalty purpose is the permit boundary.

ROYALTIES PAYABLE

2 The annual reporting period for this permit is 1 January to 31 December.

Ministry of Economic Development
Manatū Ōhanga
NZ Petroleum & Minerals

MP 53910



ANNEXURE C

HOROKIWI QUARRIES LIMITED: BASIS OF EXISTING USE RIGHTS

Background

1. Horokiwi Quarry Limited owns and occupies all of the land shown on Plan titled 'Parcels owned by Horokiwi Quarries Ltd' identified as 'Plan 1' included in **Annexure B** This request relates to the 5 blocks 4 parcels of land contained in 3 certificates of title :

   1) CT WN27C/600 - Lot 1 DP 58444 WN27C/600
   2) CT WN 83/209 - Part Section 18 Harbour District (2.2007ha)
   3) CT WN42A/635 - Lot 1 DP 6640 & Section 1 SO 23514 (subject to a mining licence embodied in CT WN1200/22)
   4) Part Section 18 Harbour District
   5) Section 1 SO 23514 WN42A/635
   6) Lot 1 DP 6640 WN42A/635 WN1200/22 Quarry Site New Zealand Gazette 1953 page 9

   The request does not extend to the block of land legally described as Lot 8 DP 28139WNF3/324 which has an area of 8.1597 hectares (which although owned by the quarry is not proposed for quarrying in the near future (probably not the next 5 years) but which is intended for quarrying in the medium term.

2. The Quarry operates without the need for a mining licence on most of its land. It also operates on 2 blocks identified as 3 and 4 in paragraph 1 above being lot 1 DP 6640 WN42A/635, WN1200/22, and Section 1 SO 23514 WN42A/635 of land in relation to which it holds a mining licence which was granted in July 1992 and expires in July 2012. (The land identified as blocks 3 and 4 in paragraph 1 will hereafter be referred to as the "*mining permit block*")

3. HQL does not hold any land use consents from Wellington City Council for quarrying. The Council has accepted that HQL has existing use rights in relation to the Wellington City District Plan for at least that part of its operation outside of mining permit block. The current request is for certification of that existing use and confirmation that the existing use also extends to the mining permit block.

Dues assessment

4. HQL has *transitional rights* under the RMA for its land use operations, on the mining permit land. Those transitional rights will expire with the mining permit in July 2012. A replacement permit was granted on the 23 April for the 23rd April 2012 for a term of 40 years (reference Mining Permit 53910) (Annexure D) but it is accepted by HQL that this will not carry with it the current transitional use rights. As from the expiry of the current mining permit HQL will either need to rely on existing use rights for operations on that land or obtain land use consent from WCC in order to continue its operations on that part of the site. According a key purpose of this request is to obtain confirmation that HQL's existing use rights extend to the mining licence site. It is noted that ongoing use of the whole of the site is dependent upon use of the mining permit block.

5. HQL also holds various Regional Council water permits and discharge to air permits. It has outstanding applications which the Regional Council is currently processing including an application for a storm water discharge permit. HQL has undertaken an audit of its Regional Council consents and applications and is confident that it has (or will have once granted) all of the necessary regional consents for its existing and future operations including operations on the mining permit block. It has complied with all of the Regional Council's further information requests and is now waiting the processing of the outstanding applications.

Transitional rights arising from the Mining Licence

6. The licence was applied for prior to the commencement of the Crown Minerals Act in October 1991. It was granted under section 77 of the Mining Act 1971, on the basis of the transitional provisions in the Crown Minerals Act 1991. The licence relates only to the mining permit block. This land was purchased from the Crown in 1988 No mining permits are required for the other blocks of land included in this application.

7. The transitional rights derive from section 107 of the CMA which is as follows:

> **Existing privileges to continue**
>
> (1)Except as provided in this Part, every existing privilege shall continue to have effect after the date of commencement of this Act as if the Act which applied to the privilege before that date continued in force, and as if—
>
> (a)Subject to subsection (3), the holder of the privilege continued to have the same statutory rights as the holder would have had if this Act and the Resource Management Act 1991 had not been enacted; and.....
>
> (3)Where any consent in respect of any such existing privilege which, but for this section, would be required and would need to be sought under the Resource Management Act 1991, then the Resource Management Act 1991 shall apply.

8. The purpose of s 107(3) CMA91 is to ensure that existing privilege holders' statutory rights under the previous mining legislation are preserved.

Where such licences stipulated that consents were to be obtained under the environmental legislation existing at the time of their issue, these consents had to be sought and obtained under the RMA.

9. The holder of any such privilege does not need to obtain any District land use consent under the RMA, as they did not need to obtain such a consent under the Town and Country Planning legislation: *Opoutere Ratepayers and Residents Assn (Inc) v Heritage Mining NL A33/95(PT) applying Stewart v Grey County Council [1978] 2 NZLR 577 (CA)*.

10. In a series of cases brought under the enforcement regime of the RMA91, the Environment Court has upheld the principles in *Stewart* (above) such that existing mining privileges continue under their previous statutory regime. That regime provides an exclusive code for the regulation and supervision of those existing land use activities. They are therefore not subject to the declaratory and enforcement jurisdiction of the Environment Court: see *Opoutere Ratepayers and Residents Assn Inc v Heritage Mining NZ EnvC A033/95, Otago Heritage Protection Group Inc v Macraes Mining Co Ltd EnvC C036/98, Terry v West Coast RC EnvC C147/01, and Save Happy Valley Coalition Inc v Solid Energy NZ Ltd EnvC C170/06.*

11. It is clear that HQL does not currently require land use consent from WCC for quarrying operations on the mining permit land. By letter dated 19 February 2010 WCC accepted that HQL was entitled to continue operations on the mining permit land at least until that permit expires in July 2012. (attached as **Annexure E**)

12. Section 107(1) of the CMA did not avoid the need to obtain water permits and discharge permits under the RMA. HQL now has water permits under the RMA and some discharge permits for discharge to air and it has applied for an additional discharge permit for discharges of storm water. Quarrying activities do not require regional land use consents for earthworks.

Existing use rights

13. HQL does not require a land use consent for its operations on the balance of the land (excluding the mining permit block) because it has existing use rights under section 10 of the RMA. It is noted that WCC has implicitly accepted this position because at no point has it ever been suggested that a land use consent is required for the balance of the site. This application seeks confirmation of that position and confirmation that those existing use rights extend to the mining permit block.

14. As discussed above, no land use consent is currently required for the mining permit block. That block is part of the overall site and accordingly

if the overall site has existing use rights it follows that the mining permit block also has those rights.

15. Section 10 of the RMA governs existing use rights in relation to district plan requirements for land use as follows:

> **Certain existing uses in relation to land protected**
>
> (1)Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—
>
> (a)Either—
>
> (i)The use was lawfully established before the rule became operative or the proposed plan was notified; and
>
> (ii)The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:
>
> (b)Or—
>
> (i)The use was lawfully established by way of a designation; and
>
> (ii)The effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.]
>
> (2)Subject to sections 357 [to] 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—
>
> (a)An application has been made to the territorial authority within 2 years of the activity first being discontinued; and
>
> (b)The territorial authority has granted an extension upon being satisfied that—
>
> (i)The effect of the extension [will not be contrary to the objectives and policies of the district plan]; and
>
> (ii)The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.
>
> (3)This section does not apply if reconstruction or alteration of, or extension to, any building to which this section applies increases the degree to which the building fails to comply with any rule in a district plan [or proposed district plan].
>
> (4)For the avoidance of doubt, this section does not apply to any use of land that is—
>
> (a)Controlled under section 30(1)(c) (regional control of certain land uses); or
>
> (b)Restricted under section 12 (coastal marine area); or
>
> (c)Restricted under section 13 (certain river and lake bed controls).
>
> (5)Nothing in this section limits section [20A] (certain existing lawful activities allowed).

16. In summary; the key requirements to establish an existing use are that the use must exhibit all of the following:

- *The use was lawfully established before the rule became operative or the proposed plan was notified; and*
- *The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:* and
- has not *been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified*

17. The latter restriction is inapplicable because the use has never been *discontinued for a continuous period of more than 12 months,* since it commenced in the 1930s. Accordingly the subsequent discussion will focus on the first three elements.

18. We will first however outline the approach which the Courts have adopted in relation to existing use rights.

Relevant case law

19. The Court of Appeal *Rodney DC v Eyres Eco-Park Ltd (2007) 13 ELRNZ 157; [2007] NZRMA 320 (CA)* has ruled that the date of inquiry is as follows:

> The word "rule" in s 10(1) and in s 10(1)(a)(i) means a rule currently in force (as opposed to a superseded rule). It is not the rule which first required the activity to have a resource consent had it not been for existing use rights. The existing use rights must be assessed by reference to the activity and its effects at the time the current rule, and not the initial rule, came in to force:
>
> .
>
> [14]
>
> Once that conclusion is reached, it seems to us to be clear that the reference to "the rule" in s 10(1)(a)(i) and (ii) must have the same meaning, because it is clear from the context that the use of the shorthand "rule" refers back to the reference to "a rule in a district plan or proposed district plan" in the introductory wording to s 10(1). That leads us to conclude that the existing use right must be assessed by reference to the activity on the land, and the effect of that activity, at the time the current rule (here the 2000 rule) came into force, not at the time the initial rule (the 1988 rule) came into force.
>
> [23]
>
> Question 1 is in fact two separate questions. We answer each of those questions "yes". However, we should explain in greater detail our answer to the first of those questions. As is apparent from our analysis at [16] above, the extent and effect of the use as at the date of the coming into force of the initial rule (i.e., at the time s 10 is first brought into play) will never be entirely irrelevant. It will be a matter of factual significance because it defines the existing

> use right as at the time of the first plan for the purposes of determining whether the current use is "lawfully established" in terms of s 10(1)(a)(i).
>
> [24]
>
> However the primary consideration will be the extent and effect of the use as at the time the most current rule came into force. That will normally be the yardstick against which the actual use and the effects of that use must be measured for the purposes of s 10(1)(a)(ii). The only situation where it will not be the yardstick will be where the use at the time the most current rule came into force was not "lawfully established" as explained in [16]. (emphasis added)

20. The effect of the *Eyres Eco-Park* decision is that the use must have been lawfully established at the time the *most current rules* first applied to the activity. In the present case the current rural activity rules first applied to the activity of quarrying when the Proposed District Plan was notified on 27 July 1994. Accordingly in terms of *lawful establishment* the first question is whether the activity was lawfully established as at that date.

21. When assessing the effects of the activity, in terms of character, scale and intensity, the comparison is between the effects of the present activity as compared to *the effect of that activity, at the time the current rule(s) .... came into force.*

22. There is other relevant case law as follows: (excerpts are from Brookers Resource Management – emphasis added)

a. The onus of proof to establish an existing use falls on the party asserting its existence: *Waitakere Forestry Park Ltd v Waitakere CC* A077/94 (PT).

b. The comparison of character, intensity, and scale calls for a finding about the effects of the character, intensity, and scale of the use before notification of the proposed rule which the current activity contravenes in comparison to the effects of the activity at issue: *Russell v Manukau CC* [1996] NZRMA 35 (HC), and *Kapiti DC v Otaki Cold Storage Ltd* EnvC W019/02. The Court of Appeal in *Rodney DC v Eyres Eco-Park Ltd(2007) 13 ELRNZ 157; [2007] NZRMA 320 (CA),* held the subsequent notification of new rules requires the reassessment of the character, intensity and scale of the effects of the activity, rather than reliance on the effects the first time a rule was contravened.

c. The question raised by s 10(1)(a)is not simply whether the use is similar, but whether the effects of the use are similar. Reasonable evolution is permitted: Russell (above), and Kapiti DC (above).

d. In an interim decision, *Ben v Auckland CC* A069/96 (PT), the Tribunal declined to determine whether a proposed advertising sign would alter the effects of the use of the site such that the existing use rights might be removed. It tentatively concluded that the whole of the land was used for the non-complying activity (which was an existing use). The existing use right pertained to the whole of the site, such that the introduction of a further use and its effect might be taken into account in determining whether the effects of the use of the land might remain the same or be similar in character, intensity, and scale.

e. In *Te Kupenga O Ngati Hako Inc v Hauraki DC* (1999) 5 ELRNZ 533 (EnvC), the Court concluded that a quarry company could not maintain its reliance on existing use rights under s 10 if the future use of land was a landfill and quarry, as opposed to a quarry alone. It concluded that the company must seek consent for both the quarry and the landfill, rather than rely on existing use rights for the quarry alone with a separate consent for the landfill.

f. In *Waikato DC v Fulcher* EnvC W160/96, the Court found the current excavation operation was a separate operation from the previous one, and that the separation of 5 or 6 years between the earthworks removed the protection offered by s 10. The first "use" had been complete. The second excavation did not form part of the first and was a new on-site activity. The Court observed that it would be absurd to suggest that an intention to excavate large parts of a

property could provide continuing protection, unless the operation was in some way continuous and of the same category (such as a quarry).

g. In *Queenstown Lakes DC v McAulay* [1997] NZRMA 178 (HC), the High Court (obiter) observed that existing use rights could potentially extend to ancillary uses which are implicitly allowed as part of land use permitted by resource consent. See A9.04.

h. An existing use right to mine a geological resource, mined gradually over 34 years, was not extinguished merely because mining had not yet extended onto a separate certificate of title held under a different royalty: *Re Omya NZ Ltd* [2004] NZRMA 104 (EnvC). In reaching that decision the following matters were relevant:
(a)
The circumstances of the case as they existed on the relevant dates;
(b)
Whether the land was capable of identification as far as possible in a way which avoided detailed investigation and complicated disputes of fact;
(c)
"Use" can involve active or passive use and that physical use of a whole planning unit, which does not necessarily relate to formal property boundaries, is not necessary for a finding of existing use rights;
(d)
If the land is rightly regarded as a unit, and it is found that parts of its area were physically used for the purpose in question, it follows the land as a whole was used for that purpose; and
(e)
If some part of the land was used for mining or extractive purposes, the fact that the balance of the land was held in reserve and intended for future use does not derogate from the fact that, in law, the whole of the land was used for mining or extractive purposes.

i. Owners can rely on ss 17 and 18 Interpretation Act 1999 to save rights which arose under the TCPA77 or the preceding 1953 Act: *Stretton v Rodney DC* EnvC A068/00.

j. "Reverse sensitivity" is irrelevant in considering whether existing use rights exist under s 10 RMA. The RMA requires consideration of the effects of the use, their character, intensity, and scale, but it does not require consideration of environmental changes outside the site which have no bearing on the character, intensity, and scale of the use in question: *Lendich Construction Ltd v Waitakere CC* EnvC A077/99.

k. *Lendich Construction Ltd v Waitakere CC* EnvC A077/99. While the expression "character" did not include the concepts conveyed by "intensity" and "scale", there may be circumstances where expansion of an existing activity may well result in a change of character, **because of additional effects of a different type generated by that expansion.**

23. Some points from the case law above are of relevance to the Horokiwi Quarry as follows:

- The existing use rights relate to the whole of the site owned or leased by HQL at the time the existing use rights arose. (at the time the current rules came into force in 1994). Accordingly the mining permit block must be treated as part of the overall site.

- In the case of earthworks a new area of excavation may be found to have different effects '*....unless the operation was in some way continuous and of the same category (such as a quarry).*" It is not enough that there was always an intention to expand into the new area, the operation must have been continuous (or at least carried out regularly and with no significant gaps) and the proposed extension must be the same type of operation as previously existed. [This is the situation in the present case]

- *If the land is rightly regarded as a unit, and it is found that parts of its area have been physically used for the purpose in question, it follows the land as a whole was used for that purpose.* In the current circumstances the mining permit land was clearly part of overall Horokiwi quarry site (the same planning unit) at the times the rules came into force and presently.

- *If some part of the land was used for mining or extractive purposes, the fact that the balance of the land was held in reserve and intended for future use does not derogate from the fact that, in law, the whole of the land was used for mining or extractive purposes.* Accordingly, in order to establish existing use rights in relation to the mining permit land, it is not necessary that the land was being used for quarrying at the time the relevant rules came into force.

- The extension of existing use rights to ancillary activities is important. The High Court decision in *Queenstown Lakes DC v McAulay* confirms that existing use rights extend to all of the activities normally associated with quarrying. In any event, if those activities were lawfully established and have not changed in character scale or intensity of effects they must necessarily be covered by their own existing use rights.

- In relation to the extension of an existing activity of the same type, a key issue will be whether there has been or will be a change of character, because of *additional effects of a different type generated by the expansion*. In the present case there are no additional effects of a different type. The current activities are of the same character as those which existed in the early 1990s before the current rules were notified in 1994 and mid 1990s before they became operative.

- The Courts have found "reverse sensitivity" to be irrelevant in considering whether existing use rights exist under s 10 RMA. Thus in the present case, the fact that *sensitivities* to the operation may have increased as a result of residential development in the surrounding area and tighter district plan policies and rules since the early 1990s (in particular the ridge top protection rules and policies) is irrelevant.

The quarry and mining cases

24. The decision in *Te Kupenga O Ngati Hako Inc v Hauraki DC* is distinguishable because in that case there was a new proposed use (land filling) which was not part of the established use.

25. The decision in *Waikato DC v Fulcher* is also distinguishable because in that case there had been significant periods of inactivity and the proposed excavation was not of the same type as previous excavations.

In respect of s 10(1)(ii) we are equally certain that the second excavation is not a "use" the effects of which are the same or similar in character, intensity, and scale to those which existed before the proposed plan was notified. We are told by Mrs Fulcher that the last excavations and fill operations amount to only one-quarter of the total upon site. That is disputed by council. Accepting for the moment that it does constitute only one-quarter of the total excavation activity the argument still suffers from a fatal defect

because it is a totally separate operation from the one which previously occurred. The separation by five or six years from the first to the second major earthworks clearly removes it from the protection offered by s 10 which refers to "*the* use". The first "use" in 1990/1991 has been completed. That forms "the use". **The second excavation does not form part of the first and is a new on site activity** not protected by the legality of the first.

It would be patently absurd to suggest that an amorphous intention to excavate large parts of a property could provide continuing protection unless the operation were in some way continuous and of the same genesis such as a quarry. Even if one were to accept that there is a similarity to a quarrying activity, an activity which can be protected by the existing use provisions of the RMA, the provisions of s 10(2) are again fatal to the existing use argument.

26. The decision which is most on point is *Re Omya NZ Ltd.*

There can be no doubt that, subjectively, Omya and its predecessors have regarded the bentonite deposit as one resource, to be worked through as a continuous operation. That it happens to extend over areas of land in different ownerships has been, for them, quite incidental.
[24]
In the nature of things, no mineral resource is worked all at once. Depending on its extent and the nature of the mining operation, the process of winning the extractable mineral may take many years. Just so here. Thirty-four years have elapsed since extraction began and only now are operations moving towards the highest point of the Wright Royalty. For all of that time Omya has had the exclusive right to mine the bentonite on both royalties. It conducted an extensive drilling programme on the Broughton Royalty in 2001. That is evidence enough, if evidence was needed, of its interest and intention of exploiting the bentonite over the whole of its royalties.
[25]
In the end, assessment of each instance is a mixed issue of fact and law. Having determined that there is an existing use, the next question to be answered in each case will be: *What is the physical extent of the*"land"*[in term of*section 10*] on which the existing use is being conducted?* There may be cases where the "land" can fairly be defined by title boundaries. Possibly, that will be more likely in an urban setting. But in settings such as this title boundaries may have little relevance in defining the "land" on which an activity or use is being conducted. We look, for instance, at the Wright Royalty itself. That is comprised of the land contained in at least three separate titles [CB8B/45, CB8F/922 and CB8F/923]. We conclude nobody could plausibly argue that the existing use rights do not cover them all. For that purpose, they are a coherent whole and should be regarded as one area of "land". Similarly there would be many farm properties which, as a mere accident of survey technique or of staged acquisition, are comprised of the land in several titles. But they would be regarded for use purposes as one coherent area of *land*.
[26]
We think the same approach should be taken in considering the two royalties. The rights to each were acquired more or less contemporaneously and have passed down the chain of ownership as one entity. The bentonite deposit is one geological entity and would be worked as one entity, albeit gradually and over an extended period of time. In our view it would be illogical and artificial to consider it as being contained on distinct pieces of *land* in this context. We think the same approach should be taken in considering the two royalties.
[27]
Counsel were unable to direct us to any New Zealand authority directly on issue, but we find reassurance that our approach is sound in Australian and UK decisions on at least broadly comparable legislation. In *Amos Ben v Auckland City Council* (Decision A69/96) the proposition from *Burdle v Secretary of State for the Environment* [1972] 3 ALL ER 240 that:
" ... it may be a useful working de to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally "
was cited with approval. We take from that confirmation that a "planning unit" does not necessarily relate to formal property boundaries.
[28]
The judgment of the High Court of Australia in *Parramatta City Council v Brickworks Limited* (1972) 128 CLR 1 is also of assistance. The Court held that the Australian equivalent of existing use rights may extend to the whole of an area held for the purpose of clay extraction even though only parts of it were being excavated at the time the planning controls were brought into force. In discussing that issue, the Court Said:
" ... if the whole of the land was acquired for and devoted to the purpose of quarrying and brickmaking, the whole may be held to have been used for that purpose although only part of it was physically used. Obviously where an expanse of land has been acquiredfor the purpose of quarrying it cannot, because of practical considerations be excavated all at once, but this does not mean that the part which has not actually been dug up is not used for the purpose of quarrying. "
[29]
The Court also went on to confirm that an assessment of what is a piece of land is to be regarded from a practical point of view and not necessarily by reference to boundaries of certificates of title.
[30]
In *Steedman v Baulkham Hills Shire Council* (1991) NSW Lexus 9627 (8 May 1991), the New South Wales Court of Appeal was required to decide whether the whole of a planning unit was protected by existing use rights even though there had not been physical use of the entire unit from the outset. The land in question had originally been owned by one proprietor but had been subsequently subdivided and sold to various owners. The Court was asked to determine whether the existing use rights attached to the subdivided pieces of land which had originally formed part of the whole. We agree with Ms Dewar's submission and the Court regarded the following matters as relevant in making that decision:

- The circumstances of the case as they existed on the relevant dates;
- Whether the land was capable of identification as far as possible in a way which avoided detailed investigation and complicated disputes of fact;
- That "use" can involve active or passive use and that physical use of a whole planning unit is not necessary for a finding of existing use rights;
- That if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question, it follows that the land was used for that purpose;
- That if some part of the land was used for mining or extractive purposes, the fact that the balance of the land was held in reserve and intended for future use does not derogate from the fact that, in law, the whole of the land was used for mining or extractive purposes.

[31]
The Court held that on the facts before it the whole of the land was to be regarded as subject to the existing use without regard to delineations of title boundaries or lot boundaries. We have applied that general line of thought.
[32]
Without wishing to labour the point, the same process of assessment was applied by the High Court of Australia in the case of *Eaton and Sons Pty Limited v Warringah Shire Council* (1972) 129 CLR 270.
[33]
For those reasons, we hold that the existing use rights extend over both the Wright Royalty and the Broughton Royalty.

27. The same analysis can be applied to the Horokiwi quarry with the same conclusion. The mining permit land is clearly part of the same "planning unit" (the site) as the balance of the quarry even though it relates to separate titles. The fact that this land has been subject to a mining licence since at least 1992 is evidence of that fact that it was clearly regarded as part of the overall quarrying operation. The proposed and previous operations are similar and the environment is effectively the same at that which existed prior to 1994.

28. All of the factors identified in the Steedman case apply:

> *Whether the land was capable of identification as far as possible in a way which avoided detailed investigation and complicated disputes of fact;*

29. It is defined by the mining licence and legal descriptions .

> *That "use" can involve active or passive use and that physical use of a whole planning unit is not necessary for a finding of existing use rights;*

30. There has been continuous active use of the planning unit (the site) for quarrying and passive use of the permit area as evidenced by the permit.

> *That if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question, it follows that the land was used for that purpose;*

31. This is exactly the situation here.

> *That if some part of the land was used for mining or extractive purposes, the fact that the balance of the land was held in reserve and intended for future use does not derogate from the fact that, in law, the whole of the land was used for mining or extractive purposes.*

32. This is exactly the situation here.

33. In summary, the existing activity on the whole quarry "site" as defined, including the mining permit block and the proposed future activity on the mining permit block are the same activity as the previous activity prior to 1994 and the land involved is all one planning unit. We now turn to consider each of the key elements of section 10 apart from discontinuity which is inapplicable in the present case.

Was the use lawfully established before the current rules became operative or the proposed plan was notified?

34. Quarrying operations commenced in the 1930s. There has never been any suggestion by the Council, that the activity was not lawfully

established prior to the commencement of the RMA in 1991 or prior to previous restrictions in the prior District Schemes.

35. The current rural area rule came into force when the District Plan was notified on 27 July 1994. The quarrying activities were all established on the site well before that date and there has never been any suggestion that they were not *lawfully* established. It is unclear whether there were prior Town Planning restrictions on the activity, however as noted above the point of inquiry is from when the current rules came into force.

Lawful establishment of activities on the mining permit land

36. This mining permit block was purchased in the 1980s and a mining licence was issued on 16 July 1992 . Accordingly as at the date the current rules were notified that land formed part of the "planning unit".

37. As discussed earlier, no land use consent was required for quarrying activities on this land because of the transitional use rights attached to the mining licence (now a deemed mining permit). It follows that quarrying was lawfully established on this part of the site.

38. There was a suggestion by Wellington City Council officers in a letter dated 10 February 2010 that a land use consent was required, but it was eventually accepted that this was not the case. Accordingly the use of this land for quarrying operations and ancillary activities was part of the existing lawful activity on the site, as at the notification of proposed District Plan even though at that date it was held in reserve for future quarrying. (*Steedman v Baulkham Hills Shire Council*)

Are the effects of the use the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified?

39. The *Eco-Park* decision confirms that the comparison of effects must be assessed by reference to the activity and its effects at the time the current rules and not the initial (pre RMA) rules, came in to force. The Court of Appeal stated the following:

> *As is apparent from our analysis at [16] above, the extent and effect of the use as at the date of the coming into force of the initial rule (i.e., at the time s 10 is first brought into play) will never be entirely irrelevant. It will be a matter of factual significance because it defines the existing use right as at the time of the first plan for the purposes of determining whether the current use is "lawfully established" in terms of s 10(1)(a)(i).*

40. The current District Plan was first notified as a proposed Plan on 27 July 1994. Additional rules including the ridge protection rules have been notified subsequently. For current purposes it will be sufficient to consider

whether the effects of the quarrying operation on the overall site are the *same or similar in character, intensity, and scale to those which existed* in the early 1990s prior to the principal rules governing quarrying being notified.

41. The effects which need to be considered are those governed by the District Plan and include:

- Traffic impacts
- Noise
- Dust
- Effects on visual amenity and landscape values
- Effects on terrestrial ecology including indigenous vegetation

42. An expert assessment of the latter two matters is set out in annexures D. No assessment has been provided in relation to the first three matters since it is self evident that these effects are similar in character, scale and intensity.

Scale of current effects on the site as compared to the scale of effects when the current Plan was notified.

43. Annexure A sets out the annual quarrying volumes for the period 1999 to 2011. During the 5 years prior to the current plan being notified the average annual volume of quarried material was estimated as 510,000 tonnes. During this period there were a number of major projects such as the seaview marina project, and upper hutt by pass that contributed significantly to the quarry activity. During the last 5 years to 30 June 2011 the average annual volume was519, 000 tonnes. The average volumes per annum thus remain similar. Accordingly the *scale* of the primary activity remains similar.

44. If follows that the scale of effects is also likely to have remained similar. In terms of visual impact, the area which was quarried (in hectares) in years leading up to the proposed plan in 1994, and in the subsequent 17 years to present has remained similar. The nature of the quarrying operation is such that activity is spread over the whole quarry with specific locations changing from time to time. :

45. It is inevitable with a quarry that the scale of landscape/visual amenity effects will increase over time. However, the question is not whether total visual effects on the site (whole of quarry) have increased over time, but whether during an equivalent period of time post 1994, versus

the same period of time prior to 1994, the scale of effects was similar. In other words, the comparison is between total or average annual visual impacts in the 17 year period 1995 to 2012 as compared to total or average annual visual impact over the 17 years prior to 1994.

46. In practice the comparison of visual impacts over these two periods is constrained by the dates of the aerial photo graphs. Accordingly Mr Evans has focussed on the 5 to 10 years to the end of 2011 versus the 5 to 10 years prior to 1994. He has also compared the effects of the intended activities over the next 5 years with those during the last 5 years.

47. He has concluded that the scale and intensity (degree) of landscape and visual amenity effects occurring over the last decade is similar to that which occurred during the decade prior to the Plan being notified. He has also concluded that the scale and intensity of the effects of the future operations on the mining permit block over the next 5 years will remains the similar to that during the last 5 years.

48. In summary, the overall scale of disturbance and scale of effects (visibility) deriving from the quarry, over the last 17 years has remained similar to the overall scale and intensity of effects which occurred during the previous 17 years.

Character of effects

49. The nature of the activities on the site has remained constant. In particular, the quarry has always had impacts on visual amenity and landscape value; that is inevitable with a quarry. The quarrying of the site has and will continue to have visual and landscape effects which are of a similar *character* to those which existed prior to 1994. In summary, in the early 1990s there were large areas of the quarry visible from dwellings and from public viewpoints and that remains the case. Accordingly the character of visual impacts has remained the same or similar.

Intensity

50. As discussed above, the scale of the activity and of effects has remained similar. Accordingly it follows that the intensity of effects has remained similar. We note that the fact that more people may see the recent development than would have seen development when the plan was notified is not of itself an indication of increased scale or intensity of effect.
The question is whether the increases in visibility of the quarry during the 17 years prior to 1994 are similar to the increase in visibility over the last 17 years.

51. As discussed above, reverse sensitivity is irrelevant. Accordingly the fact that more residential development may have occurred since the use was established and the fact that more recreational use of nearby hills may now be occurring is irrelevant.

52. For the same reason, the fact that there were previously no rules relating to ridgelines is irrelevant. The comparison of scale and intensity of effects. must be assessed in the absence of policies and rules which have been developed since 1994.

53. In assessing whether the intensity of visual and landscape impacts is similar, one must consider how visible the operations over the last 17 years has been from public_and private_viewpoints as compared to an equivalent period before the plan was proposed. Visibility from public viewpoints is particularly important. Mr Evans discusses changes in visibility from both public and private viewpoints in his report. He concludes that although the total visibility and visual impact of the quarry has increased since 1994, the degree of overall impact over the last decade is similar to that over the decade prior to 1994.

Conclusion

54. In summary, although the quarry will over the last decade have become visible from some locations from which it was not visible prior to 1994 the overall degree of impact (total or average annual visual impact) over the last 17 years remains similar to the previous 17 years. The visual impact over the next 5 years will remain similar to the visual impact over the last 5 years.

55. In conclusion, *the effects of the use* (quarrying and ancillary activities on the site)*are the same or similar in character, intensity, and scale to those which existed (on the site) before the rule became operative or the proposed plan was notified*

ANNEXURE E

1. Letter from the Wellington City Council Dated 19 February 2010

Absolutely POSITIVELY Wellington

Me Heke Ki Pōneke
Wellington City Council

19 February, 2010

The Manager
Horokiwi Quarries Ltd
PO Box 38037
Wellington Mail Centre
Lower Hutt 5045

Service Request No.207329
Property ID: 1010533

Attention: Ross Baker

Dear Ross

Horokiwi Quarry, Horokiwi Road

I refer to our conversation of Thursday 18 February 2010 following my letter dated 10 February 2010 and your letter in response also dated 10 February 2010 relating to my recent enquiry about track formations and earthworks on the quarry site, and whether that activity required resource consent.

Notwithstanding that you letter fully set out your company's position and reliance on a mining licence issued under the Mining Act 1971, given the potential seriousness had it not been able to rely on the mining licence it holds, I felt it safe to seek confirmation from Council's solicitors on the matter.

As I explained in our conversation, I can now confirm that the advice I have received does accord with yours and that the mining licence does permit your company to undertake quarrying (including within the ridge line and hilltops) in that parcel of land described in the licence as Lot 1 DP 6640, situated in Block XII, Belmont Survey District and Part Section 18, Harbour District, situated in Block XII, Belmont Survey District, collectively comprising a total area of 11.9670 hectares.

I also accept your advice, insofar as the area subject to this enquiry is concerned, that Horokiwi Quarry is not required to comply with the provisions of the Resource Management Act 1991 as a consequence of transitional provisions under the Mining Act 1971.

I note that the mining licence, which is due to expire on 15 July 2012 when its approved 20-year term ends, does require a quarry management plan and the progressive and final re-contouring of disturbed areas, including slope and structural stability that is sympathetic with adjacent landforms, and landscape considerations, and rehabilitation and revegetation proposals. I also note there is another provision of that licence requiring the area disturbed by quarrying, ancillary work and access to be confined to the 'minimum practical'.

PO Box 2199, 101 Wakefield Street, Wellington 6140, New Zealand
Ph 64-4-499 4444, Internet www.Wellington.govt.nz

You will also be aware that any proposal to quarry or to continue to quarry in the same area after the mining licence expires in 2012 will require resource consent consistent with other consents you hold for other parts of the quarry site.

The confirmations in this letter should now bring the matters subject to this enquiry to an end and I thank you for your prompt response to the issues I had raised.

On an ancillary note, you asked me to let you know if a copy of the earthworks report for the period between October 2008 and October 2009, required as part of the consent conditions under SR's 55884 and 122486, which I had requested from CPG New Zealand Limited (formerly Duffell Watts/TSE), was not received.

To date that report has still not arrived. I understand that you may have a copy of the report I have requested, and, if so, perhaps it might be easier to receive it from you.

Yours faithfully

Bob Barber
Team Leader
Development Planning and Compliance
Wellington City Council