

Decision No. W 18/95

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of an appeal pursuant to section 120 of the Act

**BETWEEN** **NICHOLAS GUY FISHER**

**(RMA 572/94)**

Appellant

**AND** **TAUPO DISTRICT COUNCIL**

Respondent

**BEFORE THE PLANNING TRIBUNAL**

Her Honour Judge Kenderdine presiding  
Mr P A Catchpole  
Mr F Easdale

**HEARING** at TAUPO on the 7th day of March 1995

**COUNSEL/APPEARANCES**

Mr N G Fisher in person  
Mr A Vane for the Taupo District Council

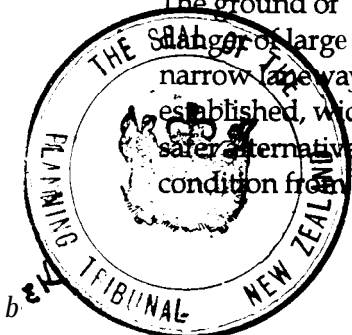
**INTERIM DECISION**

This is an appeal against one of the conditions of a discretionary use consent granted by the Taupo District Council (the council). The consent allowed the appellant to operate a vehicle workshop from an existing building on Ruapehu Street within the Commercial 2 zone, Taupo.

The condition appealed against reads as follows:

*"This consent is granted subject to the applicant providing Council with proof that the lease agreement still enables vehicle access to the adjacent carpark, from the Ruapehu Street right of way."*

The ground of appeal is that insufficient consideration had been given by the council to the danger of large volumes of traffic entering and exiting onto Ruapehu Street from the very narrow lane way alongside the appellant's building. The appellant considered that an established, wide and under utilised service lane running behind the building, provides a safer alternative means of access to the car-park. The relief sought is the removal of the condition from the consent.



Based on the evidence of Ms J E Sowerby, Acting District Planner for the council the site is one of three leased sites within a 1,969 square metre property located at 147-159 Ruapehu Street, Taupo which is legally described as Part Sections 6 and 8 Block IV Taupo Town (Certificates of Title 25D/1110 and 25D/1088). The two remaining lease sites are presently vacant. The property contains an 877.5 square metre building along the entire frontage of the site, with the exception of the 5 metre wide vehicle accessway located at the south western corner of the site on the Ruapehu Street frontage. It rises slightly from Ruapehu Street towards the rear of the building which is (excluding the concreted vehicle accessway to the property) concreted and delineated for on-site car-parking purposes. The appellant occupies 292.5 square metres or one third of the building being that portion immediately adjacent to the vehicle accessway to the property. His site includes 676.2 square metres of the on-site car-parking area to the rear of the building and the vehicle accessway to the property. We understand the remainder of the property is available for development, with a sign writer and a tavern proposed.

The property is owned by Mr H A Kidd, leased to Fletcher Merchants Ltd and subleased in part to the appellant.

A service lane to the rear of the site is vested in the Taupo District Council partly as service lane and partly as Local Purpose Reserve (service lane), and it adjoins and runs the entire length of the property's rear boundary. The service lane is 7.26 metres wide with a two lane formation from its Paorahape Street exit to just beyond the property, after which the service lane is reduced to a single lane formation to its Spa Road exit.

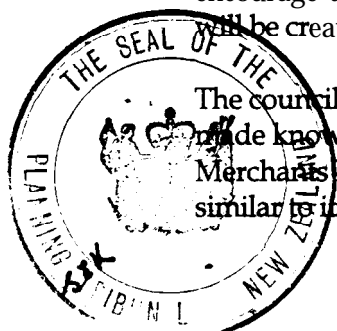
A copy of a plan of the site taken from the evidence of Ms Sowerby, is attached to this decision marked Appendix A.

### **The Council's Case**

In support of his application the appellant stated that the vehicular access is provided to both his lease site and the balance of the property from Ruapehu Street, via a laneway to the south of the building, but predominantly from the service lane between Spa Road and Paorahape Street. He stated that trade suppliers and refuse disposal trucks will have access to the site from the service lane at the rear.

The council requires each tenant to have adequate parking on the three sites. The condition appealed against is to ensure access to that parking is available from Ruapehu Street, the narrow laneway which Mr Fisher objects to using instead of the service lane as access to the carpark. Ms Sowerby deposed that by requiring the appellant to provide proof of access to the balance of the property, the council is trying to ensure that the landowner does not severely restrict future use of the unoccupied lease sites by failing to make some long term provision for vehicular access to them. If adequate provision is not made in the appellant's lease agreement, the council considers the landowner will effectively deny use of the remainder of the property. It is concerned that general access used by the public at large, is likely to create conflict with legitimate trade vehicles and encourage abuse of the service lane for normal access by the landlocked tenants and their clients. The council is concerned that such use will encourage the presumption that service lanes are, in essence, public roads. It fears a precedent will be created if customers use the service road for access.

The council officer discussed the offending condition with the owners of the property after it had made known its decision. We were told that neither Mr Kidd (the owner) nor Fletcher Merchants Ltd (the occupier/ head lessee) have supported the council by imposing a condition similar to its conditions on the appellant's lease.



It was the planning witness's opinion, that division of the property into three separately occupiable lease sites has the potential to render all sites noncomplying with respect to on-site carparking, loading bays and (in the case of the two northern leased sites) the vehicle access provision, depending on the types of use and the legal provision made for access to and from the properties lawful road frontage to Ruapehu Street. In her opinion, the onus lies first with the owner or occupier of the commercial premises to provide ready vehicle access to and from the rear of each site. While the appellant's lease site complies with the on-site parking and loading bay and vehicle access to and from Ruapehu Street provisions, unconditional approval of the resource consent application would, she considered, render the remaining portion of the property land locked and be contrary to council's objectives for self-sufficient development within the Commercial 2 zone. Ms Sowerby considered that requiring the appellant to provide proof of access to the balance of the property was, in effect, trying to ensure that the landowner does not severely restrict future use of the unoccupied lease sites by failing to make some long-term provision for legal vehicular access to them. If adequate provision is not made in the appellant's lease agreement the landowner will effectively deny any use of the remainder of the property as neither of the two unoccupied lease sites will comply with the Transitional Operative Taupo District Plan requirement for legal vehicle access to the on site carparking and loading bays.

### **The Appellant**

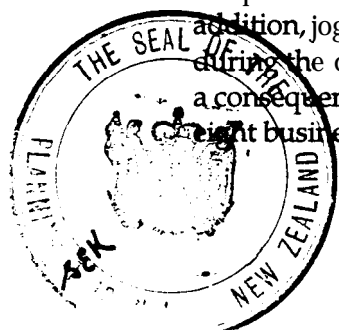
Currently the appellant is operating on the site as a vehicle repair operation despite this appeal. Mr Fisher made available to us a copy of the lease agreement in which had been inserted the following clause.

"Vehicular Access

*The sublessee's use of the driveway access, Proposed Restricted Area and Back Court Yard Area shall be the subject to any local authority rights and restrictions existing as at the Commencement Date of this lease or subsequently imposed by such local authority."*

The appellant considers he is thus currently operating legally on the site but advised us he intends having the clause removed from the lease if we find in his favour on this appeal. He hopes to completely fence off his site so that stored vehicles will be secure overnight. Currently the property is fenced along the boundary with the service lane. He proposes to fence off the laneway access to and from Ruapehu Street. A gate in the service lane and the unfenced part of Mr Fisher's site adjoining the lane together provide accessways to the overall property.

Mr Fisher deposed that he leases one third of the building in which his vehicle repair operation is situated, together with one third of the associated parking at the rear. The front access from Ruapehu Street to the rear of the property is also part of the lease. Mr Fisher is concerned that because council prefers all access to be through such a narrow laneway, the situation creates a dangerous intersection with little visibility where the laneway intersects with the footpath. Mr Fisher deposed also to delays with vehicles trying to enter from Ruapehu Street whilst others are exiting as the laneway has room only for one car. In addition, joggers from the two gyms on either side of his workshop regularly use the footpath during the day and he considers an accident with vehicles coming in and out is very likely. As a consequence, his customers do not like using that particular access. Mr Fisher explained that eight businesses on the block have not got nor are required to have access from the street to



rear parking and those businesses gain their rear access from the service lane. He stated very little use is made of the service lane by service vehicles while Ruapehu Street, by way of contrast, is a busy main thoroughfare.

### **District Plan Provisions**

Ms Sowerby helpfully put before us the relevant provisions of the former Taupo borough District Scheme which applies to the Taupo Central Business District of which this site is a part. These we set out below:

“Property” is defined as:

*“a parcel of land held in single or common ownership, which may include one or more sites, and may be comprised in one or more certificates of title.”*

“Site” is defined as:

*“the area of land required for the establishment of a land use and to satisfy the requirements of the District Scheme for that use.”*

“Service lane” is defined as:

*“land dedicated as service lane used from time to time for vehicular servicing of adjacent properties.”*

“Street” includes “road” and means “an area of land properly dedicated as street and does not include a private street, private way or service lane”.

The plan provides for a commercial core in the Commercial 1 zone in the area bounded by Tongariro Street, Lake Terrace, Ruapehu Street and Spa Road, and a commercial fringe (the Commercial 2 zone) in areas bounded by Ruapehu Street, Roberts Street, Titiraupenga Street and Spa Road and Tongariro Street, Spa Road, Opepe Street and Waikato Street.

Ms Sowerby explained that the council intends the Commercial 2 zone to act as a complementary commercial fringe to accommodate stand-alone, vehicular orientated land use, such as supermarkets, service stations and car sales yards.

Clause 2.13 of the Commercial Policy Statement sets out as follows:

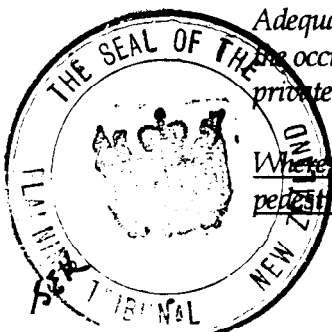
*“1. General*

*The development or redevelopment of each commercial site shall be undertaken with close regard to the type of environment sought in each particular zone.”*

*“7. Vehicle Access*

*Adequate vehicle access shall be provided to all sites in a manner that is safe and convenient to the occupants of the site and to pedestrian and vehicular traffic using any adjoining public or private place.*

*Where possible vehicle access shall be restricted to service lanes to prevent conflict between pedestrians and vehicles. This shall be especially so in the retail core and local shopping zones.”*



*"8. Parking*

*The parking requirements for each zone reinforce the type of environment sought and assist in the efficient functioning of the commercial area as a whole. . . .*

*This will maximise the use of sites, reduce conflict between pedestrians and vehicles and allow for the development of pedestrian areas.*

...

*In the commercial fringe all users shall be required to provide their own on site parking. In the local shopping zones a combination of on site parking and adjacent parking provides for the existing commercial development.*

*For future development, on site parking in an accessible location will be required, especially in local shopping areas or principal local roads."*

Clause 3.5 sets out the Performance Standards for the Commercial 2 zone. At Clause 3.6.5 Vehicle Access the plan states as follows:

*"Provision shall be made for vehicle access, with minimum width of 3.0 metres to the rear of each site. Where a service lane provides access to the property, provision need only be made for a loading space on the site.*

...

*In the Commercial 2 and 3 zone vehicular access across a pedestrian footpath shall be the minimum required for the safe convenient movement of vehicles."*

Clause 3.6.6 requires that parking for vehicles shall be provided in accordance with the requirements for each land use and the dimensions set out in Appendices 2, 3 and 4 to the district plan. The clause states as follows:

*"In the Commercial 2 zone the requirement should be met in full, on the site. Where a retail use is established, all car-parking should be located on the site, with convenient access to the retail area. . . ."*

Clause 3.6.13 Nuisance, states:

*"No nuisance shall be created which might adversely affect the amenities of an adjoining property or the public. Nuisances which are likely to cause objectionable elements could include noise, smell, dust, glare, vibration, fumes and the storage of hazardous substances. ..."*

Clause 3.7 Controlled Uses, states that several guidelines are to be used in assessing uses which are listed as controlled uses or development which become controlled uses. At Clause 3.7.4 Access, it states as follows:

*The plan shall show vehicular access to the property from the street and/or service lane in a manner which will minimise conflict with pedestrians. The Council shall have regard to the relationship of the access to vehicular movement on the adjacent streets and intersections, the*



*nature of the access with regard to safety, maintenance and engineering requirements. All driveways shall be formed and provided with a permanent surface.”*

Clause 3.8 Conditional Uses, use the Performance Standards for the zone as a guideline in the consideration of an application such as this.

Clause 3.9.1 which relates to vehicle workshops states that:

*“1. Nuisance*

*All operation and activities on the site shall be conducted so as not to cause a nuisance including such matters as noise, dust, smell or vibration, to the public or occupiers of neighbouring properties.*

*2. ...*

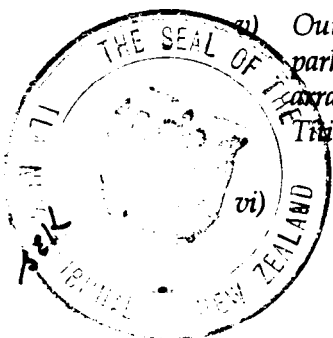
*3. Parking*

*Parking for vehicles shall be provided on the site in accordance with the following . . .*

*Vehicle workshops - one space per 35 m<sup>2</sup> of gross floor area*

Clause 3.8.5 sets out General Policies in relation to the (Parking and Loading of Vehicles) as follows:

- “i) Parking areas will be developed and improved in the following ways:*
  - a Improved layout and regulation of street parking including the formation of wide berm areas for parking purposes, parking restrictions and parking meters:*
  - b The provision of public parking facilities in the areas abutting the central three blocks:*
  - i) c By requiring adequate provisions to be made by owners and occupiers in development and redevelopment, either on the site or by joint provision or contribution towards combined sites elsewhere.*
  - ii) ...*
  - iii) The Council will take the necessary steps to ensure that the bulk of parking provided for customer parking on street, of street and public and private areas, is all managed and controlled in a manner to encourage the efficient use of the areas by regulation, agreement and, where appropriate, charging parking fees or installing parking meters.*
  - iv) ...*
  - v) Outside the three central blocks owners will be expected to meet the fill physical of-street parking requirements within their properties and site coverage, yard and access arrangements will be adjusted accordingly. In the blocks between Ruapehu and Titirāpunga Streets drive-in activities relying on off-street parking will be encouraged.*



- vii) *The scheme provides for the provision of loading bays and facilities to accommodate goods vehicle access to commercial properties clear of the streets and footpaths making use of separate driveways and service lanes.”*

Clause 6, *Parking, Loading and Access* states as follows:

“6.1 Parking

6.1.1 Provision of Private Parking

(a) Obligation of Owner or Occupier

*Every owner or occupier who constructs or who substantially reconstructs or adds to any building or changes the use of any site shall make provision for off street parking in accordance with the requirements of Ordinance 2 and in compliance with this ordinance provided that no vehicular crossing shall exceed nine metres in width.*

(b) ...

(c) ...

(d) Diminution of land Available

*The space that is made available about a building to meet the requirements of this Ordinance and Ordinance 2 for off-street parking shall not be diminished by the subsequent erection of any structure, storage of goods, or any other use.*

(e) ...

(f) ...”

Clause 6.2, *Loading* requires as follows:

“6.2.1 Provision for Loading of Vehicles

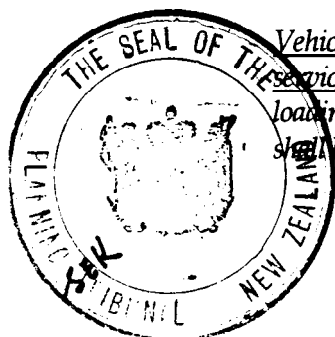
*Every owner or occupier who constructs or who substantially constructs or adds to any building or changes the use of any site in an Industrial or Commercial zone, shall make adequate provision on his own property, or by a mutual agreement on an adjacent property, for the loading and unloading of all goods associated with the site.*

6.2.2 Rear Access

*Except where the Council by resolution determines that this provision need not apply, every owner or occupier of a building in a Commercial or Industrial Zone shall provide adequate vehicular access to the rear of the premises provided that where access is approved from an arterial or principal local road, any loading dock shall be signed so that all turning and standing of vehicles is clear of the road reserve.*

6.2.3 Service Lanes

*Vehicular access to sites in the Commercial or industrial zones may be provided by way of service lanes, provided suitable and efficient accommodation is provided within the site for the loading and unloading of vehicles which is likely to arise from the use of the site. Service lanes shall be dedicated and shall be formed and sited to the Council’s requirements.”*



## Evaluation

Counsel for the council submitted that there were two questions to be answered in this appeal.

1. Whether in the circumstances, it is appropriate for the council having regard to the objectives and policies of the district plan, to request the appellant to provide access to the rear of properties on site. Can the council impose a condition requiring such access?
2. Whether it is appropriate having regard to the objectives and policies and Performance Standards of the district plan that access to such on-site parking as required, be provided from a service lane which is not intended for that use?

We agreed with Mr Vane that we should answer the first question first and if necessary issue an interim decision which might assist his client decide on the second question. This is therefore what we have set out to do.

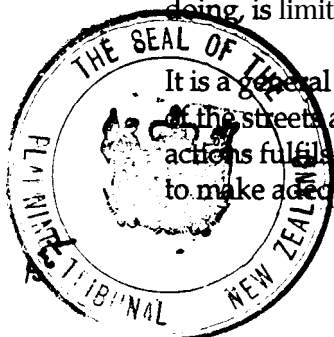
When this matter came before us, we expressed reservations to the parties about the validity of the condition under appeal and this has continued to remain our concern. It is a legal principle that a resource consent cannot have attached conditions which require the consent of a third party or a condition which is to be settled at some time in the future. Such a condition is void for uncertainty. What the council is trying to achieve through the proposed condition is to provide access to the vacant lots, by requiring the appellant to write into his lease with third parties that his use should be subject to any local authority rights and restrictions.

That question aside, we turn now to the various provisions of the district plan. We note that there is a distinction first of all to be made between “*the site*” and “*the property*”. “*The property*” is all that land owned by Mr Kidd including Mr Fisher’s site and the two vacant adjacent sites (sometimes “*premises*” is referred to.) “*The site*” is only that area of land required for the vehicle workshop and access and parking. We turn now to the objectives and policies of the district plan.

In respect of the various provisions of the district plan, we also note at the outset that the requirement that adequate vehicle access “*shall be restricted where possible to service lanes*” is a part of the Commercial Policy Statement on vehicle access.

It is a general policy for owners and occupiers in the development or redevelopment or change of use of a site to make adequate provision for parking or loading. It is a general policy in respect of parking, loading and access (private parking) for an occupier who changes the use of the site to make a provision for off-street parking in accordance with Clause 2 of the district plan. This Mr Fisher has complied with in respect of his site, pursuant to Clause 6.1.1(a). It is a requirement of the district plan also under Clause 6.1.1(d) that the space made available about the building to meet the requirements of the rule for parking are not to be diminished by any other use. In other words, where rear parking has been made available on adjacent sites by an owner/occupier then this is not to be restricted by Mr Fisher’s use of his site. Mr Fisher does not appear to be restricting the use of the property for parking; what he is doing, is limiting access to the property from the accessway adjoining his property.

It is a general policy to provide facilities for goods vehicle access to commercial property clear of the streets and footpaths making use of separate driveways and service lanes. Mr Fisher’s actions fulfil this policy. It is a general policy if an owner/occupier changes the use of the site to make adequate provision on his own property for the loading and unloading of all goods





associated with the site. Mr Fisher complies with this policy in respect of his own site although strictly speaking it is Fletcher Merchants which allowed the change of use of the site.

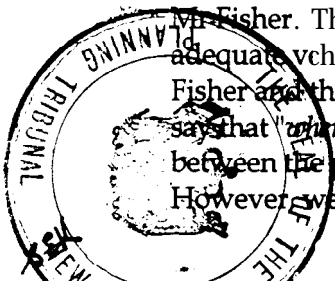
It is a general Performance Standard 3.6.11 that where more than one land use is established on a property, the relevant Performance Standards for each use should be complied with. We note the preamble to the particular standard says that it is applicable to all uses in the Commercial zones unless modified by other provisions in the plan. Subject to what we say below, we venture to suggest that the other provisions of the plan do not modify this standard. Standard 3.6.5 Vehicle Access for example, states that vehicle access across a pedestrian footpath adjacent to a site frontage will only be permitted where no reasonable alternative access is available, and shall be the minimum vehicular access required for the safe and convenient movement of vehicles. We consider the service lane is just such a reasonable alternative.

Ms Sowerby contended that Mr Fisher's concerns about the safety of the pedestrians were not justified. Mr Fisher's point was that the laneway is not a convenient access for the vehicles wishing to access his site. The issue as we see it however is whether or not there is no reasonable alternative access available and there is.

As to the functions of the service lane, the planning witness's opinion was that the definition of service lane does not explicitly differentiate between rear access to the on-site loading bay for trade vehicles, and general access to the on-site carparking area for staff and customer vehicles. She considered that by reason of the references to "*the loading and unloading of bulk goods, and the loading and unloading of vehicles*" in Clause 3.7.10 and Clause 6.2.3, that vehicular servicing relates to trade vehicles only, for the purposes of ensuring that goods are distributed to or collected from commercial premises in a safe and convenient manner.

Clause 6.2.1 Provision for Loading of Vehicles states that every owner or occupier who changes the use of any site shall make adequate provision on his own property for the loading and unloading of all goods associated with the site. It is Fletcher Merchants as occupier which has allowed the changed use of the site. Mr Fisher as sub lessee/occupier has changed the use of the site but he has not restricted the loading and unloading of goods associated with it. Clause 6.2.2 Rear Access provides that except where the council determines otherwise, every owner of a building in the Commercial zone shall provide adequate vehicle access (to all sites). It is Mr Kidd who owns the building. Mr Fisher is merely a subtenant/occupier. Through him access is still available, albeit from the service lane. If the council had had concerns it should have been up to Mr Kidd, as owner, to ensure that any tenants had adequate vehicle access from the lane leading to Ruapehu Street. Mr Kidd was approached by the council as were Fletcher Merchants to be involved with restricting access to the laneway, but that approach failed.

In any event, we do not agree with the council's interpretation of Clause 6.2.3. We read the rule as provisionally providing for vehicular access to sites in the commercial zone by way of service lanes, as long as suitable and efficient accommodation is provided within the site for the loading and unloading of vehicles likely to arise from its use. This would ensure vehicles do not stand in the lane for loading and unloading. Such provision is clearly able to be made in this case - from the photographic evidence made available to us by both Ms Sowerby and Mr Fisher. The Commercial Policy Statement at Clause 2.13.7 Vehicle Access, requires adequate vehicle access to all sites in a manner that is safe and convenient, not only to Mr Fisher and the incoming tenants, but also to pedestrian and all vehicular traffic. It goes on to say that "where possible" vehicle access shall be restricted to service lanes to prevent conflict between the pedestrians and vehicles. As such, it appears to shed some light on Clause 6.2.3. However we note that the definition of service lane in the district plan states that it is one to



be used "from time to time" for vehicular servicing which does suggest part-time use, but this is the only provision in the plan from which such inference may be drawn.

In conclusion, we wonder whether the council has the right to restrict access from the service lane. "Road" is defined in the Local Government Act 1974, s.315, entitled "Roads (other than Regional Roads) Service Lanes and Access Ways". At s.315(1)(f) it includes service lane vested in the council as an access way or service lane. Service lane is defined as:

" 'Service lane' means any lane laid out or constructed either by the authority of the council or the Minister of Works and Development [or, on or after the 1 st day of April 1988, the Minister of Lands] for the purpose of providing the public with a side or rear access for vehicular traffic to any land."

This definition does not restrict access from a service lane for the loading and unloading of vehicles only. If this interpretation is to be taken from the definition of service lane in the plan, then we consider that definition to be ultra vires the definition in the Local Government Act. There the purpose of a service lane in that Act is to provide the public with side or rear access for vehicular traffic to any land. It is not restricted in any way.

The parties made no submissions on this issue and may care to comment or they may feel the matter needs to be taken no further. We require a memorandum in reply on all matters from the council to be filed two weeks after receiving this decision, and Mr Fisher in reply to file a memorandum one week later.

**DATED** at WELLINGTON this 27<sup>th</sup> day of March 1995

S. E. Kenderdine

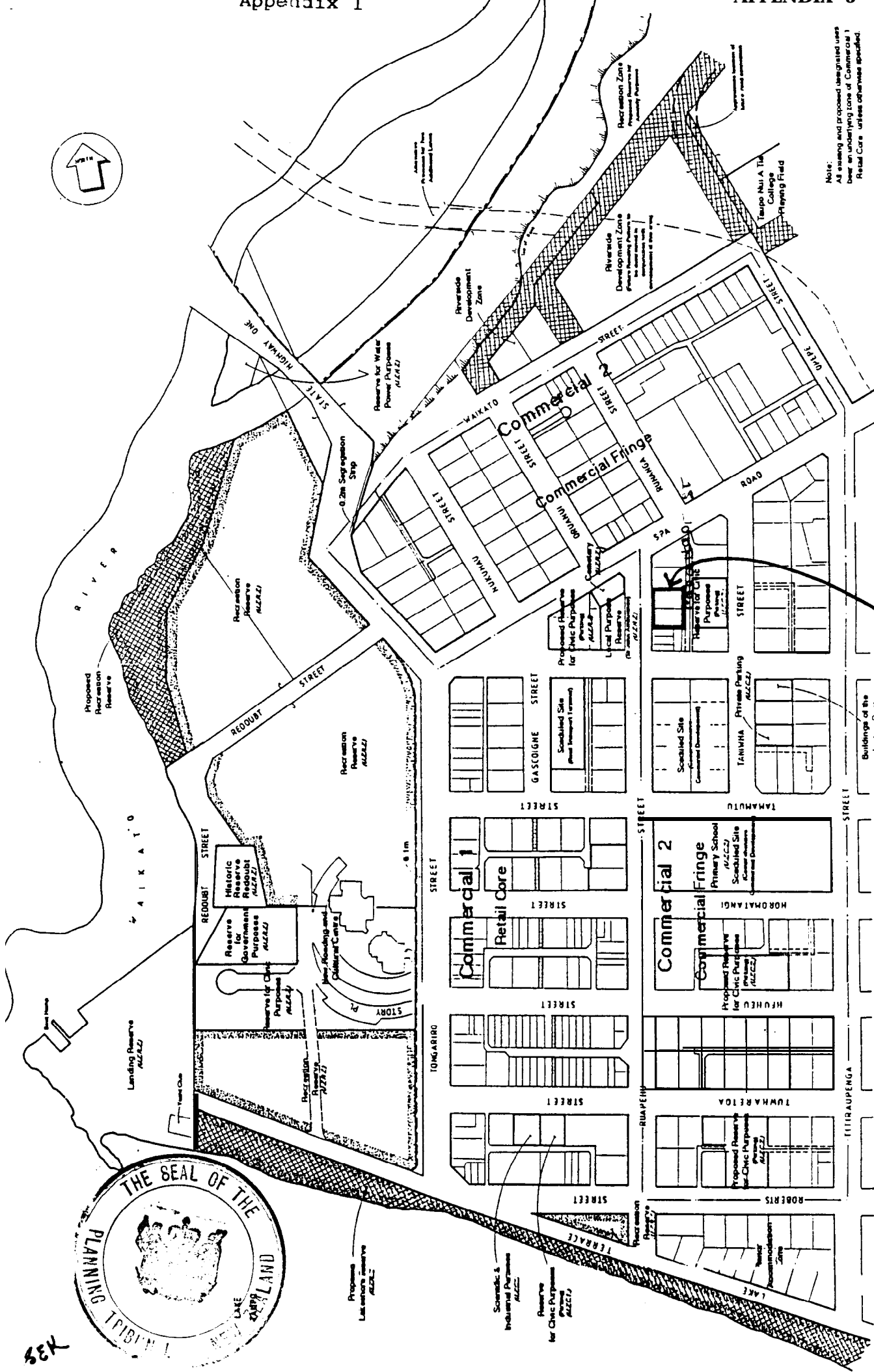
S E Kenderdine  
Planning Judge





Note:  
 All existing and proposed designated uses  
 bear an underlying zone of Commercial 1  
 Retail Core unless otherwise specified.  
 indicates the zone  
 boundary between C1 & C2 zones. Roads  
 are not affected by zoning

Scale: 1 : 2000



Subject property

District Planning Map  
Taupo Urban Area



325