BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY THE WAIMAKARIRI DISTRICT COUNCIL

IN THE MATTER OF	The Resource Management Act 1991 (**RMA** or **the Act**)
AND	
IN THE MATTER OF	Hearing of Submissions and Further Submissions on the Proposed Waimakariri District Plan (**WPDP** or **Proposed Plan**)
AND	
IN THE MATTER OF	Submissions and Further Submissions on the Proposed Waimakariri District Plan by **McAlpines Limited (McAlpines)**
AND	
IN THE MATTER OF	**Stream 5 Hearing** of submissions on the Proposed Waimakariri District Plan

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STREAM 5 LEGAL SUBMISSIONS ON BEHALF OF MCALPINES LIMITED

Dated: 14 August 2023

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STREAM 5 LEGAL SUBMISSIONS FOR MCALPINES LIMITED

INTRODUCTION

1. These submissions are filed on behalf of McAlpines Limited (**McAlpines**) in respect of the Stream 5 hearing of submission on the Proposed Waimakariri District Plan (**WPDP** or **Proposed Plan**).

2. McAlpines owns and operates a substantial sawmilling operation at Southbrook that entails a sawmill and associated timber treatment, timber drying, timber machining activities and related machinery and vehicles (collectively described as the **sawmill**).

3. McAlpines is a large local employer, and the sawmill and associated operations are a significant economic resource for Rangiora and the wider Waimakariri District.

4. McAlpines land containing the sawmill has historically been zoned industrial and more recently is zoned General Industrial Zone (**GIZ**) under the Proposed Plan. The land to the west of the sawmill is farmland and has been zoned Rural Lifestyle Zone (**RLZ**) in the Proposed Plan.

5. The Proposed Plan contains noise provisions which limits the amount of noise received in the RLZ during the daytime to 50 dBA. Noise generated by the sawmill exceeds this threshold and puts McAlpines at risk of noise complaints should the nearby farmland be subdivided for rural lifestyle residential development.

6. Such complaints could generate reverse sensitivity effects with potentially significant economic consequences for McAlpines, its employees and business partners.

7. The sawmill is a long-established activity at Southbrook. There is evidence to show that noise emissions from the sawmill are authorised pursuant to existing use rights even though such emissions are not compliant with the RLZ noise limit.

8. McAlpines seeks amendment to the Proposed Plan by inserting a new Noise Control Boundary into the planning maps showing a 55 dBA noise contour

over RLZ land immediately to the west of the sawmill and amendment to Rule NOISE R2.1 to require restricted discretionary consent for any noise sensitive activities to locate within the Noise Control Boundary. Applications triggering the new rule are likely to be granted resource consent provided that new buildings comply with proposed noise insulation standards designed to mitigate sawmill noise effects on future noise sensitive activities locating within the Noise Control Boundary.

KEY ISSUES

9. The key issues arising in this case are as follows:

   (a) Is the sawmill vulnerable to reverse sensitivity effects?

   (b) Does the sawmill have existing use rights?

   (c) What changes to the WPDP are required to protect the sawmill from future noise complaints?

   (d) What are the economic consequences for the sawmill arising from future noise complaints?

   (e) Does section 16 RMA apply? and

   (f) Are the WPDP amendments promoted by McAlpines better than the proposed plan as notified?

Evidence for McAlpines

10. McAlpines has filed the following evidence in support of the proposed amendments:

    (a) Evidence of John Duncan, immediate past General Manager of McAlpines timber Ltd;

    (b) Evidence of John Gardner, General Manager of McAlpines Timber Ltd;

    (c) Evidence of William Reeves, acoustic engineer; and

    (d) Evidence of Tim Walsh, statutory planner.

CONTEXT

McAlpines sawmill operations at Southbrook

11. McAlpines owns the land marked A1, A2, B, C, D and D1 shown on Appendix A and Appendix B of the evidence filed by John Duncan. The land marked A2 and B is zoned General Industrial Zone (GIZ) under the Proposed Plan.

12. The sawmill is a longstanding business, first established in 1925 and moving to its current premises at Southbrook, Rangiora, in the 1960s. Its operations from this site can be broken down into four main activities, namely; production of timber, processing of timber, reception and dispatch of timber and commercial operation associated with the Mitre 10 Mega Store which was established in 2007 at 1 Southbrook Road.[1]

13. McAlpines is a significant employer within the Waimakariri community. The sawmill employs many staff directly and there are further staff who operate from the McAlpines' engineering business which supplies repairs and maintenance for the sawmill. McAlpines makes structural, outdoor and re-manufacturing timber products for the domestic and export markets. These timber products are cut from logs grown in the Canterbury (especially North Canterbury) region.[2]

14. Within New Zealand, McAlpines is a major supplier to all the New Zealand based "Big Box" businesses, such as Mitre 10, Bunnings, and ITM. Within Canterbury, McAlpines is a supplier of structural wood products, and is the largest single site structural wood producer (by m^3 output) in the Canterbury region. McAlpines also supplies most of the larger frame and truss fabricators in the region which use McAlpines' structural wood products for house frame construction.[3]

McAlpines submission

15. The McAlpines submission on the Proposed Plan (relevantly) relates to potential reverse sensitivity effects on McAlpines sawmill at Southbrook

[1] Discussed in John Duncan's evidence at [13]-[30]. The Mitre 10 Mega Store is located within the land marked A1 in Appendix A of John Duncan's evidence.
[2] John Gardner evidence at [7]
Supra at [11]
[3] Supra at [12]

arising from residential subdivision and development of Rural Lifestyle Zone land to the west of the sawmill.[4]

16. The particular relief sought by McAlpines is discussed in the evidence of Tim Walsh and is summarised as follows:[5]

    (a) including a Timber Processing Noise Contour on the planning maps extending over a portion of the Rural Lifestyle Zone adjacent the McAlpines site, and

    (b) requiring consent for noise sensitive activities seeking to establish within the contour to ensure that noise sensitive activities are designed to sufficiently mitigate adverse noise effects.

Section 42A Report

17. The Reporting Officer, in her Section 42A Report, responded briefly to McAlpines' submission. In short, the Reporting Officer did not really engage with McAlpines' submission, on the basis that "(t)his issue is discussed in the Rural s42A report." This is understandable as the McAlpine submission sought changes to the RLZ provisions to recognise and protect the sawmill's activities. Advice subsequently received by Messrs Reeves and Walsh is that such changes would be more appropriately located in the Noise Chapter of the PDP.

18. McAlpines considers that it can legitimately claim existing use rights for the sawmill on the basis that it was lawfully established under previous planning instruments, as discussed in the following section.

DOES THE SAWMILL HAVE EXISTING USE RIGHTS?

The changing plans

19. There are three territorial authority plans which relate to the lawful establishment of an existing use on McAlpines site. The dates they became operative are:

    - 1 April 1985 Rangiora District Plan (1980), Chapter 13

[4] McAlpines submission at [8]-[18]
[5] Tim walsh evidence at [10]

- 28 Nov 2005 Waimakariri District Plan
- 18 Sept 2021 Proposed Waimakariri District Plan

The Rangiora District Plan, Chapter 13 (1985)

20. The Rangiora District Plan became operative on 1 August 1980 and was subject to numerous changes and reviews. Under the Rangiora District Plan, the McAlpines' site was zoned Industrial B.

21. Chapter 13 of the Rangiora District Plan became operative on the 1 April 1985 and included clause 13.2 regarding predominant uses in the Industrial B Zone as follows:

(c) Predominant Uses

Subject to compliance with the relevant provisions of this Scheme, the predominant uses shall be:

(i) Any trade or industry, not being contained in Appendix H. Provided that the work undertaken, the process carried on, the materials used or stored, the machinery employed, and the transportation of goods to and from the premises will not in the opinion of the Council, materially detract from the amenities of the neighbourhood by reason of any objectionable element whether of noise, vibration, smell, smoke fumes, dust, effluent, glare or other noxiousness or danger.

The Waimakariri District Plan (2005)

22. The Waimakariri District Plan became operative in 2005 (**ODP**). Under the ODP the McAlpines site is zoned business 3 Zone. Chapter 13 includes rule 31.12.1.2 dealing with noise within the Business 3 Zone as follows:

Rule 31.12.1.2

Activities in any zone, other than the Business 3 Zone, shall not exceed the following noise limits within measurement time internals in the time-frames stated at any point within the notional boundary of any dwellinghouse in the Rural Zone, or at any point within any Residential Zone:

a. Daytime: 7am to 7pm Monday to Saturday, and 9am to 7pm Sundays and Public Holidays: 50dBA L10.

b. Other times: 40dBA L10.

c. Daily 10pm-7am the following day: 70dBA Lmax.

The Proposed Waimakariri District Plan (2021)

23. Under the PDP the McAlpines site is zoned General Industrial Zone (GIZ) and is subject to the following noise rule:

NOISE-R19 Activities emitting noise not otherwise covered in NOISE-R1 to NOISE-R13

All Zones, activity status permitted where:

(1) The noise limits in Table NOISE-2 are met

Activity status when compliance not achieved: Restricted Discretionary

Table NOISE-2

The PDP daytime limit, which applies between 7 am and 10 pm is 50 dB LAeq, which also applies at the notional boundary of any dwellings in the rural zone. A limit of 40 dB LAeq and 70 dB LAFmax applies outside this time.

The relevant law

24. Section 10 of the RMA(1) provides for existing use rights in relation to land use:

10 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 plan if –

(a) either -

(i) the use was lawfully established before the rue 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.

25. *Rodney DC* v *Eyres Eco-Park Ltd*[6] concerned a debate about which district plan rules to apply in relation to an existing use. The Court of Appeal concluded:[7]

…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

[6] *Rodney DC* v *Eyres Eco-Park Ltd* (2007) 13 ELRNZ 157, [2007] NZRMA 320 (CA).
[7] Supra at [14]

2000 rule) came into force, not at the time of the initial rule (the 1988 rule) came into force.

26. O'Regan J giving the decision of the Court added the following clarification:[8]

> *That does not mean, however, that the extent of the use, and the effect of that use, as at the date of the coming into force of the initial rule will necessarily be irrelevant to the analysis in all cases. We say that because s10(1)(a(i) refers to a use which is "lawfully established". In the context of the present case, the use would be have been "lawfully established" as at the coming into force of the 2000 rule only if it was in accordance with the existing use right applying as at the coming into force of the 1995 rule, which in turn would have been lawfully established only if it complied with the existing use right arising on the coming into force of the 1988 rule. There is no doubt that the extent of the use in 2000 in this case was in accordance with the existing use right applying at the coming into force of both the 1988 rule and the 1995 rule.*

25. The effect of the Court of Appeal's decision is that we need to assess the factual situation at each of the relevant dates identified in paragraph 19 above.

26. The Court of Appeal in the *Eyres* also set out that the:[9]

> *Some enterprises are subject to variations within the scope of the normal operation. For example, some farming enterprises are subject to significant seasonal variations in stock numbers, with consequent variations in effects. In this context, an existing use is to be assessed on the basis of the normal year round operation, not the point in the operational cycle existing on the day the new rule takes effect.*

27. In other works, each and every separate activity that makes up a cyclical use need not be carried out in each 12 month period.

28. The Environment Court *Mawhinney* v *Auckland Council*[10] considered how s10(1) is to be applied when there are a number of relevant plans applying to the subject land. It found that, in following the *Eyres* decision, it is necessary to assess the factual situation at each of the dates at which the relevant plans came into force. In *Mawhinney* there were six relevant territorial plans. The Court in *Mawhinney,* reviewed the rules applying to the subject land under each plan. The Court then considered the factual history of the use of the land

[8] Supra at [16]
[9] Supra at [18]
[10] *Mawhinney* v *Auckland Council* [2018] NZEnvC 15.

and whether the claimed existing land use was lawfully established at the date when each of the relevant plans became operative.

29. Applying the approach adopted in the *Mawhinney* decision, to establish whether or not the sawmill is an existing use of the land it is necessary to answer the following questions:

    (a) what is the history of the use of the McAlpines site for sawmilling?

    (b) was the claimed existing use of sawmilling noise lawfully established as at the date each of the relevant plans came into force and, if so, at what character, intensity and scale?

History of the use of the land

30. The history of McAlpines use of their sawmill is set out in detail in the evidence of John Duncan and the **Graphic Supplement** attached to his evidence. His evidence sets out:

    (a) The different operations carried out on the site and the various noise producing activities (refer paragraphs 14-29); and

    (b) The development of the site over time (refer paragraphs 32-63).

31. In summary, the site was established in 1964, with the first sawmill built the same year. The sawmill site was progressively developed until 2004. After 2004 very limited extra noise producing activities were added. Between 2020 and 2021 some noise producing machines were decommissioned and removed.

Evaluation of sawmill existing use rights

32. The following section considers whether noise from the McAlpines sawmill at Southbrook was lawfully established at the date each of the relevant plans came into force and the character, intensity and scale of such noise at of the relevant dates.

<u>Was the sawmill noise lawfully established as at 1 June 1985</u>

33. Prior to 1 June 1985, McAlpines sawmilling activities were not regulated by any noise control measures. Therefore, sawmill noise was lawfully established at 1 June 1985. By this date the main noise generating activities on the site

were the sawmill (1964 & 1972), kilns (1970), old resaw and Wieneg planer (1976) and pole shed (1981).[11]

Was the sawmill noise lawfully established as at 30 November 2005

34. Between 1985 and the end of 2004 various improvements were made to the sawmill operations. These are discussed at paragraphs 45 - 54 of John Duncan's evidence. Paragraph 55 provides a summary of the different noise producing activities occurring on the site by the end of 2004. Paragraph 56 provide an explanation of the aerial photographs in the Graphic Supplement, which helps visualise the expansion of McAlpines sawmilling operations between 1983 and 2005.

35. The district plan rule regulating the noise generated by McAlpines' sawmilling activities prior to 30 November 2005 is Chapter 13 of the Rangiora District Plan. In particular, clause 13.2 in Chapter 13 required McAlpines to carry out their activities in a way which did not detract from the amenities of the neighbourhood by reason of "objectionable" noise.

36. In *Nelson City Council v Harvey*[12] the Environment Court consider an application for enforcement orders against a gun club at Cable Bay in Nelson. The Court referred to s314 RMA (scope of enforcement orders) which includes the term "objectionable". The commentary regarding the meaning of this term are considered relevant to application of "objectionable" in clause in 13.2 in this case:[13]

The terms "offensive" or "objectionable" are not defined in RMA and are commonly cited in conjunction with each other. In normal usage there is a certain commonality of meaning between the two. We refer to the various dictionary meanings of those words considered by the Court in Donnelly v Gisborne District Council[14] and adopt the meanings used by the Court in that case of ...undesirable, displeasing, annoying or open to objection.

37. And-

In determining whether noise from the Range exceeds a reasonable level or is offensive or objectionable, we are aware that the test to be applied is an

[11] John Duncan evidence at [33]-[46], and identification of main noise generating activities on Graphic Attachment at pages 2-3.
[12] [2011] NZEvc 48
[13] Supra at [65] and [67]
[14] (1999) 5 ELRNZ 138

objective one. We repeat the reference from Zdrahal v Wellington City Council[15] which was cited in Decision C 77/2008 namely that:

"It is not enough that a neighbour or other person within the relevant environment considers the activity or the matter to be offensive or objectionable. It is not enough that the Tribunal itself might think the matter was objectionable … the Tribunal in a case like this must transpose itself into the ordinary person, representative of the community at large, and so decide the matter."

38. In our submission, whether or not noise is "objectionable" is question of fact and degree, and it is necessary to consider all the surrounding circumstances including the sensitivity of the receiving environment.

39. In 1980 the Rangiora District Plan zoned the neighbouring sites to the north and west to Rural A zone. The uses permitted in this zone were farming and one or two other uses which need to be near an urban centre.[16] A dwellinghouse on a site of no less than 20 hectares was permitted and was used predominantly for farming.[17]

40. Mr Duncan's evidence identifies rural farm land lying within an arc north west and southwest of the site. Such land use is not generally regarded as being sensitive to noise.

41. Within this arc Mr Duncan identifies four residential dwellings present in 1964 located on rural land. One of these dwellings has been demolished, one is owned by McAlpines and tenanted, and the other two, located on Todds Road, continue to be used for residential purposes.[18]

42. Mr Duncan's evidence also discusses noise complaints from the McAlpines site.[19] Mr Duncan explains that to his knowledge there has never been a complaint about noise levels emanating from the Southbrook site, or indeed any sites McAlpines operates.

43. In the context of the present discussion about whether noise from the sawmill complied with clause 13.2 in Chapter 13 of the ODP, the absence of complaints is highly relevant because it provides a strong indication that the occupants of

[15] [1995] 1 NZLR 700
[16] Rangiora District Plan 1980, clause 3.1.
[17] Rangiora District Plan 1980.
[18] Evidence of John Gardner at [11]-[12]
[19] At [64]-[66]

the residential dwellings did not find such noise to be objectionable. Put another way, had they perceived the noise to "*undesirable, displeasing, annoying"* then it's reasonable to assume that they would have complained to McAlpines. We consider on the balance of probabilities the noise from the sawmill was not objectionable and accordingly as at 2005 the sawmill complied with Rule 13.2.

44. By 2005, McAlpines had added to the main noise generating sawmill operations by establishing the Waco planer (2002) and the stacker (2004).[20] We consider that the existing use of the sawmill was established by 2005 to include all of the main noise generating sawmill activities identified on the site in the Graphic Attachment to Mr Duncan's evidence (at pages 2-3). Such existing use included the various other less noisy activities discussed in Mr Duncan's evidence that were established on site prior to 2005. The noise effects generated by these activities establishes the character, intensity and scale of the existing use as at 2005.

Sawmill noise since 28 November 2005

45. Once the Waimakariri District Plan became operative on 28 November 2005, McAlpines' existing use of their site are protected by s10(1) of the RMA, allowing McAlpines to contravene the noise limits set out in Rule 31.12.1.2, provided that:

    (a) the effects of the intensity, character and scale of noise generated by the sawmill are the same or similar as which existed before Rule 31.12.1.2 became operative; and

    (b) the sawmill activity has not been discontinued for a continuous period of more than 12 months.

46. John Duncan' evidence at paragraphs 57-61 is that there has been no increase of noise coming from the site or change in the intensity or character of the noise since 2005. Instead with the decommissioning of the bandsaw in 2021 and the steamer in 2022, there has been a reduction in noise generated by the site since 2005.

[20] Evidence of John Duncan at [52] –[55] and identification of main noise generating activities on Graphic Attachment at pages 2-3

47. Further, apart from annual Easter and Christmas closedowns, and the recent Covid 19 Level 4 lockdown, the site has operated continuously since it was established.[21]

48. In summary to this point, as at 28 November 2005, the sawmill was lawfully established to include the noise generating activities discussed above and summarised at paragraph 55-56 of John Duncan's evidence.

ARE THE MCALPINES OPERATIONS VULNERABLE TO REVERSE SENSITIVITY EFFECTS?

What are reverse sensitivity effects?

49. The definition for reverse sensitivity used in case law is[22]:

> *Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The 'sensitivity' is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.*

50. A key case in the field of reverse sensitivity is *Winstone Aggregates v Matamata-Piako District Council*, which includes a helpful description of the way that complaints from a sensitive site can lead to adverse resource management outcomes (<u>emphasis added</u>):

> *Dealing with reverse sensitivity as an adverse effect poses another issue. The reactions of people to a real or perceived emitted effect can vary widely, often being conditioned by their background. Some may stoically endure it, not notice or place weight on it, while others may complain vociferously. Those subjective, sometimes even irrational, responses cannot be accurately predicted, save that it may be assumed that if there is anything to complain about, sooner or later somebody almost certainly will do so. <u>We recognise the corrosive effect that continued complaints at a high level can have on a company's continued confidence, in operating in an area.</u> That said, we do not accept that unjustified complaints need have, or be regarded as, an adverse reverse sensitivity effect. Such complaints can and should be recognised for what they are. Whether complaints are justifiable in any given circumstance can turn on a mix of considerations, including the general environment, existing use rights, compliance with applicable consent conditions and*

[21] Evidence of John Duncan at [62] and [63]
[22] From Bruce Tardy and Janine Kerr: Reverse Sensitivity — the Common Law Giveth and the RMA Taketh Away, cited in Winstone Aggregates v Matamata-Piako District Council (2004) 11 ELRNZ.

perceptions of whether the best practical option has been adopted. Existing plants with older equipment and dated operations may be more vulnerable to reverse sensitivity pressures than those newly established. But if an attempt to deal with the issue is to be made there is little point in trying to deal with reverse sensitivity at the stage where people have any plausible cause for complaint. The goal should be to remove a possible source of complaint completely, or at least to minimise it to the point where any complaint can be plainly labelled frivolous or vexatious.

Is future residential development in the rural land zone likely to cause reverse sensitivity effects on McAlpines?

51. Mr Reeves evidence is that the risk of serious annoyance for occupants, and therefore reverse sensitivity effects on the sawmill, becomes most likely at dwellings where noise levels from the sawmill exceed the upper guideline values given in NZS 6802:2008 of 55 dB L_{Aeq} during daytime, and 45 dB L_{Aeq} during the night-time.[23]

52. We refer to Mr Reeves's conclusion that the shaded blue area (on the figure at page 8 of his evidence) within the nearby RLZ will receive a rating noise level of higher than 55 dB L_{Aeq} from the sawmill and that these areas are at greatest risk of receiving noise levels which are incompatible with residential amenity.[24]

53. Mr Reeves evidence explains that noise from the sawmill would exceed the permitted activity threshold in the ODP and PDP over an even wider area[25] however Mr Reeves considers the extent of the daytime control proposed in this evidence will cover the area at greatest risk of receiving noise levels which are incompatible with residential amenity.[26]

54. RMA effects include effects which are potential, particularly those effects will have a high consequence if realised.[27]

55. We consider that there is a real risk that the RLZ land could be subdivided and developed in a manner that enables occupation of the land within the 55 dB L_{Aeq} noise boundary identified by Mr Reeves and, further, that occupants and visitors of that land are likely to be moderately, or highly, annoyed by noise

[23] Evidence of William Reeve at [21]
[24] Supra at [35]
[25] Supra at [37]
[26] Supra at [40]
[27] Section 3 RMA

associated with the McAlpines sites, such that there is a potential reverse sensitivity effect for the existing McAlpines operation.

56. Further, the presence of existing use rights does not guarantee that there will be no reverse sensitivity effects on McAlpines because:

(a) Section 17 of the RMA, the duty to avoid, remedy, or mitigate adverse effects, applies even to activities that would otherwise be lawful.[28] As per section 17(3), a council is able to commence enforcement action against any person that is seen to be causing an adverse effect, even if the activity causing the effect is carried out in accordance with existing use rights or a rule in a plan.

(b) Even complaints that are unfounded and based on permitted noise levels are likely to negatively impact McAlpines' operations, due to:

(i) the time required for McAlpines' staff to respond to the complaint;

(ii) potential monitoring charges from the Waimakariri District Council for investigating the complaints, as councils typically charge for these kinds of attendances even when a complaint is shown to be unfounded; and

(iii) the "corrosive effect that continued complaints at a high level can have on a company's continued confidence, in operating in an area" referenced in the above excerpt from *Winstone Aggregates*.

57. The principle of reverse sensitivity exists in recognition of the impacts that complaints from sensitive receptors can have on existing businesses, even where that business is operating lawfully and even where the complaint is eventually shown to be unfounded.

[28] *Aitchison v Walmsley* [2016] NZEnvC 13 at [16]

WHAT CHANGES TO THE WPDP ARE REQUIRED TO PROTECT THE MCALPINES OPERATIONS FROM FUTURE NOISE COMPLAINTS?

58. Mr Reeves recommendations for changes to the PDP to protect the McAlpines operations from future noise complaints are as follows:[29]

I recommend that this 55 dB L_{Aeq} contour is depicted in the Planning Maps. This should be accompanied by controls, which restrict the ability for residential development, or other development with a similar noise sensitivity, to occur without acoustic assessment from a suitably qualified expert. This assessment will need to demonstrate that appropriate noise levels can be achieved both inside dwellings and in associated primary outdoor areas.

59. The planning mechanisms proposed to achieve this are discussed in the planning evidence of Mr Walsh as follows:[30]

18 I agree with Mr Reeve that the McAlpines operation should be afforded protection against reverse sensitivity effects in the Proposed Plan. I propose the following method for managing potential reverse sensitivity effects (hereon referred to as 'the proposal'):

18.1 Include a 'Timber Processing Noise Contour' on the planning maps to the same extent as the 55 dB LAeq arc shown in Figure 1, and

18.2 Require restricted discretionary activity consent to authorise noise sensitive activities seeking to establish within the contour.

19 Restricted discretionary activity consent would be required by Rule NOISE-21. This rule requires consent for noise sensitive activities seeking to establish within a Timber Processing Noise Contour.

ECONOMIC CONSEQUENCES ARISING FROM NOISE COMPLAINTS

60. The potential economic effects arising from noise complaints are discussed in the evidence of John Gardner and John Duncan.

61. Mr Gardner's evidence is that should complaint lead to a reduction in McAlpines operations at Southbrook then this:[31]

(a) would have a significant adverse effect on the forestry, sub-contractor, consumable supply businesses in the region;

[29] Evidence of William Reeve at [47]
[30] Evidence of Tim Walsh at [18] and [19]
[31] Evidence of Mr Gardner at [13]-[15]

(b) would also affect McAlpine' ability to keep all their staff positions open; and

(c) could have also have significant effects on their customers' ability to trade at their current level, because alternative suppliers to the construction industry are not always available.

62. Mr Duncan's evidence is that complaints could have potentially significant negative implications for operation of the site, including:[32]

(a) Reduced safety;

(b) Increased compliance costs;

(c) Decreased productivity;

(d) Loss of jobs; and

(e) Reduced competition.

63. Accepting that it is difficult to predict with accuracy what the full implications might be for McAlpines should noise complaints arise in the future, in our view it seems clear from the evidence that McAlpines could face significant economic consequences if reverse sensitivity effects are not adequately managed under the Proposed Plan.

DOES SECTION 16 RMA APPLY?

64. In this section we discuss the relationship between s16 and s10 RMA in the context of this case and then consider whether the plan provisions formulated by McAlpines appropriately responds to these provisions by satisfying McAlpines' obligations under s16 whilst also protecting McAlpines' existing use pursuant to s10 of the Act.

The relationship between s16 and s10 RMA

65. There is limited judicial guidance regarding the relationship between the duty at s16 RMA and existing use rights of landowners under s10 RMA.

[32] Evidence of Mr Duncan at [71(a)-(e)]

66. In *Quieter Please (Templeton) Inc v Christchurch City Council*, [2015] NZEnvC 167, Environment Court, Christchurch, the Environment Court found it to be appropriate, under Plan Change 52 to the Christchurch District Plan, to show the 55 and 60 dBA Ldn contours of the Ruapuna Motorsport Park on the Planning Maps.

67. The Car Club's activities were not authorised by existing use rights, although it had been long established at the site. Rather, there had been a previous change to the operative plan in 1999, which had introduced very liberal noise controls, as there had been a significant increase in the number and kind of car races since the operative date of the District Plan. Accordingly, we consider the factual context in *Quieter Please* is different from the present case.

68. With respect to s16 of the Act, the court noted there is a duty on every occupier of land to adopt the best practical option to ensure that the emission of noise from that land does not exceed a reasonable level.[33]

69. The Court accepted that s16 creates a general obligation in the sense that it applies to all, with the result that it is an overarching obligation in relation to noise including in respect of formulating plan provisions[34].

70. The Court found that there are two aspects to the s16 duty imposed on landowners that emit noise which must inform the Council in relation to the Council's s31 functions. These are whether[35]:

    (a) Adverse effects are being internalised as far as reasonably possible, having done all that is reasonably achievable (the best practicable option aspect of s16); and

    (b) Adverse effects beyond the boundary are reasonable, having regard to the context of the environment beyond the boundary of the subject site (the reasonable level aspect of s16).

71. In *Auckland Kart Club Inc v Auckland City Council* (PT Auckland) A124/92, 22 October 1992, the Tribunal simply held: "We do not consider the existing use rights an issue in this appeal. The rights of the kart club to use the domain lie

[33] Section 16(1) of the Act
[34] At [36]
[35] At [37]

with the lease not with the existing use rights."[36] This was a successful appeal against an abatement notice. It was held that noise emissions of 60 dBA L_{10} were reasonable within the meaning of section 16 and section 322(1) of the Act.[37]

72. In *Ngataringa Bay 2000 Inc v Attorney-General* A16/94, 11 March 1994, PT (Judge Shepherd) the nearby Residents' Association sought declarations regarding the duties of the Ministry of Defence under s16 and s17 RMA in respect of the Navy's plans to establish a gymnasium and classrooms on land which had been designated for Naval purposes. The Navy had accepted the Council's requests about noise and had agreed to comply with the rule applicable to the underlying commercial zone, notwithstanding the designation. The Tribunal said (underlining added):

> *Quite apart from section 16, occupiers of land in general have to keep noise emissions from it within the limits prescribed by applicable district rules on noise control. That general statement does not, of course, apply to [Crown] works and activities defined in section 4(2) to (4), which are exempt from complying with the Act; and there may be exceptions from that general statement in the cases of noise from activities authorised by designations or existing uses (although Mr Cavanagh [Counsel for A-G] submitted that the section 16 duty cannot be avoided by a claim of existing use rights).*[38]
>
> *… I return to the submission to the effect that if noise emission from an activity does not contravene the relevant district noise control rule, there would be no basis for controlling noise by reference to some other undefined standard. In that regard, I note that section 16(1) is not focused directly on the level of noise emitted, but on taking the best practicable option to ensure that emission of noise does not exceed a reasonable level. If Mr Cavanagh's submission is correct, there would be little place left for the operation of section 16. It might have effect in respect of continuation of existing uses (authorised by section 10) yet, as the Tribunal observed in the Port Otago case, the language of the section indicates a general obligation. There are no words to create an exception where a noise control rule is not contravened, nor to indicate that noise emissions that complied with such a rule would be deemed not to exceed a reasonable level. Nor is there anything to indicate that the duty does not fall on occupiers of land carrying on an activity authorised by a designation.*[39]

[36] Page 23
[37] Page 15
[38] Page 15
[39] Page 16

73. The above underlined comments are obiter, being the judge's comments or observations, in passing, that are not essential to the decision.

74. At the time of filing these submissions we are not aware of any particular decision that reaches a conclusive finding on the relationship between s10 rights and the duty at s16. Further, none of the above decisions share a common factual context to the facts in the present case.

75. For the reasons discussed below we consider that it is not necessary to determine whether or not s10 existing use rights prevail over the duty at s16 RMA in the circumstances of this case.

Plan provisions formulated by McAlpines and s16 RMA

76. We consider that the plan provisions formulated by McAlpines satisfies the obligation under s16 by ensuring that noise levels from the site do not exceed a reasonable level whilst at the same time providing a level of protection to McAlpines' s10 existing use rights. There are several reasons supporting this view, as note below.

77. McAlpines is already doing everything reasonably possible to reduce noise emissions from the site. Mr Duncan's' evidence is that since 2021 there has been some reduction in noise generated by the site by decommissioning of the bandsaw and removal of the steamer.[40] Further, Mr Duncan's evidence is that:[41]

> *…I want to make it clear that we are not resting on our laurels. We want to be considered a good a neighbour and we do try to mitigate or reduce noise emissions whenever we can. Everything we do now in terms of development of the site is undertaken with a view towards reducing noise levels as much as practically possible. We will continue to adopt this approach as and when opportunities arise in the future.*

78. The adverse noise effects beyond the boundary are considered to be reasonable, having regard to the context of the environment beyond the boundary of the subject site. In this regard we refer to the low sensitivity of

[40] Evidence of John Duncan at [61]
[41] Supra at [66]

the rural land to the west of the site and the absence of complaints received by McAlpines regarding noise from the sawmill.

79. The noise control contour applies to land within the RLZ that is currently undeveloped (save for a residential dwelling owned and tenanted by McAlpines);

80. The proposed planning control applies only to new noise sensitive activities seeking to establish within the contour, and the level of control is proportionate to the risk of reverse sensitivity complaints (i.e. the control is designed to mitigate effects on new noise sensitive activities rather than preclude them from locating within the contour).

81. The planning mechanism protects sawmill noise exceeding 55 dB L_{Aeq} within the noise control contour. Any sawmill noise that exceeds this level outside the noise control contour will not be protected from complaint from noise sensitive activities that locate outside the noise contour. As such, the 55 dB L_{Aeq} contour delineates the extent of existing use rights of the sawmill and will operate to inhibit any future increase in noise emissions from the site.

CONCLUSION

82. Overall, the proposed amendments will provide a level of protection to McAlpines' existing long-established sawmill at Southbrook and avoid unnecessary conflict with new noise sensitive activities locating within the adjacent RLZ. They will also achieve relevant objectives and policies of the Proposed Plan designed to manage reverse sensitivity effects on existing land uses. It is therefore considered that the proposed amendments are better or more suitable than the Proposed Plan as notified.

Dated: 14 August 2023

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Chris Fowler / Shona Walters
Counsel for McAlpines Limited