

**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

**SUMMARY - STREAM 5 LEGAL SUBMISSIONS ON BEHALF OF MCALPINES
LIMITED**

Dated: 24 August 2023

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SUMMARY - STREAM 5 LEGAL SUBMISSIONS FOR MCALPINES LIMITED

CONTEXT

1. 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**).
2. 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.
3. Such complaints could generate reverse sensitivity effects with potentially significant economic consequences for McAlpines, its employees and business partners.
4. 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.
5. The key issues arising in this case are noted at paragraph 9 of our legal submissions. Comments on each issue follow below.

DOES THE SAWMILL HAVE EXISTING USE RIGHTS?

The changing plans

6. 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
 - 28 Nov 2005 Waimakariri District Plan
 - 18 Sept 2021 Proposed Waimakariri District Plan

The relevant law

7. Section 10 of the RMA(1) provides for existing use rights in relation to land use. *Rodney DC v Eyres Eco-Park Ltd*¹ concerned a debate about which district plan rules to apply in relation to an existing use. The effect of the Court of Appeal's decision is that we need to assess the factual history of the use of the land and whether the claimed existing land use (namely sawmill noise) was lawfully established at the date when each of the relevant plans became operative.
8. Applying the approach adopted in the *Mawhinney v Auckland Council*², 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

9. 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.
10. 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

Was the sawmill noise lawfully established as at 1 June 1985

11. 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

¹ *Rodney DC v Eyres Eco-Park Ltd* (2007) 13 ELRNZ 157, [2007] NZRMA 320 (CA).

² *Mawhinney v Auckland Council* [2018] NZEnvC 15.

were the sawmill (1964 & 1972), kilns (1970), old resaw and Wieneg planer (1976) and pole shed (1981).³

Was the sawmill noise lawfully established as at 30 November 2005

12. 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. The term "objectionable" is discussed in *Nelson City Council v Harvey*⁴ where the Environment Court held that the term means "*...undesirable, displeasing, annoying or open to objection.*"
13. 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.
14. 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 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. 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.
15. By 2005, McAlpines had added to the main noise generating sawmill operations by establishing the Waco planer (2002) and the stacker (2004).⁵ I 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

³ John Duncan evidence at [33]-[46], and identification of main noise generating activities on Graphic Attachment at pages 2-3.

⁴ [2011] NZEvc 48

⁵ Evidence of John Duncan at [52] -[55] and identification of main noise generating activities on Graphic Attachment at pages 2-3

effects generated by these activities establishes the character, intensity and scale of the existing use as at 2005.

Sawmill noise since 28 November 2005

16. 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.
17. 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. 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.⁶
18. 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 and, further, McAlpines' existing use rights continue to up to the present date.

ARE THE MCALPINES OPERATIONS VULNERABLE TO REVERSE SENSITIVITY EFFECTS?

What are reverse sensitivity effects?

19. Case law regarding the reverse sensitivity includes the following commentary:⁷
 - (a) 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; and

⁶ Evidence of John Duncan at [62] and [63]

⁷ *Winstone Aggregates v Matamata-Piako District Council*,

- (b) 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?

- 20. Based on the evidence of Mr Reeves it is considered 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 associated with the McAlpines sites, such that there is a potential reverse sensitivity effect for the existing McAlpines operation.

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

- 21. Mr Reeves recommendations for changes to the PDP to protect the McAlpines operations from future noise complaints are discussed in his evidence.
- 22. The planning mechanisms proposed to achieve such protection are discussed in the planning evidence of Mr Walsh.

ECONOMIC CONSEQUENCES ARISING FROM NOISE COMPLAINTS

- 23. The potential economic effects arising from noise complaints are discussed in the evidence of John Gardner and John Duncan.
- 24. 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?

- 25. There is limited judicial guidance regarding the relationship between the duty at s16 RMA and existing use rights of landowners under s10 RMA.⁸ Even so, in

⁸ Relevant case law is discussed at paragraphs 65-75 of the legal submissions.

the circumstances of this case it is not necessary to determine whether s10 existing use rights prevail over the duty at s16 RMA (or vice versa).

26. This is because the evidence of Mr Duncan shows that McAlpines satisfies the duty under s16 by ensuring that noise levels from the site do not exceed a reasonable level⁹ whilst at the same time the plan provisions formulated by Mr Reeve and Mr Walsh provide an appropriate level of protection to McAlpines' s10 existing use rights.

Dated: 24 August 2023



Chris Fowler / Shona Walters
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⁹ Mr Duncan's statement of evidence at [61] and supplementary evidence at [10]-[19]