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 FURTHER LEGAL SUBMISSIONS ON BEHALF OF MCALPINES LIMITED

Dated: 24 August 2023

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STREAM 5 FURTHER LEGAL SUBMISSIONS FOR MCALPINES LIMITED

INTRODUCTION

6. These further 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**).

7. The purpose of these further submissions is to respond to the Council s42A reply report for the Noise Chapter (**Reply Report**), in accordance with the leave granted by the Hearings Panel in Minute 12.[1]

3. The Reply Report includes legal advice from Buddle Findlay in response to questions from the Hearing Panel[2] regarding scope of the relief requested by McAlpines (**Buddle Findlay advice**).[3]

RELEVANT LAW REGARDING SCOPE

8. A useful summary of the relevant case law is set out in *Environmental Defence Soc Inc* v *Otorohanga District Council*.[4] In this case the parties to the proceeding reached an agreement as to a basis for amendments to certain provisions of the Otorohanga proposed District Plan on which the relevant appeals could be settled. One of the parties raised a jurisdictional issue as to the scope of the agreement reached between the parties. The central question to be determined by the Court was whether the proposed outcome agreed on by the parties was within the scope of the proposed District Plan as publicly notified or as sought to be amended by an appellant's submission on it.

9. The decision begins with the relevant provisions of Schedule 1, as the Court considered this was the appropriate starting point when determining how a territorial authority is to prepare a District Plan. The Court then discusses how these provisions should be applied by reference to leading decisions on the issues of scope. The relevant passages are set out in full below (footnotes removed and underling added).[5]

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[1] Minute 12 dated 13 October 2023 at [22]
[2] Minute 9 at [14]
[3] Buddle Finlay letter dated 26 September 2023 at [20]-[33]
[4] *Environmental Defence Soc Inc* v *Otorohanga District Council* [2014] NZEnvC 70.
[5] Supra at [11]-[12], [14]-[17] and [20]-[21]

[11] A careful reading of the text of the relevant clauses in Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope. Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but such further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of a council must be in respect of identified provisions or matters. The Environment Court's role then is to hold a hearing into the provision or matter referred to it and make its own decision on that.

[12] The rigour of these constraints is tempered appropriately by considerations of fairness and reasonableness. In the leading case of ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** *a full court of the High Court considered a number of issues arising out of the plan change process under the Act, including the decision-making process in relation to submissions. The High Court confirmed that the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.*

...

[14] The High Court rejected the submission that the scope of the local authority's decision-making under clause 10 is limited to no more than accepting or rejecting a submission, holding that the word "regarding" in clause 10 conveys no restriction on the kind of decision that could be given. The Court observed that councils need scope to deal with the realities of the situation where there may be multiple and often conflicting submissions prepared by persons without professional help. In such circumstances, to take a legalistic view that a council could only accept or reject the relief sought would be unreal.

[15] The High Court also considered other possible tests, including what an informed and reasonable owner of affected land should have appreciated might result from a decision on a submission. While not rejecting that approach, the Court held that it should not be elevated to an independent or isolated test, given the danger of substituting a test which relies solely on the Court endeavouring to ascertain the mind or appreciation of a hypothetical person.

[16] While clause 10 has been amended several times since 1994 and no longer uses the word "regarding" in relation to decisions on submissions, the current language does not alter the substance of the provision or otherwise render inappropriate the High Court's approach in ***Countdown Properties (Northlands)*** *to the application of this provision.*

[17] In summary, as Pankhurst J observed in an oft-repeated dictum in ***Royal Forest & Bird Protection Society Inc v Southland District Council:***

> *... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

[18] A review of the relevant subsequent case law shows that the circumstances of particular cases have led to the identification of two fundamental principles:

(i) The Court cannot permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected; and

(ii) Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the appeal are not subverted by an unduly narrow approach.

[19] There is obvious potential for tension between these two principles. As observed by Fisher J in ***Westfield (NZ) Ltd v Hamilton City Council****, the resolution of that tension depends on ensuring that the process for dealing with amendments is fair, not only to the parties but also to the public:*

> *[72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss292 and 293 of the Act: see* ***Applefields, Williams and Purvis****, and* ***Vivid****.*
>
> *[73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.*
>
> *[74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who*

> *might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in ss292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would not have been within the reasonable contemplation of those who saw the scope of the original reference.*

[20] The consideration of procedural fairness was discussed in some detail by the High Court in ***Palmerston North City Council v Motor Machinists Limited*** *[2013] NZHC 1290. That case was principally concerned with the related issue of whether a submission was "on" a plan change, but Kós J examined that question in its context of the scope for amendments to plan changes as a result of submissions by reference to the bipartite approach taken in* ***Clearwater****:*

(i) Whether the submission addresses the change to the status quo advanced by the proposed plan change; and

(ii) Whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

[21] Laying stress on the procedures under the Act for the notification of proposals to directly affected people, and the requirement in s32 for a substantive assessment of the effects or merits of a proposal, Kós J observed that the Schedule 1 process lacks those safeguards for changes to proposed plans as sought in submissions. The lack of formal notification of submissions to affected persons means that their participatory rights are dependent on seeing the summary of submissions, apprehending the significance of a submission that may affect their land, and lodging a further submission within the prescribed timeframe.

10. More recently the High Court in *Albany North Landowners v Auckland City Council*[6] considered whether changes recommended by an independent hearings panel (**IHP**) were within scope of submissions made in respect of the first Auckland Combined Plan.

11. The Court referred to the test adopted by the IHP for scope as the "reasonably foreseen logical consequence test"[7] and then evaluated the IHP approach

[6] Albany North Landowners v Auckland City Council [2017] NZHC 138
[7] Supra at [98]

against the orthodoxy of "reasonably and fairly raised" test as follows (footnotes removed and underling added):[8]

> *[115] The reasonably foreseen logical consequence test also largely conforms to the orthodox "reasonably and fairly raised" test laid down by the High Court in Countdown and subsequently applied by the authorities specifically dealing with the issue of whether a Council decision was authorised by the scope of submissions. This orthodoxy was canvassed in some detail in the IHP overview report, which I largely adopt. A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.*
>
> *[116] As Wylie J noted in* ***General Distributors Limited v Waipa District Council*** *the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise "the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".*
>
> *[117] Any differences between the Countdown orthodoxy and the IHP's 'reasonably foreseen logical consequence' test are largely semantic. The IHP's concern for natural justice is repeated in a number of different ways in the Reports. The IHP's test is simply one way of expressing an acceptable method for achieving fairness to potentially affected persons.*

12. Later in the decision, the Court discussed how the decision-maker should approach the assessment of whether a potentially affected party reading the Summary of Submissions would discern that they might be affected by

[8] Supra at [115] and [116]

changes proposed in a submission, as follows (footnotes removed and underling added):[9]

> *…To that extent I prefer to approach the assessment employing a test based on what might be expected of a reasonable person in the community at large genuinely interested in the implications of the PAUP for him or her. It is the type of assessment that Judges must regularly make on behalf of the community in resource management matters.*

13. As mentioned by the High Court in *Countdown*, the paramount test when assessing the issue of scope is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. Matters of natural justice and fairness are considerations that have informed the Court's approach to assessing the question of scope however they are not separate or additional tests.

14. The task of assessing the scope of a submission is to be approached in a "realistic and workable fashion" rather than from the perspective of legal nicety.

15. Because the participatory rights of third parties are dependent on seeing the summary of submissions, the content of the summary is also relevant to the scope assessment. The Summary should contain sufficient information to enable an affected person to apprehend the significance of a submission that might affect their land.

16. The decision-maker should approach the task of assessing whether the summary achieve this outcome on the basis of what might be expected of a reasonable person in the community at large genuinely interested in the implications of the proposed plan for him or her.

17. Where there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process, an issue of procedural fairness will arise.

18. The "reasonably foreseen logical consequence test" has been endorsed by the High Court as one way of expressing an acceptable method for achieving fairness to potentially affected persons.

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[9] Supra at [176]

19. Overall, the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed so that potentially affected persons may respond by filing a further submission if they wish to participate in the planning process.

THE PRESENT CASE

McAlpines submission

20. In the present case, under the heading "Reverse sensitivity effects" the McAlpines submission states (underlining added):[10]

> *13 The Sawmill generates considerable noise emissions that may or will exceed ODP and PDP noise standards at the zone boundary between the GIZ and Rural Lifestyle Zone (**RLZ**) to the west of the Sawmill.*
>
> *14 The land zoned Rural Lifestyle Zone to the west of the Sawmill is marked E on Attachment 1 (the **rural land**).*
>
> *15 McAlpines is concerned that residential subdivision and/or location of a residential unit or other sensitive activity (as defined in the PDP) on the rural land will cause operation of the Sawmill to be compromised, constrained, or curtailed due to complaints by future occupies and visitors of the rural land.*
>
> *16 Although the PDP does contain some provisions regarding reverse sensitivity, they do not appear to address the situation described above where the existing productive activity is located in an industrial zone and the noise sensitive activity is potentially located on nearby rural land.*
>
> *17 McAlpines seeks amendment to the PDP to ensure that future operation of the Sawmill is not constrained by reverse sensitivity effects from residential subdivision and development on the rural land.*
>
> ***Decision sought***
>
> *18 The submitter seeks the following relief:*
>
> *(a) retain RLZ over the rural land described above and marked E on Attachment 1;*
>
> *(b) retain the reverse sensitivity provisions in the PDP;*

[10] McAlpines submission dated 26 November 2021 at [13]-[18]

(c) *amend relevant RLZ subdivision standards to expressly recognise and protect the Sawmill from potential reverse sensitivity effects arising from subdivision of the rural land; and*

(d) *amend relevant RLZ land development standards to expressly recognise and protect the Sawmill from potential reverse sensitivity effects arising from establishment of any residential unit or other sensitive activities on the rural land.*

21. A central focus of the McAlpines submission is future subdivision and use of the undeveloped "rural land" located to the west of the McAlpines sawmill. The submission explains that this land is marked E on Attachment 1 of the submission. The same attachment is attached as **Appendix A** to these further submissions. The undeveloped rural land of concern to McAlpines is clearly marked with the letter "E".

22. As well as the specific relief noted above, the McAlpines submission included general relief as follows (underlining added):[11]

General relief

40 McAlpines seeks the following general relief that applies to all the specific relief requested above:

(a) that the PDP be rejected in its current form;

(b) that the PDP provisions be amended to reflect the issues raised in this submission;

(c) that the relevant PDP objectives and policies be amended as required to support and implement the particular relief described above; and/or

(d) such other relief as may be required to give effect to this submission, including alternative, consequential or necessary amendments to the PDP that address the matters raised by McAlpines.

23. It's noteworthy that the general relief also seeks that the PDP be amended "to reflect the issues raised in the submission" and/or such "other relief" as may be required to give effect to the submission.

[11] Supra at [40]

Summary of Submissions

24. The McAlpines submission is summarised in the Summary of Submissions as follows (underlining added):

> ***Section***
>
> *NOISE - Te orooro - Noise*
>
> ***Sub-section***
>
> *General*
>
> ***Submission Point Summary***
>
> *Land shown in Attachment 1 of submission is zoned General Industrial Zone (GIZ) and contains a longstanding lawfully established sawmill operation (McAlpines) employing 70 staff and 11 allied staff, of economic significance to the District. The sawmill generates considerable noise that may/will exceed District Plan noise control provisions between the GIZ and Rural Lifestyle Zone, but has existing use rights to continue regardless of those provisions. Rural Lifestyle Zoned land is shown as E on submission attachment.*
> *Residential development or other sensitive activity on the rural land will compromise the sawmill due to complaints by occupiers or visitors (to the rural land). Proposed District Plan reverse sensitivity provisions do not address the situation where the existing productive activity is located in an industrial zone and the noise sensitive activity is on rural land.*
> *Amend Proposed District Plan to ensure that future sawmill operations are not constrained by reverse sensitivity effects from residential subdivision and development on the rural land*
>
> ***Relief Sought Summary***
>
> *Retain the reverse sensitivity provisions but amend relevant subdivision standards for Rural Lifestyle Zone (RLZ) to recognise and protect the sawmill from reverse sensitivity effects from rural land subdivision; and amend RLZ development standards [sic] recognise and protect the sawmill from reverse sensitivity effects from establishment of any residential unit or sensitive activity on the rural land.*

McAlpines amendments presented at the Stream 5 – Noise hearing

25. The McAlpines amendments to the PDP were presented through the evidence of Mr Tim Walsh at the Stream 5 – Noise hearing (**McAlpines amendments**). Mr Walsh, relying on the acoustic evidence of Mr William Reeve, identified the area of land within the RLZ to the west of the sawmill that was at a higher risk of serious annoyance from exposure to noise from the sawmill by reference to the following diagram. Mr Walsh explained that the blue arc over the proposed Rural Lifestyle Zone is subject to noise exceeding 55 dB L_{Aeq}.[12]

[12] Tim Walsh evidence at [16]

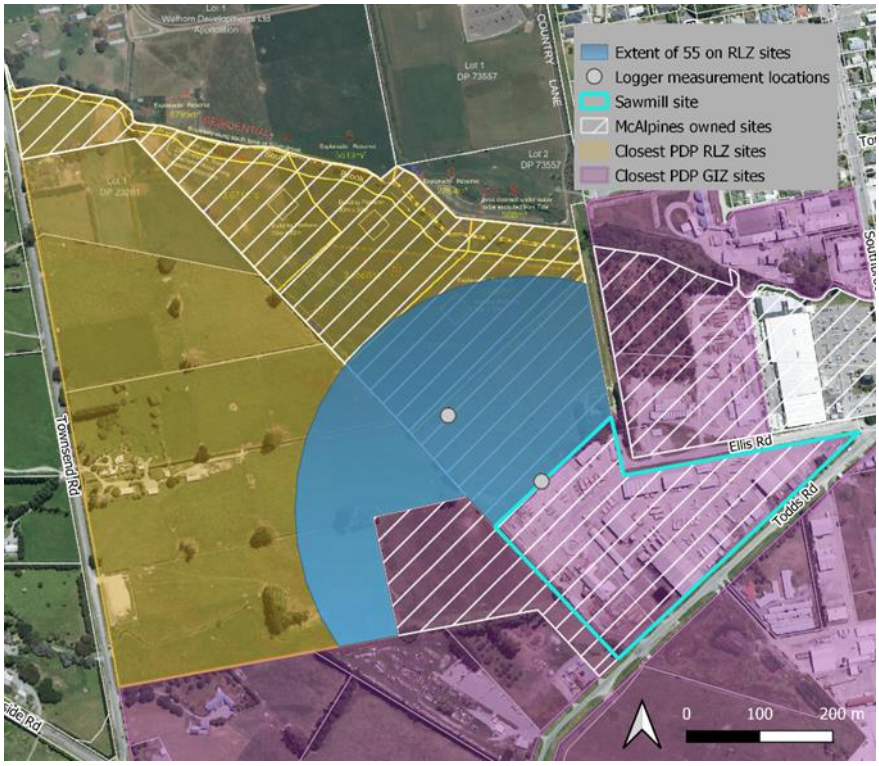

Figure 1 – 55 dB LAeq exposure area. Source: Evidence of Mr Reeve

26. At paragraph 18 Mr Walsh states that:

> *Mr Reeve considers that a Noise Control Boundary ('**NCB**'), the same extent as shown in **Figure 1**, should be shown on the planning maps of the Proposed Plan and that noise sensitive activities [13] within the NCB should require authorisation via a restricted discretionary resource consent.*

27. At paragraph 33 Mr Walsh recommends an amendment to Rule NOISE R21 to include reference to the Noise Control Boundary (identified in blue his Figure 1 above), as follows:

> *…Assuming the officer's recommendation regarding the Daiken submission is accepted, reference to the 'Timber Processing Noise Contour' should be retained in Rule NOISE-R21 as indicated below in red underlined text.*

[13] Defined in the Proposed Plan as:

a. *residential activities other than those in conjunction with rural activities that comply with the rules in the relevant district plan as at 23 August 2008;*
b. *education activities including pre-school places or premises excluding training, trade training or other industry related training facilities;*
c. *visitor accommodation except that which is designed, constructed and operated to a standard that mitigates the effects of noise on occupants;*
d. *hospitals, healthcare facilities and any elderly persons housing or complex.*

NOISE-R21	***Noise sensitive activities***	
HIZ Processing Noise Contour *Timber Processing Noise Contour*	***Activity status: RDIS*** ***Matters of discretion are restricted to:*** *NOISE-MD1 - Noise* *NOISE-MD3 - Acoustic insulation*	***Activity status when compliance not achieved: N/A***

DISCUSSION

Buddle Findlay advice

24. In summary, the Buddle Findlay advice is that:[14]

    (a) The relief sought by McAlpines is to amend the PDP to provide protection to McAlpines existing operations from potential reverse sensitivity effects, and that prima facia there is scope to make the changes sought by McAlpines to the noise chapter; and

    (b) However it would be unfair to grant the relief sought by McAlpines because a non-expert reader of the McAlpines submission may not have fairly and reasonably foreseen that the McAlpines submission would result in the rule proposed by McAlpines at Hearing Stream 5.

25. McAlpines supports the Buddle Finlay advice with respect to point (a) above but disagrees with that advice in regard to point (b) above.

26. Point (b) is discussed at paragraph 32 of the Buddle Findlay advice. In relation to that paragraph, with respect, it is submitted that the Buddle Findlay advice incorrectly separates the issue of scope into two discrete tests. This approach is not supported by case law. The two parts (a) and (b) of the Buddle Findlay advice should be integrated into an overall assessment rather than artificially separating them into two tests that each need to be satisfied. As mentioned, matters of natural justice and procedural fairness are considerations that have informed the Court's approach to assessing the question of scope however they are not separate or additional tests.

27. Further, the Buddle Findlay advice adopts an unduly conservative assessment that is not supported by caselaw. The assessment requires consideration of a

[14] Supra at [31] and [32]

"reasonable person" or a "reasonable non-expert" reader of the McAlpines submission rather than simply an "non-expert" reader. Further, the Buddle Findlay advice refers to "a risk" that people potentially affected by the rule proposed by McAlpines did not have sufficient notice of it. However caselaw adopts the standard of "real risk" rather than simply a (mere) risk. These differences may seem minor however they are important in the assessing the approach to be applied in this case.

28. Finally, and most importantly, the Buddle Findlay advice contends that a reader of the McAlpines submission may not have reasonably foreseen that the submission would result in a noise contour over the rural land and additional consenting requirements that would apply to noise sensitive activities in the area identified. With respect that view is not supported by the text of the McAlpines submission or the notified summary of that submission.

29. For example, the following points are evident from the above summary of the McAlpines submission:

    (a) The summary refers the reader to the Rural Lifestyle Zoned land marked E on Attachment 1 of the McAlpines submission as an area that receives sawmill noise and explains that residential development or other noise sensitive activity on this rural land will compromise the sawmill due to complaints by occupiers or visitors to the rural land;

    (b) The summary makes it clear that McAlpines wants to amend the PDP to ensure that future sawmill operations are not constrained by reverse sensitivity effects from residential subdivision and development on the rural land;

    (c) The relief sought is to the RLZ subdivision and development standards to protect operation of the sawmill from noise complaints arising from location of noise sensitive activities on rural land to the west of the sawmill, or otherwise to amend the PDP to reflect the issues raised in the submission including alternative or consequential amendments to the PDP; and

(d) The McAlpines submission is identified as being relevant to the "Noise" section of the District Plan, which is consistent with the relief ultimately promoted by McAlpines at the PDP hearing.

30. There can be little doubt that a reasonable owner of the land marked E on the McAlpines submission that is genuinely interested in the implications of the PDP for them would have apprehended that there was a real risk that the McAlpines submission would result in amendment to the PDP to restrict the location of noise sensitive activities on their land to protect operation of the McAlpines sawmill.

31. The above needs to be compared to the relief proposed on behalf of McAlpines by Mr Walsh at the Stream 5 hearing. That relief contains the following key features:

(a) It identifies the particular area of RLZ land that is most at higher risk of serious annoyance from sawmill noise by way of a noise contour and seeks that this area be identified on planning maps; and

(b) It amends the PDP noise rules so that noises sensitive activities within the proposed noise contour require authorisation via a restricted discretionary resource consent process.

32. The combined effect of these changes to the PDP would ensure that sawmill operations are not constrained by reverse sensitivity effects from noise sensitive activities located on the rural land near the sawmill. This outcome is entirely consistent with the outcome sought by the McAlpines submission. It is also consistent with the outcome stated in the summary of the McAlpines submission in the Summary of Submissions.

33. The McAlpine amendments relate to the planning maps and the Noise chapter of the PDP whereas the McAlpines submission and the Summary of Submissions refer to amendments to the RLZ subdivision and development standards.

34. This difference is insufficient to deny the McAlpines amendments on procedural fairness grounds because:

(a) To do so would be adopting an overly legalistic approach particularly considering the outcome sought by the McAlpines submission;

(b) The McAlpines submission includes general grounds of relief that are sufficiently broad to encompass the McAlpines amendments; and

(c) The Summary of Submissions accurately identifies the rural land likely to be affected by restrictions on noise sensitive activities and also gives notice to the reader that the subject matter of the McAlpines submission relates to the Noise section of the PDP.

35. Overall, the McAlpines amendments are ones raised by and within the ambit of what is reasonably and fairly raised by the McAlpines submission. They are a "reasonably foreseen logical consequence" of the changes proposed in McAlpines submission.

36. Therefore no issue as to procedural fairness or injustice to third parties arises in the circumstances of this case.

Dated: 24 August 2023

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Chris Fowler
Counsel for McAlpines Limited

APPENDIX 1

ATTACHMENT 1

Land owned by McAlpines at Southbrook, Rangiora, marked A1, A2, B, C and D