

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH**

**I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHU**

Decision No. [2021] NZEnvC 62

IN THE MATTER

of the Resource Management Act 1991

AND

an appeal under s120 of the Act

BETWEEN

**KOMBI PROPERTIES LIMITED
(formerly HFT LIMITED)**

(ENV-2020-AKL-53)

Appellant

AND

AUCKLAND COUNCIL

Respondent

Court: Environment Judge P A Steven
Environment Commissioner A P Gysberts
Environment Commissioner S Myers

Hearing: at Auckland on 17, 18 and 19 March 2021

Appearances: D A Allan and D E K Devine for the appellant
D K Hartley and W M C Randal for the respondent
S H Monteith in person (s274 party)

Last case event: 1 April 2021

Date of Decision: 14 May 2021

Date of Issue: 14 May 2021

DECISION OF THE ENVIRONMENT COURT

A: The appeal is declined.

B: Costs are reserved.



KOMBI PROPERTIES LIMITED V AUCKLAND COUNCIL

REASONS

Introduction

[1] The appellant, Kombi Properties Limited ('Kombi') sought consent from Auckland Council ('the Council') to establish 17 two storey units to be used for a mix of industrial, residential and ancillary office activities on land located on a coastal site in Takanini which is zoned for light industrial use.

[2] Consent was declined by the Council and an appeal to this court ensued. At the heart of the appeal is a dispute as to the potential for reverse sensitivity effects to occur due to the introduction of residential activity into a zone intended (primarily) for light industrial activity.

The planning context – site and environs

[3] The subject site is a vacant greenfield lot measuring 3721 m² in area and situated on the edge of the Pahurehure Inlet of the Manukau Harbour. It has an irregular shape with a distinctive "kink" at the centre and this shape, in turn, appears to be a result of the constraints of the surrounding physical environment including the adjoining road, Inlet Road, an adjoining reserve and the inlet itself.

[4] The surrounding industrial sites are generally larger and of a more even and regular shape. According to evidence presented, the average lot size within the wider precinct, of which the site forms part, is approximately 9000 m².¹

[5] Despite its size and shape, the site remains suited to light industrial use.

[6] Between the site and the coastal edge to the west is a modest sliver of public open space being the Longford Park Esplanade Reserve ('the reserve'). The reserve contains a footpath that links to and through the Longford Park Drive

¹ EIC, Nelson, [4.3].

residential area ('Longford Park') to the north and west, and to Wellington Park and the Great South Road (to the south and east).

[7] Longford Park lies generally to the north and north-west of the site and is an established neighbourhood of approximately 250 residential allotments. State Highway 1 (in the form of a causeway across the Pahurehure Inlet) forms a fixed western boundary.

[8] To the north and east (to the rail line) is the area of Business: Light Industrial zoned land ('LIZ') within which the site is located. The area is rather unprepossessing and contains several sites of greatly differing sizes ranging from approximately 1.3 ha (21 Inlet Road) to 720 m² (323 Great South Road). These sites accommodate a variety of land use activities, many industrial, but including many of general commercial or industrial nature. Examples of these general uses include several car yards/dealerships.

[9] These activities form most land uses and are contrasted with the intensively used Papakura Recycle and Transfer Station operated by Waste Management Limited ('WML') which is located at the head of the Inlet Road cul-de-sac. The locality can be characterised as having a varied or mixed built form.

[10] In terms of the immediately adjoining properties, the neighbouring site at 26 Inlet Road is being developed as a small-scale business park accommodating, as yet, unknown light industrial tenancies as well as a cafe.²

[11] Immediately to the east, on the opposite side of Inlet Road, at 23 Inlet Road, is a vacant site, previously occupied by a warehouse and transport depot. This site is owned by Mr Monteith, a s274 party to the appeal. The remainder of the Inlet Road 'block' is occupied by a variety of established industrial warehouse-type sheds of unremarkable design.

² EIC, Kerr-Ridge, [4.11].

[12] In terms of the wider yet still adjoining neighbourhood, the Takanini Town Centre zone is approximately 750 m from the site. Further, the Papakura sub-regional centre is approximately 1.6 km south-east of the site. Complementing these facilities, a supermarket has been developed along the Great South Road.

The proposal

[13] Details of the proposal are set out in the evidence of Ms Nelson, architect to the project.³ Since the Council's first instance decision, amendments were made by Kombi. The proposal before the court comprises the following salient elements:

- (a) three two-storey blocks separated by open space comprising a total of 16 units within the three blocks (A, B and C) including 12 mixed-use units (industrial and residential) in Blocks A and B and four units (industrial alone) in Block C.⁴ Each unit will be on a separate title.
- (b) all blocks are designed to accommodate light industrial activities at ground floor level. In addition, Blocks A and B only are designed to enable residential activity on the upper floor.
- (c) the larger shared space between Blocks A and B and its landscaping has been redesigned. Exterior spiral staircases have been added to the rear (western) facades of the mixed-use units in Blocks A and B and provide access to the private space and the esplanade reserve located to the west of Blocks A and B.
- (d) access to the development will be by way of a single, two-vehicle wide entranceway at the head of Inlet Road. Upon entry to the site, owners/visitors can make a right-hand turn to access Block A or, alternatively, make a left-hand turn to access Blocks B and C. A total of 28 carparks are to be provided on the site.

³ EIC, Nelson, Part 6.

⁴ The original proposal considered by the Council was for 17 units and the reduction in number increases the size of the shared area between Blocks A and B.

- (e) the ground floor height clearance for all units is a minimum of 2900 mm. The upper floors have a minimum ceiling height of 2400 mm. The ground floor light industrial spaces are open, apart from the provision of a toilet and shower facility, and are intended to provide a flexible workspace.
- (f) separate toilet amenities have been provided on the lower floor of each unit in Blocks A and B, allowing the business operations in the ground floor to function without reliance on the upper residential floor facilities.
- (g) glazing is proposed to achieve both thermal and glare control, as well as allowing both privacy on the street side and open views on the harbour side for residential occupants. Views out to the harbour would enhance the area by providing an opportunity for passive surveillance of the public esplanade area.

[14] The proposal is based on an integrated development to facilitate both residential and light industrial/commercial activities. Accordingly, the design provides for this mixed-use typology without compromising either the light industrial activities established to the east of the site or the residential activities to the west and north, or at least that is how it was promoted to the court.

Activity status

[15] The subject site is within the LIZ under the Auckland Unitary Plan ('AUP').⁵

[16] The proposal requires consent as several AUP rules are not complied with. Non-complying activity status is triggered by the residential component. In addition, and out of an abundance of caution, consent for the disturbance of soil was sought under the National Environmental Standard for Assessing and

⁵ Although the AUP was not fully operative at the time of the first instance hearing, all provisions relevant to the proposal were operative.

Managing Contaminants in Soil to Protect Human Health.

[17] Although activity status was not disputed, differing views were held by the planners as to the complement of rules triggered by the proposal, attributable to the on-site parking provision and the C-block office component. Nothing of significance turns on that in terms of the activity status or the court's ultimate decision and this will not be discussed further.

[18] As a non-complying activity, the application must pass through one of the gateway tests in s104D(1) before it can be considered for a grant of consent on its merits in the context of s104.

The Council's decision

[19] As required under s290A, we have considered the decision that gives rise to the appeal. In declining to grant consent, the panel had concluded that neither of the s104D(1) thresholds were met. Reasons (with which the court agrees) were that (in summary):

- (a) there would be adverse effects from the proposal associated with the amenity of residential occupants and reverse sensitivity effects that will be more than minor; and
- (b) the proposal is contrary to objectives and policies of the Regional Policy Statement ('RPS') and of the AUP including but not limited to Policy H17.3(2) and (3) being directive policies that seek to avoid activities that do not support the primary function of the zone and reverse sensitivity effects.

Council's position on appeal

[20] The appeal raised important issues for the Council given the "newly minted" status of the AUP. The Council strongly opposes a grant of consent. If consent is to be granted, it will be the first 'live-work' development (which is how

the proposal was described by the parties) consented since the AUP LIZ provisions became operative.⁶

[21] Aside from reverse sensitivity concerns, the Council also contended that the level of amenity afforded to the residents would not be acceptable. This was because of the adverse effects emanating from industrial activity taking place within the zone (odour, dust, noise and traffic) and due to the poor pedestrian environment in and surrounding the site.

[22] None of these shortcomings would be overcome by the higher level of residential amenity afforded by the proximity and westward outlook to the inlet and coastal walkway, which the Council duly acknowledged would exist.⁷ However, in a very real sense, the amenity attributable to the coastal location and its attraction for residential activity underpinned the Council's concerns as to the undesirable precedent that could be set by a grant of consent to Kombi.

[23] The Council considers that the proposal could be replicated in other LIZ coastal locations including within the subject zone. A grant of consent would set an undesirable precedent and risks undermining the integrity of the LIZ provisions.

[24] Arising from the Council's case, a fundamental issue to be determined related to the nature of the activity for which Kombi sought consent; whether the residential activity is accessory to the industrial activity within each of the units or is the residential likely to be the dominant or *only* activity within each of the units?

[25] The concern that only residential activity could occur was informed by concerns as to the effectiveness of the proposed conditions and the Council's enforcement capability considering a recent decision of the court.⁸ However, that

⁶ Council's legal submissions [12].

⁷ EIC, Bedggood, [51].

⁸ Council's legal submissions [66] referring to *Strata Title Admin Body Corporate v Auckland Council* [2015] NZEnvC 125.

case is able to be distinguished on the facts. Although we are sympathetic to the Council's concerns, we must proceed on the basis that terms of the consent (if granted) would be complied with.⁹

Position of s274 party

[26] Mr Monteith is the owner of a site at 23 Inlet Road and appeared before the court as a s274 party in opposition to a grant of consent. He gave evidence to the court and adopted the Council's case. In the past, Mr Monteith's site had been developed and used for warehousing and logistics for a moving and transport company prior to being destroyed by a fire. However, he is set to redevelop the site to accommodate a prefabricated house manufacturing business.¹⁰

[27] Mr Monteith was once the owner of the 28 Inlet Road site, and during his tenure, he considered various development opportunities for the land, including a "live-work" proposal such as that proposed by Kombi.¹¹ He also had plans drawn up for a complying building complex to accommodate an industrial activity although those never came to fruition.¹²

[28] Mr Monteith opposed a grant of consent for the proposed residential component on grounds related to reverse sensitivity effects and concerns around traffic and safety associated with trucks exiting his site, particularly if the street is occupied by 'spill-over' parking not able to be accommodated on the Kombi site.¹³

LIZ plan provisions

[29] The LIZ provisions relevant to the assessment of the proposal are set out in a joint witness statement ('JWS') of the planners engaged by the Council and

⁹ *Barry v Auckland City Council* (1975) 5 NZTPA 312.

¹⁰ EIC, Monteith, [6]-[7].

¹¹ Mr Monteith was discouraged from pursuing that proposal by Council staff.

¹² EIC, Monteith, [8]-[9].

¹³ EIC, Monteith, [16].

Kombi. They are set out in the JWS and will not be repeated in this decision, other than to note that development within the LIZ is governed (primarily) by provisions in two AUP chapters:

- (a) H17 – Business – Light Industry Zone; and
- (b) E14 – Air Quality.

[30] It is enough to note the planners' agreement that the H17 objectives and policies generally reflect and give effect to relevant provisions of the higher order RPS provisions in the AUP and to the New Zealand Coastal Policy Statement ('NZCPS'). These provisions do not require separate consideration under s104.

[31] As to these, the zone description in Chapter H17 anticipates industrial activities within the LIZ that do not generate objectionable odour, dust or noise. This includes manufacturing, production, logistics storage, transport and distribution activities.

[32] A wide range of light industrial activities are provided for as permitted activities which are listed in an activity table¹⁴ although some are required to follow a consenting pathway.

[33] For the LIZ, the anticipated level of amenity is lower than other business zones (excluding the Heavy Industrial Zone), including the Business – Mixed Use Zone,¹⁵ where permitted activity provision is made for the mix of activity proposed by Kombi although the range of industrial activities provided for in the LIZ are wider than under the Business – Mixed Use Zone.

[34] A key objective for the LIZ, being one of several provisions that are central to a resolution of this appeal, is Objective H17.2(1) and is that "[l]ight industrial activities locate and function efficiently within the zone". A further key objective

¹⁴ H17.4.1.

¹⁵ Zone description H17.1.

is that “[t]he establishment of activities that may compromise the efficiency and functionality of the zone for light industrial activities is avoided” (Objective H17.2(2)).

[35] These objectives are achieved through a policy suite that:

- (a) is *enabling* of light industrial activities (H17.3(1));
- (b) seeks to *avoid* reverse sensitivity effects from activities that may constrain the establishment and operation of light industrial activities (H17.3(2)); and
- (c) seeks to *avoid* activities that do not support the primary function of the zone (H17.3(3)).

[36] The air quality provisions in Chapter E14 are triggered where an air discharge is involved and in this chapter, the LIZ is identified as a “medium air quality – dust and odour” area.¹⁶ Pursuant to these, industrial air discharge activities could establish near to the proposed development as permitted activities.¹⁷

[37] However, ‘dwellings’ are one of a number of activities that come within the definition of ‘activities sensitive to air discharges’. For the Council, Mr Crimmins explains that this is due to the high amenity expected in residential locations and the likely presence of residents (including children) who have increased sensitivity to air quality health effects.¹⁸

Statutory approach

[38] For Kombi, Mr Allan addressed us on the approach to be taken to the AUP provisions where its policies use directive language (by use of the word “avoid”)

¹⁶ E14.4.1 Activity table.

¹⁷ EIC, Crimmins, [19].

¹⁸ EIC, Crimmins, [15].

in the context of the s104 obligation to “have regard to”, and whether that language compelled a decision to decline consent in this instance.

[39] He referred to the application of the requirement “to give effect to” higher-order planning provisions in accordance with the analysis set out by the Supreme Court (“SC”) in *EDS Inc v The New Zealand King Salmon Co Ltd*,¹⁹ noting the “different and less stringent statutory test” under s104. This, he submitted, allowed a decision-maker to take those provisions into account but to grant consent even if a proposal does not give effect to them.

[40] However, we note that the SC’s comments were made in the context of a plan change, that had to “give effect to” the higher-order NZCPS. A question to be answered by the SC had also included whether the Board of Inquiry gave effect to the NZCPS in coming to a “balanced judgement” in the context of s67(3)(b).²⁰

[41] Notably, issues in that case related to the inter-relationship between the various objectives and policies in the NZCPS, and the reconciliation of the more relevant of these with Policies 13 and 15, as these require the “avoidance” of certain adverse effects. The SC held that only after a “thorough attempt” has been made to reconcile apparent conflict is there justification for determining that one policy prevails over another.

[42] However, for a non-complying activity, the s104D threshold requirements must first be considered before moving to the ‘merits’ evaluation of a proposal under s104(1), which is permissible only if one of those requirements is met.

[43] As to the second of these, the activity must not be contrary to the objectives and policies of the relevant plan(s). The meaning of ‘contrary’ is now well understood; to be “contrary” to a provision(s), the proposal must be “opposed in

¹⁹ [2014] NZSC 38, [2014] 1 NZLR 593.

²⁰ *King Salmon* above n 19, [17].

nature, different to or opposite...”.

[44] We agree with Mr Allan that the s104D(1)(b) requirement is also that “the relevant plan provisions must be all considered comprehensively and, where possible, appropriately reconciled”; this was reaffirmed in *Royal Forest and Bird Protection Society of NZ Inc v New Zealand Transport Agency*.²¹

[45] However, having undertaken that analysis, it remains open to the court to determine, as we do here, that in this s104D context, some provisions (referred to above) are central to our consideration and ought to prevail over others of lesser bearing on the issues before the court.

Actual and potential effects

Permitted baseline

[46] By s104(2) the court has a discretion to apply a permitted baseline when considering what are relevant adverse effects to be considered. In his evidence-in-chief, Mr Kerr-Ridge considered that “workers’ accommodation” did provide a permitted baseline for consideration as it could be undertaken as a permitted activity within each of the units.²² The term ‘workers’ accommodation’ is defined in the AUP, and is (relevantly):²³

A dwelling for people whose duties require them to live on-site, and in the rural zones for people who work on the site or surrounding rural area.

Includes:

- accommodation for rangers;
- artists in residence;
- farm managers and workers; and

²¹ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390 [30].

²² EIC, Kerr-Ridge, [7.4]-[7.6].

²³ Chapter J1 – Definitions.

- staff.

[47] For the Council, Ms Bedggood confirmed that only one dwelling for workers' accommodation per site can be established as a permitted activity, whereas Kombi's proposal involves 12 dwellings.²⁴ This is a function of the AUP definition of 'site', where land is subdivided under the Unit Titles Act 2010, in which event, the 'site' is "deemed to be the whole of the land subject to the unit development..".²⁵

[48] For the Council, Ms Bedggood explained that the potential for workers' accommodation to establish within an industrial zone is limited, because the workers' duties must be such that they are *required* to live on site. In her experience at the Council, this is not a situation that has often occurred. It is her experience that the Council requires "a significant amount of evidence" that the worker is required to live on site rather than choosing to do so as a matter of preference or convenience.²⁶

[49] In the absence of a specific proposal for an industrial activity, the definitional requirement for a worker to live on the site cannot be met. Mr Maguire had spoken of potential tenancies, such as a tradesperson's workshop or storage facility, however, these activities are not likely to require a worker involved in the trade to live on site.²⁷

[50] In answer to questions in cross-examination, Mr Kerr-Ridge eventually acknowledged that the number of residents enabled by the proposal may be greater. He also agreed that there would be "different effects" from 12 residential units.²⁸ However, he considered that the provision of workers' accommodation

²⁴ NOE, Kerr-Ridge, p 108.

²⁵ Chapter J1 – Definitions.

²⁶ NOE, Bedggood, p 221.

²⁷ NOE, Maguire, p 6.

²⁸ NOE, Kerr-Ridge, p 109.

sets the precedent for dwellings in the LIZ.²⁹

[51] We acknowledge that Kombi did not seek to come within the workers' accommodation plan provision and did not need to establish that element of the definition in the context of the application it elected to pursue. However, we consider that the absence of a *requirement* to live on site in an operational or functional sense together with the scale of the residential proposed for the site, has policy implications in the context of the LIZ policies.

[52] We find that this policy implication counts against a grant of consent for the proposal, and we discuss this further below. It is sufficient to note that under the AUP, a non-industrial activity is to be avoided unless it supports the functioning of the LIZ, or if the functioning of the LIZ could be hindered due to the potential for reverse sensitivity effects.

[53] Reverse sensitivity effects are relevant for s104(1)(a) purposes, as well as having policy implications in the context of s104(1)(b).

[54] We agree with the Council that the potential for reverse sensitivity effects to arise from a single worker's accommodation dwelling is less than if there are to be 12 residential units (with the potential for up to 36 residential occupants, possibly more). This is particularly so, where the decision to live on the site is a decision of the worker borne out of convenience, for financial reasons or because of the amenity afforded by the coastal location.

Does the proposal include a hybrid form of residential activity?

[55] It is useful at this juncture to consider the question of whether the proposal involves a residential activity. Kombi's witnesses and counsel refer to the proposal as entailing a 'mixed-use' as though this was a new activity category, blending

²⁹ NOE, Kerr-Ridge, p 109, JWS Planning [24].

residential and industrial uses.

[56] Kombi was critical of the Council's treatment of the proposal as involving residential activity, although we consider that criticism unfounded. Under the AUP, the residential component must be treated as involving a dwelling whether an industrial activity is also proposed to be undertaken within the same building.

[57] Relevantly, the definition of 'dwelling' is:

Living accommodation used or designed to be used for a residential purpose as a single household residence contained within one or more buildings and served by a food preparation facility/kitchen.

[58] We consider that the Council has duly accounted for the industrial component of Kombi's mixed-use proposal as a use that is to be carried out in conjunction with residential (at least in some of the units). However, in opposing a grant of consent, the Council naturally focused on the residential component, as it is this that triggers non-complying activity status.

[59] It is also the residential component that is the target of the "avoid" directive in the policy framework for the LIZ.

[60] The residential component of Kombi's proposal is not excluded from the definition 'dwelling' merely because it occurs in a building where an industrial activity is also to be carried out. Nor does that follow where (on the facts) a residential activity supports or will be accessory to that industrial activity, which is how the relationship between the two activities was described in this case.

[61] A related Council concern is that the residential component could present itself as the more dominant activity, in terms of the overall level of activity on the site. There is some substance in that contention because the 3-bedroom dwellings could accommodate 36 residents, conceivably more.

[62] The first instance hearing panel had made the same finding and that had

counted against a grant of consent to the proposal.

Positive effects

[63] The positive effects resulting from the proposal were agreed between the planners as including:³⁰

- (a) the establishment of business premises that may bring employment opportunities to the area;
- (b) the introduction of a use of the site that interacts with and maintains the amenity values of the adjoining public open space and coastal marine area;
- (c) the south western orientation of the residential units providing passive surveillance over the esplanade reserve contributing to public safety and well-being.

[64] We find that (b) and (c) are positive effects resulting from the residential component, although (a) is an expected positive outcome of development provided for under the industrial zoning which could occur without the residential component.

[65] We also agree that the urban design outcomes would lead to positive effects, at least at the interface with the adjoining reserve. An attractive residential amenity for residents will also be afforded by the west facing design of the residential accommodation and these positive effects means that the proposal sits comfortably with Policy H17.3(7). This policy is to “[r]equire activities adjacent to residential zones to avoid, remedy or mitigate adverse effects on amenity values of those areas”.

[66] However, the positive effects of a proposal must be set aside in considering

³⁰ JWS Planners [26].

the s104D(1)(a) gateway test.

Adverse effects - reverse sensitivity

[67] It was the Council's position that the key adverse effects of concern relate to the potential for reverse sensitivity effects on industrial activities within the zone due to the sensitivity of residents to noise, odour and dust emissions, and traffic movements.³¹

[68] Prior to the hearing, experts engaged by the Council had entered caucusing with the corresponding experts for Kombi, resulting in the production of several JWSs relating to the relevant issues on noise, air quality, traffic, urban design and planning.³²

[69] The potential for reverse sensitivity effects due to odour and dust emerged as the more significant issue. We find that there is unlikely to be reverse sensitivity effects associated with noise and/or traffic. We heard considerable evidence from the Council on traffic and note that this emerged as a concern to Mr Monteith throughout the hearing. We have given careful consideration to the transport related issues.

[70] We find that the transportation conditions (for vehicles and pedestrians) within and adjoining the site are not optimal, although they do not militate against a grant of consent. Various mitigation measures to the road had been promoted to improve the on-road traffic environment, although even if minded to consider the same, in our ultimate conclusion, we find that the potential for reverse sensitivity effects due to odour and dust overrides any transport related adverse effects.

³¹ EIC, Bedggood, [60].

³² JWS – Acoustics dated 14 December 2020; JWS – Air Quality dated 16 December 2020; JWS – Transport dated 17 December 2020; JWS – Urban Design dated 14 December 2020; JWS – Planning dated 26 January 2021.

Noise

[71] The objectives and policies in Chapter E25 of the AUP seek to limit adverse effects of noise and vibration on amenity values and to protect existing noisy activities from reverse sensitivity effects.

[72] Key objectives and policies in Chapter E25 include the following:

E25.2. Objectives

- (1) People are protected from unreasonable levels of noise and vibration.
- ...
- (3) Existing and authorised activities and infrastructure, which by their nature produce high levels of noise, are appropriately protected from reverse sensitivity effects where it is reasonable to do so.
- ...

E25.3. Policies

- ...
- (6) Avoid activities sensitive to noise from establishing in industrial zones where adverse effects (including reverse sensitivity effects) arise that cannot be otherwise appropriately remedied or mitigated.

[73] The court heard evidence from Ms Drewery, on behalf of Kombi, and from Mr Runcie, on behalf of the Council on noise effects. The permitted external noise level in the LIZ, in AUP Standard E25.6.5, is 65 dB L_{Aeq} .

[74] This level is considered moderate to loud and is the same as in other business zones which provide for residential activity.

[75] Mr Runcie explained that daytime noise levels in outdoor spaces in industrial zones are therefore like those in the AUP that are acceptable for residential activity. Night-time limits differ, with lower noise limits in non-industrial zones between 11 pm and 7 am.³³

³³ EIC, Runcie, [21].

Matters agreed between acoustic experts

[76] The experts agreed with respect to noise effects.³⁴ They agreed that:

- (a) the local noise environment in the LIZ is characterised by industrial activity noise. The proposed design for the site incorporates solid boundary screening to the northern most and southern most outdoor amenity areas. This can effectively screen noise sources from adjoining sites and may reduce noise levels in the outdoor amenity areas to lower than 65 dB L_{Aeq} ;
- (b) there are potential effects of night-time noise from heavy vehicles on Inlet Road before 7 am, such as from the release of air brakes. This may result in sleep disturbance of occupants in bedrooms facing Inlet Road, and potential complaints;
- (c) however, potential effects on sleep disturbance can be mitigated through building design to achieve internal L_{Amax} noise limits. The building design incorporates the set back of bedrooms from Inlet Rd and enhanced glazing and mechanical ventilation that allows windows to be closed.

[77] As noise effects can be mitigated, they are not a determinant of reverse sensitivity or other adverse effects (on amenity) and will not be further considered.

Odour/dust

[78] As further plan context for our consideration of this issue, Chapter E14 of the AUP addresses the management of air quality. Introductory text in the zone description (E14.1) acknowledges that there is a need to separate incompatible land uses. This is because an industrial activity that involves an air discharge, needs to be recognised and provided for in the plan provisions.

³⁴ JWS Acoustics, [7]-[8].

[79] As earlier noted, a greater level of dust and odour is tolerated in the LIZ than in residential and Mixed-Use zones. A medium air quality level is provided for in the LIZ by Policy E14.3:³⁵

- (4) Support the use and development in the Business – Light Industry Zone ... by providing for medium dust and odour levels and avoiding, remedying or mitigating, the adverse effects of dust and odour.

[80] Policy E14.3(9) requires that the adverse effects of emissions must be avoided, remedied or mitigated beyond the boundary of the premises where the discharge of contaminants to air is occurring.³⁶

[81] The following key objectives (in relation to air quality) in the AUP address the separation of incompatible uses and management of reverse sensitivity effects:

E14.2 Objectives

...

- (3) Incompatible uses and development are separated to manage adverse effects on air quality from discharges of contaminants into air and avoid or mitigate reverse sensitivity effects
- (4) The operational requirements of light and heavy industry, other location-specific industry, infrastructure, rural activities and mineral extraction activities are recognised and provided for.

[82] Odour and dust amenity effects are assessed by a specialist in the field using the FIDOL framework, which is described in the Ministry for the Environment Good Practice Guide.³⁷ The FIDOL factors are specified in Note 1 of standard E14.6.1.1 and require the following:

When making a determination of adverse effects in relation to odour and dust the FIDOL factors (frequency, intensity, duration, offensiveness and location) should

³⁵ JWS Air quality, [7].

³⁶ Chapter 14 Air Quality, Policy E14.3(9).

³⁷ JWS Air Quality, [17].

be used.

[83] The FIDOL 'location' factor provides for differing levels of odour and dust in different types of areas, including greater levels of odour and dust in industrial areas where sensitive receptors are not present.³⁸

[84] E14.6.1.1(2) is one of several standards that must be complied with where an activity is identified as a permitted activity in the activity table in the LIZ chapter.³⁹ This standard specifies:

The discharge must not cause noxious, dangerous, offensive or objectionable odour, dust, particulate, smoke or ash beyond the boundary of the premises where the activity takes place.

[85] The Kombi site is near activities and other sites that are potentially sensitive to air quality effects, and to reverse sensitivity effects.⁴⁰

Matters agreed between air quality experts

[86] The court heard evidence on air quality from Mr Curtis, an air quality expert, on behalf of Kombi, and from Mr Crimmins, for the Council. The Air Quality JWS records the agreement of these experts that:

- (a) there is a potential for reverse sensitivity effects to occur when an activity sensitive to air discharges, such as the mixed-use units proposed by Kombi, is established in the LIZ. This could constrain an established permitted activity from operating;⁴¹
- (b) residential occupants are particularly sensitive to amenity effects such as odour and dust. Children and elderly people may occupy the proposed dwellings and typically have a greater sensitivity to air

³⁸ JWS Air quality, [17].

³⁹ Chapter E14 Air quality.

⁴⁰ JWS Air quality, [8].

⁴¹ JWS Air quality, [9].

- pollution health effects;⁴²
- (c) the proximity of the site to the residential neighbourhood at Longford Park Drive also constrains the potential for substantial industrial activities to establish in the western portion of this zone.⁴³

Matters of disagreement

[87] Despite the matters of agreement in their JWS, and identified in paragraph (a) above, the air quality experts disagreed on whether the proposed mixed-use units on the Kombi site will result in a greater potential for industrial activities within the LIZ becoming subject to reverse sensitivity effects.⁴⁴

[88] This was also a matter of dispute between the planners for Kombi and the Council. The planners relied upon the opinions of the air quality experts, although they also considered the plan policy implications of that assessment as part of their statutory evaluation.

[89] The experts all agreed that there is already a constraint on the range of industrial activities able to locate within the LIZ due to the adjoining residential development in Longford Park Drive.

Waste Management Limited

[90] Of the three immediate neighbours within the LIZ,⁴⁵ WML site has the highest potential to generate residual odours from the waste received, as well as from empty waste skips and bins stored on the site.⁴⁶ The WML facility comprises an older style open pit design that is not contained, compared to all modern waste

⁴² JWS Air quality, [15].

⁴³ JWS Air quality, [16].

⁴⁴ Rebuttal evidence, Curtis, [7.2].

⁴⁵ EIC, Curtis, [3.4].

⁴⁶ EIC, Curtis, 3.4(a)].

transfer stations that are enclosed within a building.⁴⁷

[91] WML holds an air discharge consent, and adjoins the Longford Park zone on the northern boundary of the Kombi site.⁴⁸

[92] WML also enjoys the benefit of an existing no-complaints covenant over the Kombi site,⁴⁹ surrendering the right for the occupants of the Kombi site to make a complaint about air emissions from the WML. WML also has the benefit of an easement over the Kombi site, the effect of which is that WML has a legal right to emit noise and vibrations, and contaminants (including odour and dust) into the airshed over the Kombi site.

[93] The covenant and easement instruments were registered over the Kombi title, before the hearing of the appeal before the court and resulted in the withdrawal of the submission of WML in opposition to the Kombi proposal.

[94] The Council maintained a residual concern as to the effectiveness (including enforceability) of these instruments for reasons discussed by Ms Bedggood and Mr Crimmins, including that even with a covenant in place, the Council could still be faced with complaints relating to noise and odour, which the Council would be obligated to investigate.

[95] We consider the Council's principal grounds of opposition to the use of the covenant.

No-complaints covenants

[96] Several Environment Court cases were referred to in submissions for the Council where no-complaints covenants to address reverse sensitivity effects had

⁴⁷ NOE, Curtis, p 73.

⁴⁸ Air discharge permit R/REG/2015/1977, issued on 27 October 2015 for 25 years, expiring 27 October 2040.

⁴⁹ EIC, Maguire, Attachment 4.

been proposed and rejected, including *Craddock Farms Ltd v Auckland Council*⁵⁰ and *Ngatarawa Development Trust Ltd v Hastings District Council*.⁵¹

[97] However, *Craddock* and *Ngatarawa* are each distinguishable on the facts and do not support the Council's opposition to a no-complaints covenant as a tool to manage reverse sensitivity effects, as a matter of general principle. The Council also relied on the decision in *Gibbston Vines Ltd v Queenstown Lakes District Council*⁵² where the court had been concerned that mitigation measures proposed in response to the reverse sensitivity risk were "fundamentally deficient".

[98] The scope of the covenant proposed in *Gibbston* had been of concern to the court, because it would not prevent a new resident opposing an application for non-complying consent if the frost-fighting devices were unable to comply with the district plan's noise limits provisions. Non-compliance could result due to the proximity of a newly established dwelling/s.

[99] We consider that *Gibbston* is also able to be distinguished on the facts.

[100] Kombi contended that the covenant is expressly anticipated by the AUP rules that apply to the Britomart and Wynyard precincts.⁵³ Refuting that, the Council contended that these were site-specific rules that had the input of the affected parties through the plan-making process.

[101] However, that fact would not rule out the use of a no-complaints covenant in another site-specific case. An appropriately drafted covenant is a private means of reconciling conflicting public interests. They do not contravene the principles of the RMA and are enforceable, albeit in a civil jurisdiction and not by the relevant

⁵⁰ *Craddock Farms Ltd v Auckland Council* [2016] NZEnvC 51.

⁵¹ *Ngatarawa Development Trust Ltd v Hastings District Council* W017/08.

⁵² *Gibbston Vines Ltd v Queenstown Lakes District Council* [2019] NZEnvC 115.

⁵³ Provisions were identified in appellant's legal submissions, pp 29, 30.

council.⁵⁴

The existing and future environment

WML

[102] We find that for as long as the present use of the WML site continues, the instruments registered against the Kombi site for the benefit of WML, particularly the easement, will be adequate in managing the potential for reverse sensitivity effects to an acceptable level.

23 and 26 Inlet Road/ the LIZ

[103] We accept the evidence of Mr Crimmins that the properties at 23 and 26 Inlet Road are most vulnerable to the potential for adverse reverse sensitivity effects resulting from residential activity on the Kombi site due to their close proximity.

[104] Kombi had offered a no-complaints covenant to Mr Monteith as owner of 23 Inlet Road, to be secured by a proposed consent condition. However, Mr Monteith (initially) was not in favour of that as a solution to his issues. During the hearing, in answers to questions, Mr Monteith said that if the court was minded to grant consent to the application, he would prefer to have a no-complaints covenant.⁵⁵

[105] On the basis of that evidence, in closing submissions, Mr Allan submitted that the court could impose a condition requiring that a no-complaints covenant be entered into between Mr Monteith and Kombi. However even if the terms of the covenant had been agreed, (and they were not) the court has no jurisdiction to

⁵⁴ See *South Pacific Tyres NZ Ltd v Powerland (NZ) Ltd* [2009] NZRMA 58.

⁵⁵ NOE, Monteith, p 253.

impose such a condition, as it is not able to impose obligations upon a third party.⁵⁶

[106] The situation may have been different had a covenant been entered into and registered before the hearing as occurred with WML, in which event a condition would not have been necessary.

[107] The owner of 26 Inlet Road expressed no concerns with the proposal, in fact, the owner lodged a submission supporting a grant of consent. Activities proposed for this site were anticipated to be permitted light industrial activities including a cafe. Construction of the units at 26 Inlet Road had commenced but had not been completed and appeared to the Council witnesses to have come to a halt.

[108] With no other registered covenants in place, reverse sensitivity effects may impact industrial activities on other LIZ sites, particularly the closest neighbouring sites at 23 and 26 Inlet Road.

[109] Although the intended uses for each of these sites were identified by the owner, we note that these could also change in the future. Our consideration of this issue must account for possible future uses of the LIZ sites for the range of permitted light industrial uses and not be confined to the presently intended uses.⁵⁷

[110] As the sites at 23 and 26 Inlet Road are presently not being used for any actual use, there are difficulties in envisaging the environment as it might exist in the future. However, the policy framework gives priority to the efficient functioning of current and future light industrial use within the zone as against potentially incompatible activities, as proposed by Kombi.

[111] In this context, we assume that if an air discharge is involved it is one that

⁵⁶ The obligation here would be to require the registered proprietor of 23 Inlet Rd to negotiate and register a no-complaints covenant against the title to their land.

⁵⁷ On the authority of *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

complies with standards including E14.6.1.1(2) to bring our consideration of the future environment within the ambit of the principle emanating from the court in *Queenstown Lakes District Council v Hawthorn Estate Ltd*.⁵⁸

[112] We accept the evidence of Mr Crimmins that the introduction of 12 new households could include occupants with varying degrees of tolerance for odour emissions, even where an air discharge meets Chapter 14 permitted activity standards. We agree that residential activity on the Kombi site may lead to constraints being imposed on future activities at 23 and/or 26 Inlet Road, an outcome that the AUP directs be avoided.

[113] The evidence from Mr Crimmins was that residential activity on 28 Inlet Road had a greater potential constraining effect on industrial activities at either 23 or 26 Inlet Road than the residential development in Longford Park across the inlet, due to the closer proximity.⁵⁹ The evidence was that Longford Park is approximately 100 – 150 m across the inlet from the northern edge of Kombi site (as the crow flies).⁶⁰

[114] As recorded in the JWS Air Quality, Mr Curtis considers that is unlikely as there are existing constraints on industrial activities across a significant portion of the LIZ due the adjacent Longford Park residential and recreational reserve.⁶¹ However, when questioned about this, Mr Curtis stated that neither the existence of these adjoining sensitive activities, nor the residential component proposed for the Kombi site, would operate as a constraint on any existing or new permitted light industrial activity within the LIZ even if that involved an air discharge.⁶²

[115] On his approach, as he explained to the court, if a light industrial use is identified as permitted use and involves an air discharge, the standard in E14.6.1.1

⁵⁸ Above n 57, [84].

⁵⁹ EIC, Crimmins, [50]-[51]; NOE, Crimmins, p 145.

⁶⁰ NOE, Samsudeen, p 216.

⁶¹ JWS Air Quality, [18].

⁶² NOE, Curtis, p 76.

would be presumed to be met. A FIDOL assessment triggered by that standard would not need to be carried out.⁶³ Where a permitted industrial activity is proposed, the sensitivity of existing residential activities near to that site would not be assessed, and that being the case, no restraining conditions could be imposed.

[116] Mr Curtis considered that the industrial activities listed as permitted in the activity table are identified as such on the basis that they should not give rise to an adverse effect on a neighbourhood within the LIZ or in an adjoining zone.⁶⁴ He stressed that the E14.6.1.1 standards mean that permitted activities or activities that are consented, cannot give rise to dust and/or odours “that are levels that are considered offensive or objectionable”.⁶⁵

[117] In answers to questions from the Council, he stated that Policy H17.3(2) on reverse sensitivity is redundant from an air quality point of view.⁶⁶

[118] Mr Curtis accepted that the situation would be different if an industrial activity was not a permitted activity and required consent, in which event, an associated air discharge would be unlikely to be granted by the Council if it involved “something of a significant nature”, due to the constraining effect of the nearby Longford Park residential development.⁶⁷

[119] Mr Curtis acknowledged that residential activity on the Kombi site could potentially operate as a constraint on the establishment of a new industrial activity, although he did not think that likely despite the site being closer than the residences at Longford Park.⁶⁸ We found it difficult to reconcile this opinion with the evidence he gave about the existing constraints imposed on development within

⁶³ Mr Curtis acknowledged that E14.6.1.1 might be considered if the activity was not permitted in the activity table and required a resource consent (for a land use) in any event.

⁶⁴ NOE, Curtis, p 75.

⁶⁵ NOE, Curtis, p 61.

⁶⁶ NOE, Curtis, p 68.

⁶⁷ NOE, Curtis, p 72.

⁶⁸ NOE, Curtis, p 76.

the LIZ due to that adjoining sensitive residential activity.

[120] However, he appeared to draw a distinction between the sensitivity of residents of a residential dwelling, and those of the proposed residential units in an industrial location. Residents of dwellings are treated by the AUP as sensitive to air discharges and as an occupant of a residential area will have a high expectation of not being affected by nuisance effects.

[121] In comparison, Mr Curtis considers that the occupants of the units proposed by Kombi would not have the same amenity expectation as they might in a residential zone.⁶⁹ He explained that complaints from residents on the Kombi site were unlikely to be made as they would accept the environment within the zone as the “price of living in that place”.⁷⁰ He acknowledged that this was an assumption as to human behaviour on his part.⁷¹

[122] Mr Kerr-Ridge expressed a similar opinion. He considered that the introduction of residential activity within the LIZ would have to bring a substantial change to the risk of reverse sensitivity effects beyond that which presently exists due to the adjacent Longford Park residential activity.⁷²

[123] The Council approaches the issues and the administration of the AUP differently to Kombi, and in the court’s view, the Council’s approach to the plan is the correct one, being properly informed by the LIZ objectives. For the Council, Mr Crimmins expressed surprise at Mr Curtis’s approach to the air discharge standards.

[124] He explained that when reviewing the air quality effects of a non-industrial proposal such as residential within the LIZ, he would apply a risk assessment

⁶⁹ NOE, Curtis, pp 62, 63.

⁷⁰ NOE, Curtis, p 71, line 26.

⁷¹ NOE, Curtis, p 63.

⁷² NOE, Kerr-Ridge, p 96.

approach where a permitted industrial activity also involves an air discharge.

[125] This would involve applying the FIDOL criteria as required by rule E14.6.1.1 and taking account of the zoning and activities at the location as part of determining the sensitivity of the environment.⁷³ Mr Crimmins would assess effects of an air discharge in terms of the AUP objectives and policies in Chapter E14, which support the use and development in the LIZ, and which address the LIZ as having medium air quality, as opposed to residential zoning that would require high air quality.

[126] Mr Crimmins's greatest concern in relation to reverse sensitivity effects is with the properties at 23 and 26 Inlet Road, due to their "very close proximity", in comparison to the more distant residential area at Longford Park.⁷⁴ If dwellings are present on the Kombi site, Mr Crimmins would account for this in any assessment of air quality reverse sensitivity effects in a FIDOL analysis where a new industrial activity is proposed within the LIZ.

[127] His "working assumption" would be that occupants of dwellings in the LIZ are as sensitive as those in a residential location.⁷⁵ He considered the three-bedroom design of the Kombi proposal would allow for people, and particularly sensitive people including children, being on site more frequently and for longer and result in more risk of conflict.⁷⁶

[128] While acknowledging the existing constraining effect of the adjoining residential development at Longford Park, he did not consider that this proximity would be fatal to use of the sites at 23 and 26 Inlet Road for industrial activity, although the situation would be different if residential were to establish any closer. His evidence was that if Kombi is able to establish residential activity on its site:

⁷³ NOE, Crimmins, p 139.

⁷⁴ NOE, Crimmins, pp 143-146.

⁷⁵ NOE, Crimmins, p 147.

⁷⁶ NOE, Crimmins, p 171.

... the increase in residential dwellings and the decrease in proximity does represent an adverse effect in terms of air quality reverse sensitivity particularly to 23 and 26

... »⁷⁷

[129] He agreed that the change in terms of the risk of complaints would be a small incremental change, although he considered that additional constraints on industrial activities beyond those which would mitigate effects on Longford Park residences may be required in that scenario.⁷⁸

[130] Mr Crimmins did not subscribe to the principle that residents who choose to live in the LIZ have come to the nuisance as the dwellings could be occupied by persons who “may not have signed up” for the effects of industrial activity, particularly odour.⁷⁹

[131] He did not consider the recreation area along the adjoining esplanade to be as sensitive to air discharges as the occupants of dwellings. This is because users of the reserve are not likely to be present for an extended period, thus having limited exposure to odour.⁸⁰

[132] In the absence of dwellings at 28 Inlet Road, Mr Crimmins would assess the FIDOL factors and apply the objectives and policies in Chapter H14 without deviation.

Risk of inter-tenancy conflict

[133] We heard evidence as to the potential for reverse sensitivity effect from internal conflicts (on an inter-tenancy basis) arising from differing air quality expectations of residents within the units. Mr Crimmins had considered the risk of internal conflict is exacerbated for the proposal where occupants may reside

⁷⁷ NOE, Crimmins, p 151.

⁷⁸ NOE, Crimmins, pp 152, 153.

⁷⁹ NOE, Crimmins, p 171.

⁸⁰ EIC, Crimmins, [43].

without any direct connection to the industrial activities taking place on the site.⁸¹

[134] This is a function of size of the units. They are able to accommodate flatmates of a worker or family members including the elderly and/or children. Only one resident in a unit is required to be involved in the industrial activity carried out on the ground floor of the unit.

[135] Mr Crimmins explained that for the purpose of the FIDOL analysis, rule E14.6.1.1(2) refers to the point of compliance as at the 'boundary of premises' rather than at the boundary of the 'site' which in Kombi's case, would have been the boundary of the site comprising the unit title complex.

[136] This means that a site could be used by multiple activities and there could be effects caused by one activity on other industrial activities within the site. Mr Crimmins explained that he treats a 'boundary of the premises' as the boundary of the area within the control of the entity that is discharging contaminants.

[137] He was particularly concerned about the activity of fibre glassing,⁸² although a number of other similar odorous activities were also identified in his evidence as activities that could occur within the LIZ that could be the source of conflict.⁸³ In his experience, these activities can be an issue in mixed-use industrial units with the odour wafting up through shared roof space affecting tenants within the same building complex.

[138] His concern is that this may lead to complaints to the Council which in turn, imposes costs on the industry involved and in his experience at the Council, such complaints are difficult to resolve given the closeness of the complainant to the discharger.⁸⁴

⁸¹ EIC, Crimmins, [24].

⁸² Use of up to 9kg/hour of styrene is permitted in (A19) of Table E14.4.1.

⁸³ EIC, Crimmins, [19].

⁸⁴ NOE, Crimmins, p 166.

[139] Mr Crimmins referred to the non-statutory ‘best practice guidance’ for recommended separation distances between industries and sensitive activities to minimise risk of conflict while noting that Kombi’s proposal to co-locate was not considered to be best practice.⁸⁵

[140] Under cross-examination, Mr Crimmins acknowledged that a condition that identified activities such as fibre-glassing as an activity that should not occur could assist in addressing reverse sensitivity air quality effects within the site. For reasons we explain below, we do not accept that this is an appropriate condition.

[141] As Mr Curtis did not address this scenario of internal conflict within the site, in his evidence-in-chief, he did not consider the application of the FIDOL assessment in E14.6.1.1(2) where an air discharge was also involved in an inter-tenancy context.

[142] However, in answers to questions, he explained that an industrial activity that seeks to establish within the Kombi site is “no different than any other” in that it cannot cause effects which are “nuisance effects to its neighbours or offsite or in the esplanade reserve”.⁸⁶

Consideration of ‘effects’ in relevant plan context

[143] For any industrial activity involving an air discharge from within any of the units, E14.6.1.1 becomes problematic as the location for assessing compliance is at the boundary of the premises and not the site boundary.

[144] ‘Premises’ is not a defined term in the AUP although we refer to the dictionary meaning of ‘premises’ is “a house or building, together with its land and outbuildings, occupied by a business or considered in an official context”.⁸⁷

⁸⁵ EIC, Crimmins, [38].

⁸⁶ NOE, Curtis, p 70.

⁸⁷ The *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011).

[145] Assessing whether an air discharge is offensive or objectionable under E14.6.1.1(2) may be problematic where a unit title complex of the configuration proposed by Kombi is involved, bearing in mind this definition. We had no evidence as to the boundary of outside areas within the control of or able to be occupied by the entity or person undertaking the industrial activities in each of the units. In a unit title development, there are likely to be common areas not under any individual unit owner's control.

[146] An air discharge does not have to be wholly contained, and nor could it practically be contained within the units where the industrial activity is taking place. A discharge is likely to occur in the airshed or as Mr Crimmins explained, odours could waft upstairs to the interior of the residential units.

[147] As alluded to above, Kombi ultimately acknowledged the potential for inter-tenancy reverse sensitivity issues to arise. In closing submissions, a condition was proffered limiting the range of industrial activities able to be conducted within the units, as follows:

Units 1-16 shall not be used for any of the following activities:

- a) All activity categories that require an air discharge resource consent (i.e.: are not a Permitted Activity discharge to air) in the Medium Air Quality – dust and odour area (Industry) pursuant to Table E 14.4.1 of the Unitary Plan.
- b) The use of less than 9 kg/per hour of styrene.
- c) Drying, curing or baking of any solvent-based coatings onto a surface by application of heat at a solvent volatile organic compound (VOC) application rate of less than 20 kg / hour.
- d) Coffee roasting at a loading rate of green coffee beans up to 250 kg per hour or with a total weekly production of less than 500 kg.

[148] Mr Allan stated that Kombi had always proposed that the body corporate rules would restrict the range of activities that would otherwise be allowed to establish as permitted industrial activities. We note that we were not provided with a copy of the body corporate rules in evidence given at the hearing although we do not consider that the rules are an appropriate method for addressing the

potential for internal conflict as they are amenable to change outside of the resource management process.

[149] More relevantly, the proposed condition would mean that industrial activities that require a discharge to air consent would not be enabled.⁸⁸ In closing, Mr Allan stated that such restraints were said to be desirable in any event due to the proximity of Longford Park residents. However, we note that the proffered condition was not addressed in the evidence for Kombi. Nor was the proposition that the condition was desirable tested in cross-examination of the Council's experts.

[150] That fact aside, the proposed restriction would constrain the establishment and operation of some light industrial activities otherwise enabled within the zone, and although the condition would mitigate the potential for an adverse effect to arise (reverse sensitivity), it targets the wrong activity. Kombi's suggested condition gives priority to the protection of residential amenity over the enablement of light industrial activities to locate within the zone, being the opposite outcome to that intended by the AUP objectives and policies.⁸⁹

[151] The condition is not one that the court would be inclined to impose were it minded to grant resource consent for Kombi's proposal. Although the condition would meet the fundamental tests for validity of a condition,⁹⁰ a further pre-requisite is that the condition must be 'appropriate' as that is the language used in s108.

[152] Whether or not a condition is appropriate is to be measured against the purpose of the Act, as articulated in relevant AUP objectives and policies.⁹¹ Accordingly, we have considered the condition, and the issue of reverse sensitivity

⁸⁸ Kombi's closing submissions [58]-[61].

⁸⁹ Objectives H17.3(1), (2) and Policies H17.3(1),(2) and (3).

⁹⁰ As identified in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

⁹¹ *Cookie Munchers Charitable Trust v Christchurch City Council* W90/08; *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

effects generally, through the lens of the more relevant AUP objectives and policies, notably:

- (a) Objective H17.2(1) that activities can “...locate and function efficiently within the zone”; and
- (b) Objective H17.2(2) that “[t]he establishment of activities that may compromise the efficiency and functionality of the zone for light industrial activities is avoided”.

[153] The objectives and policies in Chapter E14 are also of relevance in this context as they require that:

- (a) the operational requirements of light industry are recognised and provided for (Objective E14.2(4)); and
- (b) the use and development in the LIZ are supported by providing for medium dust and odour levels (Policy E14.3(4)).

[154] Mr Allan’s suggested condition is not the appropriate management response as it is not supported by these provisions, in fact it is antagonistic towards them.

[155] Nor do we accept that it is appropriate to mandate a ‘buyer-beware’ approach to this issue as Kombi invited the court to do in this instance. That would ignore the relevant objective and policy framework within the AUP, including the relevant RPS provisions, which are given effect to through the AUP.⁹² These provisions seek to prevent people from the folly of a decision made on that basis.

[156] In any event, there was no probative evidence to support Kombi’s contention that residents within the LIZ would accept that they have come to the

⁹² Objectives and Policies in Chapter B2 Urban growth and form as referred to in JWS Planning, [11.4(a)].

nuisance and would tolerate a reduced level of amenity. Mr Curtis expressed an opinion about that, despite having no relevant qualifications enabling him to do so.

[157] As we earlier record, he was also basing his opinion on his assumption as to the amenity expectations of residents who elect to live in an industrial zone, and in the absence of any scientific evidence (such as a community survey) we do not find that evidence substantially helpful in resolving the reserve sensitivity issue.

[158] We accept the evidence of Mr Crimmins in preference to that of Mr Curtis. We find that the assessment undertaken by Mr Crimmins, was within his scope as an expert, and was properly informed by the policy framework of the AUP. We find that there is potential for adverse reverse sensitivity effects particularly in relation to industrial activity at 23 and 26 Inlet Road and for that to also occur on an inter-tenancy basis.

[159] We note that only one resident from each of the units is required to be involved in the operation of the industrial activity conducted on the ground floor. The potential exists (if not the probability) for the units to be occupied by 36 residents where only 12 are involved in the industrial activity (that is, one resident per unit).

[160] We refer to the evidence of Mr Maguire who considered that the “live-work” units would be attractive to builders (or other tradespersons) whose equipment storage needs are not being accommodated at their home due to the small size of their sections. His perception of a need for this provision motivated him to seek this consent.

[161] However, a builder (or other tradesperson for that matter) is likely to conduct their actual trade at off-site locations for most of the day. However, members of the tradesperson’s family may also reside at that address. If that were to occur, the dominant on-site activity could be the residential activity during the working day.

[162] We accept that storage is permitted in the LIZ, although this misses the Council's point of concern with the proposal. Residents could be exposed to the adverse effects of activities (such as odour) operating in any of the 16 units within the Kombi site or elsewhere within the LIZ.

[163] The court is not prepared to speculate that future residents would necessarily be accepting of a lower level of residential amenity experienced within the site. Without the condition proposed by Kombi in closing, which we find is not an appropriate condition, the reverse sensitivity effects within the site remain an extant issue.

[164] The presence of residential activities at 28 Inlet Road may also constrain the establishment of new industrial activities elsewhere within the zone, and as Mr Crimmins opined, this could result in the imposition of constraining conditions if a consent for an industrial activity is required. Such constraints are not likely to be justified but for the residential activities within the zone. There is the potential for this to occur, based on the evidence before the court.

[165] Regardless of the potential for constraints, the presence of residential activities at 28 Inlet Road may also lead to complaints. Although a business within the LIZ cannot expect to be protected from all complaints, a consequence of having to respond to the same is that additional time and compliance costs are incurred.

[166] We agree with the Council that this would be an impediment to the efficient functioning of industrial activities within the LIZ, even if that does not result in the imposition of constraints on those activities. We agree with observations of the court in *Strata Title Admin Body Corporate 176156 v Auckland Council (Strata Title)*,⁹³ a decision referred to the court by Kombi and the Council.

[167] We find that these are additional costs that businesses would not have

⁹³ *Strata Title Admin Body Corporate 176156 v Auckland Council* [2015] NZEnvC 125.

anticipated at the time they established in the LIZ and note that this was a concern expressed by Mr Monteith.⁹⁴ We also agree with the court in *Strata Title* that the occurrence of complaints could disadvantage businesses compared to other businesses operating in a LIZ.⁹⁵

On-site residential amenity

[168] For completeness, we note the Council's contention that the location and layout of the site would not afford an adequate amenity for residents of the proposed dwellings due to the adverse effects associated with the industrial activities within the zone.

[169] We do not set out our consideration of this issue in any detail, other than to note our finding that residential amenity for occupants at the site will be average at best. We find that this issue is not central to our ultimate decision not to allow the appeal, although it is further support for that outcome.

[170] We note that we share Ms Samsudeen's overarching concern that the site layout is weighted heavily in favour of the residential component, in urban design terms. Although Kombi finds no error in that, the LIZ is not intended to operate as an area where the intended mix of uses are each compromised in their functioning in order to ensure a compatible co-location in the same zone, in contrast to an objective of the Business – Mixed Use Zone where provision is made for each as a permitted activity.

[171] The imbalance is aggravated by the condition Kombi proposed in closing submissions, which seeks to restrict the range of industrial activities permitted on the site.

⁹⁴ EIC, Monteith, [15].

⁹⁵ *Strata Title* above n 93 [118] and [119].

First s104D(1) gateway

[172] We disagree with Mr Kerr-Ridge that there must be a ‘substantial’ change to the existing situation in relation to the restraining effect on new industrial development due to the residential development at Longford Park. In terms of the first gateway test in s104D(1), the relevant threshold is that any adverse effect must be minor in order to get through.

[173] Whether an effect is minor or more than that, is a matter of degree and calls for a judgment. This judgement is to be informed by the relevant plan framework, as this will reveal the significance of the adverse effects being considered.

[174] We do not accept the approach of the witnesses for Kombi that in considering the potential for constraints on industrial activities, there would have to be a *substantial* change beyond that which is already existing. An increase in the potential for constraints must be accounted for (on its own or as a cumulative effect) in our assessment of adverse effects.

[175] The reverse sensitivity effects are of significance as opposed to being “relatively small or unimportant” when considering the LIZ objectives.⁹⁶ As the reverse sensitivity effects would be more than minor, the first s104D(1) “effects” gateway is not able to be surmounted.

Second s104D(1) gateway

[176] We have read the relevant AUP provisions and consider that it contains a coherent set of objectives and policies for development within the LIZ and we have referred to that framework earlier. There is no internal conflict or tension between any of Objectives H17.2(1)-(4) and/or between any of the implementing

⁹⁶ We note these words were used in the notification context in *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC), although there are no principled reasons to treat a minor effect as meaning something different when considering s104D(1)(a).

Policies H17.3(1)-(7); all can be read together and reconciled.

[177] A fair appraisal of these provisions reveals a clear expectation that activities that may compromise the efficiency and functionality of the zone for light industrial activities will be ‘avoided’. This is expressed through Objective H17.2 and is also signalled in the zone description.

[178] This key objective for the zone is implemented by a policy suite, the more relevant of these being Policies H17.3(2) and (3) referred to earlier in our statutory “effects” assessment under s104(1)(a) and s104D.

[179] Objectives H17.2(1) and (2) and implementing Policies H17.3(1), (2), (3) and (6) are strategic in nature, in terms of the outcomes sought for the zone, whereas the others focus on amenity effects at the interface with an adjoining zone/s. We find that weight must be given to the “avoid” directive in Objectives (1) and (2) and implementing Policies (1), (2), (3) and (6) in preference to the remaining provisions in that objective and policy suite.

[180] In our “effects” assessment we have considered the evidence addressing the potential for conflict between residential and industrial uses within the zone together with the evidence as to the mitigation inherent in the formulation and design of the proposal.

[181] That assessment has informed our evaluation of the proposal in the context of this second s104D(1) gateway. Given our finding that reverse sensitivity may lead to constraints on industrial activities within the zone, a finding that Kombi’s proposal is contrary to key objectives and policies follows.

[182] We find that the proposal amounts to a direct challenge to the strategic objectives for the LIZ that:

- (a) light industrial activities locate and function efficiently within the zone (H17.2(1)); and

- (b) the establishment of activities that may compromise the efficiency and functionality of the zone for light industrial activities is avoided (H17.2(2)).

[183] The activity is also contrary to the policies that implement these objectives, being those that seek to:

- (a) avoid reverse sensitivity effects from activities that may constrain the establishment and operation of light industrial activities (H17.3(2));
- (b) avoid activities that do not support the primary function of the zone (H17.3(3)).

[184] We agree with the Council that given the “avoid” directive, the appropriate response would be to not allow the activity to occur.

[185] The proposal had been said to support the primary function of the zone.⁹⁷ The evidence about this was from Mr Maguire who in his evidence-in-chief, explains what he sees as the efficiencies to businesses of having a shared live-work arrangement on the site.⁹⁸

[186] We disagree and find that the live-work arrangement will not support the primary function of the LIZ as it will result in residential activities that are incompatible with the fundamental character of the zone and thus create the potential for reverse sensitivity effects in relation to air discharges. This, in turn, could constrain the light industrial activities on the Kombi site and the establishment of new industrial activities in the zone.

[187] It will therefore be contrary to the objectives and policies in H17, including Policy H17.3(3), which is directive and seeks to avoid activities that do not support

⁹⁷ Kombi legal submissions [32].

⁹⁸ EIC, Maguire, [7.3].

the primary function of the zone.

[188] Our conclusion cannot be overcome by a finding that the proposal is consistent with Objectives (3) and (4) and implementing Policies (4) and (6). We agree with Kombi that it is consistent with these policies due to the amenity at the interface with the adjoining reserve and Langford Park. However, these provisions do not provide an ‘enabling’ pathway for an activity otherwise captured by the plans ‘avoid’ directives.

[189] In the court’s appraisal in terms of s104D (and s104(1)(b)) Policies (4) and (6) assume lesser importance than the “avoid” provisions which must be given greater weight in this statutory evaluation.

[190] We disagree with Mr Allan that the differing s104 obligation (to “have regard to” relevant plan objectives and policies as opposed to “give effect to”) tempers the weight to be given to the “avoid” provisions, and nor does that follow from a fair appraisal of the objectives and policies.

[191] We have concluded that there is no jurisdiction to consider the merits of the proposal in terms of ss104 and 104B.

[192] Had we been able to consider the merits, the precedent effect of a grant of consent would have been a relevant matter in terms of s104(1)(c). Accordingly, we set out our views on this matter as this was an issue for the Council, given the “newly minted” state of the LIZ provisions.

Precedent effect

[193] The concern in relation to precedent is that the desire to treat like cases alike for reasons of consistency and fairness will lead to more consents being granted for non-complying activities in the future. There is no requirement to establish that other applications would have to present precisely the same factual matrix as the application presently under consideration. Broadly similar facts will

be sufficient.⁹⁹

[194] The precedent effect of a grant of consent was a concern for the Council and was considered by Ms Bedggood, as it would be the first “live-work” proposal consented under operative AUP provisions in circumstances where the opportunity for this mixed-use development is specifically provided for as a permitted activity elsewhere.¹⁰⁰

[195] We are mindful that Kombi made much of the desirability of the site location adjacent to the esplanade and the high amenity that would be provided for residential activity.

[196] The evidence from the Council planner was that it was “highly likely” that if this proposal is consented, there will be more applications seeking similar opportunities in this or other LIZ locations,¹⁰¹ including on the adjoining site at 26 Inlet Road, given that the site is indistinguishable from the Kombi site, in terms of its characteristics.

[197] Kombi witnesses agreed that the site was not unique although it is not required to be unique to avoid a precedent effect. Mr Munro, Kombi’s urban design witness described it as ‘atypical’,¹⁰² whereas Mr Kerr-Ridge considered that the site has a very unusual combination of circumstances and characteristics which make it ideally suited to the proposed use.

[198] Kombi relied on the siting and outlook of the residential component of the complex facing towards the open space and estuary adjoining the site as providing for the amenity of the residential occupants. This was also said to be one of the principal methods of managing the potential for reverse sensitivity effects.

⁹⁹ *Stirling v Christchurch City Council* (2011) 16 ELRNZ 798 HC.

¹⁰⁰ The zoning referred to the court is the Business – Mixed Use Zone, Chapter H13 AUP.

¹⁰¹ EIC, Bedggood, [112].

¹⁰² NOE, Munro, p 21.

[199] However, on the evidence before the court, we find that these features could readily be replicated in other similar LIZ locations, including within the LIZ north of the subject zone, which also borders the Pahurehure Inlet.¹⁰³

[200] The shape of the site, whilst different to others within the zone, including the adjoining site at 26 Inlet Road is not enough of a distinguishing feature on its own or in combination with the other features identified by the appellant. Nor does it rule out its use for a light industrial use, on the evidence before the court, in fact none of the site features relied upon by the appellant do that.

[201] Rather, these locational features made it particularly suitable for the “live-work” proposal being promoted for consent, or at least that is how Kombi had shaped its case.

[202] We reject the appellant’s contention that the site has distinguishing features that make it sufficiently unusual to avoid a precedent being set by a grant of consent. We accept the Council’s concern that this proposal would, if consented, have implications for the ongoing administration of the AUP.

[203] Accordingly, we conclude that as the AUP is “newly minted”, the precedent effect of a grant of consent would have been a factor counting against a grant of consent to the proposal, even if there had been jurisdiction to grant consent in terms of the discretion retained under s104.

For the court:



P A Steven
Environment Judge



¹⁰³ NOE, Kerr-Ridge, pp 84–86.