

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

**AND**

**IN THE MATTER** of the Proposed Waikato District Plan

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**STATEMENT OF EVIDENCE OF MARK NICHOLAS ARBUTHNOT FOR  
PORTS OF AUCKLAND LIMITED IN RELATION TO HEARING 9 –  
BUSINESS AND BUSINESS TOWN CENTRE**

**27 JANUARY 2020**

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## EXECUTIVE SUMMARY

- A. This statement of evidence addresses the further submissions made by Ports of Auckland Limited ("**POAL**") in relation to 'Hearing 9: Hazardous Business and Business Town Centre' of the Proposed Waikato District Plan ("**Proposed Plan**").
- B. POAL's submissions are generally supportive of the provisions of the Proposed Plan as they relate to the Business Zone and sought:
- (a) the inclusion of reverse sensitivity effects and the protection of noise sensitive activities from the effects of noise from industrial activities as matters of discretion to Rule 17.1.3 RD1 (multi-unit development);
  - (b) minor corrections to Rule 17.3.5 P1 (Horotiu Acoustic Area);  
and
  - (c) the inclusion of "no complaints" covenants to Rule 17.3.5 P1 (Horotiu Acoustic Area).

### **Rule 17.3.1 RD1 – Multi-Unit Development**

- C. POAL has sought to include reverse sensitivity and the protection of noise sensitive activities from the effects of noise generated by industrial activities as matters of discretion to Rule 17.1.13 RD1 (multi-unit development) to ensure that residential intensification does not adversely affect the ongoing development and operation of the strategic industrial node at Horotiu, noting that multi-unit residential development is enabled within the Business Zone with no density constraints (Rule 17.3.8 does not apply).
- 1.2 The overall 'urban outcome' of the Proposed Plan in respect of reverse sensitivity (as proposed to be amended by Council) is set out within Policy 4.7.11, as follows:

- (a) development and subdivision design minimise the potential for reverse sensitivity effects on adjacent sites, adjacent activities, or the wider environment; and
  - (b) potential reverse sensitivity effects of locating new sensitive land uses in the vicinity of intensive farming, extraction industry or industrial activity and regionally significant infrastructure is avoided, or minimised where avoidance is not practicable.
- D. Having regard to the above intended outcomes of the Proposed Plan, I consider it necessary for the matters of discretion for Rule 17.1.13 RD1 (multi-unit development) to explicitly include consideration of reverse sensitivity effects.

#### **Horotiu Acoustic Area**

- E. POAL has sought a minor amendment to Rule 17.3.5 P1 to reference the correct table reference (Table 11, as opposed to Table 8). This relief is recommended to be accepted.
- F. POAL has also sought the imposition of “no complaints” covenants in favour of POAL in respect of new buildings and the alteration of existing buildings within the Horotiu Acoustic Area.
- G. The purpose of the “no complaints” covenant is limited to the noise effects that could be lawfully generated by POAL at the time the agreement is entered into. It does not require parties forego any right to participate in any resource consent applications or plan changes, and as such the future rights of individuals under the RMA will remain unaffected.
- H. The proposed rule is structured such that an applicant who is subject to the Horotiu Acoustic Area provisions has the choice to not provide a “no complaints” covenant, in which case a restricted discretionary resource consent is required, with focused matters of discretion and assessment criteria and the potential for notification.

- I. My evidence sets out in detail why I consider the proposed “no complaints” covenant rule to represent an efficient and effective way to prevent reverse sensitivity issues from arising, particularly given that acoustic insulation measures do not address the external noise environment, and the subjectivity of noise complaints.

## 1. INTRODUCTION

1.3 My full name is Mark Nicholas Arbuthnot. I am a Director at Bentley & Co. Limited ("**Bentley & Co.**"), an independent planning consultancy practice based in Auckland.

### **Qualifications and experience**

1.4 My qualifications and experience are set out within my statement of evidence dated 16 September 2019 (Hearing 1 – Chapter 1 Introduction).

### **Code of conduct**

1.5 I confirm I have read the Code of Conduct for Expert Witnesses 2014 contained in the Environment Court Practice Note and I agree to comply with it. My qualifications as an expert are set out above. I confirm that the issues addressed in this brief of evidence are within my area of expertise, except where I state I am relying on what I have been told by another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.

## 2. SCOPE OF EVIDENCE

2.1 Hearing 9 addresses the submissions and further submissions that have been made on the Business and Business Town Centre provisions of the Proposed Plan.

2.2 My evidence relates to POAL's primary submission points<sup>1</sup> that have been allocated to Hearing 9 of the Proposed Plan.

2.3 POAL's submissions are generally supportive of the provisions of the Proposed Plan as they relate to the Business Zone and sought:

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<sup>1</sup> 578.84, 578.85, 578.86.

- (a) the inclusion of reverse sensitivity effects and the protection of noise sensitive activities from the effects of noise from industrial activities as matters of discretion to Rule 17.1.3 RD1 (multi-unit development);
- (b) minor corrections to Rule 17.3.5 P1 (Horotiu Acoustic Area); and
- (c) the inclusion of “no complaints” covenants to Rule 17.3.5 P1 (Horotiu Acoustic Area).

### **3. STATUTORY FRAMEWORK**

3.1 The provisions that are the subject of this hearing are district plan provisions. The purpose of a district plan is set out in section 72 of the RMA. It is to assist territorial authorities to carry out their functions in order to achieve the purpose of the RMA.

3.2 Section 75(1) of the RMA requires that a district plan must state:

- (a) the objectives for the district; and
- (b) the policies to implement the objectives; and
- (c) the rules (if any) to implement the policies.

3.3 Additionally, section 75(3) of the RMA requires that a district plan must give effect to:

- (a) any national policy statement; and
- (b) any New Zealand coastal policy statement; and
- (ba) a national planning standard;
- (c) any regional policy statement.

3.4 For the purposes of carrying out its functions under the RMA and achieving the objectives and policies of the plan, section 76(1) of the RMA enables a territorial authority to include rules in a district plan.

3.5 In preparing this evidence, I have had regard to:

- (a) POAL’s primary submission, and the primary and further submissions made by other parties;
- (b) the section 32 reports, dated July 2018; and
- (c) the section 42A report prepared by Mr Matheson, dated 18 December 2019.

3.6 I have had regard to section 32 of the RMA, which requires an evaluation of the objectives and policies and rules of the Proposed Plan that are relevant to POAL's further submissions. I have also had regard to section 32AA of the RMA, which requires a further evaluation for any changes that have been proposed since the original evaluation report under section 32 of the RMA was completed.

**4. RULE 17.3.1 RD1 – MULTI-UNIT DEVELOPMENT**

*Primary submission of POAL (578.84)*

4.1 In its primary submission (578.84), POAL sought to include reverse sensitivity and the protection of noise sensitive activities from the effects of noise generated by industrial activities as matters of discretion to Rule 17.1.13 RD1 (multi-unit development), as follows:

Activity		Council’s discretion shall be restricted to the following matters:
RD1	(a) A Multi-Unit development that meets all of the following conditions: (i) ...	(a) Council's discretion is limited to the following matters: (i) ... (x) <u>Avoidance of reverse sensitivity effects on industrial activities;</u> (xi) <u>Protection of noise sensitive activities from the effects of noise generated by industrial activities.</u>

4.2 The reasons stated by POAL for the relief relate to ensuring that residential intensification enabled under the Proposed Plan does not adversely affect the ongoing development and operation of the strategic industrial node at Horotiu. In this regard, it is noted that multi-unit



residential development is enabled within the Business Zone with no density constraints (Rule 17.3.8 does not apply).

4.3 POAL’s relief is recommended by the section 42A report (at paragraph 334) to be rejected on the basis that it is already addressed by the matters of discretion:

[334] The submission from Ports of Auckland [578.84] seeks additional matters of discretion relating to reverse sensitivity. In my opinion, the matters are already contained in Matter of Discretion (a)(vi).

4.4 Criterion (a)(vi) of the matters of discretion relates to residential amenity values, as follows:

Activity		Council’s discretion shall be restricted to the following matters:
RD1	(b) A Multi-Unit development that meets all of the following conditions: (i) ...	(a) Council’s discretion is limited to the following matters: (i) ... (vi) Amenity values for occupants and neighbours in respect of outlook, privacy, noise, light spill, access to sunlight, living court orientation, site design and layout; (vii) ...

4.5 I disagree that criterion (a)(vi) is sufficient to address matters of reverse sensitivity. The criterion requires an assessment to be undertaken of the amenity values for occupants and neighbours, which to my mind is a separate matter to the management of potential reverse sensitivity effects on industrial activities.

4.6 The overall ‘urban outcome’ of the Proposed Plan in respect of reverse sensitivity (as proposed to be amended by Council) is set out within Policy 4.7.11, as follows:

- (a) development and subdivision design minimise the potential for reverse sensitivity effects on adjacent sites, adjacent activities, or the wider environment; and
- (b) potential reverse sensitivity effects of locating new sensitive land uses in the vicinity of intensive farming, extraction industry

or industrial activity and regionally significant infrastructure is avoided, or minimised where avoidance is not practicable.

4.7 Having regard to the above intended outcomes of the Proposed Plan, I consider it necessary for the matters of discretion for Rule 17.1.13 RD1 (multi-unit development) to explicitly include consideration of reverse sensitivity effects. While POAL’s submission is focussed on the effects on industrial activities, I note that the policy framework of the Proposed Plan is not so limited, and therefore consider the following amendments to the matters of discretion to be appropriate:

Activity		Council’s discretion shall be restricted to the following matters:
RD1	(c) A Multi-Unit development that meets all of the following conditions: (i) ...	(b) Council’s discretion is limited to the following matters: (i) ... (vi) Amenity values for occupants and neighbours in respect of outlook, privacy, <u>protection from external noise sources</u> , light spill, access to sunlight, living court orientation, site design and layout; (vii) ... (x) <u>Design measures to minimise reverse sensitivity effects.</u>

4.8 With reference to section 32AA of the RMA, I am of the opinion that the amendments to Rule 17.1.13 RD1:

- (a) is the most appropriate way to achieve Objective 3.12 of the WRPS in respect of minimising land use conflicts, including minimising potential for reverse sensitivity;
- (b) is the most appropriate way to achieve Objective 4.5.30, Objective 4.6.1 and Objective 4.6.12 of the Proposed Plan in respect of reverse sensitivity and the economic growth of the district’s industry;
- (c) is an efficient and effective way of achieving the above objectives as it does not alter the overall activity status of multi-unit developments within the Business Zone and does not

place unnecessarily onerous additional assessment requirements on applicants; and

- (d) will better enable opportunities for economic growth and employment.

## 5. RULE 17.3.5 P1 (HOROTIU ACOUSTIC AREA)

*Primary submission of POAL (578.85)*

- 5.1 POAL has sought within its primary submission (578.85) a minor amendment to Rule 17.3.5 P1 to reference the correct table reference (Table 11, as opposed to Table 8). This relief is recommended to be accepted.

*Primary submission of POAL (578.86)*

- 5.2 The primary submission of POAL (578.86) has sought the imposition of “no complaints” covenants in favour of POAL in respect of new buildings and the alteration of existing buildings within the Horotiu Acoustic Area.
- 5.3 The submission of POAL is recommended by the section 42A report (at paragraph 434) to be rejected on the basis that “*The matter set out in the submission could form the basis of conditions on a resource consent application*”.
- 5.4 As discussed within the evidence of Mr Kirk,<sup>2</sup> the Waikato Freight Hub will operate 24 hours per day, 7 days per week. When complete, it will have an annual throughput of approximately 300,000 containers that are to be transported by both road and rail. This represents a significant amount of freight and is greater than the container freight volumes of the Port of Napier, Port of Otago and CentrePort (Wellington).
- 5.5 As explained by Mr Kirk,<sup>3</sup> while POAL will operate their inland freight hub activities in accordance with the resource consent that is held, the

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<sup>2</sup> Para. 2.10; Statement of evidence of Alistair Graeme Kirk for Ports of Auckland Limited in relation to Hearing 7 – Industry; 6 December 2019.

<sup>3</sup> Para. 2.12; *Ibid.*

nature of their operations is such that they are unable to reasonably internalise all of its effects within its site boundaries. For example:

- (a) Noise levels from the Waikato Freight Hub activity have the potential to exceed the notified night-time noise limits of the Proposed Plan.<sup>4</sup>
- (b) The height of the container stacking (21 metres) and multiple lighting columns (25 metres) means that such structures will be visible from beyond the boundaries of the freight hub.
- (c) The 24 hour/7 days per week operation requires the site to be illuminated at night to a level that ensures the safety of workers and will result in increased truck and rail movements.

5.6 Despite achieving compliance with the rules of the Auckland Unitary Plan – Operative in Part, from time to time the operation of the Fergusson Container Terminal at the Port of Auckland receives complaints from residential properties up to 2 to 3 kilometres away in respect of noise, lighting and the height of the container stacking.

5.7 While POAL's Waikato Freight Hub is not of the same scale as the Fergusson Container Terminal, it will still handle a greater volume of containers than the Port of Napier, Port of Otago and CentrePort, and represents a considerable level of investment by POAL. The subjective nature of complaints, combined with the fact that the freight hub is unable to internalise all its effects, is such that there is potential for reverse sensitivity effects to arise. This could in turn constrain the ability of POAL to service the region's freight needs in an efficient manner and compromise their investments at Horotiu.

5.8 In my opinion, the intensification of activities that are sensitive to industrial activities on land in close proximity to a strategic industrial node has the potential to restrict the POAL's ability to carry out the activities that are authorised to occur at the Waikato Freight Hub.

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<sup>4</sup> Statement of evidence of Christopher William Day for Ports of Auckland Limited in relation to Hearing 7 – Industrial and Heavy Industrial Zone.

- 5.9 Noise effects can be subjective and are dependent on the individual receiver of that noise. For some receivers, the provisions of Proposed Plan may not be sufficient to achieve what they believe to be a reasonable level of internal amenity, while other receivers of the same noise in the same location may not perceive there to be a significant issue. Therefore, while a technically appropriate level of internal amenity will be provided by the Horotiu Acoustic Area, complaints may still arise from some receivers.
- 5.10 Furthermore, insulation alone does not address the external noise environment. Sensitive receivers who open windows or use outside areas will be subject to greater levels of noise and reverse sensitivity effects might result. Notwithstanding the measures that are adopted by POAL to reduce the noise generated from the Waikato Freight Hub, I consider that “no complaints” covenants are an appropriate measure to clearly indicate that noise levels remain elevated in this environment, and to thereby prevent reverse sensitivity issues from arising.
- 5.11 Due to the subjective nature of noise effects, it is my opinion that when provided as part of a comprehensive package (which sets maximum limits for the noise generator, and internal acoustic insulation levels for the noise receiver), “no complaints” covenants play an important role in managing reverse sensitivity effects on an existing activity that is unable to reasonably internalise all of its effects within its site boundaries, and which is of significance to the regional economy.
- 5.12 In my opinion, including a rule in the Proposed Plan requiring “no complaints” covenants to be entered into avoids the subjective nature of complaints that otherwise have the potential to result in reverse sensitivity effects. It also provides clarity to developers and future purchasers that they are located within proximity to a strategic industrial node, in an area where existing noise levels are elevated.
- 5.13 The Proposed Plan is permissive in respect of land use activities within the Horotiu Acoustic Area, enabling “noise-sensitive activities” to establish as a permitted activity.

5.14 The fact that POAL holds a resource consent for its freight hub activities at the Horotiu Industrial Park, or is able to generate a certain level of noise by virtue of the rules of the Proposed Plan, does not prevent activities that are sensitive to noise effects from establishing within the Horotiu Acoustic Area and pursuing complaints in respect of the existing noise environment.

5.15 In my opinion, “no complaints” covenants, in combination with acoustic insulation, are the most effective way to enable a permitted activity status (or other enabling status) for such sensitive activities, while ensuring that POAL is protected from reverse sensitivity effects. I therefore support the following change to Rule 16.3.10:

P1	Construction, addition to or alteration of a building for a noise-sensitive activity within the Horotiu Acoustic Area shall be designed and constructed to achieve the internal design sound level specified in Appendix 1 (Acoustic Insulation) - Table 11.
<u>P2</u>	<p><u>Activities sensitive to noise must be subject to a restrictive no-complaint covenant in favour of Ports of Auckland Limited.</u></p> <p><u>For the purposes of this rule a ‘restrictive non-complaint covenant’ is defined as a restrictive covenant registered on the Title to the property or a binding agreement to covenant, in favour of Ports of Auckland Limited, by the landowner (and binding any successors in title) not to complain as to effects generated by the lawful operation of Waikato Freight Hub. The restrictive no-complaint covenant is limited to the effects that could be lawfully generated by the Waikato Freight Hub at the time the agreement to covenant is entered into. This does not require the covenantor to forego any right to lodge submissions in respect of resource consent applications or plan changes in relation to industrial activities (although an individual restrictive non-complaint covenant may do so).</u></p>
RD1	<p>a) Construction, addition to or alteration of a building that does not comply with Rule 16.3.10 <del>P1</del>.</p> <p>b) Council's discretion shall be restricted to the following matters:</p> <ul style="list-style-type: none"> <li>(i) On-site amenity values;</li> <li>(ii) Noise levels received at the notional boundary of the building;</li> <li>(iii) Timing and duration of noise received at the notional boundary of the building;</li> <li>(iv) Potential for reverse sensitivity effects.</li> </ul>

- 5.16 The purpose of the “no complaints” covenant is limited to the noise effects that could be lawfully generated by POAL at the time the agreement is entered into. It does not require parties forego any right to participate in any resource consent applications or plan changes, and as such the future rights of individuals under the RMA will remain unaffected.
- 5.17 The proposed rule is structured such that an applicant who is subject to the Horotiu Acoustic Area provisions has the choice to not provide a “no complaints” covenant, in which case a restricted discretionary resource consent is required, with focused matters of discretion and assessment criteria and the potential for notification.
- 5.18 I acknowledge that there are other methods available to address this matter within the Proposed Plan, including:
- (a) imposing maximum noise limits for the noise generator;
  - (b) imposing minimum acoustic insulation requirements for the noise receiver;
  - (c) creating a “buffer zone” around the Horotiu strategic industrial node to discourage the establishment of “noise-sensitive activities”; and
  - (d) imposing more onerous activity statuses on “noise-sensitive activities” within the Horotiu Acoustic Area.
- 5.19 As I have discussed at paragraph 5.10 above, I do not consider the measures set out at 5.18(a) and (b) above to be sufficient on their own to prevent reverse sensitivity effects from arising.
- 5.20 In terms of 5.18(c), I do not consider the creation of a “buffer zone” that discourages “noise-sensitive activities” to be an efficient use of land.
- 5.21 With reference to 5.18(d), a more onerous activity status would only serve to reduce certainty as to process for applicants, while at the same time increase the potential for appeals and litigation. This would

have the corresponding effect of increasing the time and cost of consenting for all parties involves.

5.22 For all of the above reasons, I consider that the proposed “no complaints” covenant rule for the Horotiu Acoustic Area is a valid planning tool that is available to Council.

5.23 Having regard to all of the above matters, and with reference to section 32AA of the RMA, the proposed “no complaints” covenant rule will achieve the sustainable management purpose of the RMA as it will:

- (a) provide clarity to developers and future purchasers that they are located within proximity to the Horotiu strategic industrial node, in an area where existing noise levels are elevated;
- (b) reduce the need for litigation, thereby reducing the time and costs associated with obtaining or participating in a resource consent, and increasing certainty as to process for all parties concerned;
- (c) negate the need for a “buffer area” to be established to discourage “noise-sensitive activities” from being developed or intensified in this location (and thus avoiding the need to compromise efficient use and development of the area); and
- (d) overall, it will protect POAL from reverse sensitivity effects, while providing a clear and effective regime that provides developers with appropriate flexibility.

5.24 I consider that the proposed rule will appropriately give effect to Objective 3.12(g) of the WRPS, and Objective 4.5.30, Objective 4.6.1, Objective 4.6.10 and Objective 4.6.12 of the Proposed Plan (as proposed in evidence by Council).

5.25 I do not consider that there are any other reasonably practicable options to prevent reverse sensitivity issues from arising in respect of the existing noise environment within the Horotiu Acoustic Area.



- 5.26 In my opinion, the proposed “no complaints” covenant rule represents an efficient and effective way to prevent reverse sensitivity issues from arising, particularly given that acoustic insulation measures do not address the external noise environment, and the subjectivity of noise complaints.
- 5.27 While the proposed “no complaints” covenant rule will impose some additional costs on applicants and POAL in terms of legal fees, in my opinion the benefits of the rule and the efficiencies to the consenting process (in terms of reducing the need for and cost of litigation) will outweigh these costs.

**Mark Nicholas Arbuthnot**

**27 January 2020**