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Proposed Plan Change 2 - Pukehangi Heights - Speedway Noise and Reverse Sensitivity

INTRODUCTION

1. You have asked us to provide advice regarding the scope of relief that can be recommended in response to the submission by Rotorua Stockcar Club Inc on Proposed Plan Change 2 – Pukehangi Heights (“PC2”).
2. You have provided to us a copy of a report by James Bell-Booth of Marshall Day (dated 20 August 2020) which recommends a number of noise mitigation rules be included in PC2.
3. In summary, we consider that the submission by Rotorua Stockcar Club Inc gives Council jurisdiction to make changes to PC2 to enable consideration of reverse sensitivity issues including the use of Indicative Speedway Noise Areas and the addition of new performance standards requiring air conditioning for dwellings within the 60-65dB or the over 65dB Noise Areas. While we consider incorporating no complaints covenants on property titles to be technically within the scope of the submission, we do not recommend this approach for the reasons set out in paragraph 24(c) below.

BACKGROUND

4. PC2 seeks to provide for future urban growth within the Pukehangi Heights Development Area (“Development Area”). The Plan Change rezones land within the Development Area to a mixture of Rural 1, Rural 2 and Residential 1 to reflect the landscape characteristics of the area. The Plan Change introduces new objectives, policies, rules and assessment criteria for development within the Development Area.
5. Appendix 11: Te Hoihoi – Noise of the Operative Rotorua District Plan (as amended by Plan Change 4) contains objectives and policies relating to reverse sensitivity, and to achieving an appropriate noise environment. In particular:

Objective A11.3.2	Existing and permitted activities in the central city, rural and industrial zones are protected from noise reverse sensitivity.
Policy 11.3.2.4	Limit the location of new residential activities sensitive to disturbance from lawfully established urban and rural industries, recreation and infrastructure activities and network utilities to avoid reverse sensitivity effects.
Objective A11.3.1	A noise environment consistent with the character and amenity expected for the zone.
Policy 11.3.1.2	Avoid the potential adverse effects of noise on noise sensitive activities by ensuring at time of zoning the potential for noise reverse sensitivity is taken into account.

6. In addition, Chapter 9: Taiwhenua - Rural contains the following objective and policy:

Objective 9.3.4	New sensitive activities are located and managed to avoid potential reverse sensitivity effects on lawfully established activities in the rural environment.
Policy 9.3.4.1	Avoid reverse sensitivity effects on lawfully established rural industries, recreation, farming activities, infrastructure and network utilities by managing the location of new activities and buildings.

7. The Council's Section 32 report on PC2 considered the issue of reverse sensitivity at Section 4.16 (page 20). The report recorded that:

The Development Area bounds several areas with activities that may result in reverse sensitivity effects from urbanisation, including:

- Rural production land;
- Revegetation areas (Parklands);
- Motor Racing (Paradise Valley Speedway).

8. In respect of potential reverse sensitivity effects on the Speedway, the report concluded that:

The site is well screened by from (*sic*) noise at Paradise Valley Speedway by land form, and these temporary effects are expected to be within an acceptable range.

9. A submission was lodged on PC2 by Rotorua Stockcar Club Inc ("Stockcar Club"). The submission states:

Submission: That the rezoning takes into consideration that the Rotorua Stockcar Club Inc has Existing Use Rights which was initially granted in 1970 to race Stockcars on their property at 105 Paradise Valley Road. This racing may result in an increased noise level in the area to be rezoned and that needs to be considered in any future plans for this area.

Decision sought from the Council: That any title issued includes a proviso that we have Existing Use Rights.

10. Council has engaged Marshall Day to investigate the potential for noise emissions from the Rotorua Speedway and the potential reverse sensitivity effects on the Rotorua Car Club as a result of PC2. We note that, as the Speedway is not currently operating, Marshall Day's assessment is based on an interview with the Rotorua Car Club regarding the frequency of

events and the types of vehicles used, and noise recordings made previously at comparable race tracks.

11. Marshall Day's conclusions regarding the noise effects on the Development Area are:

Therefore, based upon:

- the conservatively calculated speedway noise levels, and
 - the intensity, frequency and duration of the current, and likely future, activity that occurs at the speedway,
- we consider that the noise levels received within PPC2 are reasonable but may cause annoyance to some of the new residents.

12. In respect of potential reverse sensitivity effects the report concludes:

However, new receivers, who move in to the PPC2 zones, may come with a different level of expectation. These new receivers give rise to the potential for reverse sensitivity effects upon the speedway.

Whilst the speedway is considered to be generating reasonable noise levels when received in the PPC2 area, there is a risk of new residents of the area becoming annoyed by the noise and complaining.

13. As a result of these conclusions, the report recommends the following changes to PC2:

- (a) Identification of Indicative Speedway Noise Areas;
- (b) Additional rules requiring air conditioning for dwellings within the 60-65dB and over 65dB noise areas (equivalent to rules applying within the Airport Noise Controls); and
- (c) Incorporating a no complaints covenant on property titles (either applying to the whole Development Area or to the 55-60dB, 60-65dB and over 65dB Noise Areas).

14. You have asked us to consider the extent to which the Council can include these types of rules in PC2 as a result of the submission by the Stockcar Club.

JURISDICTION TO AMEND PC2

15. Submissions on PC2 are made under clause 6 of Schedule 1 of the Resource Management Act 1991 ("RMA"):

Once a proposed ... plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

16. The role of the Council (or Commissioners) is to hear submissions on PC2 and give a decision on the provisions and matters raised in submissions.¹

17. In terms of the Council's jurisdiction to make changes to PC2 in response to a submission:

- (a) A submission must first be "on" PC2; and
- (b) The changes made to PC2 must be within the scope of the submission.

¹ Sch 1, cl 8(B) and 10(1) of the RMA.

Whether a submission is “on” PC2

18. The leading authority² on whether a submission is “on” a variation or plan change is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council*.³ It set out a two limb test:⁴
 - (a) Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed plan change; and
 - (b) Whether there is a real risk that people affected by the plan change (if modified in response to the submission), would be denied an effective opportunity to participate in the plan change process.
19. A submission can only fairly be “on” a proposed plan change if it meets both these limbs. The *Clearwater* test has been adopted in a number of High Court decisions.
20. The change to the pre-existing status quo that is made by PC2 is the rezoning of land in the vicinity of the Speedway from Rural 1 to a mixture of Rural 1, Rural 2 and Residential 1. The consequence of the rezoning is the potential for an increase in the number of dwellings located within the vicinity of the Speedway. The Operative District Plan recognises the need to ensure that new development avoids reverse sensitivity effects on lawfully established activities, and the need to ensure that new residential zones enjoy an appropriate noise environment. As a result, the submission by the Stockcar Club seeking that the rezoning take into consideration the noise effects of a lawfully established activity can be considered to be a submission “on” PC2. This is supported by the fact that the issue was considered in the Council’s Section 32 report. Accordingly, the submission must be considered by the Council as part of the hearing on PC2.

Whether a change to PC2 is within the scope of the submission

21. The test laid down by the High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*⁵ is whether an amendment made to a proposed plan as notified is “reasonably and fairly raised in submissions” on the proposed plan. This was endorsed by the High Court in *Albany North Landowners v Auckland Council*⁶.
22. The Courts have also stated that whether any amendment is reasonably and fairly raised in the course of submissions should be approached “in a realistic and workable fashion, rather than from the perspective of legal nicety”⁷. The “workable” approach requires the Council to take into account the whole relief package detailed in each submission⁸.
23. In accordance with these principles, the Stockcar Club submission seeks:
 - (a) That the rezoning takes into consideration that the Speedway is a lawfully established activity on the property at 105 Paradise Valley Road. We have previously confirmed

² As confirmed by the High Court in *Turners & Growers Ltd v Far North District Council* [2017] NZHC 764.

³ *Clearwater Resort Ltd v Christchurch City Council* AP 34/02, 14 March 2013, Young J.

⁴ At [66]

⁵ *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 166.

⁶ *Albany North Landowners v Auckland Council* [2017] NZHC 138, Whata J. This case concerned the Proposed Unitary Plan.

⁷ *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* [2012] NZRMA 552 at [13], confirmed by the High Court in *Albany North Landowners v Auckland Council* [2017] NZHC 138.

⁸ *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [31].

in our letter of 17 June 2020 that the Speedway operates in reliance on a resource consent granted in 1981. Whether this has been correctly referred to in the submission is in our view an issue of “legal nicety” which should not detract from the clear intent of the submission;

- (b) That PC2 recognise that racing may result in an increased noise level in the area to be rezoned that needs to be considered in any future plans for the area; and
- (c) That the submitter’s concerns would be met by including on any title issued a proviso that the Speedway has existing use rights. While the submission specifies a possible decision by Council, we do not consider that this is the only relief that can be imposed as a result of the submission. It is not uncommon for lay submitters to seek a form of relief that cannot in fact be imposed as part of the plan change process, and for a more suitable method to be identified in the course of the hearing and decision process that addresses the matters raised in the submission.

24. Having regard to the submission by the Stockcar Club we have considered whether the Council has jurisdiction to amend PC2 in the manner proposed by the Marshall Day report. We note that we have only considered the issue of jurisdiction, and have not considered the merits of the approach proposed or whether there is sufficient evidence to justify the approach. We comment on each of the proposed methods below:

- (a) **Identification of Indicative Speedway Noise Areas in PC2:** We consider that the identification of Indicative Speedway Noise Areas on a plan within PC2 is not outside the jurisdiction of the submission, as it has the effect of identifying those parts of the Development Area that are subject to increased levels of noise from the Speedway, which directly responds to the Stockcar Club submission. However, we comment more specifically on the rules which are proposed to apply as a result of the Noise Areas below.
- (b) **Additional rules for dwellings within the 60-65dB and over 65dB Noise Areas:** We consider that Council has jurisdiction to impose additional performance standards for new dwellings within the 60-65dB and over 65dB Noise Areas to ensure that dwellings can achieve an appropriate internal noise environment. This makes provision for the increased noise levels in the area as sought in the Stockcar Club’s submission. As any application which did not meet the specified performance standard would be assessed as a restricted discretionary activity, it may also be appropriate to include specific assessment criteria to ensure that issues of reverse sensitivity and an appropriate noise environment can be considered where the performance standards are not met.
- (c) **Incorporate a no complaints covenant into the property title:** A covenant registered on the title preventing a land owner from complaining about a lawfully established activity is sometimes imposed as a condition of a resource consent where the effect of the consent is to bring noise sensitive activities (such as residential development) into the vicinity of noise generating activities (such as quarries or airports). These covenants are generally imposed with the agreement of the applicant, and the Court has questioned whether such covenants can be imposed in the absence of

agreement⁹. The Marshall Day report proposes that ideally this requirement would apply to all land within the Development Area, or at the very least to the land falling within the 55-60dB, 60-65dB and over 65dB Noise Areas.

As a question of jurisdiction, it would be possible to include as a performance standard for subdivision within the 55-60dB, 60-65dB and over 65dB Noise Areas a requirement that a covenant or consent notice be registered acknowledging the location of the Speedway in the vicinity, and preventing future complaints about the lawful operation of the Speedway. This would directly respond to the relief sought by the Stockcar Club in its submission. However, given the doubts expressed by the Court in respect of requiring landowners to enter into a covenant, we consider that a better approach would be to include assessment criteria specifically enabling consideration by Council of whether reserve sensitivity effects are likely to occur, and whether an appropriate noise environment can be achieved, on an application for subdivision. This would provide an opportunity for a no complaints covenant or consent notice to be imposed as a condition of consent, with the agreement of the applicant, as a means of addressing these effects.

ALTERNATIVE METHODS

25. In addition to the methods proposed by Marshall Day, you have asked us to consider whether Council has jurisdiction to include a policy to consider mitigation options for the reverse sensitivity issue. This would apply where a restricted discretionary consent was required as the PC2 assessment criteria include reference to the policies.
26. In our view the addition of a policy and, in effect, assessment criteria relating to reverse sensitivity and the need to establish an appropriate noise environment within the Development Area are within the scope of the Stockcar Club submission as they allow consideration of the increased noise levels in the area when future development is proposed. However, these provisions will only apply where resource consent is required (including subdivision) and will not impose any additional obligations on permitted activities.

CONCLUSION

27. In our opinion Council has jurisdiction to make changes to PC2 to enable consideration of reserve sensitivity issues as a result of the submission by the Stockcar Club. Any proposed changes to PC2 would also need to be evaluated as required by section 32AA of the RMA.
28. Please contact us if you would like to discuss any aspect of our advice.

Yours sincerely



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⁹ *Ports of Auckland Limited v Auckland City Council* [1999]1 NZLR 601 at 612; *Winstone Aggregates v Matamata-Piako District Council* (2004)11 ELRNZ 49 at 59 and 60.