

IN THE MATTER OF

the Resource Management Act 1991

AND

IN THE MATTER OF

Proposed (Private) Plan Change 40
to the Upper Hutt City District Plan:
Wallaceville

SUBMITTER

**MINISTRY FOR PRIMARY
INDUSTRIES**

**CLOSING LEGAL SUBMISSIONS ON BEHALF OF
MINISTRY FOR PRIMARY INDUSTRIES**

Introduction

- 1 The MPI site contains laboratory and research facilities. The facilities at the MPI site (and the activities undertaken there) are unique in New Zealand and are of national importance. It is vital that these not be constrained by new development on surrounding land.
- 2 The applicant and MPI reached agreement (immediately prior to the commencement of the hearing) as to the mandatory mitigation required on the plan change site to address MPI's reverse sensitivity concerns. The mitigation measures reflect the applicant's acceptance that noise levels from activities on the MPI site will not exceed 55dB $L_{Aeq(15 \text{ min})}$ at any time and 75dB L_{Amax} (10pm to 7am the following day), rather than 45dB as the applicant expected when the plan change was notified.

The Mitigation Measures

- 3 The mandatory mitigation measures are as follows:

Within the Wallaceville Structure Plan Area:

- (a) A 2m high close boarded fence shall be erected along the boundaries of a site where it adjoins a site designated as MAF1. The fence shall be constructed of materials having superficial mass of not less than 10kg per square metre and shall be constructed prior to occupation of buildings on the site

(proposed permitted and controlled activity standard 18.16C (Chapter 18 - Residential Zone) and 20.17A (Chapter 20 - Business Zone) in PPC40 as notified);

- (b) Sleeping rooms and studies in buildings within 50m of a site designated MAF1 shall have a positive supplementary source of fresh air ducted from outside at the time of fit-out. For the purposes of this requirement, a sleeping room is any room intended to be used for sleeping. The supplementary source of air is to achieve a minimum of 7.5 litres per second per person. A ventilation standard for permitted and controlled activities was included in Chapter 18 - Residential Zone in PPC40 as notified (standard 18.16A) and relates to 'sleeping rooms and studies'. The ventilation requirement applies to all 'habitable rooms' in the Business Zone (20.14A);
 - (c) Windows in buildings within 25m of a site designated as MAF1 which have an aspect to a site designated as MAF1 (including windows on the sides of buildings where those windows have an aspect to a site designated as MAF1) shall be non-opening, except for the existing Buddle Building which is exempt from this requirement;
 - (d) Buildings in the Urban Precinct and Grants Bush Precinct within 25m of a site designated as MAF1 shall not exceed a single storey and shall have a maximum building height of 5 metres. The same requirement applies to any buildings in the Gateway Precinct used for residential purposes or people sleeping overnight.
- 4 The applicant and MPI have agreed that this mandatory mitigation will be recorded by way of a covenant on the title to the plan change land.
- 5 However MPI also seeks that the mitigation be included within the Plan. I understand that the applicant's position is that 3(a) and (b) should be included in the Plan but that 3(c) and (d) should not. I understand that the Council (Mr Taylor) is neutral as to whether 3(c) and (d) are included in the Plan, but that if they are to be included, they should be supported by a new policy.

- 6 Thus the two outstanding issues between the parties are:
- (a) Whether 3(c) and (d) should be required in the Plan; and
 - (b) How non-compliance with the standards should be dealt with in the Plan.

Should 3(c) and (d) be Standards in the Plan?

- 7 MPI maintains that 3(c) and (d) should be required in the Plan, for the following reasons:
- (a) It is settled law that reverse sensitivity is itself an adverse effect in terms of s3 of the RMA¹. That has a significant consequence. If reverse sensitivity is an adverse effect, then there is a duty (subject to other statutory directions) to avoid, remedy or mitigate it, so as to achieve the Act's purpose of sustainable management²;
 - (b) Mitigation which is necessary to address reverse sensitivity effects can (and should) be dealt with under the RMA and therefore addressed in the Plan;
 - (c) The control of effects of the development of land is clearly within the Council's s31 functions, and the purpose of the Plan is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act (s72);
 - (d) Proposed rules must be evaluated as to whether they are the "most appropriate" method for achieving the objectives of the proposal, having regard to their "efficiency and effectiveness" (s32(1)(b)(ii)). It is inefficient for applicants to be able to apply for (and require the Council to process) an application for resource consent which can never be implemented;
 - (e) Inclusion of all of the required mitigation measures in the Plan is necessary (in the sense of being desirable and expedient,) and better meets the purpose of sustainable management;

¹ *Winstone Aggregates & Auckland Regional Council v Papakura District Council* (A49/02) at [12]

² *Winstone Aggregates v Matamata-Piako District Council* (2004) 11 ELRNZ 48 at [3]

- (f) Plan users should be able to identify in the Plan the controls which apply to development, particularly when matters such as building height and ventilation (to which the requirement for non-opening windows is related) are already expressly dealt with in the Plan.

Non-compliance with Standards

Residential Zone

- 8 A range of residential activities are listed in Table 18.2 of PPC40 (as notified) as being permitted or controlled subject to meeting the relevant standards for permitted and controlled activities. These include one dwelling per site, two or more dwellings on a site which complies with the minimum net site area, rest homes and community care housing. Few non-residential activities are permitted or controlled activities in the Residential zone.
- 9 Comprehensive Residential Development on a site within a Residential Centres Overlay Area which complies with the standards and terms of Rule 18.28A is a restricted discretionary. The standards and terms of Rule 18.28A include compliance with the maximum building height standard of Rule 18.15, the ventilation standards of Rule 18.16A and the fencing standards of Rule 18.16C. Rule 18.28A requires applications to be processed on a non-notified basis.
- 10 Comprehensive Residential Development on a site within a Residential Centres Overlay Area which does not comply with the standards and terms of Rule 18.28A is a discretionary activity.
- 11 Activities listed in Table 18.2 as permitted or controlled which do not comply with the relevant standards in Chapter 18, or which are not listed in the table, are also discretionary activities.

- 12 A number of land use activities are listed in Table 20.2 of PPC40 as notified as being permitted subject to meeting the relevant standards. These include:
- (a) Retail activity, restaurants, offices, early childhood centres and residential accommodation above ground level in the Gateway Precinct; and
 - (b) Visitor accommodation.
- 13 Garden centres and all other activities other than retail activity, restaurants, office, early childhood centres and residential accommodation above ground level in the Gateway Precinct are discretionary activities.
- 14 Buildings which do not comply with the permitted or controlled activity standards are a restricted discretionary activity.
- 15 There is text missing from the new rule relating to new buildings or significant exterior alterations to existing buildings in the Wallaceville Structure Plan Area but these appear to be a restricted discretionary activity, applications for which are to be processed on a non-notified basis (except that notice is to be given to Heritage NZ in certain circumstances).
- 16 Activities listed in Table 20.2 as otherwise permitted or controlled which do not comply with the relevant standards in Chapter 20 are discretionary activities.

Land Use/Development on Sensitive Land On the MPI Boundary

- 17 MPI seeks (as suggested by Ms Boyd during the hearing) that land use within 50m of the MPI boundary which would otherwise be permitted require resource consent as a controlled activity in order that the Council can ensure that the relevant standards are in fact achieved. This is important as otherwise, neither the Council nor MPI will have any oversight as to whether the standards in relation to windows and ventilation are met.

- 18 Requiring resource consent for development on the sensitive land will impose very little additional burden on an applicant as they will need to apply for subdivision consent (as a minimum) in any event.
- 19 MPI seeks that non-compliance with the relevant standards on the sensitive land be a prohibited activity (as also suggested by Ms Boyd) so that the mitigation requirements cannot be overcome by way of resource consent application (as the Plan currently allows).
- 20 The Act clearly provides for prohibited activity status as one of the tools in a local authority's toolbox³. Such status is appropriate in situations where the effects of particular activities are unacceptable and ensures no resource consent can be granted for particular activities under any circumstances.
- 21 In *Coromandel Watchdog of Hauraki Inc. v Chief Executive of the Ministry of Economic Development*⁴, the Court of Appeal confirmed that a prohibited activity is one for which resource consent is not available, and puts those relying on the Plan on notice that an activity is prohibited for the life of the Plan⁵. It held that:

In addition to the cost/benefit analysis required by s32, there are a number of other requirements which must be met by a local authority in preparing its district plan. When determining which of the activity types referred to in s 77B should be applied to a particular activity, the local authority must have regard not only to the cost/benefit analysis undertaken pursuant to s 32, but also to its functions under s 31, the purpose and principles set out in Part 2 of the Act, particularly the sustainable management purpose described in s 5, the matters which it is required to consider under s 74, and, in relation to rules, the actual or potential effect on the environment of activities including, in particular, any adverse effects (s 76(3))⁶.

- 22 In the case of PPC40, non-compliance with the relevant standards within 50m of the MPI site should be a prohibited activity because:

³ *Robinson v Waitakere City Council (No 8)* A003/09 at [1118]

⁴ 13 ELRNZ 279

⁵ at paragraphs 40 and 41

⁶ at paragraph 31

- (a) In terms the cost/benefit analysis required by s32, it would be inefficient to require the Council to process an application for resource consent to avoid the relevant standards when that application could never be given effect to (by virtue of the terms of the covenant). In terms of benefits, prohibited activity status for non-compliance with the relevant standards provides certainty that the mitigation measures are the minimum requirements of developing in that location. It is important that the Plan be absolutely clear that applications to avoid the minimum mitigation measures (and expose future residents of the PPC40 land to a lower level of amenity) will not be considered in any circumstances. In terms of effects, the mitigation measures represent environmental bottom lines which cannot be avoided;
- (b) As noted above, control of any actual or potential effects of development of land is clearly within Council's functions under s31;
- (c) For the reasons set out in (a) above, prohibited activity status for non-compliance with the relevant standards better achieves the purpose and principles set out in Part 2 of the Act, particularly the sustainable management purpose described in s5;
- (d) The matters which the Council is required to consider under s74 (particularly its functions under s31, the provisions of Part 2 and its obligations under s32) are also addressed above;
- (e) In terms of the actual or potential effect on the environment of activities including, in particular, any adverse effects (s 76(3)), the standards reflect the minimum mitigation required to enable development to occur within very close proximity of the MPI boundary and to ensure that the effects of that development are acceptable, both in terms of avoiding reverse sensitivity effects but also in terms of ensuring a certain level of amenity is achieved for future residents of the PPC40 site. The Act allows a rule to make different provision for different areas (s76(4)), and prohibited activity status is only sought for non-compliance

with the relevant standards on the sensitive land on the MPI boundary.

- 23 Amendments to the Plan to include the mitigation measures set out in paragraphs 3(c) and (d) of these submissions, to require resource consent to be obtained as a controlled activity for development within 50m of a site designated MAF1 and to provide that non-compliance with those standards is a prohibited activity, are set out in the Appendix attached to these submissions. A new policy to support the rules is also included.

DATED this 27th day of July 2015

A handwritten signature in blue ink, appearing to read "M A Thomas".

M A Thomas

Counsel for Ministry for Primary Industries

Appendix - Plan Amendments

The amendments sought in PPC40 as notified or as agreed to be amended by the applicant and the Council (if the provisions as notified have been superseded) are shown in black and underlined.

The amendments to that text, or new text sought by MPI, is shown in red, and struck out or underlined.

Chapter 4: Residential Zone

[AMENDMENT 3]

Objective 4.3.5

To promote the sustainable management and efficient utilisation of land within the Wallaceville Structure Plan area, while avoiding, remedying or mitigating adverse effects.

The Wallaceville Structure Plan Area comprises a mix of residential and commercial zoning and provides opportunity for higher density living. It has a number of site specific values, constraints and opportunities. It is also a very important land resource within the City's urban boundary. Its development should therefore occur in a manner that is consistent with the Structure Plan, in an integrated way that does not compromise the amenity or servicing requirements of future development stages. Particular regard must be paid to the potential for reverse sensitivity issues arising from interfaces with adjoining land uses.

The Wallaceville Structure Plan was developed to provide for the development of the Wallaceville Structure Plan Area in a logical and coherent manner that takes into account the historical, cultural, environmental and landscape characteristics of the area. The Structure Plan has been adopted by the Council as the guiding document for the development of this area and as such all development should be guided by this document as to what is appropriate. The intentions and outcomes for each of the precincts contained in the Structure Plan provide an outline of the development that the Structure Plan is seeking to achieve. These are the key considerations for development in this area.

Policy 4.4.17

Avoid development which does not achieve the permitted and controlled activity standards in relation to fencing, windows and ventilation, and building height in the Wallaceville Structure Plan Area within 50m of a site designated as MAF1.

The Wallaceville Structure Plan Area adjoins land designated MAF1. The National Centre for Biosecurity and Infectious Disease operates on the MAF1 site. The activities authorised by the MAF1 designation are unique in New Zealand, and are of national importance. It is important that these are not constrained by development in the Wallaceville Structure Plan Area. Standards have therefore been imposed (in relation to fencing, windows and ventilation and building height) to avoid reverse sensitivity effects, particularly as a result of noise from activities which may be undertaken on the MAF1 designated site. The standards are the minimum mitigation measures required to address those effects and ensure an appropriate level of amenity for residents within the Structure Plan Area. Therefore non-compliance with those standards is a prohibited activity.

Chapter 6: Business Zone

The same or a similar objective to Objective 4.3.5 should be included in Chapter 6: Business Zone and a new policy inserted into Chapter 6 (as per Policy 4.4.17 above) to give effect to that objective.

Chapter 18: Residential Zone Rules

Add to Table 18.2 (Land Use Activities) (For Both Residential and Non-Residential Activities):

<p><u>Activities listed as permitted which are to be undertaken within the Wallaceville Structure Plan area and within 50m of a site designated MAF1.</u></p>	<p><u>Controlled</u></p>
<p><u>Activities within the Wallaceville Structure Plan area and within 50m of a site designated as MAF1, whether listed in this table or not, which do not comply with all of the following standards:</u></p> <ul style="list-style-type: none"> • <u>18.15 (height);</u> • <u>18.16A (windows and ventilation); and</u> • <u>18.16C (fencing).</u> 	<p><u>Prohibited</u></p>

Standards for Permitted and Controlled Activities

<p>18.15</p> <p><u>Objective 4.3.5,</u></p> <p><u>Policies 4.4.2, 4.4.4, 4.4.17</u></p>	<p>Building height</p> <p>The maximum height of any building <u>not within the Wallaceville Structure Plan Area and within 25m of a site designated as MAF1</u> shall not exceed 8m.</p> <p><u>Buildings within the Wallaceville Structure Plan Area and within 25m of a site designated as MAF1 shall be limited to a single storey and shall not exceed 5m in height.</u></p> <p>Exemptions:</p> <p><u>[AMENDMENT 21]</u></p> <p><u>The maximum height of any New buildings as part of a Comprehensive Residential Development in the Urban Precinct of the Wallaceville Structure Plan Area which are not within 25m of a site designated as MAF1 where the maximum height of any building shall not exceed 10m.</u></p> <p>Chimneys, flues and minor decorative features may exceed the maximum height by up to 1m.</p>
<p>18.16A</p> <p><u>Objective 4.3.5</u></p> <p><u>Policy 4.4.17</u></p>	<p><u>[AMENDMENT 23]</u></p> <p><u>Windows and Ventilation</u></p> <p><u>Within the Wallaceville Structure Plan Area, windows in buildings within 25m of a site designated as MAF1 which have an aspect to a site designated as MAF1 (including windows on the sides of buildings where those windows have as aspect towards a site designated as MAF1) shall be non-opening. For the purposes of this requirement, a sleeping room is any room intended to be used for sleeping.</u></p> <p><u>Within the Wallaceville Structure Plan Area, where:</u></p> <ol style="list-style-type: none"> <u>1. sleeping rooms and studies where openable windows are proposed in dwellings within 20m of the Alexander Road boundary or 50m of the rail corridor (designation TZR1); or</u> <u>2. sleeping rooms and studies where openable windows are proposed in dwellings buildings within 50m of a site designated as MAF1;</u>

	<p><u>a positive supplementary source of fresh air ducted from outside is required at the time of fit out. For the purposes of this requirement, a sleeping room is any room intended to be used for sleeping. The supplementary source of air is to achieve a minimum of 7.5 litres per second per person.</u></p>
--	---

<p>18.16C <i>Objective</i> 4.3.5 <i>Policy 4.4.17</i></p>	<p>[AMENDMENT 24] Fencing Within the Wallaceville Structure Plan Area:</p> <ul style="list-style-type: none"> • <u>a 1.5m close boarded fence shall be erected along the boundaries of a site where it adjoins a site designated for railway purposes (designation TZR1). The fence shall be constructed of materials having superficial mass of not less than 10kg per square metre and shall be constructed prior to the occupation of dwellings on the site.</u> • <u>a 2m high close boarded fence shall be erected along the boundaries of a site where it adjoins a site designated as MAF1. The fence shall be constructed of materials having superficial mass of not less than 10kg per square metre and shall be constructed prior to occupation of dwellings buildings on the site.</u> • <u>fences along front yards of sites within the Urban Precinct and Grants Bush Precinct must not exceed a maximum height of 1.5m.</u>
---	--

Chapter 20: Business Zone Rules

Add to Table 20.2 (Land Use Activities):

<p><u>Activities listed as permitted which are to be undertaken within the Wallaceville Structure Plan area and within 50m of a site designated MAF1.</u></p>	<p>Controlled</p>
<p><u>Any activities within the Wallaceville Structure Plan area and within 50m of a site designated MAF1 which do not comply with all of the following standards:</u></p> <ul style="list-style-type: none"> • <u>20.10 (height);</u> • <u>20.14A (windows and ventilation); and</u> • <u>20.17 (fencing).</u> 	<p>Prohibited</p>

Standards for Permitted and Controlled Activities

<p>20.10</p> <p><u>[Chapter 6 equivalent of Objective 4.3.5],</u> <u>Policy 6.4.4,</u> <u>[Chapter 6 equivalent of Policy 4.4.17]</u></p>	<p>Building height</p> <p>The maximum height of any building in the following areas shall not exceed:</p> <table border="1" data-bbox="448 383 1321 1021"> <tr> <td data-bbox="448 383 960 600"> Business Commercial (except CBD) <u>except for new buildings in the Gateway Precinct of the Wallaceville Structure Plan Area which are within 25m of a site designated MAF1</u> </td> <td data-bbox="960 383 1321 600"> 8m </td> </tr> <tr> <td data-bbox="448 600 960 723"> CBD (except for northern side of Main Street) </td> <td data-bbox="960 600 1321 723"> 40m </td> </tr> <tr> <td data-bbox="448 723 960 837"> CBD (northern side of Main Street only) </td> <td data-bbox="960 723 1321 837"> 20m </td> </tr> <tr> <td data-bbox="448 837 960 929"> Business Industrial </td> <td data-bbox="960 837 1321 929"> 12m </td> </tr> <tr> <td data-bbox="448 929 960 1021"> Business Industrial zone located on Eastern Hutt Road </td> <td data-bbox="960 929 1321 1021"> 15m </td> </tr> </table> <p><u>New buildings in the Gateway Precinct of the Wallaceville Structure Plan Area within 25m of a site designated MAF1 used for residential purposes or people sleeping overnight shall not exceed a single storey and shall have a maximum height of 5 metres.</u></p> <p>Exemption:</p> <p>Chimneys, smoke stacks and similar structures in the Business Industrial Sub-zone shall not exceed 30m in height.</p>	Business Commercial (except CBD) <u>except for new buildings in the Gateway Precinct of the Wallaceville Structure Plan Area which are within 25m of a site designated MAF1</u>	8m	CBD (except for northern side of Main Street)	40m	CBD (northern side of Main Street only)	20m	Business Industrial	12m	Business Industrial zone located on Eastern Hutt Road	15m
Business Commercial (except CBD) <u>except for new buildings in the Gateway Precinct of the Wallaceville Structure Plan Area which are within 25m of a site designated MAF1</u>	8m										
CBD (except for northern side of Main Street)	40m										
CBD (northern side of Main Street only)	20m										
Business Industrial	12m										
Business Industrial zone located on Eastern Hutt Road	15m										

<p>20.14A</p> <p><u>[Chapter 6 equivalent of Objective 4.3.5],</u> <u>[Chapter 6 equivalent of Policy 4.4.17]</u></p>	<p>[AMENDMENT 40]</p> <p><u>Windows and Ventilation</u></p> <p><u>Within the Wallaceville Structure Plan Area, windows in all buildings (except the building constructed in 1973 known as Buddle Block¹) within 25m of a site designated as MAF1 which have an aspect to the MAF1 site (including windows on the sides of buildings where those windows have an aspect to a site designated as MAF1) shall be non-opening. For the purposes of this requirement, a sleeping room is any room intended to be used for sleeping.</u></p> <p><u>Within the Wallaceville Structure Plan Area, habitable rooms must have a positive supplementary source of fresh air ducted from outside is required at the time of fit-out. The supplementary source of air is to achieve a minimum of 7.5 litres per second per person.</u></p>
--	---

¹ This will need to be defined by reference to an aerial photo or similar.

	<p>For the purposes of this standard a habitable room means a space used for activities normally associated with domestic living, but excludes any bathroom, laundry, watercloset, pantry, walk-in wardrobe, corridor, hallway, lobby, clothes-drying room, or other space of a specialised nature occupied neither frequently nor for extended periods.</p>
--	--

<p>20.17A [Chapter 6 equivalent of Objective 4.3.5], [Chapter 6 equivalent of Policy 4.4.17]</p>	<p>[AMENDMENT 41] Fencing Within the Wallaceville Structure Plan Area a 2m high close boarded fence shall be erected along the boundaries of a site where it adjoins a site designated as MAF1. The fence shall be constructed of materials having superficial mass of not less than 10kg per square metre and shall be constructed prior to occupation of dwelling buildings on the site.</p>
--	--