

BEFORE THE DUNEDIN CITY COUNCIL HEARING PANEL

IN THE MATTER OF

The Resource Management Act 1991

AND

IN THE MATTER OF

Land Use Consent Application LUC-
2017-561 by McNay Some
Partnership

Expert Planning Evidence by Kirstyn Lindsay

12 April 2018

INTRODUCTION

1. My name is Kirstyn Lindsay and I am the sole director and employee of Southern Planning Solutions Limited. I hold a Masters in Planning from the University of Otago. I have 15 years' experience in district and regional planning. I am an accredited RMA commissioner and hold full NZPI membership.
2. I confirm that I have read the Environment Court's Code of Conduct for Expert Witnesses and, while this is not an environment court hearing, I agree to comply with the code. I confirm that I have considered all the material facts that I am aware of that might alter or detract from the opinions that I express, and that this evidence is within my area of expertise, except where I state that I am relying on the evidence or another person.

PROCEDURAL MATTERS

3. The submission by T & J Clark Family Trust was delivered via email from Conrad Anderson and signed by Mr Anderson. Mr Anderson is a professional planner based in Dunedin. The email disclaimer identified the content as potentially legally privileged and referred to Mr Anderson's company, clients and associated entities. I sought clarification from Mr Anderson as to whether he prepared the submission in an expert capacity but had no response.
4. Based on the submission delivery, and discussions I had with Mr Anderson prior to limited notification of the application, I have assumed that the submission was prepared by Mr Anderson in his professional capacity as an expert planner and have treated it as such. Ms Shipman has not discussed whether the submission was prepared by an expert planner or not.
5. I refer in my evidence to a very recent application (LUC-2018-59) prepared by Mr Anderson in which he sought approval for a commercial activity within the Industrial zone at 535 Andersons Bay Road. This application is a public document and the assessment undertaken in that application is attached as Annexure A. For clarity, I was contracted by DCC as the processing planner for this application but the decision was made by a DCC Senior Planner under delegated authority.

6. The purpose of referring to this application is to allow the Panel to question the expert position put forward by Mr Anderson in the submission, compared to the expert position adopted by Mr Anderson in LUC-2018-59.
7. However, if the panel are satisfied that Mr Anderson did not prepare the submission, then please disregard my references to Mr Anderson and his application for LUC-2018-59 at 535 Andersons Bay Rd. Those references are contained in highlighted paragraphs 28, part 33, 43, 44, part 45, 60, 81, 82 and 83 and Annexure A.

PROPOSAL

8. McNay Somes Partnership (the applicant) seeks resource consent to authorise a non-complying activity to establish a seven-bedroom apartment on the vacant ground floor, and reconfigure the three existing apartments on the first floor, at 5 Clark Street, Dunedin. The area on the ground floor is currently vacant space used for storage.
9. The reconfiguration of the three upstairs apartments will result in an additional habitable room. Access to the site is via a gated driveway through the building and leads to a parking area at the northwest corner of the site. Four carparks and two bicycle parks are to be provided. Outdoor amenity space will be provided for each apartment. Earthquake strengthening including removing or reducing parapet height, removing or reducing chimney height, and tying the roof back into the building is proposed as part of these works.

NATIONAL ENVIRONMENTAL STANDARD FOR ASSESSING AND MANAGING CONTAMINANTS IN SOIL TO PROTECT HUMAN HEALTH (NES).

10. The subject site has been identified as a HAIL site and the proposal has been assessed in the S42A report as a change of use and, therefore, as triggering the NES. The HAIL status of the site was not addressed in the application because this was not a matter identified by DCC at the pre-application meeting held on 17 October 2017.
11. At paragraph [40] of the s42A report, Ms Shipman states that the HAIL status of the property was disputed by the applicant. This is not true. However, whether the application triggered the NES or not was questioned by the applicant (see the email bundles 1, 2, 3 and 4 annexed as Annexure B to this evidence).

12. Once the matter of NES was raised, I argued, on behalf of the applicant, that the proposal was not a change of use, given that residential activity was already occurring the site and that this application was merely an expansion of that existing consented activity. In addition, I advised that the site was fully sealed and was to remain fully sealed and therefore, even if it was technically a change of use, page 20 of the users guide for the NES advised that the land was not to be included as land covered by the NES. I further stated that there was no disturbance of soil proposed which would exceed the permitted activity levels set out in the NES and, finally, offered the NES permitted activity conditions as conditions to be imposed on the consent if this would assuage Council's concerns.
13. The DCC Senior Planner who managed the application until 24 November 2017, prepared a further information request requiring an assessment under the NES, dated 23 November, and advised on 24 November that advice from DCC's expert, Stantec, was being sought to determine whether an assessment of contaminant risk was necessary and what, if any, matters needed to be addressed in the risk assessment (see email bundle 3 of Annexure B).
14. The subsequent advice from Stantec to Council was that a pragmatic approach should be taken and that, as there was no disturbance of soil, an assessment of risk was not necessary. Stantec specifically agreed with my proposed approach regarding compliance with permitted activity conditions, as did the senior planner (see email attached as Annexure C).
15. After this expert advice had been received, Council, based on legal advice (to date unseen by the applicant), dismissed Stantec's original advice. (see Annexure D). Council suggested that the expert advice was originally sought on the wrong basis (see email dated 11.44 am, Dec 19 2017 Annexure D). A copy of the Council's request to Stantec is attached as Annexure E and, in my reading, appears to comprehensively identify the issues.
16. The report, prepared by e3 on behalf of the applicant, evaluated the risk associated with residential use of the subject site and found it to be very low and that no soil disturbance beyond permitted levels would occur. The planner's assessment in the s42A report now accepts our original advice that the NES is not triggered.

PLANNING ASSESSMENT

17. In her S42A report, Ms Shipman has completed an assessment of the application against the relevant rules in the Operative District Plan, I agree with her finding that the proposal should be assessed as a **non-complying** activity overall. Ms Shipman also rightly discounts the rules in the Proposed District Plan and NES as not applicable to this application.
18. Ms Shipman then notes that the existing building breaches the yard setback set out in Rule 10.5.2(i)(b) although she notes that this breach was likely approved by RMA-2001-0593 (and quite possibly again at the time of subdivision in 2011).
19. For completeness, I note that the rules set out in 10.5.2 of the District Plan are conditions attached to permitted activities and are not applicable to non-complying activities. While I acknowledge that these performance standards can be used as guide to assist the Panel in gauging the appropriateness of the development, there are no external changes to the building proposed and, as such, any evaluation of the proposal against 10.5.2(i)(b) does not provide the Panel with much, if any, assistance.

LIMITED NOTIFICATION

20. The property at 61 McLaggan Street is zoned Industrial 1 and occupied by a vacant industrial building. The property at 3 Clark Street is zoned Residential 4 and owned and occupied by the Otago Motorcycle Club. The property at 9 Clark Street is zoned Industrial 1 and used for consented residential activity.
21. The above properties were identified by Council as potentially affected on the basis of reverse sensitivity effects (i.e. the use of the site for residential purposes would hinder the use of the neighbouring sites for permitted industrial and service uses and the ongoing existing use associated with the motorcycle club).
22. T & J Family Trust of 9 Clark Street submitted in opposition to the application and seek that the application be declined on a range of matters which extend beyond reverse sensitivity.

ASSESSMENT OF ENVIRONMENTAL EFFECTS

Permitted Baseline and Existing Environment

23. Ms Shipman has undertaken an assessment of the permitted baseline and existing environment but did not identify the three consented residential units on the subject site and the consented residential activity occurring on the submitter's site at 9 Clark Street. The existing building, access and parking on the site were also overlooked. I would ask that the Panel keep these consented and existing activities in mind when determining whether to apply the permitted baseline.
24. While I consider that there is no permitted baseline for residential activity in the Industrial 1 zone, except where already provided for by resource consent, Ms Shipman does consider at para [57] that in terms of environmental effects, an activity permitted as of right in the industrial zone is expected to have far greater adverse effects on the neighbouring properties than those arising from this proposal.
25. While I agree with Ms Shipman's observations at Para [59] of the s42A report that a complete redevelopment of the site to support a permitted industrial activity is somewhat fanciful, given the existing environment surrounding the site, I do not consider it fanciful (although currently uneconomic and, perhaps, undesirable) that the ground floor could be converted into a limited service or industrial activity. This potential use of the ground floor area for this purpose has also been promoted in the submission. I consider that if this were to occur then the adverse effects relating to noise, traffic, parking and amenity values on the neighbouring properties are expected to be greater than those arising from this proposal.
26. Turning to the submission, it states that the application does not clearly describe the consented environment, potentially risking that the environmental effects will be incorrectly assessed. The application states within the site description that:

"The site is zoned Industrial 1 under the operative plan and industrial under the proposed plan. At the southern boundary, the district plan zoning changes to Residential 4 and across the road to the east is the Central Activity zone. The activities within the area do not always run true to the zoning. Immediately next door to the south within the Residential 4 Zone is the Otago Motor Cycle Club while at the northern boundary within the Industrial zone is another residential unit at 9 Clark Street. Across Maclaggan Street, and also zoned Industrial, is a range of residential activities occurring at 66 and 28 Maclaggan Streets. On the eastern side of Clark Street is commercial office space which is compatible with its Central Activity zoning."

27. It is unclear what consented activities are considered to be omitted and how these activities would influence the assessment of effects.
28. It is worth noting that when identifying the permitted baseline in order to assess reverse sensitivity effects, Mr Anderson found for his application at 535 Anderson's Bay Road that *"as long as the proposed activity operates within the parameters of a permitted industrial activity, then the effects are no more than the baseline and can be disregarded."* The Panel may wish to seek clarification from Mr Anderson if his assessment is equally applicable in this instance.
29. Overall, I consider the permitted baseline with respect to the consented residential activity, the existing footprint of the building and current occupation of the site along with the non-fanciful use of the ground floor for a permitted activity, with all its associated environmental effects, should be applied when assessing the effects of this proposal. In my opinion, the baseline assessed in conjunction with the immediate existing environment makes for a compelling argument in support of this application as discussed further below.

Noise and reverse sensitivity

30. Acoustic insulation conditions were offered to Council on 24 November 2017 and confirmed on 13 December 2017, prior to limited notification. These conditions are now considered to form part of the application and it is unfortunate that these were not included as part of the notification document bundle. These conditions are intended to address the neighbour's and Council's concerns regarding acoustic insulation.
31. Ms Shipman, in consultation with the Environmental Health Officer, has deemed these conditions to be acceptable, subject to her clarification regarding the technical formula for the acoustic insulation. For clarity, I propose the condition applied to residential activity within the Central Activity Zone of the operative District Plan:

Noise Insulation for Residential Activities [Inserted by Plan Change 2: 19/12/05]

Any kitchen, dining area, living room, study or bedroom in a building to be used for a Residential Activity shall be acoustically insulated from noise from the external environment. The Airborne Sound Insulation provided to insulate these rooms shall achieve a minimum performance standard of $D_{2m,nT,w} + C_{tr} > 30$.

32. The Environmental Health Officer, being the only expert in relation to noise, has accepted the offered conditions as being appropriate. However, to fully appreciate the

current noise environment and the adequacy of the conditions offered, the Panel may wish to understand the noise insulation methods used by the submitter in their timber dwelling and their experience of surrounding noise environment.

33. The submission raises concerns regarding the heat pump placement and the effects this may have on noise. Ms Shipman and the Environmental Health Officer have not identified this as a matter of concern and have not recommended any conditions of consent in respect of heat pump placement. Furthermore, I refer the Panel back to Mr Anderson's assessment for the 535 Andersons Bay Road application regarding the permitted baseline discussed at Paragraph 26 above.
34. With regard to construction noise, Ms Shipman at Para [81] of her report quotes the construction noise standard NZS 6803:1999 and includes the parameters set out in the standard as Condition 11. I consider the construction noise restrictions set out in Condition 11 as acceptable.
35. Turning my mind to reverse sensitivity, I note that this is not a term that appears in the RMA. It is commonly accepted as being a situation where a sensitive activity is introduced to an area with non-sensitive existing and permitted land uses, and the otherwise reasonable effects of those existing and permitted land uses on the sensitive activity are so offensive and objectionable that it could potentially result in the curtailing or restraint of operation of those existing and permitted land uses.
36. I include my explanation of reverse sensitivity to differentiate this from noise effects. Ms Shipman at Para [85] and Condition 5 of her report recommends in conjunction with the Environmental Health Officer, insulation between the units and floors of the building at 5 Clark Street to *"minimise any potential reverse sensitivity effects"*.
37. I consider that both first and ground floor activities at 5 Clark Street are sensitive land uses and, as such, reverse sensitivity effects experienced by the residential activity on the ground floor as a result of the existing residential activity on the first floor are not technically possible. However, I do not suggest that adverse noise effects aren't possible.
38. I consider Condition 5, as it relates to the internal walls and floors of the building, to be unnecessary to address reverse sensitivity issues. With regard to noise effects, I expect that the controls under the Building Act will require adequate insulation

treatment between the residential units (likely as part of fire cell creation). Furthermore, the Environmental Health Officer recognises that the protection of the RMA, with regard to excessive or unreasonable noise, is available to all residential tenants on the site. For clarity, I assume that the officer is referring to s16 of the RMA.

39. With regard to insulating the party walls at the south, west and northern boundaries to address noise as per Condition 5, I expect that this is already occurring due to the thickness of the walls. However, I would be content that this part of Condition 5, as it relates to the party walls remain, subject to some reasonable and agreed parameters. Currently, I consider that the condition is not certain or measurable.
40. In terms of reverse sensitivity effects overall, I consider that the establishment of residential activity in an acoustically insulated ground floor apartment is unlikely to have greater reverse sensitivity effects than those effects experienced by the activities already present on the subject and neighbouring sites. Nor do I expect the creation of a ground floor apartment to influence whether an industrial or port activity decides to establish in the area, given the mix of activities already present in the area.

Loss of industrial land

41. The submission raises concerns regarding the loss of industrial land in the ground floor of 5 Clark Street and considers that if granted the consent may impact on the affordability of industrial land. No evidence has been provided with the submission to support the assumed impact.
42. For completeness, I note that Ms Shipman did not assess the loss of industrial land in her s42A report and I assume that this is because she recognises that the subject land is already lost to industrial use.
43. However, the concerns regarding the loss of industrial land as outlined in the submission, contradict Mr Anderson's expert position in the application for 535 Andersons Bay Rd. There, Mr Anderson argued that because the immediate area is atypical of the Industrial 1 zone and non-industrial activities occur on Andersons Bay Rd, *"a non-industrial use of the site is considered to be an efficient use of resources"* (assessment of Obj 10.2.3, page 14 of LUC-2018-59).
44. I recognise that the application for 535 Andersons Bay Road is for a different activity in a different location, however the two proposals do seek to establish non-complying, non-industrial activities on industrial sites located in atypical and corroded industrial

areas. The assessment matters remain the same and there needs to be consistency in how these overarching assessment matters are interpreted and applied. It may be helpful for the Panel, in coming to their decision on this matter, to understand the differences in Mr Anderson's assessment in each of these situations.

45. Notwithstanding, Mr Anderson's apparent position above, the existing environment has not changed much since 2001 with the exception of additional residential activities establishing across the road at 28 and 66 Maclaggan St. RMA-2001-0593 which authorised residential activity on the subject site, described the existing environment as:

"The surrounding area contains a mix of activities with an automotive garage located on the corner of Maclaggan Street adjoining the northern boundary of the site. The building at the rear of the site is used for general storage purposes and is built right up to the boundary with a solid brick wall extending the length of the shared boundary. The building to the south of the site is occupied by a motorcycle club. The opposite side of Clark Street has established professional offices. Therefore, the surrounding existing environment is not industrial by nature but rather is mixed use in character. In this regard there will be little or no change in the amenities of the area by the additional residential unit. The proposed activity is consistent with the surrounding area and the mix of activities that it contains."

(Paragraph 2 of Section 1 of the AEE, pages 2 & 3 of RMA-2001-0593)

46. Furthermore, the subdivision decision (SUB-2011-26) which separated the submitter's site from the subject site stated that:

"Residential activity is not an expected component of this Industrial 1 zone but is, in this case, well established on the subject site." And "The surrounding area is of mixed use, with residential use in close proximity, and non-residential use of Residential 4-zoned land immediately next door. Therefore, the existing residential activity is not out of character for the area, and is, in any case, well-established at this location and in these buildings."

(Paragraph 1 of section 7 of the AEE, page 4 of SUB-2011-26 & LUC-2011-115)

47. I remain of the opinion that indiscriminate mixing of activities has occurred over a long period of time in this area (including the currently consented residential activity on the subject site) and that this has potentially constrained the industrial uses for this area. I remain convinced that the expansion of residential activity on the site will not further exacerbate the existing industrial constraints.
48. The submission suggests that there are a number of industrial or service activities that could be undertaken on the site and that the rational put forward in the application, regarding the limited uses available to the ground floor of the building should not hold much sway. The potential for permitted use has been considered as part of my assessment of the permitted baseline at Para [25] of this evidence.
49. However, I remind the panel that the site is flanked by residential zoning to the south, consented residential activity to the north and occupied by consented residential activity above. There is little parking or loading available to the site, and only timed parking on the street. As such, I remain of the opinion that there would be a very limited number of industrial or service activity tenants who would be suitable for the site and who would not have undesirable effects on the residential neighbours.
50. My opinion is supported by the assessment for RMA-2001-0593, which found that:

"It is considered that the use of the site for residential purposes will not give rise to an increase in demand of industrial land for non-industrial purposes due to the site characteristics and location. The site has historically been utilised mainly for residential purposes and never fully for industrial purposes. The design of the building is considered more appropriate for commercial or residential activities."

(Paragraph 1 of Section 3 of the AEE, page 3 of RMA-2001-0593)

51. I consider this assessment to remain relevant when assessing the current application. I continue to hold the opinion that in allowing the ground floor of this site to convert to an apartment, there will be no significant or detrimental loss of industrial land.

Heritage and Urban Design

52. The submission raised the matters of heritage and urban design and considered that the effect of the application on these matters require consideration. There are no townscape or heritage overlays in this zone. The Council's Urban Designer has assessed the proposal and finds that:

“the streetscape is robust with a history of mixed use and no particular architectural style to consider. The overall character of 5 Clark Street will not be altered significantly even though there will be some loss of pedestrian amenity by removing two doors. Having considered this, I believe the effects on streetscape values would be less than minor.”

53. The Urban Designer did not recommend any conditions. However, Ms Shipman has proceeded to recommend Condition 10 requiring either separation of the pedestrian access from the vehicle access or retention of the pedestrian access into the building. There is no pedestrian safety reason identified for this condition and it appears to be recommended based on the Urban Designer’s “nice to have” comments regarding the readability of the streetscape or permeability of the building when viewed by pedestrians.
54. In my opinion, there is no justifiable reason for the inclusion of this condition. The area is zoned Industrial 1 and is considered by the district plan to have inherently low amenity values. The site is located outside of any townscape precinct and is not located in an identified high pedestrianised area. And, ultimately, the expert assessment of the Urban Designer found the effects of the proposed design on streetscape values to be less than minor and no conditions necessary.
55. No other expert urban design evidence has been submitted and, as such, the findings of the Council’s Urban Designer must be relied upon and I respectfully request that Condition 10 be removed from consideration.

Density

56. It is acknowledged that the Central Activity and Residential 4 Zone rules of the Operative District Plan and the Inner City Residential Zone rules of the 2GP are not applicable to this site. There are no density standards for this site as the activity is non-complying.

Amenity values, loss of privacy and security concerns.

57. The proposal does not seek to introduce a new activity to the area. Residential activity has been associated with this site since 1927. It was authorised in 2001 and again at the time of subdivision in 2011.
58. Industrial areas, by their very nature, set low expectations with regard to amenity value. Yard setbacks are not provided for in the industrial zone. The dwelling at 9 Clark Street

is located on the boundary shared with 5 Clark Street and the proximity of the buildings at these sites was deemed acceptable when residential activity was authorised in 2001 and when the sites were subdivided in 2011.

59. The submission raises the effects on 9 Clark Street, associated with the loss of privacy, security concerns and closer and increased residential activity, as key issues.
60. I refer the panel to Mr Anderson's assessment of the effects on residential areas at page 16 of the application for LUC-2018-59, where he considered the proposed non-industrial activity was "*considered to be beneficial to the neighbouring residential zone when compared to the permitted environment*". The panel may wish to question Mr Anderson as to whether his assessment would be equally applicable to the adjacent residential activity in this circumstance.
61. The proposed balconies for the existing first floor apartments will ensure a far greater level of amenity for the tenants of 5 Clark Street than currently exists. With regard to loss of privacy for 9 Clark Street, it is noted that privacy is not provided for in the District Plan, especially within the Industrial 1 zone. The Council's Urban Designer did not raise concerns regarding the potential for reduced privacy to the occupiers at 9 Clark Street.
62. However, in order to address the submitters concerns, Ms Shipman has recommended Condition 9 which requires screening of the deck area such that users of the deck cannot view into the bedroom windows at 9 Clark Street. While I consider that this condition is not strictly necessary given the zoning, in the interest of being a good neighbour, the applicant offers to install screening at the end of the balcony where it meets the boundary with 9 Clark Street. Given the proximity to the boundary, the screening is expected to incur a significant cost due to this treatment having to be suitably fire resistant.
63. It is unclear from the submission what security concerns may arise from the expansion of residential activity on the subject site. The access to 5 Clark Street is via a gated entranceway. The removal of the doors along the front of the site would mean that access to the site will be just as tightly controlled as it is currently, if not more so.
64. The residential activity is, and will continue to be, contained within site at 5 Clark Street. It is noted that the entire courtyard is currently available for use by the residential activity and tenants are not restricted to using the front door for access. This is

confirmed by Ms Shipman at Para [71] of her report *"that even with provision for pedestrian access at the street front, it may be that occupiers/tenants will still have a preference for entering via the vehicle crossing, particularly when the re-design allows for improved access to the rear of the units via improved decks/stairs."*

65. Furthermore, Ms Shipman recognises at Para [69] that, in regard to pedestrian and vehicle access to the site, a permitted activity would have *"greater potential disruption to the amenity enjoyed by residents at 9 Clark Street"*. I agree that this would be true even if the permitted activity use were restricted to the ground floor area only.
66. After taking into consideration the permitted baseline, including the existing residential activity on the site, and the underlying zoning of the site, it remains my assessment that, subject to the condition requiring screening of the deck end, the effects on amenity values, loss of privacy and security concerns on the property at 9 Clark Street are less than minor.

Transportation

67. The proposal has been assessed by the Council's Transportation Planner/Engineer who concluded that *"the proposed development to have no more than minor adverse effect on the safety/functionality of the transport network"*.
68. At Para [35] of her report, Ms Shipman assesses the parking and access requirements for seven units. For clarity, only four units have been applied for in the application. However, I acknowledge that four units will still result in an increase in the width requirement for the access under 20.5.7(v)(b) Table 20.7, but that this is not physically achievable and this has been accepted by the Transportation Planner.
69. The Transportation Planner has calculated the parking for the development and determines that there is a shortfall of one parking space. He accepts the two bike parks offered as a condition by the applicant as reasonable. In lieu of any other expert transportation evidence to the contrary, I have adopted the Transportation Planner's evidence, except that I question Condition 3 relating to the allocation and numbering of carparks.
70. I remain unconvinced as to whether specific carpark allocation is a resource management issue or Tenancy Act matter. Ultimately, the carpark to residential unit ratio has been deemed acceptable by the Transportation Planner and allocation of

these parks may be best addressed through the tenancy agreement, providing, of course, that all parks on the site are for exclusive use of the tenants and are not sub-leased.

71. However, if the panel considers that there is an adverse effect on the transportation network which is avoided, remedied or mitigated by the labelling of the carparks and that the matter falls within the Council's powers under the RMA, then the applicant will accept the requirement to allocate and label the carparks.

Infrastructure

72. The application has been assessed by an officer within the Council's Water and Waste Group, who considers that the proposal can be adequately serviced for water, wastewater and stormwater, subject to recommended Conditions 12 – 14. I adopt this finding and accept the conditions recommended by the officer as reasonable.
73. The officer also encouraged the use of water saving devices but stopped short of recommending these as a condition of consent, rather including them as an advice note. Ms Shipman has however included a requirement for water saving devices at proposed Condition 15.
74. I note that there is technically no density breach in this situation and the permitted baseline could provide for a greater use of water and wastewater (depending on the permitted activity). As such, I consider that it would be more correct, and in line with the expert's recommendation, for this condition to be applied as advice note.

DECISION MAKING FRAMEWORK

Objectives and Policies

75. Ms Shipman has undertaken a comprehensive assessment of the objectives and policies of the operative and proposed district plans and regional policy statements. It appears that Mr Anderson, as part of the submission, has also undertaken an objective and policy assessment.
76. For the sake of expediency, I do not reassess the objectives and policies here and note that my original assessment in the application stands. I draw the Panel's attention to the matters below where I have a clear difference in opinion to Ms Shipman and/or Mr Anderson or for the purposes of clarification.

Operative District Plan

Objective 10.2.1 and supporting policies

77. I note that Ms Shipman has considered Objectives 10.2.1 and 10.2.2 together. The only supporting policy for both of these objectives is identified as Policy 10.3.1. Policy 10.3.1 seeks to manage the adverse effects of industrial activities in the industrial zone.
78. I would argue that Objective 10.2.1 is not relevant to this application as it relates solely to managing the effects of industrial activities in industrial zones.
79. In my reading of Objective 10.2.2, this can only be achieved by implementing Policy 10.3.1 which is also not relevant to this application. Therefore, I request that the Panel disregard Ms Shipman's findings that the application is inconsistent with Objective 10.2.1 and 10.2.2 and Policy 10.3.1 as, in my opinion, these are not applicable to this proposal.

Objective 10.2.3 and Policy 10.3.2

80. The submission finds the application to be contrary to Policy 10.3.2 of the operative plan. The policy appears to have been considered in isolation, however the court directs that objectives and policies should be considered in a suite.
81. For completeness, when Mr Anderson made an argument for the non-complying, non-industrial activity at 535 Anderson's Bay Road, he determined that Objective 10.2.3 *"provided for the use of industrial land for non-industrial purposes (otherwise the objective is a nonsense)."* (page 14, assessment of Obj 10.2.3).
82. When assessing Policy 10.3.2 in light of that application, Mr Anderson considered that the use of the land for non-industrial activity was an efficient use of resources because the surrounding environment was atypical of an industrial zone and included other non-industrial activities. He found that proposal to be "not inconsistent" with Objective 10.2.3 and Policy 10.3.2. (last paragraph, page 14 of LUC-2018-59).
83. In coming to its' determination, the Panel may find it helpful to understand the differences of Mr Anderson's two assessments where one application is found to be "contrary" and one was found to be "not inconsistent" with.
84. Turning to Ms Shipman's assessment of this policy suite, I agree with her observation at page 21 of her report that the language used in Policy 10.3.2 is at odds with that

used for Objective 10.2.3 but I find it difficult to reconcile her separate assessments that the proposal is inconsistent with the objective but contrary to the policy, particularly given that there is only one policy identified to achieve the objective.

85. However, I acknowledge her following rational further in that assessment that *“when considered collectively the intention must be that the activities are excluded unless they can demonstrate they do not have a limiting effect on the industrial businesses occupying the zone.”* In this instance, I do not consider that increasing the residential activity on the subject site will further constrain industrial activity any more so than the activities already occurring in the area.

86. Having reassessed the objectives and policies of the operative plan, I continue to endorse my assessment set out in the application that the proposal is not contrary to the objectives and policies.

2GP

87. Ms Shipman has undertaken assessment of the objectives and policies of the 2GP and found the proposal contrary with Objective 19.2.1 and Policies 19.2.1.1, 19.2.1.3 and 19.2.1.9, leading her to an overall assessment that the proposal is contrary to the objectives and policies of the 2GP. The submission also considers that the proposal is contrary to Policy 19.2.1.3 and 19.2.1.9 (but omitting the relevant objective) of the 2GP.

88. In respect of Policy 19.2.1.1, this seeks to *“provide for the establishment and operation of industrial and port activity, industrial ancillary tourism activity and industrial ancillary retail activity in the industrial zones.”* As such, this policy is not directly applicable to this application.

89. With regard to Policy 19.2.1.3, this proposal does not seek to introduce a new activity in an industrial area, (or even a new activity to the subject site) and, as such, the time for avoiding the establishment of non-industrial activities has passed. I consider that, converse to what is demanded in the submission, there is no need to provide evidence as to how the proposal would result in positive effects on the industrial area.

90. I consider that Policy 19.2.1.9, which specifically refers to residential activity in the industrial zone, is most relevant to this proposal, as it take the finer grained approach preferred by the 2GP. I have undertaken my assessment of the proposal in respect of how this policy achieves the relevant objective.

91. I return to the fact the residential activity is already consented on the site and that this proposal will merely increase the scale of the existing activity. As such, the Panel can be reassured that this is not a situation where there is a choice to “avoid” residential activity. In my opinion, the granting of consent would not be a flouting or disregarding of Policy 19.2.1.9 and will not limit or restrict the establishment and operation of industrial and port activity in this area as required by Objective 19.2.1.

Objective 4.2.3

92. With regard to question raised in the submission regarding Objective 4.2.3 of the 2GP, a pre-application meeting was held with Council prior to lodging and infrastructure capacity was not identified as a potential issue. Furthermore, the Council’s Water and Waste Services Group advise that the site can be adequately serviced.
93. Overall, I remain of the opinion that the proposal is not contrary to the objectives and policies of the 2GP.

Section 104D and 104(1)(c)

94. I note that Ms Shipman has found the proposal to be inconsistent with the objectives and policies of the operative plan but contrary to those of the 2GP. Yet she has found that the proposal passes both tests set out in S104D. While her finding is in the applicant’s favour, the *Code of Conduct for Expert Witnesses* requires me to advise the Panel that Ms Shipman has incorrectly applied weighting to the objectives and policies of the 2GP in her s104D assessment.
95. Section 104D(1)(b) states that when determining whether a consent may be granted:
- the application is for an activity that will not be contrary to the objectives and policies of—*
- (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*
 - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*
 - (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*
96. Section 104D (1)(b)(iii) means that there is no objective and policy weighting available to the tests set out in s104D.

97. Therefore, if Ms Shipman's assessment of the objectives and policies is to be adopted, the proposal must fail the second test of s104D. I note that she has found the adverse effects of the proposal to be no more than minor, so based on her assessment, the Panel can still consider granting consent.
98. However, as noted above, I do not consider that the proposal is contrary to either the operative or proposed district plans and I also find the effects of the proposed activity to be no more than minor. It is my opinion that the proposal passes both tests under s104D.
99. Pursuant to s104(1)(c), which refers to other matters, I also find that given the existing consented activity on the site, the surrounding existing and consented environment and the finite life left in the operative plan, there is unlikely to be any threat to the integrity of the District Plan as result of granting this proposal.

Part 2 of the Act

100. The recent High Court decision, *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, applies the Environment Court's reasoning in *EDS v NZ King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (commonly known as King Salmon) to resource consent applications. This approach is consistent with that also applied in *Saddle View Estate Ltd vs Dunedin CC* [2014] NZEnvC 243 [2015] NZRMA 1 and *Aro Valley Community Council v Wellington CC* [2015] NZHC 532.
101. The Court has held that in most cases it is not necessary to refer back to Part 2 when determining an application for resource consent. The reasoning for this is because planning instruments are prepared as a cascade with district plans at the bottom of the cascade. Therefore, unless the District Plan(s), under which the resource consent is being considered, are deemed to be incomplete, invalid or uncertain, the District Plan(s) are assumed to have given effect to the higher order planning documents including Regional Policy Statements, National Policy Statements and Part 2 of the Act, and no further consideration of those planning instruments is required.
102. I consider that the policy direction given by the District Plans is not incomplete, invalid or uncertain, as such, there is no need to revert to higher order planning instruments or Part 2 of the RMA. I note Ms Shipman, at Para [133] of her report, also agrees with this approach although, paradoxically, she did find it necessary to undertake an assessment of the proposal against the operative and proposed Regional Policy Statements for Otago at Paras [124-132].

Conditions of Consent

103. Section 108 provides the Panel with the ability to impose conditions, should it be of a mind to grant consent. Recent changes to the RMA, took effect on 18th of October 2017. Of these changes, the underlying principles introduced by Section 108AA are relevant when considering conditions to be imposed any resource consent. These principles set out the criteria the consent authorities must consider when imposing conditions.

Conditions can only be imposed on a consent if at least one of the following is satisfied:

- *the applicant agrees to the condition;*
- *the condition is directly connected to an adverse effect of the activity on the environment;*
- *the condition is directly connected to an applicable district rule, regional rule, or national environmental standard; or*
- *the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.*

In this context, an 'applicable rule' means a rule that is the reason, or one of the reasons that a resource consent is required for the activity. (source: MfE Fact Sheet 10)

104. It is respectfully requested that, should the Panel be of a mind to grant consent, s108AA is given particular regard to when imposing conditions on this consent.
105. Ms Shipman has provided the Panel with a suite of recommended conditions. As discussed previously in this evidence, the applicant raises challenges to Conditions 3, 5, 10 and 15.

Conclusion

106. Having completed a full planning assessment of relevant planning instruments, the matters raised in the submission, and the assessment and recommendations contained with the s42A report, I consider there are no obvious planning reasons why consent cannot be granted, subject to fair and reasonable conditions.



Kirstyn Lindsay
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