

4 February 2021

By Email: brent.pizzey@ccc.govt.nz

Christchurch City Council

ATTENTION: Brent Pizzey

Dear Brent

LEX 20449 - RULE INTERPRETATION [REDACTED]

Application of Noise Contour Rules

1. I refer to our discussion on 3 November 2020 regarding the application of noise contour rules in the District Plan. Having considered the way in which the 50 dB contour is referred to in the zoning rules, I have revised my preferred interpretation of the way in which the noise contour rules are intended to operate. My preferred interpretation is that where a rule is stated as applying “within” a particular noise contour, it applies to all of the area to the inside of that contour line, including areas that are also within a higher noise contour. Thus, rules applying within the 50 dB contour would apply to the area within the 50 dB contour, the 55 dB contour and the air noise boundary. Rules applying within the 55 dB contour would apply within the 55 dB contour and the air noise boundary.
2. I have set out briefly below the reasons for my revised interpretation. Brookfields’ previous letter of advice dated 20 December 2018 was directed to the specific question of whether rule 6.1.7.1.5 NC1 applied to a property at [REDACTED], which was mostly located within the air noise boundary, rather than a broad analysis of the way in which air noise contours applied within the District Plan. In that context, our view was that the applicable rules applying to the property were those that related to the air noise boundary (i.e. either rule 6.1.7.1.6 PR1 if the activity fell within the meaning of a “sensitive” activity, or rule 6.1.7.1.5 NC3 if otherwise). It was our view that the rules applying to buildings “within the 55 dB contour” would only apply to buildings between the 55dB air noise contour and the air noise boundary. This view was based on the following assessment:
 - a. Having regard to the text, purpose and context of the provisions (including the ordinary meaning of a contour line and the way in which the air noise boundary was defined in the District Plan), the rules relating to the 55db noise contour only applied between the 55db noise contour line and the air

noise boundary contour line, and that the rules relating to each respective area did not overlap;¹

- b. The applicable rules applying to the relevant property are those relating to the air noise boundary because that is where both the existing building and proposed extension are located;²
- c. This interpretation would provide for a graduated approach whereby more restrictive rules would apply to the air noise boundary than to the 55db contour.³ Whereas within the 55db contour:
 - a. An activity listed in 6.1.7.2.2 is a permitted activity if it meets the activity standards in that rule: 6.1.7.1.1 P1; and
 - b. A new building or addition to an existing building that does not meet one or more of the activity standards in 6.1.7.1.1 is a non-complying activity: 6.1.7.1.5 NC1.

Within the air noise boundary:⁴

- a. Any new sensitive activity is a prohibited activity: 6.1.7.1.6 PR1; and
- b. Any new activity that does not meet the definition of a “sensitive” activity is a non-complying activity pursuant to rule 6.1.7.1.5 NC3.

- 3. While I preferred the above interpretation when specifically considering the way in which the air noise rules in chapter 6 of the District Plan applied, having considered the way in which references to the 50 dB air noise contour are used in the zone rules, I consider that this approach could give rise to anomalous outcomes, which would be contrary to the approach to interpretation of district plan rules provided for in **Nanden v Wellington City Council**.⁵ In particular, there are a number of zoning rules which impose a more restrictive activity status for specified activities “within the 50 dB Ldn Air Noise Contour”,⁶ but there are no corresponding rules imposing a more restrictive activity status for similar activities within the 55 dB air noise contour or the air noise boundary. If the rules relating to the 50 dB air noise contour were interpreted as only applying between the 50 dB contour and the 55 dB contour, this would result in a more restrictive activity status applying by virtue of air noise issues in areas further away from the airport and a more liberal activity status applying to certain activities where noise effects would likely be greater (i.e. in the 55 dB air noise contour). Such an outcome would be contrary to the underlying purpose of the air noise rules as described in objective 3.3.12(b)(ii) of the District Plan.

¹ Paragraphs 6-7 and 25(a) of Brookfields letter dated 20 December 2018.

² Paragraph 8 of Brookfields letter dated 20 December 2018.

³ Paragraph 5 of Brookfields letter dated 20 December 2018.

⁴ Paragraph 26 of Brookfields letter dated 20 December 2018.

⁵ [2000] NZRMA 562 at [48].

⁶ See for example, rules 17.5.1.5 NC5 and 14.4.1.3 RD34.

4. In my view, the preferable interpretation that would avoid anomalous outcomes is to treat the 50 dB contour line as a boundary line signalling when more restrictive rules apply inwards of that line. As such, references to activities “within the 50 dB air noise contour” should logically encompass all areas inwards of that line, not just the area between the 50 dB line and the 55 dB contour line. As this is my preferred interpretation of the way in which references to the 50 dB contour line should be applied within the zone rules, it follows that in the interests of consistency I must revise my preferred interpretation of the way in which the chapter 6 rules operate. In order to ensure consistency with the zone rules, rules in chapter 6 applying within the 55 dB air noise contour must apply to both the 55 dB air noise contour and to the air noise boundary. In relation to the air noise boundary, where there is a specific rule applying with a more restricted activity status (i.e. 6.1.7.1.6 PR1) this rule would prevail over a more liberal activity status provided for in other rules.

Range of activities captured by rule 6.7.1.5 NC3

5. You have also asked me to advise the range of activities captured by rule 6.1.7.1.5 NC3. For the reasons set out below, it may subvert the purpose of this catch-all provision to limit its application to buildings (given that some of the rules, if not the activity standards, have a broader application than just to building activities), but would go beyond the purpose of the noise rules if NC3 were to apply to any possible activity within the relevant areas not specifically provided for in the activity tables. Given that the purpose of the provisions is to mitigate against adverse noise effects near infrastructure by placing limitations on sensitive activities and by requiring noise insulation of buildings, my view is that this purpose should define the scope of “any activity” in NC3. As such, the reference to “any activity” should relate to any sensitive activity not provided for as a permitted, restricted discretionary or prohibited activity in the activity tables at 6.1.7.1.
6. In other words, this would mean, for example, that rule 6.1.7.1.5 NC3 could potentially apply to:

Any new noise sensitive activity or extension to a noise sensitive activity that is not otherwise addressed in the activity tables e.g. a new noise sensitive activity within the 55 dB air noise contour, or an extension to a noise sensitive activity within the 55 dB air noise contour, air noise boundary or 65 dB Ldn engine testing contour, which is not addressed elsewhere in the activity tables, for example because the new or extended activity does not involve a new building or an addition to a building.
7. Rule 6.1.7.1.5 NC3 forms part of the activity status tables for activities near infrastructure in rule 6.1.7.1. The activity table for non-complying activities specifies 6 categories of non-complying activities, including NC3, a catch-all category, which provides that any activity not provided for as a permitted, restricted discretionary or prohibited activity is a non-complying activity:

6.1.7.1.5 Non-complying activities

- a. The activities listed below are non-complying activities.

Activity	
NC1	Any new buildings and/or additions to existing buildings located within the 55dB L_{dn} air noise contour shown on the planning maps that do not meet one or more of the activity standards in Rule 6.1.7.2.2 .
NC2	Any new buildings and/or additions to existing buildings located within the 55 dB L_{dn} engine testing contour shown on the planning maps that do not meet the L_{dn} standards in the activity standards in Rule 6.1.7.2.2 .
NC3	Any activity not provided for as a permitted, restricted discretionary or prohibited activity.
NC4	Any activity listed in Rule 6.1.7.2.1 (Sensitive activities near roads and railways) that exceeds any noise limits in the activity standards for that activity by more than 10 dB.
NC5	In any rural zone, any new noise sensitive activity located within the Ruapuna Inner Noise Boundary surrounding Ruapuna Motorsport Park as shown on the relevant planning maps.
NC6	In any rural zone, other than the Rural Quarry Zone, any new noise sensitive activity or any addition to an existing noise sensitive activity proposed between the Ruapuna Inner and Outer Noise Boundary relating to Ruapuna Motorsport Park as shown on the relevant planning maps, that does not comply with the activity specific standard of Rule 6.1.7.1.1 P2 .

8. The reference to “any activity” in NC3 suggests that its application is broader than just building activities. While some of the rules apply specifically to buildings e.g. NC1, NC2 and rule 6.1.7.2.2, there are other rules which relate more broadly to noise sensitive activities. The definition of noise sensitive activities specifies a number of different activities which are sensitive, most of which are also defined in the district plan. The definitions of these individual activities indicate that the activity could be broader than just use of a building and could also relate to use of land for the particular activity. For example, “education activity” is defined as a “sensitive activity”. It is defined as:

...the use of land and/or buildings for the provision of regular instruction or training. It includes ancillary spiritual activities, recreation activities, health activities and cultural activities, offices, out of school care (all of which may be shared) and boarding/residential accommodation. It also includes preschools in the Specific Purpose (School) Zone and Specific Purpose (Tertiary Education) Zone.

9. Given that the relevant activity status rules potentially apply more broadly than just to buildings, it may subvert the purpose of NC3 as a catch-all category if it were interpreted as just applying to buildings. However, were NC3 interpreted as applying to any possible activity not otherwise provided for in the activity status table, this would impose a non-complying activity status on any activity within the relevant areas not specifically provided for. This would mean that some non-noise sensitive activities that are addressed in other parts of the district plan, such as earthworks, would be given a non-complying activity status within the relevant geographical area by NC3, despite having no discernible reverse sensitivity effects. Such an interpretation would confer on NC3 an application far beyond the purpose of the relevant rules, which are

to mitigate against reverse sensitivity effects related to infrastructure, by imposing rules around “sensitive activities” and new buildings or extensions.⁷ In my view, the underlying purpose of the rules, as outlined in the objectives and policies, would require the scope of “any activity” in NC 3 to be primarily limited to sensitive activities not provided for elsewhere in the activity tables. For example:

- a. Rule 6.1.7.1.6 provides that any new sensitive activity is a prohibited activity within the air noise boundary (PR1) or within the 65 dB Ldn engine testing contour (PR2). The activity status for an extension to an existing sensitive activity within these areas is not specifically provided for. If the activity is not addressed by rule 6.1.7.2.2, this may be an instance where NC3 would apply.
 - b. Rule 6.1.7.2.2 sets out activity standards for new buildings or additions to new buildings within the 55 dB Ldn air noise contour or engine testing contour. Non-compliance with these standards renders the activity non-complying pursuant to NC1 or NC2. However, new sensitive activities within these areas that do not involve a new building or addition to an existing building are not provided for in the activity table e.g. where a new sensitive activity is proposed within an existing building or where the new sensitive activity is outdoors. In those situations, NC3 may apply.
10. I note that for the most part the activities provided for in the activity tables relate only to sensitive activities. The exception to this is the rules relating to airport noise, where the rules and activity standard apply more broadly to “any new building and additions to existing buildings” without being limited to buildings for the use of sensitive activities. Rule 6.1.7.2.2 sets out differing insulation standards for different buildings depending on the use, both of the entire building and specific parts of the building. However, even where a specific type of building (e.g. a church building) is not specifically mentioned in the list at Table 6.1.7.2.2(a)(i), such buildings would still be subject to the requirement at rule 6.1.7.2.2(a)(i) that: “Any new buildings and/or additions to existing buildings shall be insulated from aircraft noise”. In circumstances where no specific standards of insulation are specified, the requirement to insulate remains, but the appropriate levels of insulation will need to be assessed by an acoustic engineer.
 11. Finally, I have considered Chapman Tripp’s email of 11 November 2020, which expressed the view that 6.1.7.1.5 NC3 would not apply to sensitive activities, because noise sensitive activities are already provided for in the zoning rules. It is not clear whether their position is that the rules in 6.1.7 are only intended to address buildings and their insulation and do not apply more widely to other sensitive activities, or whether they interpret NC3 as only applying to a sensitive activity where such an activity is not specifically addressed by a zoning rule.
 12. I disagree with either approach. Having regard to the first potential interpretation, for the reasons expressed above, while certain rules in 6.1.7 specifically address buildings (such as rule 6.1.7.2.2), the rules are not necessarily limited to buildings, but may also apply to other sensitive activities. Further, the zoning rules do not

⁷ See for example, Policy 6.1.2.1.1 and Policy 6.1.2.1.5(b).

necessarily capture all sensitive activities within the geographic area covered by the activity tables in 6.1.7.1. While some of the zoning rules provide specific rules for sensitive activities in the 50dB contour, there are some potential gaps. For example, in the residential suburban zone, there is no comprehensive rule that would cover any sensitive activity within the air noise contours. There is a rule (14.4.1.3 RD34) that would likely cover most noise sensitive activities, but not all. If this interpretation were applied, it could therefore potentially result in gaps where some noise sensitive activities may not be captured by the rules.

13. The second potential interpretation would treat NC3 as operating as a catch-all rule to address situations not otherwise covered by specific zoning rules. While this approach may seem attractive because it would serve the purpose of filling any potential gaps in the rules, I do not agree that NC3 is intended to operate in this manner. In my view, 6.1.7 is intended to comprehensively address noise sensitive activities within the relevant geographic area of those rules, and NC3 is intended to address noise sensitive activities not specifically provided for within the activity tables in 6.1.7, regardless of whether other rules in other parts of the plan may also apply. My reasons for this view are:
 - a. As discussed above, the underlying policy framework makes it clear that the purpose of the rules is to mitigate against reverse sensitivity effects of infrastructure on sensitive activities within specific geographic areas;
 - b. The way in which NC3 is worded indicates that it is only intended to apply where the activity tables within 6.1.7.1 do not specifically provide for an activity. NC3 refers to “any activity not provided for as a permitted, restricted discretionary or prohibited activity”. It does not refer to discretionary or controlled activities because there is no provision for any such activities within the activity tables at 6.1.7.1. This indicates that NC3 is intended to operate as a catch-all for all activities to which 6.1.7 applies, rather than a catch-all where there are no other applicable rules anywhere in the district plan.
 - c. The zoning rules have a broader application than the rules in 6.1.7.1, which address *inter alia* activities within the 55 dB contour. Whereas a noise sensitive activity undertaken outside the 55 dB contour would only be subject to the applicable zoning rules, a noise sensitive activity undertaken within the 55 dB contour may be subject to rules both within the relevant zoning chapter and in 6.1.7.1. In general discussion regarding the scope of the rules in 6.1.7.1, the approach agreed to by both Chapman Tripp and myself is that where there are zoning rules and rules in 6.1.7.1 that may apply to an activity, both are of relevance, but the most restrictive activity status applies. It would be consistent with this approach to treat 6.1.7.1.5 NC3 as applying to noise sensitive activities within the 55dB contour if that activity is not specifically provided for elsewhere within those activity tables, notwithstanding that there may also be relevant zoning rules that apply to the activity.

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Yours faithfully
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