DOUBLE SIDED ORIGINAL

Decision No. W 91/99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 121 of the Act

BETWEEN **TIM O'BRIEN**

(RMA 411/98)

Appellant

AND **UPPER HUTT CITY COUNCIL**

Respondent

AND **SEAN CLANCY**

Applicant

BEFORE THE ENVIRONMENT COURT

Her Honour Judge S E Kenderdine presiding
Environment Commissioner J Rowan
Environment Commissioner R Bishop

HEARING at WELLINGTON on the 16th day of June 1999

COUNSEL/APPEARANCES

Mr P Milne for the appellant
Mr G J Thomas for the applicant
Mr B R Dodson for the Upper Hutt Council

DECISION

Introduction

1. This appeal relates to an appeal filed by Mr Tim O'Brien ("the appellant") under s.120 of the Resource Management Act 1991 ("the RMA") against a decision of the Upper Hutt City Council ("the council") to allow the application of Mr Sean Clancy ("the applicant") for a land use consent to operate a mechanical workshop at Whitemans Valley Road, Whitemans Valley.

Background

2. In 1996 the applicant on the advice of a surveyor and resource management consultant applied for a building permit for a workshop. The council issued a building consent to the applicant on 14 October 1996 (Building Consent Number: 6164). The consent was issued under the Building Act 1991 for out-buildings of 120 square metres floor area located at 229 Whitemans Valley Road (Lot 2 Deposited Plan 52363) and was for an indefinite period but not less than 50 years. The building consent noted the intended use of the permit was for workshop purposes.

3. Two months after the workshop had commenced operation (April and May 1997) the appellant found the noise levels from the applicant's workshop unacceptable and complained to the council. The council declined to intervene.

4. However, after continued complaints, the council informed the applicant he needed to apply for a resource consent for his workshop. In November 1997 Mr Clancy applied to the council for a resource consent *"To operate a mechanical workshop in the Rural C Zone which is a non-complying activity."*

5. The appellant objected to the application stating that it was contrary to both the City of Upper Hutt Transitional District Plan Review No.4[1] ("the transitional plan") and the provisions of the RMA. The proposal presented adverse environmental effects and there were no effective means of limiting the potential nature of the activity or of effectively monitoring or controlling it. Further, approval of the application would set a precedent for the establishment of similar industry in rural, residential and commercial zones.

6. As part of the documentation accompanying the application the applicant provided a noise assessment report prepared by an acoustic consultant.[2] In turn, the council engaged an environmental consultant to examine that report. The council's consultant concluded that the area has a naturally low ambient sound level, the proposed activity had the potential to generate noise off-site and that the noise impact could be more than minor, but there was a potential to reduce the off-site noise through mitigation. It was therefore recommended that consent be declined on noise grounds but that the council could consider granting consent subject to specified conditions.[3]

7. In response, the applicant again hired the acoustic consultant to prepare an acoustic report on the mitigation measures proposed as conditions to the granting of the consent.[4] This report was assessed by the council whose environmental consultant then recommended that the application be approved based on the mitigation measures.

8. Meanwhile, a Senior Planning Officer of the Upper Hutt City Council reviewed the relevant statutory and district plan considerations and the potential effects on the environment. The officer's report recommended that the application be declined. The reasons given were that the information and noise assessment indicates that the potential noise effects are more than minor, the proposal is not in accordance with the objectives and policies of the transitional plan in relation to maintaining environmental amenity and the effects of allowing the activity will adversely affect public confidence in the administration of the transitional plan in relation to establishing industrial activities in rural zones.

9. On 31 March 1998 the council notified its decision to grant the resource consent to Mr Clancy, subject to conditions. In giving its reasons for doing so it stated that with the conditions of consent, it could be satisfied that the effects of the activity on the environment will be minor. Furthermore, the activity and the effects of the activity are not dissimilar in kind or scale to the activities or the effects of activities that the council would permit in the zone albeit as a discretionary activity, such as farm service uses and forest product industries. In summary the conditions of the consent included the following:

   (a) All noise producing activities shall be conducted within the building with all doors and windows closed.

   (b) The activity shall be operated Mondays to Fridays only between 8.00 am and 4.00 pm.

   (c) Within two months of this decision the workshop is to operate so that noise levels measured 20m from any rural dwelling should not exceed the following levels:

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[1] Operative from 31 August 1994.

[2] A B Effendi's report on sound levels generated by Mr Clancy's workshop, 3 December 1997.

[3] M Hunt, "Noise Measurement Report from Malcolm Hunt Associates", 9 March 1998.

[4] Noise Level Calculations of Proposed Mitigation Measures as Supplied by Mr Effendi, 19 March 1998.

Mon-Fri 7.30am-4.00 pm – L_{10} 45dBA and L_{max} 60dBA

(d) The applicant shall arrange for professional noise monitoring of representative sound levels during normal engineering activities and submit the results to the council. Further reports shall be submitted to the council as required, until the council is satisfied that the measures taken ensure the noise condition in (c) is being complied with.

(e) The council will require the applicant to pay the council's costs of monitoring compliance (s.26(1)(d) of RMA).

(f) Not more than one staff member (in addition to Mr Clancy) shall be employed on the property at any one time

(g) No sign shall be erected on the property which advertises the business.

(h) The council is empowered to review the conditions of the consent at any time should future monitoring of the activity indicate that any effects of the activity are more than minor.[5]

10. The appellant appealed.

The Site

11. The appeal site is zoned Rural C in the transitional plan and falls within the Valley Floor sub-zone of the Rural Zone of the Upper Hutt City Council Proposed District Plan[6] ("the proposed plan").

12. The site to which the appeal relates is in a small valley known as Whitemans Valley which is part of Upper Hutt City and to the east of the main valley floor. Whitemans Valley extends from the Blue Mountains area (above Silverstream) in the south west, to the more substantive Mangaroa Valley to the north east.

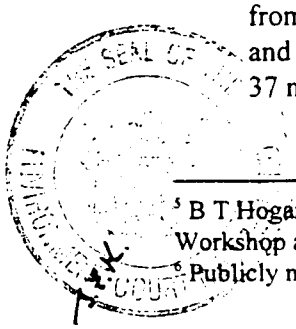
13. Land in Whitemans Valley has traditionally been used for pastoral farming with an emphasis on dairying, particularly town milk supply. Over the last decade or two, the use of properties for dairying has declined sharply. Today the properties in Whitemans Valley are used for a variety of livestock farming, lifestyle blocks and forestry. The land ownership pattern has trended to closer settlement through small lot subdivision and the break-up of the large farms into five and ten acre blocks.

14. The site is approximately seven kilometres by road from the Upper Hutt Central Business District. It is a 2-hectare allotment containing the applicant's house and a number of out-buildings, one of which is used as an engineering workshop.

15. The appeal site lies on the eastern side of the road/river, elevated above the road with a north-westerly aspect across the valley.

16. These buildings are situated some 110 metres upwards from Whitemans Valley Road. The workshop, which contains a mezzanine office floor, is approximately 8 metres by 15 metres, and 5 metres high. It is located approximately 12-13 metres from the northern boundary of the site.

17. The appellant's property is a 4 hectare allotment to the north of the appeal site but separated from it by entrance strips to rear land, approximately 25 metres wide. The appellant's house and garage are located at the southern end of the property, the house being approximately some 37 metres from the northern boundary of the Clancy property at the closest point.



[5] B T Hogan, "Report on an Application for Land Use Resource Consent to Operate a Mechanical Engineering Workshop at 229 Whitemans Valley Road", 12 March 1998.

[6] Publicly notified 26 August 1998.

18. Apart from some amenity and shelter planting around the buildings on these two properties, they present to the road frontage as relatively open pasture. To the rear of the appellant's property there is a stand of native bush, which in turn is backdropped by steep hillsides used for exotic forestry.

The Appellant's Case

19. **Mr T O'Brien** gave evidence as the **owner** of a **four hectare** bare **block of farmland** next door to the appeal site. He outlined his relationship with the applicant, the background to the resource consent application and the workshop activities following the grant of the consent. He also traversed the character and frequency of the noise emanating from the workshop, noise measurement studies and the monitoring of the noise by the council. **Mrs O'Brien** also gave brief evidence on the impact of the proposal.

20. The appellant and his wife purchased their farmland block in 1992. Their intended use was to build their home, keep horses and re-establish the native bush. Their aims were long term and met a life-long ambition. Mr O'Brien explained that until the applicant started operating his workshop, Whitemans Valley was entirely within the appellant's expectations of a rural environment. Given the transitional plan provisions they 'had not expected a non-complying industrial activity to be established in that environment'.

21. The appellant believes that the council had granted a building consent for the workshop structure without identifying that the future use of the workshop was a non-complying activity and that the building was for a commercial or industrial use. The council had therefore ignored provisions of its own plan. This was an issue which affected the local community and amenity values and had potential impacts in terms of community confidence in the plan being upheld. Indeed, the appellant regards this simply as a matter of protecting the amenity values he and his wife used to enjoy and which the plan protects.

22. The appellant accepts that with insulation, the excessive and unreasonable noise levels currently experienced by him and his wife may be reduced. However, under the consent the workshop can operate more intensively than it now does and there is nothing to prevent hammering and grinding throughout the day. The appellant believes that not only have the conditions of consent not been complied with, compliance with the conditions to the consent will be difficult to enforce and impossible to guarantee.

23. The appellant raises the following grounds for the appeal:

- The activity associated with the workshop is not a "home occupation" and effects should not be assessed by comparison with such. The activity is non-complying and is therefore required to pass the threshold test of s.105(2A) of the Act.

- The test contained in s.105(2A)(a) is not met in that the adverse effects on the environment are more than minor. The principal effect is that of noise. The appellant accepts that if the noise standards set by the council could be complied with at all times the effects on the environment would be minor, but there would still be adverse effects from noise in excess of background levels. Further, it is unlikely that the council's conditions can be met and effectively monitored and enforced.

- The threshold test contained in s.105(2A)(b) is not met in that the activity is contrary to the objectives and policies of both the transitional plan and the proposed plan. The plan zoning encourages the appeal site area for rural lifestyle living and does not envisage this type of activity unless it will not detract from rural amenity values.

- In the alternative, even if the threshold in s.105 is passed, the consent should be overturned having regard to the matters set out in s.104. The granting of consent would have an adverse effect on the integrity of the transitional and proposed plans. The

community and the appellants are entitled to have the plan applied in the manner envisaged in the plans.

24. **Mr S R Kinnear, Consultant Planner** and **Surveyor**, gave evidence of his assessment of the adverse effects of the workshop and the consent's relationship with the relevant planning instruments. **Mr N Lloyd, Acoustical Consultant**, gave evidence on the likely noise emissions from the operation of the workshop and the suitability of the council's conditions together with the likelihood of the workshop being able to operate within the conditions.

The Case for the Applicant

25. **Mr S P Clancy, Electrician**, gave evidence of his background association with Whitemans Valley and the types of work activities his business undertakes there. He described the planning history leading to the resource consent and its application and the objection raised by the appellant. He also explained the Taylors' objection to his application. He then specifically addressed the sound issues, the support he has received for his application and his view on the testing procedures.

26. The applicant has had an association with Whitemans Valley since he was 17 years old. His father had a farm near to where he now lives and before he bought his present property, he worked on a 700 acre block for 4 years. Mr Clancy bought his homestead, a former Whiteman family homestead, and 5 acre block in 1992.

27. After training as an electrician, the applicant established his own business in 1987 as a specialised repairer of pumps and pipes and installs communications equipment, often using equipment supplied by clients on their sites. He works almost solely for local authorities and public utilities and does not do general engineering work. The applicant's business employs one other person only and 60% of their time is spent at locations away from Whitemans Valley. Mr Clancy claims this is the reason he decided to build a workshop at his home. Indeed, he sees his work as a "home occupation".

28. In response to this appeal, the applicant submits that this is essentially a dispute between neighbours. He asserts that he did not fail to disclose any information in making his application for the building permit. He took advice from Mr Bob Lendrum, surveyor, engineer and resource management consultant, who advised him he was allowed a workshop if it was part of a "home occupation". As far as he is concerned, the applicant was given a building permit without any indication that his workshop might create resource management issues.

29. The applicant agrees that the adverse consequences of activities require control. However, he believes the argument in this case has 'been subverted by emotional reference to "heavy industry" in Whitemans Valley' which he is not involved in. This Court should not, therefore, be 'subverted by a purist concern about "rural" and "residential" and "industrial" zones and what should happen in each'. Even if this were relevant, the applicant is doing what other residents of Whitemans Valley have been doing for years, as agricultural contractors, general contractors and farmers.

30. The applicant submits that while he does not immediately fall into the definition of a "home occupation" under the transitional plan, he is very close to it. He stores plant and vehicles and is a self-employed tradesman. Further, under the proposed plan "home occupation" is wider and means a trade carried on in residential buildings which are defined to include accessory buildings like a workshop.

31. The applicant submits the council properly gave consent to his application under s.105(2A). The scale of traffic movements, hours of operations, staff levels and scale buildings are no more than minor in comparison to what might occur if a farm service were established. In allowing this application, the council was not allowing heavy industry into Whitemans Valley, nor the loss of public confidence in the administration of the transitional plan.

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32. The applicant states he was prepared to mediate matters and is now prepared to make changes to the workshop so that there is no possibility of excess or offensive noise. One roller door is to be closed completely and the whole of the northern wall and roof insulated with fibreglass batts and acoustic wooden panelling – at an approximate cost of $6,000.

33. **Mr M J Hunt, Environmental Consultant** specialising in environmental noise, gave evidence on ensuring noise from the activity was mitigated in accordance with the "best practicable option" and that the resultant level of "residual" noise was not likely to be unreasonable having regard to the sensitivity of the receiving environment. **Mr A A Aburn, Resource Management Specialist**, in his evidence reviewed the resource management context for the application and addressed the issues raised in the notice of appeal.

The Council's Position

34. The council states that the decision appealed against is in accordance with sound resource management practice and that the decision is further justified by the reasons set out by it in its Notice of Decision.

35. Two witnesses appeared on behalf of the Upper Hutt City Council. **Mr B T Hogan, Senior Planning Officer** and **Mr Hans Van Kregten, Planner.** Their evidence we refer to elsewhere.

Issues

The Relevant Plan

36. The council's transitional plan was prepared under the Town and Country Planning Act 1977 and was operative from 31 August 1994. The proposed plan was publicly notified on 26 August 1998. It is at the stage where submissions and further submissions have been made but no hearings have yet taken place. Under s.105(2A):

> **... a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that-**
> ...
> **(b) The application is for an activity which will not be contrary to the objectives and policies of,-**
> **(i) Where there is only a relevant plan, the relevant plan; or**
> **(ii) Where there is only a relevant proposed plan, the relevant proposed plan; or**
> **(iii) Where there is a relevant plan and a proposed plan, either the relevant plan or the relevant proposed plan.**

37. The council considered the application for a resource consent and notified its decision on 31 March 1998. At the time the council made its decision it had not yet publicly notified its proposed plan. It appears therefore that under s.105(2A)(b)(i) it is the council's transitional plan that is relevant to this appeal. However, as Mr Aburn contended, given that the hearing before the Court is a hearing *de novo*, the applicable clause is s.105(2A)(b)(iii). This sub-clause provides an option of assessing the proposed activity in terms of either the transitional or the proposed plan in the alternative. Mr Dodson, counsel for the council considered the proposed plan had not progressed far enough in its formation process for us to give it the appropriate weight. The proposed plan is at the stage where submissions and further submissions have been made, but no hearings have taken place.

"Home Occupation" under the Plans

38. The appellant submits that the applicant's activity is wholly non-complying under both plans. However, the applicant contends that while not falling directly within the "home occupation" definition, his activity comes close to it.

39. Mr Aburn gave evidence for the applicant on this point. He accepts that the activity is a non-complying activity, at least insofar as the transitional plan is concerned. However, he also

states that it is not too far from qualifying as a "home occupation". Under the transitional plan "home occupations" pursuant to the requirements of Ordinance 6.2.1 are a permitted activity in the Rural C Zone. Home occupations are defined in the plan as:

> *"Home occupation means a full time or part time business activity carried out in conjunction with the household unit and in accordance with the provisions of Ordinance 6.2.1."*

40. In turn, Ordinance 6.2.1 specifies a number of performance standards, including a 50 metres square floorspace restriction. Up to two persons who are not residents of the household may be engaged in home occupations. Noise limits are set at 50dBA L_{10} Monday to Saturday 7.00 am-7.00 pm and 35dBA L_{10} on Sundays and public holidays, with a 70dBA L_{max} between 7.00 am-7.00 pm. Mr Aburn states that the applicant's activity complies in all ways except the restriction of floorspace that may be utilised for a home occupation.

41. Under Ordinance 6.2.1, trade activities, including engineering workshops, are not specifically listed either as permitted or prohibited home occupations. Mr Aburn says this is not surprising given that the ordinance was specifically developed for Residential Zones. He accepts the 50 square metre floorspace limit is appropriate for residential areas but too restrictive for rural areas.

42. Turning to the proposed plan, a home occupation is defined as:

> *"An occupation, art, craft, business, trade or profession which is carried out in residential buildings by a maximum of three non-resident persons present at any one time, at least one of whom lives in those buildings as their principal place of residence, but excludes the repair or maintenance of vehicles or engines other than those belonging to the residents, the use of the site as a depot for any heavy vehicle associated with a trade, and retail of goods other than those produced or grown on the site."*

43. Home occupations involving non-rural activities are permitted in the Rural-Valley Floor sub-zone where they meet the permitted activity standards. They become a limited discretionary activity where they do not meet the permitted activity standards. The standards specified for a permitted activity include an 8 metre maximum height limit, 12 metre setback from the boundaries and maximum noise levels.

44. In Mr Aburn's opinion, if the definition of "home occupation" under the proposed plan were operative, the proposal would arguably be a permitted activity in that:

    (a) It represents a trade being undertaken by a maximum of one resident and one non-resident employee;
    (b) The accessory building (i.e. the workshop) is a residential building for the purpose of the definition of home occupation;
    (c) The building meets the standards specified in Rule 14.8.2;
    (d) The activity can comply with the specified noise limits.

45. If the proposed activity fails to meet any of the specified standards, it would become a limited discretionary activity under Rule 14.8.4.1. Under this provision, the council has limited its discretion to external storage, the number of non-resident workers, the creation of light or noise nuisance, the appearance of the building, car parks and financial contributions.

46. Mr Kinnear for the appellant acknowledges that "home occupations" are included in the Permitted Activities in Rural C Zone in the transitional plan. However, in his opinion it is clear that the commercial operation of the workshop is not a "home occupation". By definition home occupations are limited to a specific list of activities.

47. The appellant's counsel submits that under the transitional plan, the applicant's activity is not an activity which is carried out '*only in conjunction with a dwelling house*' where '*the*

permitted activity of the premises remains residential'. The workshop was purpose built for commercial engineering. The consent allows it to be used for those purposes 5 days a week during the normal working hours. The use of the premises is therefore no longer primarily residential. In any event, once the activity becomes non-complying, it becomes wholly non-complying. A comparison with what might otherwise have been permitted is inappropriate (Aley & Ors v North Shore City Council [1998] NZRMA 361).

48. In reply to Mr Aburn's suggestion that the activity is arguably now a permitted "home occupation" the appellant submits that the activity of a commercial engineering workshop was never intended to be within the "home occupation" category. The definition refers to activities carried out in "residential buildings" and excludes "repair or maintenance of vehicles or engines". Although the proposal does not involve vehicle maintenance, the appellant submits it is similar in nature.

49. The appellant accepts that the definition of "residential buildings" includes "accessory buildings" which in turn include "workshops not used for commercial purposes other than home occupation". However he does not accept that this extends to workshops purpose built for commercial engineering purposes. The definition would not make sense at all if workshops used for a commercial activity can become residential buildings and therefore home occupations if they are used for that purpose.

50. Furthermore, Rule 14.8.2.8 and the table of rules in the proposed plan refer to "home occupations **incidental** to residential activities". The appellant argues this activity is not incidental to a residential activity, it is an entirely separate commercial activity on the same site. In any event, the rule is at a rather immature stage.

51. Mr Van Kregten, for the council, stated that a mechanical engineering workshop is not provided for as a permitted, controlled or discretionary activity in the Rural C Zone and the proposal is therefore non-complying. In the proposed plan, the zoning of the site is Rural Valley Floor and a mechanical engineering workshop is not provided for in the list of activities applicable to this Zone (see Rule 14.8.1). The status of the proposed activity is therefore non-complying.

Evaluation

52. Under the transitional plan we do not accept that the proposal is a part time business activity carried out in conjunction with the household unit to allow it to be considered a *"home occupation"*. We do not see a mechanical light engineering workshop as *having a connection with* what is carried on in the household, even if it mostly complies with the provisions of Ordinance 6.2.1. In our view it does not have sufficient nexus with any residential activities to be considered related to them. The list of permitted activities in the zone specifically exclude buildings used for a commercial or industrial nature, and under the list of discretionary activities it is clear that the workshop building does not relate to any there identified.

53. Under the proposed plan the activity, although a trade, is not carried out in a residential building in which Mr Clancy lives. We do not therefore consider a purpose built building such as the workshop qualifies as 'residential' to make the building an accessory to residential use. Nor is a mechanical engineering workshop provided for in the list of activities applicable to the Rural Valley Floor zone.

54. Under both plans therefore, the activity cannot be classified as a home occupation and may only be assessed as a non-complying activity. We accept the appellant's case in this regard. The proposal therefore requires assessment as a non-complying activity in terms of s.105.

Section 105 and Non-Complying Activities

55. Under s.105(2A) a consent authority must not grant a resource consent for a non-complying activity unless satisfied either that the adverse effects on the environment will be minor, or that

the application is for an activity which will not be contrary to the objectives and policies of the relevant plan. The appellant submits that the proposal does not pass either of these threshold tests.

Adverse effects

56. The predominant adverse effect at issue in this appeal is the effect of the noise generated by the applicant's workshop activities.

57. The appellant submits that in determining whether effects are minor what is required is a comparison with the existing amenity values. In support of this the appellant relies on two cases – Hanton v Auckland City Council [1994] NZRMA 289 and Baker v Franklin District Council A70/98. In the former case the Tribunal considered that the word "*minor*" did not imply that a comparison should be made of the possible effects of hypothetical activities that could be permitted by the rules in the plan. Whether or not an effect was minor should be considered in the context of the immediate existing situation. In the latter, the Court found that in determining whether effects are minor it was appropriate to look at the effects of the proposal in the context of the present amenities in the area rather than what might exist were other permitted activities developed. It noted that it would be strange if a non-complying activity had less adverse effects than a permitted activity but these activities were still regarded as more than minor.

58. The appellant argues that the noise effects of this non-complying activity will not be less adverse than those of permitted activities - i.e. permitted by both plans. Apart from home occupations, the only relevant permitted activities are not subject to noise standards but are of a rural rather than an industrial type. Furthermore, an engineering workshop operating throughout normal working hours on weekdays has greater potential noise effects than a home occupation.

59. Compliance with standards in a plan is not determinative of whether effects are more than minor. The appellant argues this must apply to cases like this where there are no noise standards for the Rural zone. In Aley the High Court found that:

> *A consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists, not just those aspects of development which have the effect of requiring a discretionary activity consent.*

It cannot be said that the plan permits noisy activities as of right. Activities are only permitted if they comply with all other requirements. If they do not, then noise must be assessed against existing amenity (background noise levels) rather than against what might be possible if other requirements were met.

60. The appellant accepts that if the conditions on the consent are consistently complied with, the effects of the activity would be no more than minor. However he considers, it is unlikely the conditions imposed on the consent in fact could be complied with or readily enforced. The practical difficulties in complying with the conditions means the adverse effects of the proposed activity may not be mitigated. If conditions of consent are insufficient to achieve mitigation or avoidance, the consent should be refused in order to avoid the adverse effects (Ruru v Gisborne District Council W100/93). In Ruru the Tribunal held that if conditions cannot be practically formulated so that the parties have confidence they will work, the use is not suitable for the site.

61. In reply, counsel for the applicant suggests that the scale of traffic movements, hours of operations, staff levels and the scale of buildings are no more than minor in comparison to what might occur if a farm service was established on the site. Farm service uses are a discretionary activity in Rural C Zone [in the transitional plan]. It was contended Mr Clancy may not grind

or hammer on ploughs and haymakers but his activity is no different, in a rural sense, from those who do.

62. As part of his resource consent application, the applicant submitted a Sound Level Assessment Report prepared by Mr Effendi (3 December 1997). It assessed the anticipated sound levels in terms of L_{10} and L_{max} in the immediate surrounding environment and found the sole acoustically significant activity in the workshop is the use of an electrical grinder. According to Mr Effendi, the noise generated by the grinder therefore will determine the L_{max} level. He stated:

> ...
> *"It is our assessment that L_{max} will be determined by the grinder and will be in the order of 44dB(A) at the residential boundary. As grinding, in terms of percentages of the time, will only take place for low single figures, L_{10} will be determined by ambient noise and will generally be well below 44dB(A) at the residential boundary."*

63. Given that the actual and potential noise effects of the activity would be a central element of the consideration of the application, the council commissioned Mr Hunt to undertake measurements of workshop noise, assessment of noise impact and make recommendations to the council. He recommended that the council could decline the consent based on inadequate information required for an assessment of environmental effects found in Mr Effendi's report. However he considered the council could also consider granting consent subject to certain conditions.

64. Mr Hunt took measurements at the 20 metre notional boundary to Mr O'Brien's residence under favourable weather conditions. He found that hammering, sawing and grinding were the main types of noise that had the potential to generate significant off-site noise effects. As there are no applicable noise performance standards in the transitional plan and the proposed plan had not been notified at the time, Mr Hunt relied on the provisions of NZS6802:1991 *Assessment of Environmental Sound*. Hammering, measured at L10 **51.6** dBA, was found to contain special audible characteristics.

65. Mr Hunt considered conditions could be imposed on the consent that included a limit of L10 **45** dBA for the daytime workshop activity based on the "background sound level plus 10" approach. Hammering should be no more than L10 **40** dBA, due to its special character. Mr Hunt continues to believe these limits are reasonable to control the potential adverse noise effects.

66. A report was then prepared by Mr Effendi on mitigation measures capable of containing noise levels within the recommended limits. These represent the "best practicable means" and the applicant is prepared to implement them at a projected expense of $7,603 plus GST. They include the following:

- The construction of a double wall for the north wall. A 20 millimetre particle board can be erected 150 millimetres from the current Colorsteel façade. The cavity between the Colorsteel and particle board can be filled with fibreglass sound absorption.
- The removal of one roller door in the north wall and blocking of that area with the above.
- Improving of the detailing around the remaining roller door to fix the current gaps.
- The construction of an improved roof. A 6.5 millimetre safety glazing can be erected 250 millimetres from the two lines of corrugated polycarbonate roofing material.
- The reduction of reverberation inside the workshop by applying 10 square metres of "Woodtex" acoustic panels inside the workshop.

67. Mr Effendi states the projected effect of these measures will be a reduction of grinding noise by **10** dBA to **36** dBA L_{10}. This will reduce grinding noise to the same level as the natural background. A similar **10** dBA reduction can be expected for hammering noise. This will reduce the maxima of hammering from **56** dBA to **46** dBA, which is only **10** dBA in excess of the background. The NZS6802:1991 *Assessment of Environmental Sound* allows for a night time L_{max} of 30dBA above the background level. It is Mr Effendi's opinion that no noise

nuisance whatsoever will exist after implementing these measures. Mr Hunt agreed that once the mitigation measures are in place the noise levels would be no more than (and are likely to be far less than) the noise arising from typical farming activities.

68. Mr Aburn for the applicant considers the effects of the noise generated from the activity can 'measure up', based on the mitigation measures proposed by Mr Hunt and given the scale and duration of the activity. He also notes that the noise levels specified in the council's decision are more restrictive than those specified in both the transitional and proposed district plans for the residential zones.

69. Mr Van Kregten of the council pointed out that, perhaps surprisingly, the rural zones in Upper Hutt do not have specific noise standards. He states it must be concluded that the council clearly regards the Rural zones as economic or business areas, and determined that farming and residential activities (for which the Rural zones of the transitional plan seem primarily designated) from time to time may result in noise levels that might exceed those it could have stipulated in the plan. It is therefore not unreasonable to have to accept, from time to time, some noise effects in the zone. The absence of specific rural zone noise standards has been carried forward into the proposed plan.

70. Mr Lloyd noise consultant to the appellant states compliance with the conditions is unlikely because of the proximity of the workshop to the O'Briens, the construction of the workshop itself (eg the roller doors), the need for ventilation, the quiet rural environment (low background noise), the nature and volume of noise likely to be generated from this type of activity (bearing in mind that the activity has not yet fully commenced and may well become more intensive) and the difficulty in monitoring and enforcing these particular standards. To him real issues remain as to the effectiveness of the insulation measures proposed, and as to how representative the tests conducted by Messrs Effendi and Hunt were.

Evaluation

71. Mr O'Brien produced in evidence a detailed diary June 1997 – May 1999 (Attachment J to his evidence) of dates in which he had heard noise events allegedly coming from Mr Clancy's workshop activities and the duration. He also detailed 5 instances of the delivery of steel pipes over that period. Mrs O'Brien stated she occasionally heard the clanging of metal on metal which she took to be the loading of heavy pieces of metal onto a truck (once a month).

72. In cross-examination about some of these events, Mr Clancy gave oral evidence referring to his work diary (Exhibit I) that he and his employee were not working at all in the workshop during a number of the days when the alleged events took place. He gave details of the specific locations where he and his employee were working, the dates and often the times. On another occasion (a Sunday) Mr Clancy was not in the workshop. We had no reason to doubt the truthfulness of Mr Clancy's evidence. And in fact his diary indicates he is away from the workshop more than 60% of the time. Mr Clancy stated also that some of the noise related events could have been coming from a neighbouring shed where farming activities are carried on. That cannot be ruled out, because the Taylor property also in Whitemans Valley Road contains a number of farm buildings and sheds and Mr Clancy indicated there was a lot of activity around the area.

73. Mrs O'Brien gave evidence that the noise she hears from the workshop is a high pitched whining sound. She said "*the regular drone of industrial machinery, whether or not it is accompanied by Classic Hits, is enervating and seriously interferes with the enjoyment of our home and garden*". But she acknowledged that *"this is unlikely to be the equipment in use in the workshop but it is the only similar sounding machinery which I am familiar"*.

74. We are not convinced that the *"regular"* drone of machinery takes place. Subtracting the occasions Mr Clancy was not at his workshop together with the ones detailing radio noise and steel deliveries, or loading only we found there were approximately 35 noise events recorded

by Mr O'Brien largely associated with grinding and hammering over an approximately two year period. Those events cannot therefore be considered consistent or "*regular*" as described.

75. In addition, Mr Clancy stated in his evidence in chief that he would never use a grinder for more than 3 or 4 minutes in any one day and would rarely use a hammer for more than 10 to 15 seconds at a time, never for more than 2 minutes during a day and only about 2 days per week. Thus even if Mr Clancy is regularly in his workshop for 2 days each week, any grinding and hammering on his evidence can scarcely be considered of lengthy duration. This evidence contrasts with that of Mr O'Brien whose duration times for hammering and grinding events vary. The discrepancy was not resolved.

76. In respect of other alleged noise events there had been noise from the truck radio of two employees from the Hutt City Council visiting the property, music emanating from the workshop and music from the family sleepout. The number of deliveries of the 6 metre steel pipes stated was challenged, in that the records indicated there had been only 3. There had also been occasions when firewood has been sawn at the back of the workshop. We do not consider any of these noise events to be unduly intrusive in a rural zone. They could reasonably be associated with any homestead and associated farming activities (such as a woolshed).

77. We concluded the effect of noise in a quiet rural environment such as Whitemans Valley is likely to be personalised to the receivers. For some, Mr Clancy's activities may have no adverse acoustic effects at all. But for the O'Briens, who have an expectation that they are entitled to live in a relatively noise free situation because that is why they chose to be there, intermittent hammering and grinding emanating from an unlined corrugated iron workshop close to their boundary could have an adverse effect which to them is more than minor. We noted from Mr Hunt's evidence, hammering has special audible characteristics and would be intrusive at 51.5 dBA (worst case) against the measured ambient level of 36 dBA. Clearly such events have developed well beyond just an irritant – especially as the O'Briens are home a great deal.

78. It is unfortunate that the council, in granting the building permit at the initial stage, did not consider the possible implications of allowing the workshop to be established in the close vicinity to a neighbouring property. If Mr Clancy had been required to obtain a resource consent the workshop may have been erected further from the O'Brien house and with the roller doors opening out in the opposite direction to what they do now. We note however that Mr Clancy stated that there had always been a workshop on his property, even closer than the new one: and that Mr O'Brien knew this when he chose to build his house virtually on the Clancys' southern boundary.

79. Nevertheless looking at the issue objectively we concluded the effect of the noise from the workshop on the O'Brien household is major if the council's conditions are not amended. Because they are sensitive receivers, because the background noises in the area are few resulting in a low ambient level, the noise generated from the workshop has a high impact regardless of its duration and frequency (see the extended definition of *"effect"* in s.3 of the Act).

Plan Provisions: Objectives and Policies

80. The appellant submits that the proposed activity is clearly contrary to the objectives and policies of both the transitional plan and, if it is relevant under s.105(2A)(b)(iii), the proposed plan. The appellant claims the Rural C Zone in the transitional plan expressly provides for and encourages rural lifestyle living. The Zone Statement describes Rural C as:

> *Intended to provide for the promotion of viable farming on smaller blocks of land having a high actual or potential value for the production of food, and also permit certain other rural-oriented uses appropriate to the rural environment.*

81. The appellant points to one of the principal objectives of the transitional plan:

To contain urban development within the limits of present zoning leaving the balance of the City in rural use.[7]

82. Mr Kinnear also identified that the transitional plan contains an Implementation Policy at Clause 2 – 3:

To ensure that the land use is conducted in a manner which is compatible with the Council's planning policies and avoids unnecessary conflicts.

83. This to be achieved by zoning areas within the district for different classes of uses in development and by imposing appropriate performance standards with regard to those zones.

84. Ordinance 5.4.1 of the Rural C zone states as follows:

This zone is intended to provide for the promotion of viable farming on smaller blocks of land having a high actual or potential value for the production of food, and also to permit certain other rural-orientated uses appropriate to the rural environment.

85. It is the appellant's contention that the objectives and policies of the transitional plan exhibit a clear intention that non-rural activities should only be allowed where they do not compromise rural amenity values. Industrial activities are not of themselves contrary to the rural objectives and policies, provided that they can be established without detraction from rural amenity values and without detracting from the use and enjoyment of adjoining properties.

86. It is clear that the council has for some time encouraged rural lifestyle living in the Rural C zone and, in reliance on Aley,[8] the appellant argues a comparison with what is already existing in a quiet rural lifestyle is the appropriate approach when considering whether what is proposed is contrary to the objectives and policies of the plan.

87. In reviewing the transitional plan, Mr Aburn particularly notes Clause 7.1 which specifies the policies for the rural zones. In the introduction it is stated that:

... In the Rural A, B and C zones the emphasis is on farming and Council's objective is to permit suitable agriculture or other rural orientated uses, but to prevent speculation and possible use for non-rural purposes ...

88. But Mr Aburn did not add the rider to this statement which makes no reference to industrial uses in the rural zones:-

This is consistent with Council's overall planning objective to avoid the spread of urban-type development beyond the Upper Hutt Valley and to promote the best use of rural land. A wide range of suitable land uses are provided for, subject to land use productivity, conservation, amenity and services criteria.

Council sees the City's rural area fulfilling the following functions:

(i) It is suitable for farming purposes and other primary production activities, particularly forestry ...

(ii) It provides for rural residential living ...

(iii) It provides for recreation ...

(iv) It is an amenity area ... "

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[7] Clause 1-2(a) of the transitional plan.

[8] Supra

89. Clause 12 Policies on Development Control, Policy 1 reads:

> *To maintain adequate standards of performance and amenity with respect to the use and development of private property.*

And Policy 3 reads:

> *To provide for an appropriate degree of flexibility in the operation of the District Scheme provisions.*

In explanation of the policy it is stated that:

> *The regulatory controls embodied in the Plan largely relate to the average situation, and exceptional circumstances which do not necessarily comply with particular requirements but which conform to the policies of the Plan, are not always catered for. Accordingly, various procedures are incorporated into the Scheme to enable special cases to be considered on their merits provided that the intentions of the Plan are not compromised.*

The transitional plan prescribes noise standards for most urban zones but does not provide a standard for the rural zones. The appellant submits the plan does not control noise detraction by way of standards, but by way of permitting only appropriate rural type activities. The appellant further submits that the following "Development Control" objective is applicable. It reads:

> *To control and reduce where possible any detraction from the use and enjoyment of any property in the district arising from elements of noise, smoke, smell, effluent, vibration, dust or other noxiousness or danger, or from the unsightly appearance of any property.*[9]

90. Turning to the proposed plan, the appellant states the following matters may be relevant when considering consents for non-rural activities:

> ...
> *Whether the amenities and the quality of the rural environment can be maintained.*
>
> *The potential impacts of noise, dust, glare, vibration, fumes, smoke, odour, other discharges or pollutants or the excavation or deposition of earth.*
> ...
> *Whether the site of any non-rural or residential use is appropriately located having regard to the scale of the building development proposed and the intensity of the activity...*[10]

91. Further, the proposed plan includes objectives and policies on "Environmental Quality" which apply across the entire city. Under a general objective to protect amenity values (Objective 5.3.1), these include:

> *Policy 5.3.1.4*
> ***To manage noise emissions to levels acceptable to the community.***

The explanation to this policy contains the following statement:

> *"... Council has responsibility for the management of emissions of noise and the mitigation of the effects of noise in the City.*

[9] Clause 13.6(vii) of the transitional plan.
[10] Clause 14.9 of the proposed plan.

The most effective method is to implement performance standards by way of District Plan rules. *Such rules are based on community-derived values, rather than individuals perceptions. For example, the emission of noise from activities which have a legitimate function in an area, such as tractor noise in a farming area or noise from motor vehicles using roads, may be deemed 'acceptable'.* ***Conversely, noise from activities which are not an accepted part of the character and functioning of an area can be considered to be unacceptable.***
(Emphasis added)

92. The appellant submits that under the proposed plan there is a clear policy to manage noise emission to a level acceptable to the community. The noise in question is 'not an accepted part of the character and functioning' of this area. Even if noise effects can be minimised, there will still be some noise from this non-rural activity on a very regular basis.

93. The appellant concludes that if the council accepts that there are real issues regarding compliance with the noise conditions, then the activity will be contrary to the objective and policies of both plans. And even if compliance is consistently achieved, distinctive industrial noises will still be heard and may still be regarded as contrary to the intentions of the planning provisions.

94. Mr Aburn for the applicant adopts the approach favoured by the High Court in Elderslie Park v Timaru District Council [1995] NZRMA 433 which was that the process of assessing a non-complying activity in terms of s.105(2)(b)(ii):

> *... involves an overall consideration of the purpose and scheme of the plan rather than a checking of whether the non-complying activity fits exactly with the detailed provisions of the plan.*

95. The High Court also said that in determining whether or not a grant of consent would be contrary to the objectives and policies of a plan or proposed plan, it was:

> *... important to read the words in a real and sensible manner. Mere non-compliance with the strict terms of a plan would not be sufficient. The council must consider whether the non-complying activity applied for is opposed in its nature to the objectives and policies of the plan.*

96. Turning to the proposed plan, Mr Aburn points to these objectives and policies applicable to this appeal. Messrs Aburn and Van Kregten identified the following as having relevance:

> *Objective 14.3.1*
> *The maintenance and enhancement of the open space, natural features and ecological systems which comprise the rural character and amenity.*
>
> *Policy 14.3.1.1*
> *To manage the scale, density, number and location of new building developments and activities so that they do not compromise the rural character and landscape.*
>
> *Objective 14.4.1*
> *The promotion of an environment within which soil, water and land resources are managed sustainably.*
>
> *Policy 14.4.1.3*
> *To encourage new development of an urban nature to locate within the urban areas of the city.*
>
> *Objective 14.5.1*
> *To maintain and enhance the amenity values of the rural areas.*

Policy 14.5.1.1
To manage rural and non-rural activities to limit their potential adverse effects on the rural amenity values.

97. Mr Aburn believes the proposal could not be held to be contrary to these objectives and policies. Certainly there is no 'ban' on non-rural activities. Indeed, Policy 14.5.1.1 envisages non-rural activities being established in the rural zone in situations where those activities do not adversely impact on rural amenity values.

98. Given the scale of the activity and the appearance and location of the workshop building, Mr Aburn concludes that the proposal is of the type and scale contemplated as an appropriate non-rural activity in the rural zone. In this regard, therefore, it could not be held to be contrary to the plan in the way that "contrary" was defined in NZ Rail v Marlborough District Council & Port Marlborough (1993) 2 NZRMA 449.

99. Mr Van Kregten for his part considered little weight could be given to the provisions because no hearing on submissions had taken place and at the time Mr Clancy's application had been processed the proposed plan had not been notified.

Evaluation

100. Mr Aburn identified that the transitional plan acknowledges the need to provide an appropriate degree of flexibility as the regulatory controls in the plan relate to the "average situation" (Policy 3 on Development Controls). He considered this policy provides the mechanism for assessing proposals against the transitional plan objectives and policies within the context of the "effects-based" approach of the RMA.

101. But in regard to urban containment (and consequently the containment of industrial-type activities into rural areas), apparently planning studies carried out some years ago identified that urban expansion into the Mangaroa Valley was undesirable and unnecessary (the population of Upper Hutt in 1996 showed a decline in the census for that year). Whitemans Valley is very close by so it may be considered that industrial type workshops may be considered undesirable and unnecessary in that location also. We note that Clause 6.2 of the transitional plan requires the council to ensure that there is sufficient suitable land available to accommodate the expansion in industrial development envisaged. The evidence indicated that there is more than enough industrial land available for the activity particularly with the closure of the General Motors plant. So in this sense the Clancy land is not 'required'.

102. And in terms of the objectives and policies of the transitional plan, we were not referred to any *"special case"* as to why Mr Clancy should operate his workshop in this location. What Mr Clancy stated was this:

> *"After training as an electrician, I did contract work around the Hutt Valley. Increasingly I was asked to do work for local Councils on pumps and pipes. I set up a specialised contracting business in 1987. I called it Western Hutt Engineering because I used a workshop on the old Western Hutt Road. 96% of my work is for local utility companies like the Regional Council, other local authorities, Telecom and Transpower.*
>
> *The work that I do is refurbishing and constructing old pumping stations and pipework. Often the equipment is client-supplied. For example I carried out the refurbishment on the Paraparaumu Sewage Treatment Plant and worked on the new Heretaunga Pumping Station. I have one employee. Most of the work is on-site work.*
>
> *I found that only about a third of the work that I did was at my workshop and found that I was away from the workshop most of the time. The workshop on Western Hutt Road was basically being used as a shelter to keep the rain off contracting gear.*
>
> ...

I am not engaged in work of a heavy engineering nature. No commercial welding takes place. I do repairs to equipment where such repairs cannot be effected on site. The building is the style of a workshop that I need for my occupation."

103. This explanation does not seem to be a *"special case"* as envisaged in the policy which provides for an appropriate degree of flexibility in the siting of non-conforming uses in the Rural C zone. It was Mr Kinnear's evidence that the district plan identifies some 170 hectares zoned for industrial activity. Currently there are apparently some 10 hectares of vacant industrial land in Upper Hutt for which there is very low demand. In addition, there are a number of vacant buildings in industrial zones for sale or lease. While farming and other rural activities contemplated by the district plan can give rise to adverse effects on rural amenity, these are expected (and accepted) by the rural community. The noise emanating from this activity is not – depending on how noisy is the activity and how close it is to other residents.

104. We find the nature of Mr Clancy's activity is one of light industrial use and of small scale. But it cannot be considered rurally oriented in terms of the rural zone statement. Whilst the noise from tractors, farm vehicles and general and forestry harvesting, together with noises from implement sheds on farm properties may be expected in this environment, we do not consider hammering and grinding producing an identifiable noise pattern is, even if it occurs intermittently. The calibre of the noise from the activity as outlined by Mr Lloyd appears to be such that it cannot be accepted as part of the rural character and function of this area (the work in mitigation suggested by Messrs Hunt & Effendi confirms that).

105. And nor does the proposed activity necessarily assist the council in achieving the containment of urban development, for it results in a "foot-in-the-door" to industrial activity (albeit one of a very small scale) in a quiet rural area

106. Such a non-rural activity can therefore only be acceptable if the development is adequately controlled and/or reduced. Because of the building materials from which the workshop is made and its proximity to the O'Brien boundary, we do not consider that the council's conditions achieve what is intended. Therefore we must conclude overall that the activity is contrary to the relevant provisions of the transitional plan.

107. Mr Aburn accepts that the objectives and policies aim at containing urban development, maintaining rural land for productive uses and avoiding unnecessary conflicts. However, in his opinion, the transitional plan was clearly developed under the previous town and country planning legislation with its emphasis on "directing and controlling". This approach is not consistent with the resource management legislation. He considers there is greater flexibility clearly inherent in the proposed plan.

108. In terms of this plan to which we now turn, some of the objectives and policies are not relevant. Those that are, relate to the maintenance and enhancement of the amenity values of Whitemans Valley and the need at the policy level to manage non-rural activities such as Mr Clancy's so that potential adverse effects are restricted. This is difficult because on Mr Effendi's evidence the council's conditions do not go far enough in maintaining amenity let alone enhancing it.

109. Otherwise the scale and density of the workshop does not compromise the rural character and landscape of the site. It is worth noting too that at the policy level that non-rural activities are obviously contemplated. If the activity can be managed as Mr Hunt suggests, then the proposal is not contrary to the provisions of the proposed plan.

110. We now return to s.105(2A)(b)(iii) Decisions on Applications, and conclude that the relevant plan to assess is that of the transitional plan. The progress of the provisions of the proposed plan are not advanced far enough in the planning process to give them sufficient weight.

111. In respect of the transitional plan therefore and in the light of our evaluation above, the proposal may be considered contrary overall to its objectives and policies. The proposal does not meet the threshold test of s.105(2A) and is required to be considered under s.104.

Section 104 considerations

112. Section 104 matters singled out to be considered in this appeal include:

> **(1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to-**
>
> **(a) Any actual and potential effects on the environment of allowing the activity;...**
>
> **...**
>
> **(d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and**
>
> **...**
>
> **(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.**

Actual & Potential Effects

Noise

113. In respect of noise, Mr Lloyd as noted was called on behalf of the appellant. He has had considerable experience as Noise Control Engineer for the Department of Labour in respect of noise generated in workshops. He did not visit the Clancy workshop or undertake any measurements but gave his opinion on the evidence of the other noise experts and his own experience as a noise control engineer.

114. It was his evidence that whilst he considered the resource consent conditions are appropriate in the circumstances from his reading of the acoustical consultant's report, he doubted whether the insulation measures will be effective, practicable or whether they can be enforced.

115. Rather than a noise reduction by 10 dBA, Mr Lloyd sees only 5 dBA being achieved because the roller shutter door is a poor noise reducer and will provide a weak link. Further there are no recommendations to treat the side walls in the mitigation measures. This would leave hammering sounds at 46 dBA L_{10} based on Mr Hunt's measurements 6 dBA over the consent limit of 40 dBA L_{10} (45 dBA L_{10} being corrected by 5 dBA for impulsive sound).

116. In Mr Lloyd's opinion the workshop is poorly located. He believes that the noise insulation recommendations made by Messrs Hunt and Effendi border on the extreme for a building of this kind. He sees heat build-up as probable consequence, because for the sound insulation measures to work, the windows and doors must be kept closed at all times. The temptation will be to open doors and windows.

117. The workshop has been constructed without sound insulation being a steel clad structure with additional translucent polycarbonate roofing elements. Both of the 3.5 metre and 3.4 metre roller doors face in a northerly direction which direct sound propogation lines to the O'Brien's dwelling. They are therefore facing the wrong way. In addition Mr Hunt described hammering as having impulsive characteristics and grinding as having a distinctive sound. In Mr Lloyd's opinion there is nothing besides the limitation on hours of operation to stop the applicant undertaking noisy work for a significant duration. In addition it is the nature of the high level short duration and unpredictable sounds associated with such a workshop that they are difficult to monitor effectively. Little or no noise may be generated for periods of days, weeks or even months. This makes council monitoring very difficult.

118. In conclusion Mr Lloyd stated that there is the potential to hear noise all day. He considered that relocation of the building would improve the O'Brien's amenity considerably, for if talking of L_{10} as 10% of time, he stated that in any 15 minute to 1 hour period the limit may be exceeded for 10% of the time but without going to L_{max} which is also set in these noise conditions.

Evaluation

119. The evidence establishes that the noise levels specified in the conditions are more restrictive than in both transitional and proposed district plans for residential areas. But this is a very quiet area even during the day and noise is a significant issue.

120. The Court notes that the mitigation measures recommended by Mr Effendi in his second report (19 March 1998) were not incorporated into the council's conditions attached to the granting of consent. These measures included insulating both the north wall and the roof and the removal of one roller doors and fixing of the gaps. These measures, the cost of which the applicant is prepared to meet, will in our view will go some way to answering the concerns of Mr Lloyd that compliance with the council's conditions is unlikely. We consider they are essential to include if Mr Clancy is to continue his workshop at this site. In addition we consider insulation should take place on the side walls also. Mr Lloyd answered in questioning too that putting an enclosure around the remaining steel door would also assist in mitigating effects. We consider such enclosure also should be a condition of consent.

121. Mr Lloyd acknowledged that it was difficult to struggle with the subjective nature of the sounds he identified. We agree, and for this reason have given the O'Briens' concerns considerable deliberation. Mr Lloyd would not want to limit the activity to any one day or in any one week and nor would we. Mr Lloyd acknowledged that there was no machinery work impacting on steel plate so there is only work on pipes and vessels. We concluded if Mr Clancy cannot meet the amended conditions we intend to impose on noise emissions then the site is not suitable for the use.

Visual Amenity

122. The evidence established the existing visual amenity of the site will not change with the facility. The activity complies with the bulk and location requirements in Ordinance 5.4.6 for the Rural C zone being a 12 metre set-back from any boundary and a maximum height of 8 metres.

123. The existing building has a minimum set-back of 12.3 metres and a maximum height of 5.05 metres. The scale is not dissimilar to other permitted farm buildings such as implement sheds, hay barns and cow sheds. Any onsite storage is screened by planting. The workshop building is painted a dark green which does not create an adverse amenity effect in a rural zone. And there will be no advertising signage. It is altogether a discrete operation visually.

Traffic

124. The applicant has a light truck and the employee a car which it is claimed will create no more than 2 extra traffic movements a day. Mr Clancy lives on site anyway and often his employee does not come to the site during working days at all. Steel deliveries are very intermittent, as the evidence over a 2 year period demonstrated that Mr Clancy prefers to pick up the steel himself to save costs.

125. From both Mr Clancy's detailed evidence of his activities and those of his employee, we do not consider that the proposal will have any actual or potentially adverse traffic effects. If the property was being fully utilised for farming or horticultural purposes there is the potential for much more.

Relevant Objectives Policies Rules & Other Provisions of the Plan

126. We have discussed the relevant objectives and policies of the transitional plan and were not specifically referred to any other provisions other than the definition of 'home occupation' which we have already assessed.

Any Other Matters

127. Counsel for the appellant emphasises that under s.104 regard can be had to the effects which a non-complying activity might have on public confidence in the district plan. He cites Batchelor v Tauranga District Council [1993] 2 NZLR 84; (1922) 2 NZRMA 137 (HC) as authority for this submission and states that the approach outlined in that case remains valid following the 1993 amendment to the Act, although matters of integrity of the plan and public confidence in its consistent administration are now relevant in terms of s.104(1)(d) and (i), rather than s.104(1)(a) (Hopper Nominees Ltd v Rodney District Council [1996] NZRMA 179; Reith v Ashburton District Council [1994] NZRMA 241).

128. The appellant submits that in Stark v Auckland Regional Council [1994] NZRMA 126, the Planning Tribunal held that it would be unrealistic to ignore the cumulative factor of granting a land use consent for a non-complying activity. The availability of alternative in-zone sites was also highly relevant. Similarly, in Coleman v Tasman District Council [1999] NZRMA 39,47, it was held that:

> *If the controlling authority has to ignore the potential effect of granting of an application when a grant would establish a principle upon which other applicants could reasonably be expected to rely, then the controlling authority would be unable to deal with the cumulative consequences of applications such as the present. It is certainly a matter which the Environment Court was entitled to take into account under s.104(1)(i).*

129. In Pigeon Bay Aquaculture Ltd v Hay C32/99, Jackson J adopted the reasoning in Stark and Coleman:

> *... once the first resource consent is granted, there is no good reason under the Act for refusing further applications (until the accumulation of ecological effects comes back into play). In this example the first non-complying consent may be a valid precedent for further consent ... This is so especially where adverse ecological effects are not greatly an issue but amenity effects are.*

130. Furthermore, the appellant submits, the Court has consistently recognised the relevance of provisions for non-complying activities in in-zone sites. In Burns v Waikato District Council A9/95, for example, one of the primary reasons the Court declined consent for a non-complying activity was that there was no reason why the activity could not be established in-zone. The Court reached this conclusion notwithstanding its finding that the proposal would not have adverse effects on the environment. And in Stark, which also involved a non-complying activity, the Court felt it could not disregard the fact that the plan specifically made provision for the activities in other zones, while omitting to do so in the present zone.

131. Mr Aburn for the applicant considers that the relevant s.104(i) matters are those contained in s.104(1)(a) and (d), ie any actual and potential effects on the environment of allowing the activity and any relevant objectives, policies, rules or other provisions of a plan or proposed plan. As already considered in terms of the s.105 assessment, Mr Aburn considers the effects of Mr Clancy's workshop activities are no more than minor and cannot be held to be contrary to the objectives and policies of the either the transitional or proposed plans.

132. In Mr Aburn's opinion it is an overstatement to conclude that the proposal sets a precedent for the establishment of industry in the rural zone and therefore challenges the integrity of the district plan. The reasons given for this are the following: the proposal meets all but one of the performance standards for a home occupation; the rural zone provisions contemplate a range of permitted and discretionary activities that could have greater impact on the amenities of the area; in respect of noise limits, the specified levels are less than those that would apply to a permitted activity; and the transitional plan envisages situations where consents can be granted without compromising the intentions of the plan.

133. Mr Aburn refers to the statements made by the Planning Tribunal in Monad Leisuretime Ltd v Queenstown-Lakes District Council W 116/95:

We make clear again that the question of precedent or confidence in the administration of the district plan can no longer be used as a reason for refusing consent to an activity. Confidence will only be jolted if a council ignores its policies and objectives and allows an activity with a major effect pursuant to s.105(2)(b) [now s.105(2A)] *which is clearly contrary to those policies and objectives.*

134. The applicant also relies on the High Court decision Elderslie Park to conclude that the activity the subject of this appeal is not opposed in its nature to the objectives and policies of the plan such that there would be a loss of confidence in the council's administration of the plan.

135. However, Mr Hogan of the council does not agree. In his opinion, s.104(1)(d) envisages consideration of the integrity of the transitional plan and the weight to be given to any effect on that integrity. The public rely on the council to administer the transitional plan in an equitable manner and that its policies and objectives should be given weight. The overall planning objective of the transitional plan is to *avoid the spread of urban-type development beyond Upper Hutt valley and to promote the best use of rural land.*[11] In this respect, the effects of allowing the activity will adversely affect public confidence in the administration of the transitional plan in relation to the establishment of industrial activities in the rural zones.

136. Mr Van Kregten, also of the council, cannot see how granting the application could affect public confidence in the administration of the transitional plan given that the effects on the environment are not more than minor. Furthermore, the proposal is unusual in that the operator lives on site and is small-scale and is therefore quite different from many other industrial and engineering type activities characterised by signs, outside storage, employees and parked vehicles. It could hardly set a precedent and is further reason why public confidence in the council's administration cannot be seriously affected.

Evaluation

137. In questioning by Mr Milne Mr Clancy identified that to his knowledge there were lots of workshops in Whitemans Valley carrying out commercial/engineering type repairs. He was uncertain whether they were carrying out these activities (as he is) approximately 40% of the time. The question was not put to any of the planning witnesses so that evidence stands. In questioning by the Court however Mr Hogan identified that agricultural contractors are allowed to operate in the rural zone - as discretionary activities. We concluded these activities could include farm machinery maintenance which is not too dissimilar to what Mr Clancy undertakes.

138. And because the Clancy proposal is of such small scale, the use of the workshop intermittent, and the use has aspects that could be loosely aligned with farming, forestry and generalised repair work, we have concluded that this case is unlikely to cause a precedent in terms of requirements for the consistent administration of the plan. The one adverse effect, noise, is only major if not able to be adequately mitigated in terms of s.5(2)(c). We consider it can be mitigated sufficiently to displace adverse noise effects which appear major to the appellant.

Part II considerations

Section 5

139. It is the appellant's position that the granting of the consent is not consistent with section 5 because it is unlikely the applicant can adequately avoid, remedy or mitigate any adverse effects of the activity on the environment under s.5(2)(c). Although the council has imposed conditions on the consent, the practical difficulties in complying with these means that the adverse effects of the proposed activity may not be mitigated. The retrospective nature of the consent contributes to the difficulty of imposing effective conditions. Had the establishment of the workshop and the uses proposed to be carried out in it, been the subject of a resource consent then the location of the building, its construction and the incorporation of measures to

[11] Clause 7.1 of the transitional plan.

mitigate the adverse effects of noise could have been considered and been the subject of conditions.

140. In Mr Aburn's opinion, the only way in which the proposal could be inconsistent with the purpose of the Act is if any noise generated by the activity could not be satisfactorily mitigated, such that it resulted in a level of noise intrusion into the prevailing rural environment that caused adverse health effects or resulted in a general detraction from rural amenities.

141. It is Mr Hogan's view that the proposal may give rise to potential noise effects that are more than minor and potential environmental conflict with surrounding established residential activities, which is not consistent with the principle of avoiding, remedying or mitigating adverse effects on the environment.

142. However, Mr Van Kregten believes the proposed use contributes to the promotion of the sustainable resource use of the site. While it may be possible that the site can be used for other activities more traditionally associated with rural areas, this is by no means certain.

Section 7

143. The appellant submits that in terms of s.7, the efficient use and development of natural and physical resources (s.7(b)) and the maintenance and enhancement of the quality of the environment (s.7(f)) are relevant matters to this appeal. The granting of the consent does not maintain and enhance the quality of this essentially rural lifestyle environment due to the likely noise effects. Nor does it advance efficient use and development because there is no reason why the activity cannot be carried out in-zone.

144. However, Mr Aburn for the applicant considers it appropriate to have regard to matters concerning the maintenance and enhancement of amenity values (s.7(c)) and matters concerning the maintenance of the quality of the environment (s.7(f)) . For the reasons given when addressing s.104, Mr Aburn does not consider that either the building or the proposed activity, given its nature and scale, could be considered to be inconsistent with these principles.

Evaluation

145. We have paid particular regard to the s.7 matters raised by both parties. There is no real reason why this activity cannot be carried out in zone. On the other hand the use of the workshop on his site provides Mr Clancy with more efficient use of his resource which does not appear large enough to accommodate traditional farming uses. We note the activity does not have to be the most efficient use of the site.

146. In terms of other issues raised by s.7 provisions we concluded that they are able to be answered sufficiently by the fact the noise effects of the activity under s.5(2)(c) should be able to be mitigated by the following conditions:

(1) Noise levels resulting from workshop activity at the 20 metre notional boundary of any rural residence apart from the residence on the site shall not exceed the following:

Monday to Friday	7.30 am – 4.00 pm
General noise	L_{10} 45 dBA, L_{max} 60dBA
Hammering	L_{10} 40 dBA, L_{max} 60dBA

No workshop operation outside the above hours or on weekends or Public Holidays.

(2) Noise insulation adequate to meet the above noise levels to be installed at the direction of a recognised acoustic expert.



(i) to the north wall of the workshop, and
(ii) to the side walls, and
(iii) to the workshop roof.
(iv) one roller door on the north wall to be removed, the other to be treated so as to reduce noise transmission.

(3) Activity involving grinding or hammering shall be conducted with all external doors and windows shut.

(4) A report to the council from a recognised acoustic expert that the noise conditions have been achieved when the mitigating measures have been put in place.

(5) Monitoring of noise levels to council's requirements.

(6) No signage advertising the activity to be erected.

(7) Not more than one staff member (in addition to Mr Clancy) shall be employed on the property at any one time.

(8) The council will require the applicant to pay the council's costs of monitoring compliance (s.26(1)(d) of the RMA).

(9) The council is empowered to review the conditions of the consent at any time should future monitoring of the activity indicate that any effects of the activity are more than minor.

147. In this regard we noted that reference was made to the difficulties of monitoring the conditions for noise emissions in Ruru where the Planning Tribunal considered that if conditions cannot be practically formulated so that the parties have confidence they will work, then the use is not suitable for the site.

148. We consider the acoustic lining of the corrugated iron building is a practical condition. We also consider, unlike Ruru, that the council can be at the site within 6-8 minutes of being advised that the conditions are being breached. In Ruru, Tolaga Bay, where the appellant's site was situated, was a very long way from the offices of the Gisborne District Council monitoring team. This is not the case here.

Conclusion

149. For the aforegoing reasons the council's decision is confirmed subject to amended conditions.

150. The question of costs is reserved.

DATED at WELLINGTON this 17th day of September 1999

S E Kenderdine
Environment Judge

DOUBLE SIDED ORIGINAL

Decision No. W 91/99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 121 of the Act

BETWEEN **TIM O'BRIEN**

(RMA 411/98)

Appellant

AND **UPPER HUTT CITY COUNCIL**

Respondent

AND **SEAN CLANCY**

Applicant

BEFORE THE ENVIRONMENT COURT

Her Honour Judge S E Kenderdine presiding
Environment Commissioner J Rowan
Environment Commissioner R Bishop

CORRIGENDUM

1. In our decision dated 17 September 1999 we stated as follows:-

"Mr Lloyd answered in questioning too that putting an enclosure around the remaining steel door would also assist in mitigating effects. We consider such enclosure also should be a condition of consent."

3. Condition 2(iv) of the consent provides:

> *"One roller door on the north-wall to be removed, the other to be treated so as to reduce noise transmission."*

4. The appellant seeks clarification as to whether the words *"the other to be treated so as to reduce noise transmission"* requires the putting of an enclosure around the remaining steel door so as to mitigate noise effects. This was certainly the intent of the condition. To be transparent the condition requires a corrective addition to read:

> *"One roller door on the north wall to be removed, the other to be treated so as to reduce noise transmission, including its enclosure."*

DATED at WELLINGTON this 29th day of September 1999

S E Kenderdine
Environment Judge

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