

Tabled 27th
November

IN THE MATTER

**of the Resource Management Act 1991
("Act")**

AND

IN THE MATTER

**of the Proposed Whangarei District
Council Plan Change: Urban and
Services**

AND

IN THE MATTER

**of submissions by Downer New Zealand
Ltd ("Downer"):**

Submission 217

**LEGAL SUBMISSIONS ON BEHALF OF
DOWNER NEW ZEALAND LIMITED**

27 NOVEMBER 2019

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1. INTRODUCTION

- 1.1 Downer New Zealand Ltd (“Downer”) is the lessee of an asphalt plant located at 116-118 Port Road, Whangarei and ancillary offices located on an adjacent site at 120-122 Port Road (“the Sites”). The asphalt plant holds resource consents for *inter alia*, discharges to air. The sites occupied by Downer are outlined on the map attached as Appendix One that is extracted from the planners’ s42A report. The Sites have a Business 4 zoning under the Operative District Plan and a proposed Heavy Industry zoning under the District Plan Change – Urban and Services (“Plan Change”). The Plan Change proposes to change the zoning of a number of adjacent sites (on the other side of Port Road) from Business 4 to Light Industry.
- 1.2 Downer’s submissions were supportive of the zoning approach proposed for its Sites and were largely supportive of the Plan Change as a whole though sought some improvements:
- (a) To ensure that heavy industrial activities are generally enabled and that they are appropriately protected from reverse sensitivity effects; and
 - (b) To achieve consistency (where appropriate) as between the Light Industry and Heavy Industry zone objectives and policies.
- 1.3 At the outset it is noted that the planners’ s42A report has generally accepted the submissions made on behalf of Downer. As such, no evidence is provided. The purpose of appearing before the hearings committee is to provide support for the s42A report’s recommendations by reinforcing the importance of those provisions to my client’s operations and to address any issues that the hearings committee may wish to raise. I propose to briefly provide some legal context to the reverse sensitivity effects by addressing:
- (a) Relevant aspects of the statutory framework;
 - (b) Reverse sensitivity effects and their potential impact;

- (c) The specific changes proposed by way of a submission table.

2. STATUTORY FRAMEWORK

- 2.1 Reverse sensitivity effects are specifically recognised in Objective 3.6 of the Northland Regional Policy Statement:

The viability of land and activities important for Northland's economy is protected from the negative impacts of new subdivision, use and development, with particular emphasis on either:

- (a) Reverse sensitivity for existing:
- (i) Primary production activities;
 - (ii) Industrial and commercial activities;
 - (iii) Mining*; or
 - (iv) Existing and planned regionally significant infrastructure; or
- (b) Sterilisation of:
- (i) Land with regionally significant mineral resources; or
 - (ii) Land which is likely to be used for regionally significant infrastructure.

- 2.2 The objective is followed through in policy 5.1.1 (Planned and coordinated development) which provides that:

Subdivision, use and development should be located, designed and built in a planned and co-ordinated manner which ...

(e) should not result in incompatible land uses in close proximity and avoids the potential for reverse sensitivity...

- 2.3 The District Plan must give effect to the Regional Policy Statement.

- 2.4 The Council also has, by virtue of s31 of the Act, the functions, for the purpose of giving effect to the Act of:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

(aa) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district:

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

(i) the avoidance or mitigation of natural hazards; and

(ia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

...

(f) any other functions specified in this Act.

2.5 Section 3 of the Act provides that the meaning of effect includes, *inter alia*, future effects as well as positive effects.

3. MANAGEMENT OF EFFECTS INCLUDING REVERSE SENSITIVITY

3.1 There are two types of effects associated with industrial activities that need to be avoided or mitigated:

(a) Effects of industrial activities on people and communities; and

(b) Reverse sensitivity effects on industrial activities from other activities.

3.2 The effects of industrial activities on people and communities are generally managed by separating 'incompatible activities' through zoning and by conditions on resource consents. Mitigation of reverse sensitivity effects is therefore generally achieved through land use limitations on certain types of activities and through ensuring adjacent zoning is appropriate.

3.3 It is settled law that the adverse effects of potentially incompatible uses should be avoided, remedied or mitigated where they would be likely to place restrictions on, or inevitably come into conflict with, the use of other resources.¹ The concept of reverse sensitivity has been described as:²

[T]he legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted, the established use **may be required** to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

[emphasis added]

3.4 There is no requirement in the definition of reverse sensitivity for the established use to show that there are actual effects on its lawfully

¹ Nolan, *Environmental and Resource Management Law*, 5th ed, p 858

² *Affco New Zealand v Napier City Council* [2004] NZEnvC W 082/04 at [29].

existing activity; the potential for effects is enough, in view of the definition of the broad definition of "effect".³

3.5 In the context of industrial activities, reverse sensitivity effects can arise in many ways but the effects of most concern ultimately culminate in restrictions on the ability to efficiently operate in the existing location. If 'incompatible activities are not appropriately separated the prospect is that there will be ever increasing calls from the community for more restrictive operational controls. Such restrictions would inevitably have a significant economic and social impact and frustrate the obligation of the local authority to implement objectives, policies, and methods to ensure that there is sufficient development capacity in respect of business land to meet the expected demands of the district.⁴

3.6 The district plan provides an opportunity to focus on appropriate land use planning provisions for the future. Through sound planning and zoning the plan can appropriately separate activities to limit future conflict and ensure efficient use of land.

3.7 In the determination of a proposed plan the proceedings are in the nature of an enquiry to ascertain the extent to which land use controls are necessary, whether the controls are the most appropriate approach and to ensure that the controls achieve the objectives and policies of the plan.⁵

4. DOWNER'S POSITION / SPECIFIC CHANGES

4.1 From Downer's perspective it is submitted that the recommendations set out in the Planners' s42A report in relation to the industrial chapters of the proposed Plan Change generally give appropriate effect to the NPS provisions that refer to reverse sensitivity and that they meet the Council's duties pursuant to s31 in so far as they relate to the matters at issue.

4.2 The recommendations proposed in response to Downer's submissions have resulted in:

³ RMA Section 3

⁴ S31(1)(aa)

⁵ *Kerr Trusts v Whangarei District Council* [2004] NZEnvC A060/04 at [15]

- (a) improved consistency and clarification of the relationship between the heavy and light industrial zones (eg HIZ-02, LIZ-04, LIZPNew 1) which assists in the management of potential reverse sensitivity issues;
 - (b) recognition that an industrial activity may not be both large and noxious.
- 4.3 Rather than address each submission individually, I have attached the table of submissions provided with an additional column that compares the relief requested with the s42A Report recommendations. It is proposed to draw to your attention some minor issues arising.

Gill Chappell
Counsel for Downer

Aerial Imagery of Affected Site

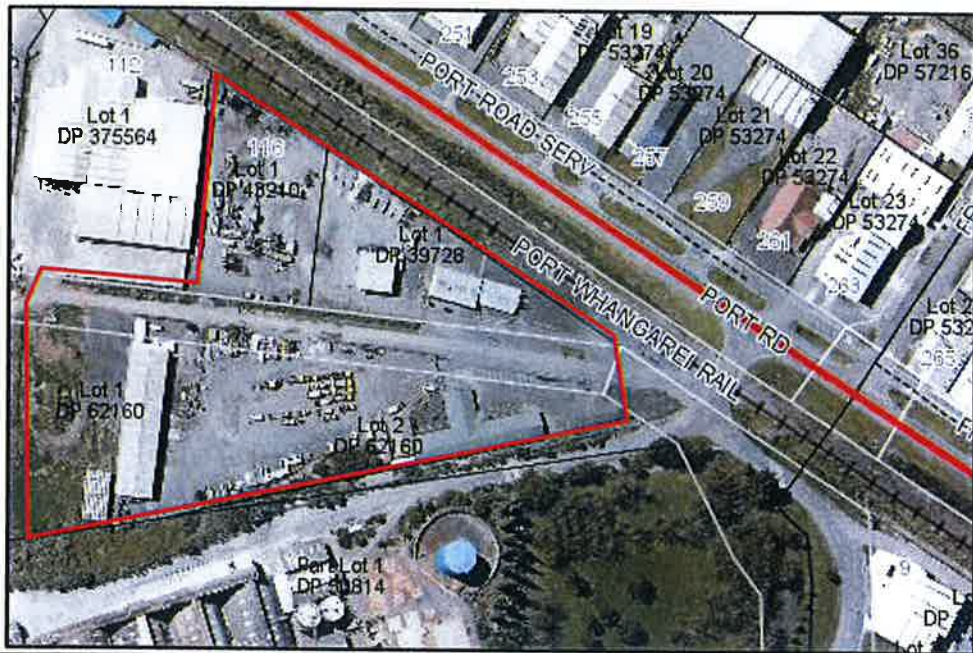


171. Downer New Zealand Ltd (**Downer**) seeks to retain zoning of 116 - 118 and 120 -122 Port Road as HI and zoning in Zone Map 73Z.

Downer Property and Submission Information	
Submission Number	217.21 and 22
Notified Planning Map	10Z and 73Z
Legal Description	Lot 1 DP 43210, Lot 1 DP 39728 and Lot 2 DP 62160
Address / Locality	116-118 Port Road, 120-122 Port Road
Area	2.92ha (approx.)
Operative Zoning	Business 4 Environment
Notified Zoning	Heavy Industrial Zone
Requested Zoning	Heavy Industrial Zone
Submitter's Supporting Technical Information or Reports	Nil
Discussion	I acknowledge the support of the notified HI zoning.

Recommendation	Accept in Part (noting zone changes recommended to Map 73Z)
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Aerial Imagery of Affected Site



172. Circa Marine and Industrial Limited request, as an alternative to submission point 2, to amend Planning Map 73Z so that the subject land is located in the HI rather than the LI as shown on the submission plan.

Circa Marine and Industrial Limited (Circa) – Property and Submission Information	
Submission Number	256
Notified Planning Map	10Z and 73Z
Legal Description	Lot 29 DP 57216, Lot 30 DP 567216, Lot 14 DP 53274 and Lot 15 DP 53274
Address / Locality	8 and 10 Hewlett Street, and 245 and 247 Port Road,
Area	1.3ha approx.
Operative Zoning	Business 4 Environment
Notified Zoning	Light Industry Zone
Requested Zoning	LI (as an alternative relief if the 7000m2 limit applying to activities listed under LI-R7 to LI-R11 is removed.
Submitter's Supporting Technical Information or Reports	Nil

Table One – Whangarei District Plan Change – Urban and Services: Submissions with s42A Council Report Recommendations and Downer’s position

Provision	Heading	Support / Oppose	Reasons	Decision Requested	S42A Council report recommendations
Heavy Industrial Zone (HI) – PC88H					
	Overview	Support	The issues listed are an accurate reflection of the matters arising within the Heavy Industry zone. There is an appropriate emphasis on reverse sensitivity effects.	Retain	Retained as requested.
Objectives	HI-O1	Support in part	The intention of the objectives is supported but confining the Heavy Industry zone to large scale and noxious industrial activities is too narrow. Not all heavy industry will be large scale and not all heavy industry will be noxious. Heavy industry may produce objectionable odour, dust and noise emissions, but this does not necessarily make the activity “noxious”.	Amend as follows: Large-scale and noxious Heavy industrial activities function effectively and efficiently without constraint from non-compatible activities.	Amended to: Large-scale and noxious Industrial activities, particularly those which are noxious or generate objectionable odour, dust or noise, function effectively and efficiently without constraint from non-compatible activities. HIZ DOWNER POSITION: The amendments are supported
	HI-O2		It is important to recognise that activities in the Light Industry zone do not have the same sensitivities as activities in residential or other zones used for recreational purposes. By contrast the objective for the Light Industry zone is that industrial activities that are not noxious or large scale establish in the Light Industry. That leaves a lacuna for those activities that are not both large scale and noxious.	Limit Objective 2 to managing the adverse effects of heavy industry on zones other than the Light Industry Zone.	Amended to: Adverse effects on the natural environment and amenity of adjacent zones, <u>excluding the Light Industrial Zone</u> , are managed. DOWNER POSITION: The amendments are supported
	HI-O4		Subject to these minor amendments, the objectives are generally supported on the basis that they provide appropriate recognition of reverse sensitivity effects.	Activities that may compromise the operation of noxious or large-scale heavy industrial activities within the HI, or generate reverse sensitivity or increased risk effects, are avoided.	Amended to: Sensitivity Activities that may compromise the operation of noxious or large-scale industrial activities, particularly those which are noxious or generate objectionable odour, dust or noise, within the Heavy Industrial Zone, or generate reverse sensitivity or increased risk effects, are avoided. DOWNER POSITION: The amendments are supported
	HI-O5			The supply of large allotments within the HI is	Amended to:

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Provision	Heading	Support / Oppose	Reasons	Decision Requested	S42A Council report recommendations
				preserved for large scale heavy industrial activities.	The supply of large allotments within the HI Heavy Industrial Zone is preserved for large scale industrial activities, particularly those which are noxious or generate objectionable odour, dust or noise DOWNER POSITION: The amendments are supported
	HI-O3	Support	The objective is appropriate and consistent with the provisions of the RMA and higher order documents.	Retain	Amended to: Ancillary and supporting activities are controlled to ensure that industrial land supply is not compromised. DOWNER POSITION: no issue with the minor change
Policies	All	Support Subject to specific amendments below	The policies listed are generally an accurate reflection of the matters arising within the Heavy Industry zone and the objectives. There is an appropriate emphasis on reverse sensitivity effects.	Retain	
	HI -P1	Support in part	The final sentence of this policy “moderate to high levels of exposure to potential nuisances such as odour and other emissions” stands alone with no supporting verb. It is assumed that this is a typo and that it should follow on from clause 2. Notably, the corresponding LI policy (LI-P1) also includes other character issues which are equally applicable to the HI zone, especially noise.	Amend as follows: 3. <u>Moderate to high levels of exposure to potential nuisances such as noise, odour and other air emissions.</u> 4. <u>High levels of heavy vehicle traffic, particularly on arterial routes and during daytime hours.</u> 5. <u>A low presence of active building frontages and landscaping.</u>	Amended to: To recognise and protect maintain the character and amenity values of the Heavy Industrial Zone including, but not limited to: 1. <u>High levels of noise and heavy traffic activity.</u> 2. Large allotment sizes, often with restricted public access. 3. <u>Moderate to high levels of exposure to potential nuisances such as noise, odour and other air emissions.</u> 4. <u>High levels of heavy traffic, particularly on arterial routes and during daytime hours.</u> 5. <u>A low presence of active building frontages and landscaping.</u> DOWNER POSITION: The amendments are generally supported though it is noted that there are still some inconsistencies as between the drafting of this policy compared to LIZ policy P1. That policy refers to high levels of noise associated with traffic and

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Provision	Heading	Support / Oppose	Reasons	Decision Requested	S42A Council report recommendations
					commercial activities and industrial activities. By contrast the HI-Z-P1 policy refers to moderate to high levels of exposure to noise etc. It seems inconsistent to anticipate high levels of noise in the LIZ but moderate to high levels of noise in the HI-Z. The suggestion is that the HI-Z policy retain the reference to “high levels of noise” and the change to “noise be removed from clause 3.
	HI-P2	Oppose	These policies rely on the scale of the activity, but size is not necessarily a good indicator of whether an activity is a heavy industrial activity. Some small scale industrial activities may have associated effects, such as odour discharges, that mean that they are not activities that should be appropriately located in other zones, such as Light Industry. It is also not clear in Policy 3 how small scale activities will be “managed” in the context of land fragmentation. Policy HI-P7 is the most efficient means of managing land fragmentation.	Amend P2 as follows: To enable larger scale <u>or</u> potentially noxious or objectionable industrial activities to locate and operate in the HI without unreasonable constraint from other activities	Amended to: Activities To enable larger-scale and industrial activities, particularly those which are potentially noxious or generate objectionable odour, dust or noise industrial activities to locate and operate in the HI Heavy Industrial Zone without unreasonable constraint from other activities. DOWNER POSITION: The amendments are supported P3 deleted
	HI-P3			Delete P3	DOWNER POSITION: The amendments are supported
	HI -P4	Support	The policies are appropriate, consistent with the plan objectives, provisions of the RMA and higher order documents.	Retain P4	DOWNER POSITION: The amendments are supported Policy retained with minor amendments.
	HI-P7			Retain P7	DOWNER POSITION: The amendments are supported Policy retained
Rules	HI-R14	Oppose in part	“Commercial services” are referred to in Rule 14 whereas the definition in the District Plan is “Commercial activity”. For consistency, the term “commercial services” should be replaced with “Commercial Activity” or otherwise the terms used should be	Replace the term “Commercial Services” with “Commercial Activity”	DOWNER POSITION: The amendments are supported Not amended as requested DOWNER POSITION: Accepted

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Provision	Heading	Support / Oppose	Reasons	Decision Requested	S42A Council report recommendations
	HI-R15	Oppose	<p>consistent.</p> <p>Food and beverage activities are not consistent with policy HI-P4 and should accordingly be provided for as discretionary activities or alternatively as restricted discretionary activities with matters of control related to the existing matters of control and discretion as well as the potential for reverse sensitivity effects.</p>	Redraft the rule to give effect to the matters listed in the policies and change the activity status to Discretionary.	<p>Relief not granted in full. Some amendments made.</p> <p>DOWNER POSITION: Accepted</p>
	Light Industrial Zone (LI) – PC 88G				
	Overview	Support in part	<p>The issues listed are an accurate reflection of the matters arising within the Light Industry zone. However, there is a lack of clarity regarding large scale industrial activities that are not noxious as outlined in relation to HI-O1 above.</p> <p>There is also a lack of clarity as to what is large scale. For example, the overview notes that “industrial activities range in scale and nature” and that those activities anticipated in the LI are generally smaller in scale and carried out indoors and are unlikely to give rise to significant adverse effect beyond the site. It then lists warehousing and bulk storage although these may be large scale activities.</p>	<p>Rewrite the Overview so that it provides greater clarity as to the expectation for the management of activities within the zone.</p>	<p>Amendments made to the overview that address the issues raised.</p> <p>DOWNER POSITION: The amendments are supported</p>
Objectives	LI-O1	Oppose in part	<p>The objective for the LI zone is that industrial activities that are not noxious <u>or</u> large scale establish in the LI. That leaves a lacuna for those activities that are not both large scale and noxious. As outlined in relation to HI-O1 there is a lack of clarity as between the HI and the LI as to what activities should establish where.</p>	<p>Clarify the relationship between the HI and the LI for large scale and / or noxious activities.</p>	<p>Amended to:</p> <p>Industrial activities that are not noxious, <u>and do not generate objectionable odour, dust or noise or large in scale</u>, establish and operate efficiently and effectively within the Light Industrial Zone.</p> <p>DOWNER POSITION: The amendments are supported</p>
	LI-O4	Support in part	<p>It is appropriate to recognise reverse sensitivity effects. However, this policy should</p>	<p>Amend as follows:</p>	<p>Amended to:</p> <p>Avoid activities that may generate reverse</p>

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Provision	Heading	Support / Oppose	Reasons	Decision Requested	S42A Council report recommendations
Policies	LI-P3	Support in part	<p>also recognise that the operation of the HI zone should not be compromised. In some parts of the District, such as around Port Road, the B4 zoning has been split between HI and LI.</p> <p>Clause 4 recognises that non-industrial activities in the LI zone may compromise the viability of other zones, but there is no reference to the HI zone, to which the LI is often adjacent, and which is used as a buffer between the HI zone and other more sensitive zones.</p>	<p>Avoid activities that may generate reverse sensitivity effects or compromise the operation of future industrial activities within the LI or HI.</p> <p>Insert a new policy which addresses the use of the LI zone as a buffer between the HI zone and other more sensitive zones, or recognise that the viability of the HI zone is an appropriate consideration when managing non-industrial activities.</p>	<p>sensitivity effects or that compromise the operation of future industrial activities within the LI Light Industrial Zone or Heavy Industrial Zone</p> <p>DOWNER POSITION: The amendments are supported. It is noted that new objective LIZ-06 which seeks to limit retail activities to trade retail is not well integrated into the policies given the level of specificity in the objective. Amended to:</p> <p>Industrial Activities To manage non-industrial activities by ensuring that they: 1. Are not likely to generate reverse sensitivity effects that constrain the establishment and operation of industrial activities.</p> <p>Further associated amendments include a new policy addressing the points raised:</p> <p>LIZ-PNew1 – Zone Interface To recognise the interface between the Light Industrial and Heavy Industrial Zones by managing non-industrial activities within the Light Industrial Zone to protect the viability of the Heavy Industrial Zone.</p> <p>DOWNER POSITION: The amendments are supported</p>
Rules	LI-R7	Oppose	The term “General Industry” is not defined. For consistency with the definitions, the term “Industrial Activity” should be used.	Replace “General Industry” with the term “Industrial Activity”.	Relief not accepted DOWNER POSITION: Minor consistency issue not addressed, but not opposed.
	LI-R23	Oppose in part	“Commercial services” are referred to in Rule 23 whereas the definition in the District Plan is “Commercial activity”. For consistency, the term “commercial services” should be	Replace the term “Commercial Services” with “Commercial Activity”	Relief not accepted DOWNER POSITION: Minor consistency issue not addressed, but not opposed...

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Provision	Heading	Support / Oppose	Reasons	Decision Requested	S42A Council report recommendations
	LI-R12 – LI-R21	Oppose in part	<p>replaced with Commercial Activity” or otherwise the terms used should be consistent.</p> <p>The activity status and control for these activities does not give effect to Policy 3 as the only matter of control relates to landscaping.</p>	Redraft the rule to give effect to the matters listed in the policies.	<p>Some changes made to the rules to take better account of reverse sensitivity effects as a matter of discretion.</p> <p>DOWNER POSITION: The amendments are supported.</p>
Zoning Maps					
	Zone Map 73Z	Support	<p>The zoning of the Downer New Zealand Ltd’s site at 116-118 Port Road, Morningside, Whangarei as Heavy Industry appropriately reflects the activities on site and is consistent with the current zoning.</p> <p>The zoning of the adjacent site at 120-122 Port Road, also leased by Downer New Zealand Ltd and which contains the administrative services for the asphalt plant, is also considered appropriate in view of its proximity to heavy industry and use as an ancillary operation.</p>	Retain zoning	<p>The zoning has been retained.</p> <p>DOWNER POSITION: Accepted</p>
	Zone Map 73Z	Support	<p>The zoning of the Morningside area as Heavy Industry appropriately reflects the general nature of the activities in this area and is consistent with the current zoning.</p>	Retain zoning	As above.