

# PREFERRED OPTION REPORT TO DISTRICT PLAN COMMITTEE

**DATE:** 17 April 2019

**TOPIC NAME:** Noise and Vibration

**SCOPE DESCRIPTION:** NZDF West Melton Rifle Range

**TOPIC LEAD:** Justine Ashley

**PREPARED BY:** Vicki Barker

## EXECUTIVE SUMMARY

<i>Issue(s)</i>	<i>To protect the West Melton Rifle Range from reverse sensitivity effects</i>
<i>Preferred Option</i>	<i>(i) Option 1 (Objective and policy framework) is agreed to regardless to better recognise strategic infrastructure and the need to manage reverse sensitivity effects;</i> <i>(ii) The Committee agree to pursue Option 4 (No-complaints covenant). Note that if Option 4 is not agreed to then Council will be obligated to pursue Option 3 in order to give effect to the CRPS and NZDF may still decide to pursue their preferred option by way of a submission on the District Plan;</i> <i>(iii) The preferred option will be progressed further with NZDF and stakeholder and landowner engagement will be initiated as part of the District Plan Review process.</i>
<i>Recommendation to DPC</i>	<i>That the Committee:</i> <i>a) Notes the report,</i> <i>b) Endorses the Preferred Option for 'Noise and Vibration – NZDF West Melton Rifle Range' for further development and engagement, including Section 32 and plan drafting.</i> <i>c) Notes the communications and engagement Summary Plan.</i>
<i>DPC Decision</i>	<i>That the Committee:</i> <i>a) Notes the report,</i> <i>b) Endorses the Preferred Option for 'Noise and Vibration – NZDF West Melton Rifle Range' for further development and engagement, including Section 32 and plan drafting.</i> <i>c) Notes the communications and engagement Summary Plan.</i>



# 1.0 Introduction

## 1.1 Background

The New Zealand Defence Force (NZDF) has operated the West Melton Rifle Range ('the Range') at Range Road, West Melton since the 1940s. It is used primarily as a rifle range, but also for grenade, explosives and general military training. NZDF have advised it is a nationally important facility and critical to meet Defence Act 1990 obligations.

As the Range is a noise generating activity in a rural-lifestyle environment it is particularly susceptible to reverse sensitivity effects. The Range is currently protected by way of designation but there are no rules in place to manage reverse sensitivity. NZDF informed Council they would be investigating seeking greater statutory protection for the Range and its activities through the District Plan Review.

In July 2018, the Noise and Vibration Preferred Option Report<sup>1</sup> noted that NZDF would like further discussions with Council about managing reverse sensitivity effects in relation to the Range and their Burnham facility. NZDF are pursuing changes in relation to the Range only and are not seeking any change in planning approach with respect to their Burnham site.

## 1.2 Preliminary Range of Options Proposed by NZDF

In August 2018, NZDF provided a letter to Council setting out four potential options to provide greater statutory protection of the Range, including:

1. Option 1: Objective and policy framework - Include objectives and policies for reverse sensitivity that recognise the importance of the Range
2. Option 2: New extended designation and associated land use controls - Lodging a Notice of Requirement (NoR) for a buffer designation over land surrounding the Range based on noise contours
3. Option 3: Restrictions on subdivision and land use within a noise buffer area surrounding the Range - The noise contours would inform the extent of the buffer and rules would be sought which would manage subdivision and land use, and a requirement for acoustic attenuation could form part of the measures. For example, prevent new noise sensitive activities within the 65dBA Ldn contour and otherwise require acoustic attenuation between the 55 and 65dBA Ldn contour for new noise-sensitive development.
4. Option 4: Restrictions on subdivision and land use within a noise buffer area (within the 55 dBA Ldn contour) surrounding the Range, but requiring a no-complaints covenant instead of acoustic attenuation requirements. No-complaints covenants can be used to restrain incoming activities from complaining about the adverse effects of an existing activity.

A copy of the NZDF letter setting out these options is attached as **Appendix 1** and the options were also summarised in the Noise Post Engagement Report<sup>2</sup>.

<sup>1</sup> [https://www.selwyn.govt.nz/\\_data/assets/pdf\\_file/0007/282166/Noise-and-Vibration-Endorsed-Preferred-Option-Report.pdf](https://www.selwyn.govt.nz/_data/assets/pdf_file/0007/282166/Noise-and-Vibration-Endorsed-Preferred-Option-Report.pdf)

<sup>2</sup> [https://www.selwyn.govt.nz/\\_data/assets/pdf\\_file/0004/288202/PER-Noise-and-Vibration.pdf](https://www.selwyn.govt.nz/_data/assets/pdf_file/0004/288202/PER-Noise-and-Vibration.pdf)

The Noise Post Engagement Report notes that further information was requested from NZDF in order to progress any changes and that the options have the potential to impact on development and private property owners and targeted landowner engagement will be required. In particular, a map of the preliminary noise contours around the range (i.e. the 'buffer area') was requested to understand the extent of private land beyond the existing designation that would be affected by the options.

NZDF advised in late October 2018 that Option 2 (New extended designation) was not its preferred option at this point in time as the extent of the new designation would be extensive and from a landowner's perspective is likely to be the most intrusive approach (and still remains a default option to NZDF at some later point by way of a NoR process). At that stage NZDF were advised that Option 4 (No-complaints covenants) was not preferred as it is a unique approach for the District and is untested and uncertain, and that Options 1 (Objective and Policy Framework) and 3 (Restrictions on subdivision and land use within a noise overlay area) in combination appeared to be the most feasible for further development.

### 1.3 NZDF Proposed Approach

On 5 February 2019 draft provisions were received from NZDF proposing Options 1 (Objective and Policy Framework) and 4 (No-complaints covenants) in combination. A copy of the draft provisions are attached as **Appendix 2**.

In summary, NZDF are seeking both subdivision and land use provisions:

- Subdivision - any subdivision within the proposed buffer area is a restricted discretionary activity if a no-complaints covenant is included on each new title (10.x.1), and is otherwise a non-complying activity.
- Land use development - any new dwellings/noise sensitive buildings in the buffer area are permitted if a no-complaints covenant is entered into (3.x.1), otherwise a restricted discretionary activity resource consent is required. Alternatively, if permitted activity status is not feasible, NZDF propose restricted discretionary resource consent would be required for land use development.

The proposed buffer area is based on a preliminary Malcolm Hunt Associates Ltd (MHA) noise study and modelling and may be subject to change (although not expected to be substantial). The Range is shown with a red outline on the map below and the buffer area would be all that land between the green Ldn 55 contour line and the range designation boundary (disregard the orange Ldn 65 contour line in relation to the proposed Option 4 approach).



**Figure 1** An example of predicted future Ldn noise contours for WTMA (ref. MHA Report No.2 (above)).

What these proposed rules mean in effect is that any future subdivision or land use development for a noise sensitive activity within the 55 dBA Ldn contour would require a covenant to be registered on the title of the property waiving rights of complaint about the Range. The covenant would be entered into between NZDF and the property owner.

No District Plan mechanism is proposed to protect the range from complaints from owners and occupiers of existing development in the area (i.e. the provisions cannot be applied retrospectively).

## 2.0 Summary of Issue

### Reverse sensitivity

The key issue is to protect the Range from reverse sensitivity effects that may arise as a result of future subdivision and development in the area.

## 3.0 Statement of Operative District Plan approach

The Range is designated in the Operative District Plan for 'Defence Purposes – Military Training Area' (Rural Volume - Appendix 2 - DE3). The underlying zoning is Rural Inner Plains. There are no conditions attached to the designation.

The site is surrounded by Rural (Inner Plains) and Rural (Outer Plains) zoned land (the Inner/Outer Plains divide is at Calders Rd/Thompsons Rd to the west).

The Rural Volume recognises reverse sensitivity as a particular issue (B.3.4 Quality of the Environment Issues) and the Plan contains a specific policy which seeks to protect existing activities in the Rural zone

from potential reverse sensitivity effects<sup>3</sup>. There is also a policy that provides for the establishment of rural residential activities within the Greater Christchurch area covered by Chapter 6 of the RPS in locations adopted in the SDC Rural Residential Strategy 2014 to reduce the risk of potentially adverse reverse sensitivity effects on the productive function of rural zoned land, strategic infrastructure and on established education and research facilities<sup>4</sup>. The area around the Range is outside the identified West Melton growth areas adopted in the SDC Rural Residential Strategy 2014. Mushroom and intensive farming are among the specific activities mentioned which require protection from reverse sensitivity, however there is no specific mention of reverse sensitivity in relation to the Range or other NZDF facilities. In addition, there is no specific policy about reverse sensitivity in relation to strategic infrastructure.

In terms of subdivision there are also policies which reference reverse sensitivity<sup>5</sup>, and allotments that do not meet the minimum size require restricted discretionary consent where a matter of discretion includes consideration of potential reverse sensitivity effects. There are no assessment matters which specifically reference the Range.

## 4.0 Council's Legal Advice - No-Complaints Covenants

Legal advice has been obtained from Council's legal advisors which addresses: whether no-complaints covenants can and should be included as a rule requirement in a district plan; the form of a no-complaints covenant and whether this should be in an Appendix to the Plan; precedent risks; other options; responsibility and enforcement of a covenant; and the scope and terms of any covenant (i.e. explicit to noise rather than waiving all rights of complaint, submission, appeal or objection). A copy of the legal advice is contained in **Appendix 3**.

In summary, the legal advice received advises:

- (i) It is lawful for Council to include a no-complaints covenant within a District Plan rule (except for a permitted activity rule) and the inclusion of a no-complaints covenant within District Plan rules is an appropriate means of addressing reverse sensitivity effects.
- (ii) Should Council choose to include a no-complaints covenant, a template covenant should be included within the District Plan as an Appendix. Reference to the covenant should also be made in the policies as well as having a suitable linkage with the relevant objective.
- (iii) There is a risk that other strategic infrastructure providers will be able to demonstrate a 'like' factual scenario and may request similar rules, relying on the Range rules as a precedent. This could give rise to further costs for landowners, increased administration demands on Council and present uncertainty for the public in interpreting and understanding the District Plan covenant requirements.
- (iv) Plan provisions requiring acoustic attenuation is an alternative approach, however would not prevent noise complaints and mitigating outdoor noise would not be achieved.

<sup>3</sup> Policy B3.4.21

<sup>4</sup> Policy B3.4.22

<sup>5</sup> Policy B4.1.2 and B4.1.9

- (v) A no-complaints covenant is readily enforceable by the parties to it subject to it being correctly drafted. Also the existence of a no-complaints covenant serves as 'notice' to landowners and could assist Council in its enforcement role.
- (vi) If the no-complaints covenant is intended to be restricted to complaints in relation to noise and/or vibration, this should be made clear within the template covenant. If it is to be broader in scope then this outcome too needs to be clear.

A key finding of the legal advice is that a no-complaints covenant should not be imposed for a permitted activity if it renders the permitted status of the activity subject to a discretion of the Council. For instance, the current drafting of the provision (3.x.1) provided by NZDF states that "*A no-complaints covenant shall be entered into in a form acceptable to the Council*" (underlining for emphasis). Our legal advisors state there is substantial case law that reinforces that a permitted activity must not be dependent on a subjective judgement of a Council. This means that as the land use covenant provision is currently drafted it is considered legally unacceptable.

A potential option is to redraft the permitted activity rule so that there is no Council discretion. For example, delete the above mentioned problematic wording and include a clear covenant template in the Plan. NZDF have provided an Auckland Unitary Plan example of permitted activity status which applies to the City Centre Port Noise Overlay, whereby if a no-complaints covenant is entered into (and noise attenuation is provided) the activity is permitted, and otherwise restricted discretionary activity resource consent is required.<sup>6</sup>

Alternatively if permitted activity status cannot be achieved, a resource consent process would be required to impose a covenant in relation to any land use development. Consent is required in any case for subdivision, but for land use developments this could potentially be the only reason for resource consent.

NZDF have advised that they are also seeking their own legal advice in relation to the ability to apply a permitted activity no-complaints covenant rule, and the implications for Council if there is a complaint from a property with a no complaints covenant in place. Council will also need to revisit this matter with our legal advisors.

## 5.0 Summary of relevant statutory and/or policy context and other background information

### 5.1 RMA

Providing for reverse sensitivity effects within the District Plan is within the range of functions prescribed for territorial authorities under the RMA. Section 31(1)(b) provides that one of the functions of territorial authorities is "the control of any actual or potential effects of the use, development, or protection of land....". Council's legal advisors note that the Environment Court confirmed Councils could include provisions within a district plan that provide for reverse sensitivity ([1997] NZRMA 205 (ARC v ACC).

<sup>6</sup> D25.6.1 (6) City Centre Port Noise Overlay



## 5.2 Canterbury Regional Policy Statement

The CRPS recognises both the Burnham and West Melton Defence facilities as ‘strategic infrastructure’ and the relevant policies seek that:

- New development in the greater Christchurch area does not affect the efficient operation, use, development....of existing strategic infrastructure (Policy 6.3.5.4);
- The effects of land use activities on infrastructure are managed, including avoiding activities that have the potential to limit the efficient and effective provision, operation, maintenance and upgrading of strategic infrastructure (Policy 6.3.5.5);
- That rural-residential development does not compromise the operational capacity of the Burnham Military Camp or West Melton Military Training Area (6.3.9.5(e)).

Given the Range is identified as strategic infrastructure the Council needs to be confident that the approach ‘gives effect to’ the objectives and policies for strategic infrastructure in the CRPS (s75(3)(c) of the RMA). Based on legal advice it is considered that the inclusion of a no-complaints covenant would be legal and it is considered that the approach would give effect to the policies and objectives for strategic infrastructure in the CRPS (as would Option 3).

## 5.3 Proposed approach of other strategic infrastructure/industry operators to manage noise and reverse sensitivity effects

No other strategic infrastructure operators in Selwyn are seeking a no-complaints covenant approach.

In summary, LPC is seeking that the Inland Port is protected from reverse sensitivity effects by applying noise control boundaries based on noise contours around their strategic infrastructure. They are proposing two noise control boundaries - a wider 45dB contour and a more confined 55dB contour, both of which extend over privately owned adjacent rural land. They propose that any noise sensitive activity within the 55dB contour is a non-complying activity and that any noise sensitive activity within the 45dB contour is designed and constructed to meet specified internal noise levels and that an acoustic report is provided to confirm compliance.

CIAL have existing provisions in the Plan which manage reverse sensitivity and are seeking that these be retained with some amendment, which includes continuing to permit noise sensitive activities within the 55dB airport noise contour where acoustic attenuation standards are met, and non-complying activity status for subdivision within the contours where density is not met.

As part of the District Plan Review, NZTA and Kiwirail are seeking enhanced reverse sensitivity provisions including setbacks from the state highway/railway applicable to noise sensitive activities (setbacks also currently apply from the state highway in some areas) to control outdoor noise, and to manage indoor noise by allowing development within the setback if acoustic attenuation is provided to meet specified levels accompanied by an acoustic report.

Although not defined as strategic infrastructure, the existing Dairy Processing Management Activities also employ a noise control boundary approach and a requirement for acoustic attenuation which they are seeking to retain.

## 5.4 Development potential around the Range

NZDF were asked to quantify the existing and future development potential within the buffer area to assist with gauging the scale of the potential issue and whether their approach is necessary and justified. The analysis completed by NZDF shows that there are a substantial number of properties within the buffer area that could be subject to either subdivision<sup>7</sup> and/or land use development and that there is potential for further development in the vicinity of the Range that should be managed to avoid reverse sensitivity effects. Refer to the Map in **Appendix 4**.

## 5.5 Complaints History

NZDF were also asked to provide information about the complaints history at the site to assist in gauging how much of an issue reverse sensitivity effects on the Range is/has been, but noting that this only provides a snapshot of past complaints history and that the situation could readily change if new development proceeds or new residents oppose the activity at some stage in the future.

NZDF have advised they manage the Range carefully to control noise and reduce the incidence of complaints. This includes notification to the surrounding area of exercises. Refer to the example notice attached as **Appendix 5**. NZDF has also assessed, and in some cases implemented, measures within the Range to reduce noise effects outside of its designation. NZDF therefore currently receives very few complaints at the moment. The NZDF Range Warden noted (in August 2018) the following complaints that he is aware of:

- Mid 2018 a call was received regarding noise at the range. This was caused by earthmoving trucks on the next block blowing out tyres, and nothing to do with NZDF.
- Helicopters flown by RNZAF have created a small problem due to them being flown at night but that was three years ago.
- Post- earthquake period (2011-2012) the range received some complaints due to people being sensitised to noise.
- Historically some complaints from a local who was very opposed to NZDF. Refer to <https://www.stuff.co.nz/the-press/news/our-communities/6359997/Rifle-range-in-firing-line>

The Range Warden also notes the limited issues regarding complaints from normal day to day activities could be in part due to the self-imposed Range Standing Orders (RSO's). RSO's restrict the time, ammunition natures and days the range operates and, along with local advertising, mitigates most issues as long as people are aware or upcoming training (refer attached notice for a recent exercise). A noise bund was also constructed in the mid to late 1990s due to issues with noise and complaints.

Council's Monitoring and Compliance Team have advised they only have one record of complaint on file from January 2013 where a caller rang to inform Council about the Range operating beyond 10pm.

Overall, noise and reverse sensitivity has been an issue in the past, and the current situation could also change with new development in the area.

<sup>7</sup> Based on the existing (and anticipated proposed) densities of 1 dwelling/4 ha in the Inner Plains and 1 dwelling/20 ha in the Outer Plains.



## 6.0 Summary of reverse sensitivity management responses – Other Districts

### 6.1 No-complaints covenants

There are a range of examples of no-complaints covenants in relation to strategic and significant infrastructure employed in District Plans. Some key examples are outlined below.

#### Auckland Unitary Plan - Airports, Quarries, Port, Stadia

The Auckland Unitary Plan has set no-complaints covenant rules around airports, quarries, ports and stadia. For example, the chapter for the Britomart Precinct provides at Rule I201.6.1 that any post-rule new dwellings and visitor accommodation must be subject to a no-complaints covenant in favour of the Ports of Auckland for the purpose of avoiding reverse sensitivity effects on the Port.

NZDF have noted that the no-complaints covenant which applies to the D5. City Centre Port Noise Overlay in the Auckland Unitary Plan applies to a permitted activity (which is not in accordance with our legal advice), but that more typically such covenants are tied to a consent requirement (typically restricted discretionary through to non-complying activity status).

#### Christchurch District Plan - Lyttelton Port

The Christchurch District Plan deems a range of residential activities within the Lyttelton Port Influences Overlay restricted discretionary on the condition a no-complaints covenant is registered against the relevant property. If a covenant is not registered, the activity is non-complying, the purpose being to avoid reverse sensitivity effects.

### 6.2 Noise Contours and Acoustic Attenuation

Applying setbacks or noise contours and requiring acoustic attenuation for noise sensitive development within such setbacks/contours is a common approach across district plans to address reverse sensitivity. For example, the Christchurch District Plan applies acoustic attenuation requirements in relation to the state highway and railway network and Christchurch Airport.

## 7.0 Summary of Options to address Issues

For the purposes of this analysis, NZDF is not pursuing extending the designation at this point in time, and objectives and policies (Option 1) are inherent in either of the remaining options and therefore have not been analysed as a stand-alone option.

Therefore, the two key options (Option 3 and 4) are analysed in the table below:

Factors considered	Option 3 (Restrictions on subdivision and land use within the buffer area, including acoustic attenuation)	Option 4 (No Complaints Covenant)

Precedent for the approach in other district plans	✓	✓
Precedent for the approach in Selwyn	✓	✗ Unique approach for Selwyn compared to other strategic infrastructure operators to manage reverse sensitivity
Gives effects to the CRPS	✓	✓
Legal approach	✓	✓
Requires resource consent	✓ Subdivision (but consent required regardless)  ✓/✗ Land use development activity could potentially be a permitted activity subject to acoustic attenuation, alternatively resource consent required.	✓ Subdivision (but consent required regardless)  ✓/✗ Land use development activity could potentially be a permitted activity subject to a covenant, alternatively resource consent required.
Financial costs to landowners	Land use development could potentially be a permitted activity (subject to acoustic attenuation requirements being met), otherwise consent costs would apply.  Acoustic attenuation - design and construction costs  Acoustic compliance reporting costs	Land use development could potentially be a permitted activity (subject to covenant being entered into), otherwise consent costs would apply.  Legal costs - covenant (could be reduced by providing a clear covenant template)  Covenant runs with the land - may be a concern affecting property prices/sales
Costs to the council	Permitted activity compliance costs or additional consent administration costs	Permitted activity compliance costs or additional consent administration costs
Ability for a layperson to understand the rules	Low to medium – typically quite complex provisions and associated acoustic standards, but could be assisted by stakeholder engagement.	Low to medium - a unique approach and could present uncertainty for the public in interpreting and understanding the requirements, but could be assisted by a clear covenant template (NZDF willing to

		provide first draft) and stakeholder engagement.
Precedent risks	Low	Medium to High. Other strategic infrastructure providers or incompatible activities may also seek such an approach instead of or in addition to their existing approach.
Effectiveness in addressing the issue: Reverse sensitivity and noise	High with respect to indoor noise, but low with respect to outdoor noise. Considered by NZDF to be a more appropriate approach where there is more constant rather than intermittent noise and/or night time noise.  Not as effective at addressing reverse sensitivity as a no-complaints covenant.	Does not address potential noise effects on people (indoors and outdoors); however it is understood that modern construction standards largely achieve acoustic insulation to a level appropriate for indoors.  High with respect to reverse sensitivity resulting from new development.
	With both options, neither address existing development and the potential for complaints. NZDF has noted that while ideally the approach should address both existing and future development, focusing on the latter recognizes that new landowners may have different and higher expectations of rural amenity.	
Responsibility and Enforcement	With an acoustic attenuation approach this could be built into the building consent (PIM check) process if permitted, or a resource consent process. Acoustic certification is required to demonstrate compliance.  Still nothing to prevent complaints and Council would need to investigate.	The covenant would be registered against the party in favour of the NZDF.  If a party complains to Council, Council could rely on the covenant to exercise its discretion not to undertake enforcement action.
Project budget or time implications	Both options anticipated to be similar to progress budget and time wise.	
Stakeholder and community interests	Both options will be of significant interest to stakeholders and the community as the options affect private property rights. Stakeholder engagement will be required.	

## 8.0 Summary of stakeholder engagement

No stakeholder engagement has been undertaken until such time as the preferred option is endorsed.

## 9.0 Conclusion

Overall, NZDF considers Option 4 (No-complaints covenant) is the most effective and efficient approach in the circumstances.

Both approaches are considered to give effect to the CRPS and could potentially be provided for as a permitted activity subject to further legal advice, alternatively land use resource consent would be required (resource consent is required for subdivision regardless). The key difference between the two approaches is the ability to manage reverse sensitivity and noise effects, and precedent. Option 4 is considered to better manage reverse sensitivity than Option 3, but Option 3 is expected to better ensure indoor noise is managed. However, even without acoustic attenuation requirements modern construction is understood to achieve acoustic insulation to an acceptable level so Option 4 will also manage indoor noise by default. Option 4 could set a precedent for other strategic infrastructure operators to also seek no-complaints covenants, however this would need to be evaluated as to costs and benefits and effectiveness in relation to any particular proposal.

Which option to pursue is finely balanced, but based on the above analysis and NZDF's preference for Option 4, Option 4 is the recommended preferred option.

## 10.0 Preferred Option for further engagement

The Project Team recommends that:

- (i) Option 1 (Objective and policy framework) is agreed to regardless to better recognise strategic infrastructure and the need to manage reverse sensitivity effects;
- (ii) The Committee agree to pursue Option 4 (No-complaints covenant). Note that if Option 4 is not agreed to then Council will be obligated to pursue Option 3 in order to give effect to the CRPS and NZDF may still decide to pursue their preferred option by way of a submission on the District Plan;
- (iii) The preferred option will be progressed further with NZDF and stakeholder and landowner engagement will be initiated as part of the District Plan Review process.



## **Comments on the Selwyn District Plan review: Options for protecting the West Melton Rifle Range from reverse sensitivity effects**

**To:** Selwyn District Council  
**Attention:** Catherine Nichol / Vicki Barker

**From:** New Zealand Defence Force  
**Contact Person:** Rebecca Davies, Senior Environmental Officer

**Address:** New Zealand Defence Force  
C/- Defence Estate and Infrastructure  
Level 6 Reserve Bank  
NZDF Headquarters  
20 Aitken Street, Thorndon  
Wellington

**Mobile:** +64 21 445 482  
**Email:** [rebecca.davies@nzdf.mil.nz](mailto:rebecca.davies@nzdf.mil.nz)

### **1 Introduction**

The New Zealand Defence Force (NZDF) has recently provided feedback on the Preferred Options Report for Noise and Vibration (on 04/07/2018) and has previously commented on the Selwyn District Plan review as it relates to NZDF's activities (on 17/02/2017). NZDF also undertook a site visit with Council staff to the West Melton Rifle Range in 2016 to discuss reverse sensitivity issues associated with activities at the Range, and encroaching residential development on its immediate boundary and surrounds.

Following on from the above, NZDF wishes to provide the following additional feedback on the Preferred Options Report for Noise and Vibration and the broader Selwyn District Plan review as it relates to the West Melton Rifle Range.

### **2 Background**

The New Zealand Defence Force (NZDF) has operated a rifle range at West Melton, approximately 25 kilometres from the centre of Christchurch, since the 1940s. The West Melton Rifle Range (the Range) is used primarily as a rifle range, but also for grenade practice and training in the use of explosives, and for general military training. It is a nationally important training facility for NZDF. Ensuring that this facility can operate in accordance with its obligations under the Defence Act 1990 is critical.

As the Range is a noise-generating activity, it is particularly susceptible to reverse sensitivity effects. The site has been the subject of occasional noise complaints from residents living in the general vicinity of the Range. NZDF has already put in place some self-imposed constraints on operations as a result of noise complaints and media exposure. With the



significant pressure for rural-residential subdivision and development in Greater Christchurch, NZDF has identified the potential for reverse sensitivity effects on the operations and functioning of the Range as an issue of strategic importance.

By way of example, resource consent to subdivide a nearby property into 15 new allotments was granted in 2006. This property is located to the west and adjoins the Range, with approximately half of the lots lying within the modelled 65dBA Ldn noise contour for the Range identified by Malcolm Hunt Associates (MHA)<sup>1</sup>. NZDF is therefore investigating options for providing greater statutory protection for the Range and its activities.

### 3 Potential approaches to managing reverse sensitivity effects

The review of the Selwyn District Plan offers an excellent opportunity to incorporate protections for the West Melton Rifle Range from reverse sensitivity effects in a similar manner to reverse sensitivity protections identified for Christchurch International Airport Limited (CIAL) and NZTA State Highways. Incorporating specific provisions for the Range would therefore be consistent with the approach taken to other significant infrastructure within the plan, and would also give effect to the direction in the Canterbury Regional Policy Statement (CRPS) regarding strategic infrastructure.

There are several different ways that protections could be built into the Selwyn District Plan during the review process. These are outlined in Table 1 below.

**Table 1: Potential options for managing reverse sensitivity effects**

Option 1: Objective and policy framework
<p>Include objectives and policies for "reverse sensitivity" that recognise the importance of the West Melton Rifle Range. For example:</p> <p><u>Objective(s)</u>: <i>Subdivision and development occurs in a manner that recognises the presence, ongoing operation and strategic importance of the West Melton Rifle Range</i></p> <p><u>Policies</u>: <i>Avoid the establishment of new activities sensitive to noise within the high noise contour in the West Melton Noise Overlay.</i></p> <p><i>Ensure that reverse sensitivity effects in respect of noise from the operation of the West Melton Rifle Range are appropriately avoided as far as practicable, and otherwise remedied or mitigated.</i></p> <p>The Operative Selwyn District Plan includes reverse sensitivity provisions for Christchurch International Airport, the road and rail network, and utilities. NZDF requests that this is extended through the Proposed Selwyn District Plan to incorporate other strategic infrastructure such as the West Melton Rifle Range.</p>
Option 2: New designation and associated land use controls
<p>One of the options that NZDF is considering to protect the Range from reverse sensitivity effects is lodging a Notice of Requirement (NOR) for a 'buffer' designation on land not owned by NZDF adjacent to the Range. The boundary of the designation would be based on modelling of noise from the Range. Preliminary noise contours developed by MHA identifies two potential buffer areas around the West Melton Rifle Range as follows:</p> <ul style="list-style-type: none"> <li>i Land affected by noise between the 55dBA Ldn and 65dBA Ldn contours.</li> <li>ii Land affected by noise of 65dBA Ldn and greater (i.e. inside the 65dBA Ldn contour).</li> </ul> <p>In the absence of any specific standard or guidelines addressing noise from firing ranges, MHA has applied New Zealand Standard NZS 6805:1992 Airport Noise Management and Land Use Planning</p>

<sup>1</sup> Malcolm Hunt Associates, *West Melton Buffer Designation – Noise & Acoustics Issues Paper*. Prepared for New Zealand Defence Force, July 2011, Reference 9932/010–B. Malcolm Hunt Associates. *West Melton Training Area Updated Noise Predictions*. Prepared for New Zealand Defence Force, July 2010, Reference 019/991–0031-02.

(NZS 6805) which provides for this type of approach in relation to the operation of airports and associated noise effects<sup>2</sup>. This Standard establishes 55dBA Ldn as a "threshold" of annoyance, above which the effects could be considered to be significant and warrant land use planning restrictions. Noise greater than 65dBA Ldn is generally found to be unacceptable for residential and other sensitive land uses.

Land use controls in the Proposed District Plan could prevent new noise-sensitive activities from locating on land within the 65dBA Ldn contour, and otherwise require acoustic insulation for new noise-sensitive activities proposed between the 55 and 65dBA Ldn contour, consistent with the approach set out in NZS6805 relating to airport noise<sup>3</sup>.

If NZDF decides to proceed with this option, then it is relevant to note that the noise contours developed by MHA are preliminary and NZDF would review and update these prior to pursuing this option.

#### **Option 3: Restrictions on land use within an overlay or buffer area surrounding the Range**

As an alternative to a new designation, the Proposed District Plan could incorporate an overlay or buffer area within a specified setback from the Range, similar to the approach proposed by NZTA in relation to the State Highway network. The boundary of the overlay or buffer area would not necessarily be the extent of the noise contours, although we would anticipate that the noise contours would inform the buffer distance/ extent of overlay to ensure it was reasonable and justifiable.

Within this overlay or buffer, additional controls or consent requirements would apply to the subdivision of land and/ or the establishment of activities sensitive to noise. For example:

- a. The overlay could contain restrictions on dwelling numbers and density.
- b. An additional restricted discretionary consent trigger could apply within this area to subdivision and noise-sensitive activities, with matters of discretion and assessment criteria focused on management and mitigation measures to reduce the potential for reverse sensitivity effects. Acoustic insulation could form part of these measures.
- c. NZDF could be identified as an affected party for the purpose of the Restricted Discretionary activity application with its written approval required prior to the subdivision of land and/ or erection of any building housing activities sensitive to noise.
- d. Within the buffer / overlay, applications that relate to residential subdivision or the establishment of activities sensitive to noise that do not fall for consideration as a Restricted Discretionary activity default to a Non-complying activity status.

#### **Option 4: No complaints covenants**

No complaints covenants are a common mechanism used to restrain incoming activities from complaining about the adverse effects of an existing activity. The covenants usually consist of an acknowledgement of a lawfully established activity, a pledge not to complain in respect of that activity, and constraints upon seeking changes to that activity. Such an undertaking may be either agreed as a condition of consent under section 108 of the RMA or as a private agreement, and can be registered on the title of the receiving site.

No complaints covenants could be required within the specified buffer area, or alternatively, as part of obtaining the written approval of NZDF, landowners would likely be required to enter into a no complaints covenant.

<sup>2</sup> This approach is also reflected in *NZS 6909: 1999 Acoustics – Port Noise Management and Land Use Planning*.

<sup>3</sup> Similar to noise provisions within the operative Selwyn District Plan relating to Christchurch International Airport Limited (CIAL). In accordance with Rule 3.8.1, new buildings or additions to existing buildings within the CIAL 55 dBA Ldn noise contour are permitted if designed to meet specific internal noise levels. If these levels are not met, non-complying activity resource consent is required.

There are examples of these methods being used in other district plans throughout the country. The methods are not mutually exclusive, and a mixture of these methods including objectives and policies, rules and development controls could be included to manage reverse sensitivity effects, allowing for the incorporation of a comprehensive set of controls within the plan.

#### **4 Next steps**

In the Preferred Options Report for Noise and Vibration to the District Plan Committee dated 25 July 2018, it is noted that there is a range of measures available to manage noise and/or reverse sensitivity effects between incompatible activities, and that *'this issue needs further consideration during the next phase of the review in consultation with key stakeholders to ensure a consistent approach and a consistent set of provisions is achieved'*.

NZDF considers that this early stage of the District Plan review process presents an excellent opportunity to engage with Council and to ensure appropriate protections for the West Melton Rifle Range are incorporated into the proposed Selwyn District Plan. NZDF would appreciate the opportunity to further engage with you on the matters above.

**Rebecca Davies**  
**Senior Environmental Officer (Planner)**  
**Defence Estate and Infrastructure**  
**New Zealand Defence Force**



21/08/18



## Selwyn District Plan - Rural Volume

### OBJECTIVES

#### New Objective x

Subdivision and development occurs in a manner that recognises the presence, ongoing operation and strategic importance of the West Melton Rifle Range.

#### New Objective y

The ongoing operation of the West Melton Rifle Range is not jeopardised by reverse sensitivity effects from residential development in the Selwyn District.

### POLICIES

#### New Policy x

Ensure that reverse sensitivity effects on the operation of the West Melton Rifle Range are avoided as far as practicable, and otherwise remedied or mitigated.

#### New policy y

To avoid reverse sensitivity effects and ensure existing lawful uses and strategic infrastructure are not constrained by managing the establishment of noise sensitive activities, including within the West Melton Rifle Range Buffer Area [the State Highway Reverse Sensitivity Buffer and Effects Area, Christchurch International Airport Ltd Aircraft Noise Contours, etc.]

#### Policy B3.4.22

Provide for the establishment of rural residential activities within the Greater Christchurch area covered by Chapter 6 of the Canterbury Regional Policy Statement only in locations identified in the adopted Selwyn District Council Rural Residential Strategy 2014 to reduce the risk of potentially adverse reverse sensitivity effects on the productive function of rural zoned land, strategic infrastructure and on established education and research facilities.

#### Policy B4.1.9

Ensure any allotment created is of sufficient size and shape for its intended use, including the avoidance of reverse sensitivity effects on existing lawful uses and strategic infrastructure, and has provision for a complying access to an adjacent road.

### PART C

## 10 **RURAL RULES** - SUBDIVISION

### 10.1 Subdivision General

#### Controlled Activities — Subdivision General

10.1.1 Any subdivision of land shall be a controlled activity if all of the following standards and terms are met:

10.1.1.1 Any allotment created is not located within any of the following areas:

(a) Any areas shown on the Planning Maps as the Waimakariri Flood Category A area;

**Commented [KB1]:** Nearby subdivision of adjacent rural properties represents a reverse-sensitivity risk to the site. Noise bunds have been installed along the south side of Wooster A and B ranges.

NZDF purchased the neighbouring property to the southeast in 1999 due to noise complaints. This 20 acre block forms the southeast part of the site

**Commented [KB2]:** Based on existing Selwyn DP provisions. Mark ups shown as underlined text

(b) Any area shown on the Planning Maps as the Lower Plains or Lake Ellesmere/Te Waihora flood areas;

(c) Seaward of the Coastal Hazard Line, as shown on the Planning Maps; and

(d) Between any waterbody and any stopbank designed to contain floodwater from that waterbody;

(e) The area shown on the Planning Maps as the West Melton Rifle Range Buffer Area.

...

10.1.1.4 Any allotment created is not located within 300 metres of any existing lawfully established intensive livestock production activity, except that the 300 metres restriction shall not apply to any allotment created in the Living 2A Zone at the intersection of Shands and Blakes Roads, Prebbleton and legally described as Lots 1, 2 and 10 DP 54204 and Lot 1 DP 21798 in respect of the existing Tegel Foods Ltd poultry operation located on Lot 1 DP 53738.

The separation distance shall be measured from the edge of any permanent building, enclosure or yard in which the intensive livestock production activity occurs or is permitted by a rule in the Plan (or a resource consent) to the nearest boundary of any proposed allotment.

#### **10.1.1.4b (Alternative option – based on above example)**

Any allotment created is not located within **x** metres of the West Melton Rifle Range. The separation distance shall be measured from the edge of the West Melton Rifle Range designation DE3 (as shown on the Planning Maps) to the nearest boundary of any proposed allotment.

...

#### **10.1.1.12**

Any allotment created complies with the minimum allotment areas set out in Table C10.1. The minimum allotment sizes set out in Table C10.1 do not apply to any allotment used solely for access, utilities, as a reserve or to house a community facility(ies).

**Table C10.1 – Minimum Allotment Size**

Area (on Planning Maps)	Legal Description	Allotment Size
<b>Existing Development Areas</b>		
...	...	...
<b>In Other Areas</b>		
...	...	...
Inner Plains	—	4 ha <b>minimum</b>
Outer Plains	—	20 ha minimum

**Commented [KB3]:** This buffer area will align with the 55dBA contour.

While the approach in the noise reports adopts the approach taken to airport (and port) noise contours i.e. identifies the 55 and 60dBA contours, I have not distinguished between these because the potential for further subdivision and development within the 60dBA contour appears limited (currently have a GIS person quantifying subdivision and development potential).

Having the one buffer area also represents a simpler approach.

**Commented [KB4]:** Less preferred option on the basis that the required distance is not standard. E.g. to the west the 55dBA noise contour is located a distance of up to 3km from the West Melton Rifle Range property boundary (albeit most of this is ECAN-owned land), however to the south it is substantially less than this. Also it is simpler / clearer to have something mapped rather than a rule referring to a distance.

**Commented [KB5]:** Understand from discussions with SDC this is likely to be retained.



## **10.x SUBDIVISION IN THE WEST MELTON RIFLE RANGE BUFFER AREA**

### **Restricted Discretionary Activities — Subdivision in the West Melton Rifle Range Buffer Area**

*Note: The following rule does not apply to activities which comply with Rule 10.12.*

10.x.1 Any subdivision of land which does not comply with Rule 10.1.1.1(e) shall be a restricted discretionary activity if the following standard is met:

- a) A no-complaints covenant shall be included on each title issued. This covenant shall be registered with the deposit of the subdivision plan, in a form acceptable to the Council under which the registered proprietor will covenant to waive all rights of complaint, submission, appeal or objection it may have under the Resource Management Act 1991 or otherwise in respect of any subdivision, use or development of the New Zealand Defence Force's land at the West Melton Rifle Range.

**Commented [KB6]:** Based on Auckland Unitary Plan precedent for subdivision in proximity to the Whenuapai Airbase.

Under Rule 10.x.1 the Council shall restrict its discretion to consideration of:

- a) The potential for reverse sensitivity effects on the West Melton Rifle Range. This shall include, but not be limited to, the proposed use of the building, the distance from the West Melton Rifle Range, and surrounding topography;
- b) The location of any building platforms;
- c) Any proposed mitigation measures to address potential reverse sensitivity effects and the effectiveness of those measures; and
- d) Any consultation undertaken with the New Zealand Defence Force and the outcome of that consultation.

### **Non Complying Activities - Subdivision in the West Melton Buffer Area**

10.x.2 Any subdivision of land which does not comply with Rule 10.x.1 shall be a non-complying activity, unless it complies with Rule 10.12.

## **10.11 SUBDIVISION OF LOTS SMALLER THAN THE MINIMUM SIZE**

### **Restricted Discretionary Activities — Subdivision of Lots Smaller than the Minimum Size**

10.11.1 Any subdivision of land which does not comply with Rule 10.1.1.12 shall be a restricted discretionary activity if:

10.11.1.1 Any allotment created is located outside the area shown on the Planning Maps as the Inner Plains;

...

### **Non-Complying Activities — Subdivision of Lots Smaller than the Minimum Size**

10.11.3 Any subdivision of land which does not comply with Rule 10.11.1 shall be a non-complying activity, unless it complies with Rule 10.12.

**Commented [KB7]:** Request retaining this activity status for lots smaller than 4ha in the Inner Plains zone

## **10.12 SUBDIVISION AND BOUNDARY ADJUSTMENTS**

Controlled Activities — Subdivision and Boundary Adjustments

10.12.1 The subdivision of land by the altering of boundaries between allotments shall be a controlled activity provided all of the following standards and terms are met:

10.12.1.1 The allotments subject to the boundary adjustment shall adjoin one another.

10.12.1.2 There shall be no increase in the number of allotments created as a result of the boundary adjustment.

10.12.1.3 No allotment shall be created which is smaller than the smallest allotment existing prior to the boundary adjustment.

10.12.1.4 The boundary adjustment shall not result in any increase in the potential number of dwellings which may be erected on any allotment subject to the boundary adjustment, in compliance with Rule 3.10 than the number which could have been erected on that allotment prior to the boundary adjustment.

...

10.12.3 The Consent Authority shall retain its control over all of the following matters:

10.12.3.1 All those matters listed in Rule 10.1.2.

10.12.3.2 The mechanism(s) which shall be used to ensure the boundary adjustment does not increase the potential number dwellings able to be erected on any allotment subject to the boundary adjustment.

#### **Non-Complying Activities — Subdivision and Boundary Adjustments**

10.12.4 Any boundary adjustment which does not comply with Rule 10.12.1 shall be a non-complying activity, unless it complies with one of the rules for subdivision under Rules 10.1 to Rule 10.11, in which case the activity shall be assessed under that rule.

...

#### **Reasons for Rules**

...

Rule 10.11 does not apply to land within the area shown on the Planning Maps as the Inner Plains. The minimum allotment size in the Inner Plains is 4 hectares. Council believes that residential density in this area is sufficiently high to require each dwelling to have 4 hectares. It is considered that 4 hectares allotments will avoid adverse effects of on-site effluent treatment and disposal on groundwater, and potential 'reverse sensitivity' effects on rural activities; and maintain a rural character that is distinct from townships (see Part B, Section 4.1).

...

**Commented [KB8]:** As above, support the retention of existing limitations below on boundary adjustments.

**Commented [KB9]:** Request retaining this activity status for boundary adjustments that do not comply with above.

## PART C

### 3 RURAL RULES - BUILDINGS

#### **3.x BUILDINGS IN THE WEST MELTON RIFLE RANGE BUFFER AREA**

##### **3.x.1 Permitted activities**

Any dwelling or any building designed or intended to be used for a noise sensitive activity which is erected on any site located within the West Melton Rifle Range Buffer Area shall be a permitted activity if the following condition is met:

- a) A no-complaints covenant shall be entered into in a form acceptable to the Council under which the registered proprietor will covenant to waive all rights of complaint, submission, appeal or objection it may have under the Resource Management Act 1991 or otherwise in respect of any subdivision, use or development of the New Zealand Defence Force's land at the West Melton Rifle Range. This covenant shall be in a form that is attached to the property such that future proprietors are bound by the terms of the covenant.

##### **3.x.2 Restricted Discretionary Activities — Buildings in the West Melton Rifle Range Buffer Area**

Any activity which does not comply with Rule 3.x.1 shall be a restricted discretionary activity.

Under Rule 3.x.2 the Council shall restrict its discretion to consideration of:

- a) The potential for reverse sensitivity effects on the West Melton Rifle Range. This shall include, but not be limited to, the proposed use of the building, the distance from the West Melton Rifle Range, and surrounding topography;
- b) The location of any building platforms;
- c) Any proposed mitigation measures to address potential reverse sensitivity effects and the effectiveness of those measures; and
- d) Any consultation undertaken with the New Zealand Defence Force and the outcome of that consultation.





**ADDERLEY  
HEAD**

ENVIRONMENTAL LAW SPECIALISTS

23 March 2019

Attention: Vicki Barker & Justine Ashley  
Selwyn District Council  
PO Box 90  
Rolleston 7643

Email: [Justine.Ashley@selwyn.govt.nz](mailto:Justine.Ashley@selwyn.govt.nz)

Dear Vicki/Justine

## **DPR - WEST MELTON RIFLE RANGE - NO COMPLAINTS COVENANTS**

### **Council objective:**

- 1 To ensure that the current level of activity at the West Melton Rifle Range (WMRR) remains unrestrained.
- 2 To ensure the above objective is achieved, provide an appropriate and legally acceptable means of protecting the WMRR from reverse sensitivity effects that may arise as a result of future development near the site.

### **Issue and context:**

- 3 The WMRR is designated under the District Plan for defence purposes and military training. It is recognised under the Canterbury Regional Policy Statement (CRPS) as strategic infrastructure on the basis it is deemed a necessary facility/service which is of greater local importance.
- 4 The New Zealand Defence Force (NZDF) has, as part of the District Plan review, proposed that subdivision within the WMRR buffer area be a restricted discretionary activity and subject to the registration of a no-complaints covenant on the subdivision titles. Where this condition cannot be met, NZDF proposes that the status of the activity becomes non-complying.
- 5 Additionally, the NZDF have further proposed a rule that *permits* some buildings within the buffer area provided a no-complaints covenant is registered against the title. So there are essentially two types of activities relevant here, subdivision and the construction of dwellings within the buffer area.
- 6 The reason NZDF has sought these provisions is because it is concerned about future development that may occur within the buffer area around the WMRR and the reverse sensitivity effects such development may give rise to. Due to the nature of the activity at the WMRR (we assume activity includes the discharge of hand-held combat weapons but may also include heavier weapons such as machine guns and possibly mobile guns and the discharge of other more powerful explosive ordinance), NZDF is particularly concerned about noise and vibration complaints.
- 7 Council seeks advice as to whether a no-complaints covenant can and should be included within a district plan rule as a means of addressing any reverse sensitivity issues at WMRR that may arise from new subdivision and or new dwellings.

- 8 In the event a no-complaints covenant is a legally acceptable and appropriate method to achieve Council's objectives, Council seeks further direction as to the how the no-complaints covenant should be provided for within the District Plan.
- 9 Council also wishes to have advice on the responsibility to and ability for it to enforce such covenants.
- 10 Council also wishes to have some advice on relying on other mechanisms such as acoustic attenuation to provide for the reverse sensitivity issue.

#### **Power of Council to include a no-complaints covenant in a District Plan rule**

- 11 Providing for reverse sensitivity effects within the District Plan is within the range of functions prescribed for territorial authorities under the RMA<sup>1</sup>. In particular, section 31(1)(b) RMA provides one of the functions of territorial authorities is –  
  
*“the control of any actual or potential effects of the use, development, or protection of land...”*
- 12 This position was reinforced by the Environment Court in Auckland Regional Council v Auckland City Council which confirmed that councils could include provisions within a district plan that provide for reverse sensitivity. Broadly then, Council has the power to address reverse sensitivity through District Plan rules.
- 13 No-complaints covenants have been recognised within planning instruments as an appropriate and legally acceptable method for addressing reverse sensitivity effects – for example, the Auckland Unitary Plan has set rules around Auckland Airport, quarries, ports and stadia.
- 14 By way of example, the chapter for the Britomart Precinct provides at rule I201.6.1 that any post-rule new dwellings and visitor accommodation must be subject to a no-complaint covenant in favour of the Ports of Auckland for the purpose of avoiding reverse sensitivity effects on the Port.
- 15 Another example within the Auckland Unitary Plan is rule I502.6.1 (Albany Centre Precinct) which provides any post-rule new dwelling within sub-precinct A must be subject to a no-complaints covenant in favour of North Shore Stadium for the purpose of avoiding reverse sensitivity effects (noise) on the Stadium.
- 16 The Christchurch City Plan deems a range of residential activities within the Lyttelton Port Influences Overlay restricted discretionary on the condition a no-complaints covenant is registered against the relevant property. The activity status becomes non-complying in the event a no-complaints covenant is not registered is against the title. The purpose of this rule is to avoid potential reverse sensitivity effects on the Lyttelton Port.
- 17 Given the WMRR is identified within the CRPS as strategic infrastructure, as required by Section 75(3)(c) RMA, Council needs to be confident inclusion of a no-complaints covenant within a District Plan rule 'gives effect to' the objectives and policies for strategic infrastructure in the CRPS.
- 18 In our view the inclusion of a no-complaints covenant in the District Plan rules does give effect to the policies and objectives for strategic infrastructure in the CRPS. Generally, the CRPS objectives and policies seek to ensure the efficient operation/use/development of existing strategic infrastructure by requiring that territorial authorities include provisions within their District Plans that manage the effect of land use on strategic infrastructure.

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<sup>1</sup> [1997] NZRMA 205 (ARC v ACC)



- 19 In particular the CRPS directs that new development in the Greater Christchurch area is not to "...*effect the efficient operation, use, development...of existing strategic infrastructure.*"<sup>2</sup> Additionally, it requires "[m]anaging the effects of land use activities on infrastructure, including avoiding activities that have the potential to limit the efficient and effective, provision, operation, maintenance of upgrade of strategic infrastructure..."<sup>3</sup>
- 20 Territorial authorities are required under the CRPS to "*include objectives, policies and rules in district plans to manage reverse sensitivity effects between strategic infrastructure and subdivision use and development, including for residential and rural-residential activities.*"<sup>4</sup>
- 21 We consider the inclusion of a no-complaints covenant in District Plan rules to address reverse sensitivity effects on the WMRR (identified as strategic infrastructure) gives effect to the CRPS objectives and policies.
- 22 For the above reasons, in our view, the inclusion of a no-complaints covenant in the District Plan rules is both lawful and gives effect to the relevant parts of the planning hierarchy.
- 23 However, a no-complaints covenant should not be imposed for a permitted activity. The way in which NZDF proposed rule 3x1 is drafted renders the permitted status of the activity subject to a discretion of the Council (i.e. a no-complaints covenant must be registered *in a form acceptable to the Council*).
- 24 A long line of case law exists that establishes and reinforces the principle that a permitted activity must not be dependent on a subjective judgement of a council<sup>5</sup> – if it is, it will be struck out as being ultra vires. Here the subjective element is the acceptability or otherwise of the covenant.
- 25 Also where controls/conditions are required, they must be set out with reasonable certainty so that someone seeking to undertake the particular activity can determine whether they can do so as of right, i.e. without resource consent. This certainty is removed if the permitted activity is subject to a discretion (subjective judgment) of a council.
- 26 For these reasons, in our view, the inclusion of a no-complaints covenant in permitted activity rule 3x1 is not legally acceptable. The activity should instead be regulated as a 'controlled' activity.
- 27 For the avoidance of doubt, the inclusion of a no-complaints covenant in a rule for restricted discretionary/discretionary/non-complying activities is legally acceptable.

#### **Should a template no-complaints covenant be included within the plan?**

- 28 If the no-complaints covenant option was pursued, Council should include a template no-complaints covenant within the District Plan. This will ensure consistency in terms of content and demonstrate to those registering a form of no-complaints covenant that is acceptable to the Council.

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<sup>2</sup> Refer Policy 6.3.5.4 CRPS

<sup>3</sup> Refer Policy 6.3.5.5 CRPS

<sup>4</sup> See direction for Territorial Authorities, Policy 6.3.5 CRPS

<sup>5</sup> *Boanus v Oliver* C072/94 (PT), *Bryant Holdings Ltd v Marlborough District Council* [2008] NZRMA 485 (HC), *Fletcher Property Ltd v America's Cup Village Ltd* (1999) A050/99, *Ruddleston v Kapiti District Council* (1986) A532/85, A535/85

- 29 The template should be attached as an appendix to the plan as opposed to being included within the body of the plan. Referring to the template in an advice note or a footnote under the relevant rules will draw the reader's attention to the template. Also we would think when the related objectives and policies are being drafted some reference to the method, namely the covenant, should also be made.
- 30 If the no-complaints covenant is intended to be restricted to complaints in relation to noise or vibration from the WMRR activities, this should be made clear within the template (and should be provided for within the rule). If the approach is to address the noise and vibration issue as part of an overall amenity effect then the covenant terms would need be broader.

#### **Precedent issue**

- 31 One concern Council has is that the inclusion of a no-complaints covenant in favour of WMRR within a district plan rule might create precedent issues and cause other strategic infrastructure providers to request similar rules.
- 32 While the inclusion of a no-complaints covenant does, in a broad way create a precedent, whether or not the precedent applies depends on the circumstances and facts of each case. For a precedent to apply, the fact scenarios must be substantially similar, or 'like'.
- 33 The nature of strategic infrastructure activities vary greatly and some strategic infrastructure providers will already have other methods in place to address reverse sensitivity effects which is likely to reduce the need for a no-complaints covenant – for example, airports have noise contours in place to reduce reverse sensitivity effects in relation to noise.
- 34 However the risk is that some strategic infrastructure providers will be able to demonstrate a 'like' factual scenario and if so, they may request similar rules, relying on the WMRR rules as a precedent. This could give rise to further costs for landowners, increased administration demands on Council and present uncertainty for the public in interpreting and understanding the District Plan.
- 35 With this in mind, Council will need to carefully consider precedent risk when assessing all available methods for addressing reverse sensitivity effects on WMRR and determining the most appropriate method to achieve Council's objective.

#### **Other Options**

- 36 Plan provisions allowing either subdivisions and or dwellings to locate within the buffer subject to acoustic attenuation could be an efficient and effective approach. The cost of the specialist assessment design and construction could all rest with an applicant. However such an option will not prevent noise complaints.
- 37 Acoustic attenuation and noise suppression are useful to mitigate noise effects while persons are indoors and particularly when persons are asleep. However either the need or desire to open windows, particular during summer at night time, can cause issues if the noise occurs at night time.
- 38 Given the nature of the activities at the WMRR, successfully mitigating noise effects from it on outdoor areas would, we think, be challenging. So the effectiveness of such alternatives needs be assessed with care.
- 39 Council may determine, after assessing all alternative options that more than one method is required to adequately address reverse sensitivity effects on WMRR.

For example, it may be that a no-complaints covenant together with noise attenuation is necessary to achieve Council's objective.

### **Responsibility and Enforcement**

- 40 Usually the parties to no-complaints covenants are the party undertaking the noise-emitting activity and another party wishing to subdivide or build a dwelling or undertake some other activity which will likely experience more noise than is acceptable.
- 41 The no-complaints covenant will be registered against the other party's land in favour of WMRR. Essentially the party agreeing to the covenant has accepted an environment as modified by the activity, giving rise to the need for the covenant and the covenant itself.
- 42 Each party can enforce the covenant against the other. If an owner of a residential property (subject to the covenant) complains to Council seeking noise effects be remedied, Council could rely on the existence of the covenant, (provided the covenant covers the issue), to exercise its discretion not to undertake enforcement action against WMRR.
- 43 Enforcement of the covenant will be for the WMRR (NZDF) to undertake, as they are the party for which the covenant was made.

### **Covenant Terms**

- 44 Whether the terms of the proposed covenant are limited to noise or are more broadly expressed, will be determined by the circumstances of the case. If noise is the key critical issue then a specific covenant would appear to be all that is needed and could be justified in planning and/or property terms.
- 45 A comprehensive no-complaints covenant that waived all rights to submit, object and/or appeal against future expansions, and/or changes to the WMRR, would seem, we think, to be extreme.
- 46 However if expansion or re-development of the WMRR is likely then some consideration of a broad scope no-complaints covenant seems sensible. However if adopted in the Plan, essentially such provisions will significantly limit the range of effects that could be considered if the NZDF sought, in the future, to expand the designation for the WMRR.
- 47 While the WMRR is recognised and provided for as strategic infrastructure, a comprehensive no-complaints covenant protection, we think, would have the effect of elevating the importance of the WMRR more than is appropriate.
- 48 Some types of strategic infrastructure have unique locational requirements and/or high levels of past and current investment and provide critical national benefits, for example airports, hydro, geothermal plants. That type of infrastructure and those circumstances may support a very comprehensive no-complaints covenant but we are not convinced WMRR is in that same category. However that is a matter for you to investigate further.

### **Conclusion**

- 49 It is lawful for Council to include a no-complaints covenant within a District Plan rule (except for a permitted activity).
- 50 In our view, we consider that the inclusion of a no-complaints covenant within District Plan rules is an appropriate means of addressing reverse sensitivity

effects and would achieve Council's objective to ensure the current level of activity at the WMRR remains unrestrained.

- 51 Should Council choose to include a no-complaints covenant, to ensure consistency, and provide an efficient and effective process, Council should include a template no-complaints covenant within the District Plan (as an appendix) and refer to this template within an advice note below the relevant District Plan rules to ensure readers are aware of it. Reference to the covenant should also be made in the policies as well as having a suitable linkage with the relevant objective.
- 52 If the no-complaints covenant is intended to be restricted to complaints in relation to noise and/or vibration, this should be made clear within the template covenant. If it is to be broader in scope then this outcome too needs to be clear. However scope will need be supported by the relevant circumstances including the strategic importance of the WMRR.
- 53 If the plan does include a comprehensive and all-inclusive no-complaints covenant, the impact of that circumstance on the range of effects available to be considered, if the designation is later expanded, will be important to understand and consider.
- 54 We consider a no-complaints covenant is readily enforceable by the parties to it subject to it been correctly drafted. Also the existence of a no-complaints covenant will assist Council in its enforcement role.
- 55 If you would like us to provide you with a draft no-complaints covenant, we would be happy to do so.
- 56 If you have any further queries in relation to the above, please let us know.

Yours faithfully  
**ADDERLEY HEAD**



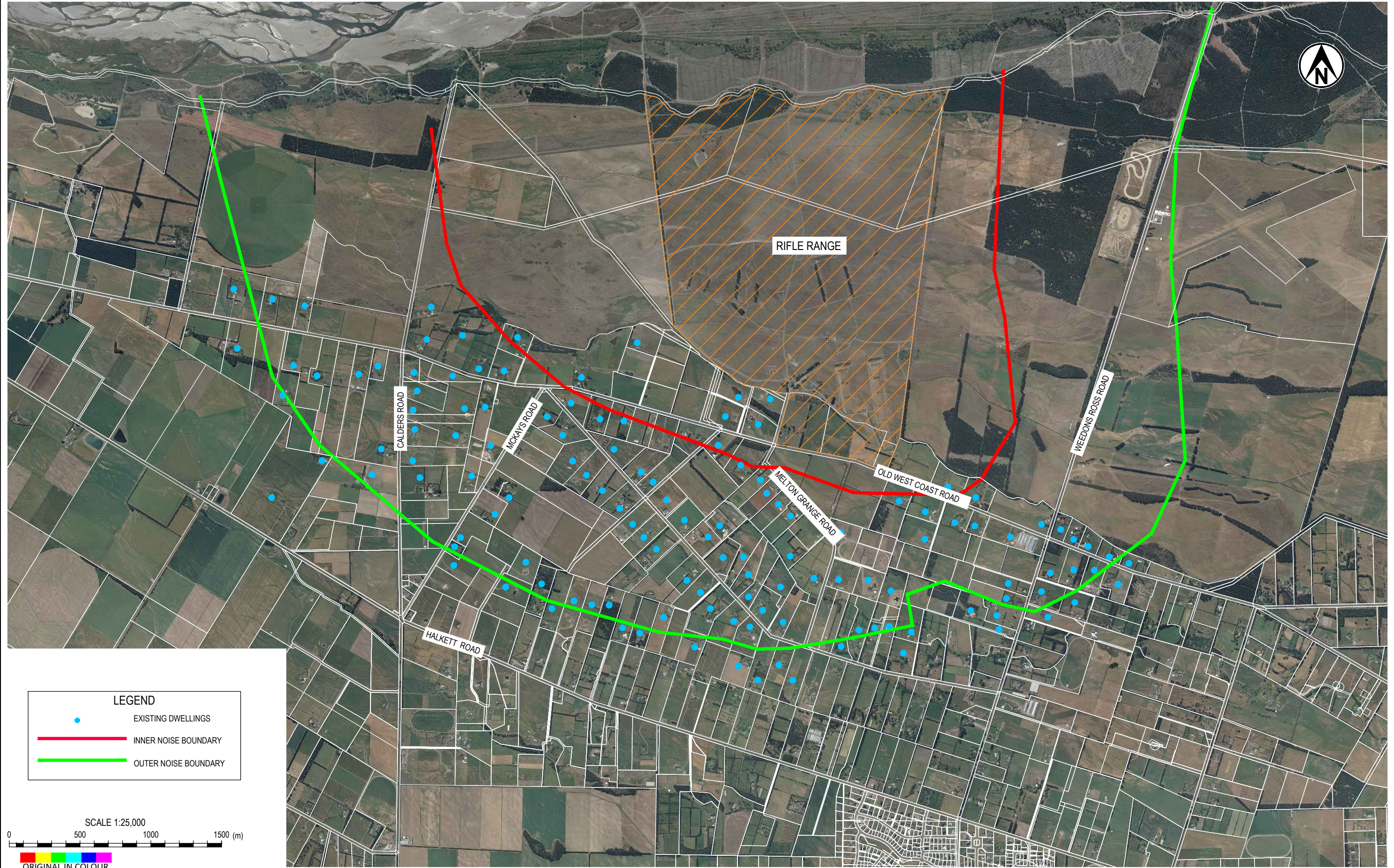
**Paul Rogers**  
Partner

DDI: +64 3 353 1341  
E: paul.rogers@adderleyhead.co.nz

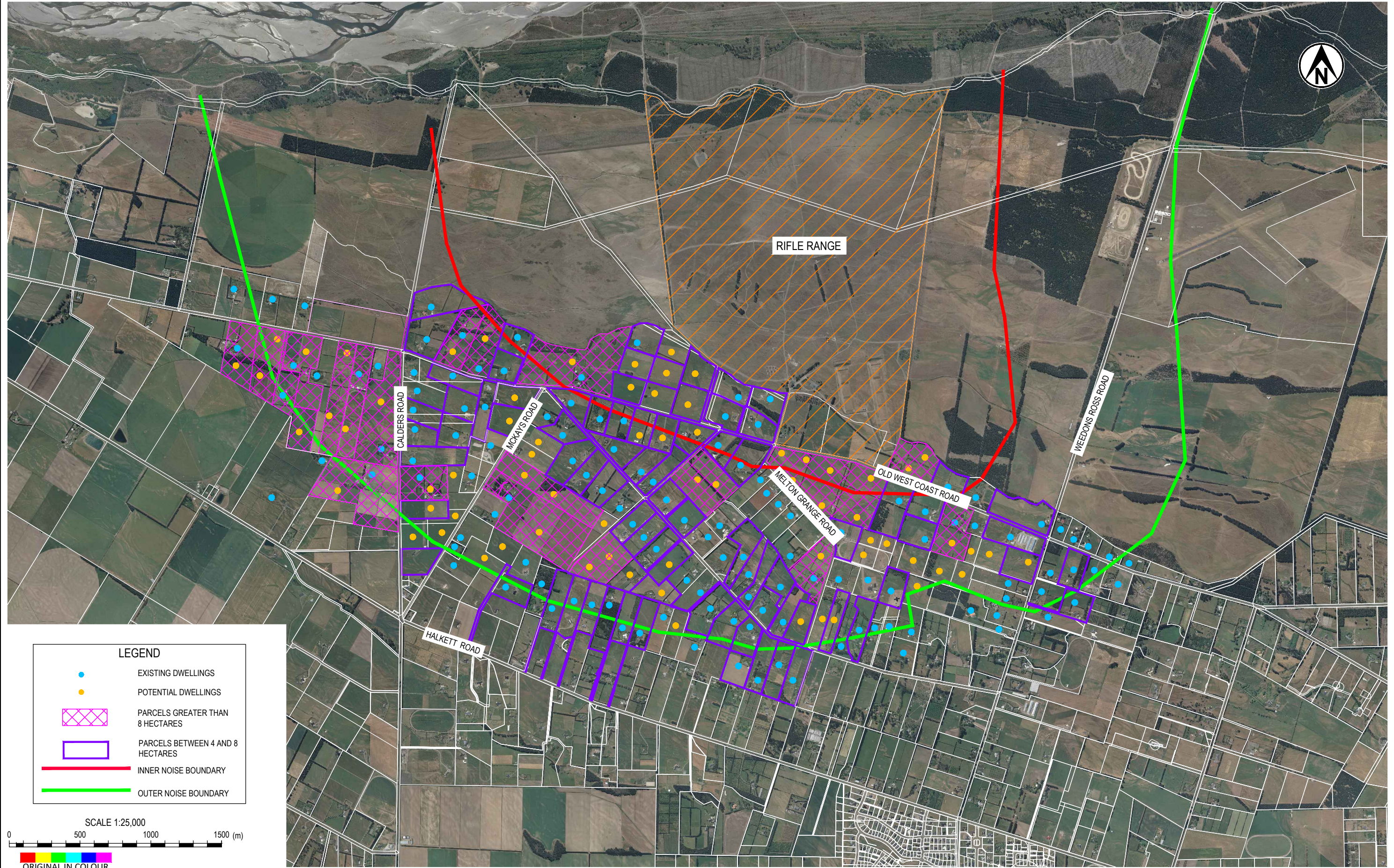
Our ref: RPM-038777-308-5-V1

















## Night Firing and High Explosives, 4 - 15 March 2019

The general public is to be advised that a NZ Army Exercise will be conducted in the West Melton Rifle Range area over the period 4 – 15 March 2019.

The exercise will involve personnel of Delta Company 2/1 RNZIR, from Burnham Military Camp. The exercise will involve up to 60 personnel.

Subject to fire restrictions training will involve soldiers live firing at night on West Melton Rifle Range, commencing at 8pm and concluding no later than 10pm on Monday 4, Wednesday 6, and Thursday 7 March 2019.

High Explosives will be used from 10am to 4.30pm daily from Monday 11 to Thursday 14 March 2019.

For more information please call  
Burnham Military Camp  
03 363 0099

This page was last amended on 22 March 2019

