BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2020] NZEnvC 174

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for enforcement orders pursuant to ss 314 and 316 of the Act
BETWEEN	HAMILTON CITY COUNCIL
	(ENV-2019-AK-000319)
	Applicant
AND	GLOBAL METAL SOLUTIONS LIMITED
	First Respondent
AND	CRAIG VERNON TUHORO
	Second Respondent

Court:	Environment Judge M Harland Environment Commissioner A Gysberts[1]
Hearing:	24 June, 13 July, 12 August 2020 (site visit 24 June 2020), closing submissions filed 21 August 2020
Appearances:	L Muldowney and S Thomas for the applicant T Braun and K Bond for the respondents
Date of Decision:	14 October 2020
Date of Issue:	14 OCT 2020

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The application for enforcement orders is granted on an interim basis, subject to the outstanding matters to be resolved as set out in paragraph [189] of this decision.

[1] Environment Commissioner D Bunting commenced as part of the Court but was unable to continue for the hearing on 13 July 2020.

REASONS

Introduction

[1] This case concerns an application by Hamilton City Council (**the Council**) against Global Metal Solutions Limited (**GMS**) and Mr Tuhoro (its managing director) for enforcement orders sought to deal with the impact of noise emissions from the metal recycling business GMS operates at 203 Ellis Street, Frankton in Hamilton (**the site**). Although the site is situated in the Industrial Zone, it is alleged that the noise limits set out in the operative Hamilton District Plan (**District Plan**) that apply at Rimmington Drive within the Residential Zone near to the GMS site are exceeded by it, thereby adversely affecting the amenity and wellbeing of some of the residents who live there.

[2] The application is opposed by the respondents, who although claiming they have existing use rights, accept that relocating the business to another site is the best option; however, they contend they need up to two years to do so. The Council submitted that, if the Court allows an extended period for full compliance, it must be framed as a deadline for compliance not a deadline for relocation, which then might be the subject to an application for an extension. If this is the outcome, then the Council also seeks strict on-site mitigation requirements that have the effect of significantly reducing the noise levels at Rimmington Drive.[2] The Council's position is based on its view that the respondents have had long enough to organise a relocation of the business to a more suitable site.

The application and the evidence

[3] The Council has applied for enforcement orders under ss 314 and 316 of the Resource Management Act 1991 (**RMA**). The orders sought are as follows:[3]

> 1. a) An order under ss 314(1)(a)(i) and 314(1)(a)(ii) of the Act requiring the respondents to cease carrying out activities that emit noise:
>
> i) in contravention of Rule 25.8.3.7 of the Hamilton Operative District Plan (**District Plan**); and
>
> ii) which is offensive and objectionable to such an extent that it has an adverse effect on the environment;
>
> b) An order under ss 314(1)(b)(i), 314(1)(b)(ii), 314(c) and 314(1)(da) of the Act requiring the respondents to establish noise mitigation measures on the property, described in paragraph 2 below in order to:
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> i) ensure compliance with Rule 25.8.3.7 of the District Plan. The order is to be complied with before a date to be set by the Court; and
>
> ii) avoid, remedy, or mitigate an adverse effect on the environment caused by the respondents;

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[2] Counsel for the Council closing submissions, paragraph 43.
[3] Application for enforcement orders dated 19 December 2019.

c) Such further and consequential order(s) the Court deems fit to make.

2. The location of the site for which the enforcement orders are sought is 203 Ellis Street, Frankton, Hamilton which is legally described as Lot 6 DP 362674 and Lot 9 DP 362674.

[4] The application for enforcement orders was supported by 10 affidavits, including five in reply. Affidavits were filed by three Council officers, Ms Jennifer Baird (General Manager of City Growth),[4] Mr Peter McGregor, (Environmental Health Manager and Warrant Enforcement Officer under the RMA),[5] and Ms Alice Morris, (Team Leader of Planning (Policy)).[6] Two affidavits were filed by an expert acoustic consultant, Mr Jon Styles,[7] and four affidavits were filed by residents from three Rimmington Drive addresses.[8] Following the first part of the hearing, further affidavit evidence was filed by Mr Eric Hopkins[9] (the CEO of ProForm Limited) in relation to the existing use argument and by Mr Theodore de Leeuw (a real estate agent) in relation to available alternative sites to which GMS could locate.

[5] The grounds for the application were set out for the Council in Mr Muldowney's opening submissions as follows:[10]

(a) noise measurements taken from within the Residential Zone adjacent to the GMS site by Council, Styles Group and Marshall Day Acoustics (**Marshall Day**) confirm that the site is regularly in breach of the noise limit in Rule 25.8.3.7a) of the District Plan (**District Plan Noise Rule**);

(b) the respondents do not hold resource consent to exceed the limit in the District Plan Noise Rule;

(c) the noise emissions from the GMS site have resulted in numerous complaints to Council since 2014;

(d) the noise emissions from the GMS site are offensive and objectionable to the extent that they have an adverse effect on the environment, namely the amenity of the residents in the adjacent Residential Zone;

(e) the respondents are in breach of an abatement notices served on 13 March 2018; and

(f) the respondents are in breach of their duty under s 16 of the RMA to avoid emitting unreasonable noise as experienced in the adjacent Residential Zone.

[6] The respondents filed a notice indicating they wished to be heard in respect of the

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4 Affidavit of Ms Baird affirmed 12 December 2019.

5 Affidavit of Mr McGregor sworn 6 December 2019, affidavit in reply sworn 26 May 2020

6 Affidavit in reply, Ms Alice Morris sworn 29 May 2020.

7 Affidavit of Mr Styles affirmed 5 December 2019; affidavit in reply affirmed 26 May 2020.

8 Affidavits of Mr Mitchell (affirmed 29 November 2019), Ms Smith (affirmed 6 December 2019), Mr and Mrs Greenfield (sworn 29 November 2019).

9 Affidavit of Mr Hopkins sworn 21 July 2020.

10 Counsel for the Council closing submissions, paragraph 9.

application,[11] and have since filed affidavit evidence from Mr Craig Tuhoro (the managing director of GMS),[12] Ms Robyn Blake (the Chief Financial Officer of GMS),[13] Mr Ronald Julian (a former project manager),[14] Mr Gary Mallett (an Investment Manager and former Councillor at the Hamilton City Council)[15] and Mr Stephen West (a Private Investigator).[16] Mr James Bell-Booth, an acoustic consultant with Marshall Day Acoustics (**Marshall Day**) also provided evidence for the respondents.[17] Further affidavit evidence in reply was filed by Mr Roger Wilson (the CEO of GMS since 6 January 2020, and a director and shareholder) in relation to available alternative sites to which GMS could relocate.[18]

[7] Prior to the hearing, the acoustic experts undertook expert witness conferencing and produced a joint witness statement (**JWS**).[19] More will be said of this later, however there was considerable agreement between the experts about the methodology undertaken by them to monitor sound from the GMS site at the nearest residential boundary, the noise rating levels from the GMS activity, and the options available to GMS to reduce noise levels from the site.

The site and the surrounding environment

[8] GMS has operated a scrap metal business at Ellis Street, Frankton, since 2015 (**the site**). Mr Tuhoro told us that a scrap metal business had operated at the site since the 1980's and he knew this because his father had managed it and he had worked there as well. He said that in 2004/2005 an Australian company, CMA, had operated a scrap metal business from the site; again, a matter he knew about because he had been the Chief Executive Officer of CMA in Sydney for many years.[20] He told us that CMA went into receivership (or administration) in approximately 2013, and that he established GMS in the same year. He said that GMS moved onto the site in 2015, although from other evidence he gave, we infer that GMS may have assumed legal obligations for the site in around August 2014. The point of all of this was to try to establish that a scrap metal business had been operating at the site continuously for many years, to support the

[11] Dated 31 January 2020.
[12] Affidavit of Mr Craig Vernon Tuhuro sworn 17 April 2020.
[13] Affidavit of Ms Robyn Anne Blake sworn 17 April 2020.
[14] Affidavit of Mr Ronald Julian sworn 17 April 2020.
[15] Affidavit of Mr Gary Mallett sworn 17 April 2020.
[16] Affidavit of Mr Stephen West sworn 17 April 2020.
[17] Affidavit of Mr James Bell-Booth sworn 11 May 2020.
[18] Affidavit Mr Wilson sworn 24 July 2020.
[19] JWS 17 June 2020.
[20] Transcript, 13-14 July 2020, pages 69-70.

respondents' contention that it has existing use rights. More will be said of this later.

[9] As mentioned above, the site is situated within one of the industrial zones provided for in Hamilton under its District Plan. All the boundaries of the site, apart from the eastern boundary, front onto other businesses operating within the Industrial Zone. The North Island Main Trunk Railway Line (**the railway line**) is situated to the east of the site, beyond which is a recreational reserve known as Innes Common. Further to the east of Innes Common is Lake Rotoroa, a popular recreational area.

[10] A residential area is situated to the south of Innes Common, directly to the east of the railway line. The residential properties closest to the railway line and nearest to the GMS site are situated on Rimmington Drive. The Court heard from four property owners who live at three Rimmington Drive addresses, Mr Mitchell (16A Rimmington Drive), Ms Smith (16 Rimmington Drive) and Mr and Mrs Greenfield (18 Rimmington Drive) (**the residents**). Of these properties, the Mitchell's property is the closest to the GMS site, the nearest boundary to the north-east being between 70 and 80 metres away from it. Attached to this decision as "A" is a copy of an aerial photograph produced at the hearing showing the site in its context.[21]

[11] The activities undertaken on the GMS site include the loading, unloading, crushing, shredding and processing of metal. Attached to this decision as "B" is a copy of another aerial photograph showing the layout of the site.[22] The residents contend that the noise associated with these activities severely and significantly impacts on their amenity, wellbeing and overall quality of life. During 2015-2018, the Council received a series of complaints from them to this effect.

[12] GMS operates its metal and other wastes recycling business from three New Zealand sites: Hamilton, Auckland and New Plymouth. At these locations, metal and other wastes are collected, prepared and consolidated for export, thus realising the residual value of bulk and highly-varied metal products, paper products and other waste materials. In addition, and from these three bases, the company operates throughout New Zealand and offers logistical support with the collection, transportation and consolidation for export of metal and other wastes to a range of small to medium enterprises. Locations offered such a service include Tauranga, Wellington,

[21] Counsel Exhibit 1A.
[22] JWS, page 9, Figure 2.

Christchurch and Invercargill.

[13] The business operates as an integrated processing system with the New Plymouth branch completing a pre-shredding process, with the product then being transported to Auckland for further processing. The shredding part of the processing operation, which produces the noise exceedences, is undertaken at the Hamilton and Auckland sites. Some product is moved backwards and forwards between Hamilton and Auckland to maximise efficiency in relation to the processing of the material. We were told that product is moved between Hamilton and Auckland at the rate of about ten truck movements per week (comprising about 200 tonnes of product), which was described as not being a significant quantity.[23]

[14] Given the scale and type of operation, GMS employs between 52 and 60 staff members at its various bases and adjunct centres. Of this total, between 30 and 36 are based in Hamilton, although this figure (as with the national total) remains fluid as staff frequently travel to work in the other centres as circumstances dictate.

The noise rules in the District Plan

[15] Noise, or unwanted sound, is an adverse effect specifically addressed in the RMA as one requiring controls.[24] The District Plan, therefore, includes specific objectives, policies and rules to manage potentially adverse noise effects.

[16] Chapter 25.8 "Noise and Vibration" of the District Plan states in its Purpose Statement:[25]

> 1. Noise and vibration can have an adverse effect on amenity values, adversely affecting people's health, interfering with communication and disturbing sleep and concentration.
>
> ...
>
> c) The duty to adopt the best practicable option is not always avoided by compliance with the District Plan rule on noise. Noise may be deemed to be unreasonable even though the District Plan does not require resource consent. Enforcement action for unreasonable noise will usually be based on the noise enforcement provisions of the Act but may be based on exceeding the District Plan standards.

[17] The District Plan then includes the following objective and policies:

Objective

[23] Transcript, 12 August 2020, pages 49-50.
[24] Section 16 RMA, see also s 31(1)(d).
[25] 25.8.1.

25.8.2.1 Activities have minimal adverse noise and vibration effects on other activities and sites, consistent with the amenity values of the receiving environment.

Policy

25.8.2.1a The amenity values of the surrounding neighbourhood and adjoining activities especially **noise-sensitive activities**, shall be protected from the effects of unreasonable noise.

25.8.2.1d Commercial, industrial and community activities shall ensure that noise received at the boundary of Residential and Special Character Zones is consistent with the Residential Noise Environment.

25.8.2.1e Noise from non-Residential activities in residential areas shall not unduly adversely affect residential amenity values.

(emphasis added)

[18] "Noise sensitive activities" are defined in the District Plan as:

Noise-sensitive activities: Means residential activities (including residential accommodation in buildings which predominantly have other uses such as commercial or industrial premises), marae, spaces within buildings used for overnight patient medical care, and teaching areas and sleeping rooms in buildings used as educational facilities. For the purpose of this definition educational facilities includes tertiary institutions and schools, and premises licensed under the Education (Early Childhood Services) Regulations, and playgrounds which are part of such facilities and located within 20m of buildings used for teaching purposes

[19] The Explanation Statement to the objective and policies provides:

The policies ensure that noise levels will be appropriately managed to protect the amenity values of receiving environments.

Management of the interface between areas is important to ensure that noise is within a reasonable expectation for the zoning and noise levels meet accepted minimum standards for the receiving environment. Within industrial or commercial areas, higher noise levels are accepted, but will be controlled to prevent unreasonable noise from transferring between sites.

...

[20] Rule 25.8.3.7 gives effect to the above objective and policies. It provides:

25.8.3.7 Noise performance standards for activities in all zones except Major Facilities, Knowledge, Open Space, Ruakura Logistics and Ruakura Industrial Park Zones

a) Activities in all Zones except for Major Facilities, Knowledge, Open Space, Ruakura Logistics and Ruakura Industrial Park Zones shall not exceed the following noise levels at any point within the boundary of any other site in the:

i. Residential Zone
ii. Special Character Zone

Time of Day	Noise level measured in $L_{Aeq\ [15\ min]}$	Noise Level measured in $L_{AF\ max}$
iii. 0600-0700 hours	45dB	75dB

iv. 0700-2000 hours	50dB	
v. 2000-2300 hours	45dB	
vi. 2300-0600 hours	40dB	75dB

[21] There are also provisions in the Industrial Zone of the District Plan that apply. We set out Objective 9.2.4 and Policy 9.2.4(a) and the explanation that relates to them as follows:[26]

Objective	Policies
9.2.4 The adverse amenity impacts of industrial activities on residential and open space areas are to be avoided.	**9.2.4a** The adverse effects of industrial activities are contained within the Industrial Zone boundary to avoid adverse effects on amenity within other zones, particularly the Residential, Special Character and Open Space Zones. ...
Explanation *Industrial activities can generate adverse amenity effects beyond the boundaries of the zone. These can have a particular impact on residential and open space areas where expectations for amenity are far higher.* *The Amenity Protection Area is a key mechanism to protect residential sites where they are adjacent to land within the Industrial Zone. Industrial properties covered by the Amenity Protection Area are subject to additional standards. Enhanced management of noxious or offensive activities where they are near residential land uses is also a key aspect of the provisions.*	

Legal framework

[22] The Council has an obligation under s 84 of the RMA to enforce its District Plan. As well, under s 31(1)(d) of the RMA the functions of territorial authorities include controlling the emission of noise and mitigating the effects of noise.

[23] In addition to District Plan controls, s 16 of the RMA imposes a general duty on every occupier of land to control the emission of noise from that land. It provides:

> **16 Duty to avoid unreasonable noise**
>
> (1) Every occupier of land (including any premises and any coastal marine area), and every person carrying out an activity in, on, or under a water body or the coastal marine area, shall adopt the best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level.
>
> (2) A national environmental standard, plan, or resource consent made or granted for the purposes of any of sections 9, 12, 13, 14, 15, 15A, and 15B may prescribe noise emission standards, and is not limited in its ability to do so by subsection (1).

[26] Council Exhibit 2.

[24] In *Empire Entertainment Limited v Elzin Trust*[27] the High Court in relation to s 16 said that:

> ...It sets out the supervening policy of the Act in relation to noise and could be called upon notwithstanding that noise emissions comply with the noise control limits of a District Plan. ... the clear intent of the section is to limit emissions of noise from land to **reasonable levels**. (emphasis added)

[25] What amounts to a "reasonable" level is a question of fact and degree.[28]

[26] An application for an enforcement order is made under s 316 of the RMA. The scope of it is set out in s 314 as follows:

> **314 Scope of enforcement order**
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> (1) An enforcement order is an order made under section 319 by the Environment Court that may do any 1 or more of the following:
>
> (a) require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the court,—
>
> (i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed); or
>
> (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
>
> (b) require a person to do something that, in the opinion of the court, is necessary in order to—
>
> (i) ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or
>
> (ii) avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person:
>
> (c) require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person:
>
> (d) require a person to pay money to or reimburse any other person for any actual and reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect on the environment, where the person against whom the order is sought fails to comply with—
>
> (i) an order under any other paragraph of this subsection; or
>
> (ii) an abatement notice; or
>
> (iii) a rule in a plan or a proposed plan or a resource consent; or
>
> (iv) any of that person's other obligations under this Act:
>
> (da) require a person to do something that, in the opinion of the court, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier:
>
> (e) change or cancel a resource consent if, in the opinion of the court, the information made available to the consent authority by the applicant contained inaccuracies relevant to the enforcement order sought which materially influenced the decision to grant the consent:

[27] [2010] NZRMA 525 at paragraph [41].

[28] *Auckland Kart Club Inc v Auckland City Council* EnvC A124/92, 22 October 1992, page 21.

(f) where the court determines that any 1 or more of the requirements of Schedule 1 have not been observed in respect of a policy statement or a plan, do any 1 or more of the following:

(i) grant a dispensation from the need to comply with those requirements:

(ii) direct compliance with any of those requirements:

(iii) suspend the whole or any part of the policy statement or plan from a particular date (which may be on or after the date of the order, but no such suspension shall affect any court order made before the date of the suspension order).

(2) For the purposes of subsection (1)(d), **actual and reasonable costs** include the costs of investigation, supervision, and monitoring of the adverse effect on the environment, and the costs of any actions required to avoid, remedy, or mitigate the adverse effect.

(3) Except as provided in section 319(2), an enforcement order may be made on such terms and conditions as the Environment Court thinks fit (including the payment of any administrative charge under section 36, the provision of security, or the entry into a bond for performance).

(4) Without limiting the provisions of subsections (1) to (3), an order may require the restoration of any natural and physical resource to the state it was in before the adverse effect occurred (including the planting or replanting of any tree or other vegetation).

(5) An enforcement order shall, if the court so states, apply to the personal representatives, successors, and assigns of a person to the same extent as it applies to that person.

[27] As is outlined above, the Council seeks orders against both GMS and Mr Tuhoro under either s 314(1)(a)(i) or (ii), or both.

[28] Section 319 sets out the decision-making framework that applies to an application under s 314. It provides:

319 Decision on application

(1) After considering an application for an enforcement order, the Environment Court may—

(a) except as provided in subsection (2), make any appropriate order under section 314; or

(b) refuse the application.

(2) Except as provided in subsection (3), the Environment Court must not make an enforcement order under section 314(1)(a)(ii), (b)(ii), (c)(d)(iv), or (da) against a person if—

(a) that person is acting in accordance with—

(i) a rule in a plan; or

(ii) a resource consent; or

(iii) a designation; and

(b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may be.

(3) The Environment Court may make an enforcement order if—

(a) the court considers it appropriate after having regard to the time that has elapsed and any change in circumstances since the approval or granting, as the case may be; or

(b) the person was acting in accordance with a resource consent that has been

changed or cancelled under section 314(1)(e).

[29] The Court has a discretion to refuse an enforcement order where the grounds for it have been made out, but case law has identified that such a discretion will be rarely exercised. Counsel for the Council referred us to the High Court decision of *Russell v Manukau City Council*,[29] where Elias J said:

> There is considerable force in the submission made on behalf of the respondent that the options of not making a noise enforcement order or requiring mitigation of the effects of non-compliance with a staging of the process of moving to conformity, is not appropriate where a use infringes the district plan. The wide enforcement options are necessary to provide the tools to deal with a variety of environmental impacts. That is why powers to order mitigation, making good of environmental effects, or the imposition of conditions upon enforcement order are contained in section 314. **In the case of the use which infringes the provisions of the district plan, however, except in exceptional circumstances it would not be appropriate for the Planning Tribunal to countenance continuation of a breach of a district plan.**
>
> ... (emphasis added)
>
> Where grounds for the enforcement order are made out, as they are here with the conclusion that the use is in breach of the district plan and not protected by existing use rights, I accept that it would only be in unusual circumstances that an order to effect immediate compliance would be refused. That is the effect of authorities such as *O'Sullivan v Mt Albert Borough Council*,[30] and *Rangiora New World Limited v Barry*.[31] The integrity and even-handed application of district plans is an important consideration.

[30] The Environment Court has applied the reasoning of *Russell* in relation to the exercise of the Court's discretion. In *Kapiti Island Watching Interest Incorporated v Kapiti Coast District Council* Judge Smith said:[32]

> [61] We conclude from that decision:
>
> (a) that the Environment Court has still a discretion to refuse an enforcement order where the grounds are made out;
> (b) that discretion would be rarely exercised;
> (c) the discretion as to whether to order immediate compliance is a matter for the Environment Court and must be explicitly considered;
> (d) this general discretion can include the form any order may take, ie suspension or conditions.

[31] Mr Muldowney submitted that, under s 314(1)(a)(i), the burden of proof that a breach of a District Plan rule has occurred rests on an applicant for an enforcement order. In our view, the same burden of proof applies in relation to an application under s 314(1)(a)(ii). Equally applicable is the standard of proof which is "on the balance of probabilities".

[32] In relation to an order under s 314(1)(a)(ii), whether the noise emission is or is likely

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[29] [1996] NZRMA 35, 47, pages 15-16.
[30] [1968] NZLR 1099 (at 115 per McGregor J).
[31] [1992] 1 NZRMA 133.
[32] EnvC C154/2002, 2 November 2002.

to be offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment is to be tested objectively. As was outlined in *Zdrahal v Wellington City Council*,[33] this must be viewed from the perspective of an ordinary person who represents the community at large.

The issues

[33] The issues for us to decide are:

- Has GMS satisfied us on the balance of probabilities that it has existing use rights to operate at the site so that the District Plan noise rule does not apply to it? We will refer to this as "the existing use rights argument."
- If no, has the Council satisfied us on the balance of probabilities that GMS's activities on the site:

  (a) Contravene, or are likely to contravene, the noise rule in the District Plan; or

  (b) are, or are likely to be, offensive or objectionable to such an extent that there has been or is likely to be an adverse effect on the amenity and health and/or wellbeing of the residents?

  We will refer to this as "the s 314(1)(a) argument."
- If yes, should an enforcement order be made against GMS?
- If yes, what should the terms of that enforcement order be?

[34] We address each of the issues in turn.

The existing use rights argument

[35] Section 10 of the RMA provides:

> (1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—
>
> (a) either—
>
> (i) the use was lawfully established before the rule became operative or the proposed plan was notified; and
>
> (ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:
>
> (b) or—

[33] [1995] 1 NZLR 700.

(i) the use was lawfully established by way of a designation; and

(ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.

(2) Subject to sections 357 to 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—

(a) an application has been made to the territorial authority within 2 years of the activity first being discontinued; and

(b) the territorial authority has granted an extension upon being satisfied that—

(i) the effect of the extension will not be contrary to the objectives and policies of the district plan; and

(ii) the applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.

(3) This section does not apply if reconstruction or alteration of, or extension to, any building to which this section applies increases the degree to which the building fails to comply with any rule in a district plan or proposed district plan.

(4) For the avoidance of doubt, this section does not apply to any use of land that is—

(a) controlled under section 30(1)(c) (regional control of certain land uses); or

(b) restricted under section 12 (coastal marine area); or

(c) restricted under section 13 (certain river and lake bed controls).

(5) Nothing in this section limits section 20A (certain existing lawful activities allowed).

[36] GMS contends that it meets the criteria set out in s 10 to establish an existing use, however it also acknowledges that s 10 does not do away with the need for it to comply with its obligations under s 16 of the RMA to adopt the best practicable option to ensure that the emission of noise from the site does not exceed a reasonable level. GMS says that it has done this, and that, as it complies with the noise emission standards for the Industrial Zone (65dB), the noise it emits is not exceeding a reasonable level.

[37] The Council does not agree that GMS has existing use rights. It contends that for the respondents to hold existing use rights pursuant to s 10 of the RMA, they must prove that on the date that the noise rule became operative, GMS was operating in a manner that was compliant with the then-operative noise rule, or if not compliant with it, they had existing use rights arising at an earlier date that preceded the old noise rule becoming operative. The Council contends that the respondents have failed to meet this legal and evidential test.

The evidence

GMS evidence

[38] Mr Tuhoro outlined in his affidavit that in the early 1980s his father worked in the

scrap metal business and was the general manager of CableCo in Hamilton. CableCo worked out of two sites in Hamilton, one which was the current GMS site at Ellis Street, and Mr Tuhoro began working there too in 1987. He told us that he has remained working in the scrap metal industry in the Hamilton area since then. He worked on the site for CableCo and later CMA until around 2010. All up, this amounts to about 33 years in the industry. Mr Tuhoro said that the GMS site "has always been the location of a scrap metal business."[34]

[39] Mr Tuhoro said that in 2004-2005 CableCo was purchased by CMA Recycling Limited (**CMA**), a New Zealand subsidiary of an Australian company. He said that CMA went into receivership (or administration) in approximately August 2013 and went into liquidation in January 2014.[35] Around the time that CMA began experiencing financial difficulties, Mr Tuhoro said he became aware that CMA had "fallen over" and he contacted the landlord. Mr Tuhoro said that he was advised that the landlord had been "let down by" CMA, who had recently abandoned the site and stopped paying rent.[36] When CMA went into receivership, Mr Tuhoro started GMS and it moved onto the Ellis Street site after CMA "handed it back in 2015".[37] We have already referred to Mr Tuhoro's evidence where he said GMS took over the site in around August 2014.[38] On the face of it, this is inconsistent with his evidence that GMS moved onto the Ellis Street site in 2015, however it may be that GMS did not start operating at the site until 2015 even if legal arrangements were made for it to do so in 2014.

[40] Mr Tuhoro further said that, when GMS took over the site, metal processing equipment belonging to CMA and historical records associated with CMA remained on site.[39] This was also referenced in a photograph produced as GMS Exhibit 1, a photograph that appears to be taken at the time of a fire. We refer to this later in our discussion of the evidence.

[41] As one might expect, and as Mr Tuhoro told us, the metal recycling industry has changed over the years as a result of new technology being developed. In the early days, Mr Tuhoro said that a lot more noise was produced at scrap metal yards, the process was more labour intensive, and metal was dropped, pushed and loaded.

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[34] Affidavit of Mr Tuhoro, paragraph 7.
[35] GMS Exhibit 3, and also Affidavit of Mr Tuhoro, paragraph [8]. CBD page 420.
[36] Transcript 13-14 July 2020, Mr Tuhoro, page 78, lines 6-25.
[37] Affidavit of Mr Tuhoro paragraph 8.
[38] Mr Tuhoro corrected paragraph 8 of his affidavit to August 2014 see Transcript 13-14 July 2020, page 68.
[39] Transcript 13-14 July 2020, Mr Tuhoro, page 78, lines 6-25.

However, he said that noise levels from scrap metal yards have "decreased with the improvement of technology and machinery".[40]

[42] Mr Tuhoro also said that, during the 1980s, railway wagons on tracks came into the Ellis Street site where they were loaded and then railed out. He described this as very noisy, as it involved trains, wagons and the dropping of metal into the wagons. At that time he described Ellis Street as being very wet, because the area is built on peat which is approximately 1 metre below the surface, which he said was not suitable for residential development.[41] This comment was linked into a theme evident in the respondent's case that the Council were somehow to blame for allowing residential development so near to an industrial site.

[43] In summary, Mr Tuhoro's evidence was that:

(a) a scrap metal business has operated continuously at the GMS site since the 1980s;

(b) the operations, particularly in the 1980s, were much noisier than now due to the loading of railway wagons on the site and the absence of the kind of technology now available;

(c) he worked on the site for CableCo and later CMA until around 2010 and that the noise now emitted from the site is no worse than that which has always been emitted from the site.

The Council's evidence

Planning history of the residential area and the site

[44] Ms Morris, the principal planner at the Council, outlined the background to the current noise rule and the zoning history of Rimmington Drive/Hastings Place/Gilbass Avenue (**residential area**). She obtained this information from the Council's records.

[45] The land that is now within the residential area comprising Rimmington Drive, Hastings Place and Gilbass Avenue, was previously part of Waipa County before coming into the Hamilton City boundary in 1962. At that time the area was rural land. The GMS

[40] Affidavit of Mr Tuhoro at paragraph 9.
[41] Affidavit of Mr Tuhoro, paragraph 11.

land was zoned Industrial C, a heavy industrial zone.

[46] The first Hamilton District Scheme was notified in 1970 and the proposed zoning of both the residential area and the GMS land at that time was Industrial C. The District scheme became operative in 1973, and both areas retained Industrial C zoning.

[47] The first review of the Hamilton District Scheme was notified in 1977. At this time a residential zoning was first proposed to be introduced over the residential area. A mixed residential and industrial zoning was proposed, including Residential 1 and 15 and Industrial 1 and 4 Zones. The GMS land was proposed to be zoned Industrial 4 (Heavy Industrial). This scheme, with the new zoning provisions, became operative in 1981.

[48] The second review of the Hamilton District Scheme was notified in 1989. The proposed zoning of the residential area was Residential Medium, except for a strip of land separating the Residential Area from the Hamilton western rail trail, which was proposed to be zoned Industrial. An Amenity Protection Area was later introduced, through the decision version of the second reviewed Hamilton District Scheme in 1992, which zoning required certain additional standards that industrial activities were required to comply with to protect amenity within residential zones that were adjacent to an industrial zone. A map was attached to Ms Morris's evidence depicting the existence of an Amenity Protection Area over the strip of land referred to above.[42] This strip of land appears to include the Mitchell and Smith properties, but it is less clear whether it would have covered the Greenfield's property. In any event, no further information was available to help us determine whether this inference is reasonable or not. Ms Morris did, however, say that when the scheme was made operative in 1992, the strip of land we are referring to became part of the Residential Medium Zone. The GMS land was zoned Industrial General.

[49] This may have been a point of some significance were we to have had evidence explaining the reason why the Amenity Protection Area was moved from this strip of land. As we outline shortly, the Rimmington Drive subdivision was completed in 1990, so it is possible to infer that the Amenity Protection Area over the strip of land did not include the residents' properties. However we are not satisfied that there is enough of a factual basis for us to draw any proper inferences about this. To add to the unsatisfactory nature of the records about all of this, it then appears that a plan change was promulgated (Plan

[42] Affidavit of Ms Morris, Exhibit 6, CBD page 407.

Change 7).

[50] Plan Change 7 sought to change the zoning of the strip of land separating the residential area from the Hamilton western rail trail from Residential Medium to Recreational. The explanation given for the amendment was to include a buffer between the residential area and the railway. Ms Morris was unable to identify the date of Plan Change 7 or locate any further information about it.

[51] The first-generation proposed Hamilton City District Plan under the RMA was notified in 1999. It proposed zoning the residential area as General Residential. The zoning of the GMS land was proposed to continue to be Industrial. This plan became operative in part in 2010 and fully operative in 2012, with no further changes made from the proposed zoning notified in 1999.

[52] The second-generation proposed Hamilton City District Plan under the RMA was notified in 2012. It retained a General Residential zoning over the residential area and a continuation of the Industrial zoning over the GMS land.

[53] From the Council records, Ms Morris was able to ascertain that GMS did not challenge the zoning, or indeed any of the plan provisions when the currently operative Hamilton City District Plan was reviewed in accordance with Schedule 1 of the RMA.

[54] The current Hamilton City District Plan became operative in 2017.

Development of the residential area

[55] From the Council records, Ms Morris was able to establish the history of the development of the residential area. She outlined the various subdivisions that developed the residential area as follows:

(a) Gilbass Avenue was completed in 1976;

(b) Rimmington Drive was completed in 1990; and

(c) Hastings Place was completed in 1993.

[56] Mr Julian (now retired) was previously a project manager. He was involved in development of residential property in Gilbass Avenue, which he said was completed in

about 1984-1985. Mr Julian described that this development backed onto the railway track, and he noted that there was a scrap metal yard on the opposite side of the tracks. He said "the scrap metal yard made a considerable volume of noise as expected from an industrial area". He expressed the opinion that the distance between Gilbass Avenue and the industrial area "was on the edge of how close you would build".[43] He then went on to express the opinion that he was surprised that Rimmington Drive was allowed to be developed.

[57] Mr Mallett also expressed opinions about the development of Rimmington Drive as a residential area. He said:[44]

> ...
> I believe the HCC did not address the current noise issues at this time. They were aware that this development backed onto the Frankton industrial area but failed to provide sufficient protection to the industrial area.

[58] He then noted that the RMA had come into effect after this development. He said:[45]

> I believe the HCC had created this issue due to the following:
>
> (a) by not providing "protection for the rights of the people in industries to make a reasonable level of noise"; and
>
> (b) by not notifying developers and/or the subsequent residents of Rimmington Close (and affected areas) of the nature of the industrial zone (specifically noise levels) which is close to Rimmington Close and I believe the HCC needs to fix that failure to notify.

[59] Mr Mallett then continued to express opinions about the performance of the Council, which he said had been "hung by its own petard".[46]

[60] The expressions of opinion by Mr Julian and Mr Mallett in relation to the development that proceeded at Rimmington Drive and the Council's role in that are inadmissible, and we disregard them. Even if those expressions of opinion are relevant (which we doubt), neither witness can qualify themselves as expert to the degree required to enable them to express an opinion on these matters in terms of the Evidence Act 2006, and in addition their opinions were not substantially helpful in accordance with the test set out in s 25 of the Evidence Act.

[61] Ms Morris, who was qualified to express an expert opinion about planning matters, said that, at the time residential area subdivisions were established, reliance was placed

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[43] Affidavit of Mr Julian, paragraph 6.
[44] Affidavit of Mr Mallett, paragraph 17.
[45] Affidavit of Mr Mallett, at paragraph 19.
[46] Affidavit of Mr Mallett, paragraph 23 and 24.

on the buffer offered by the railway and the reserve land, and the Industrial Zone noise provisions which protect amenity within the residential area from the noise generated within the adjacent Industrial Zone. Ms Morris described these as "rational and orthodox planning techniques used to address sensitivities between contrasting adjacent land uses such as residential and industrial".[47]

[62] Although we accept Ms Morris's evidence as a statement of general principle, it was not detailed enough to outline how such techniques might have changed over the years given the fact that the Rimmington Drive subdivision was completed in 1990 – before the RMA. We are slightly troubled about this given that an Amenity Protection Area was proposed in 1989[48] over the strip of land we have already referred to, which is likely to have included some of the properties on Rimmington Drive owned by the residents who are impacted by the noise from the GMS site. It was not satisfactorily explained how or why the Amenity Protection Area over this strip of land was not retained.[49] The fact that it was included in the proposed Scheme seems to indicate a concern about the proximity of the Industrial Zone to this area, however as it was not included in the Scheme when it was made operative, we can take the matter no further.

[63] Ms Morris also outlined the history of the noise rule with which we are concerned. She explained that the noise rule was transferred from the first RMA District Plan into the current District Plan with only minor changes. She outlined that the limit of 50dBA is the same, however the main differences between the two are that the specific limits for Sunday and Public Holidays have been deleted in the current District Plan, and the previous District Plan measured noise levels in L_{10} rather than $L_{Aeq\ (15\ mins)}$. The $L_{Aeq\ (15\ mins)}$ level is more favourable to GMS.[50]

Continuous use of the site

[64] After the first two days of hearing, the Council sought to file a new affidavit from Mr Hopkins, the chief operating officer for ProForm Limited (**ProForm**). This was initially opposed by the respondents, however we consider the evidence to be relevant, and that the adjournment period has enabled GMS to consider it properly and to challenge it

[47] Affidavit of Ms Morris, paragraph 19, Transcript 13-14 July 2020, pages 38-40.

[48] The Amenity Protection Area was notified in 1989, but introduced in 1992 through the decision version of the second Hamilton District Scheme, see Transcript, 13-14 July 2020 at pages 31 and 44.

[49] No explanation was provided as to why the strip of land later became Residential Medium see Affidavit of Ms Morris at paragraph 8.

[50] Affidavit of Mr Styles, paragraph 53, CBD pp 384-385.

through cross-examination at the resumed hearing.

[65] The effect of Mr Hopkins' evidence was to challenge Mr Tuhoro's contention that the site has been continuously operated by a scrap metal business since the 1980s. Specifically, it relates to s 10(2) of the RMA dealing with the requirement that, if the grounds under s 10(1) have been made out, the existing use of land that contravenes a rule in a district plan or proposed district plan cannot be discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified. As we have already outlined, this is subject to a successful application for extension being granted by a territorial authority, however there was no suggestion in this case that an application for extension was sought.

[66] Mr Hopkins told us that he had been employed by ProForm since 1997. He explained that ProForm is a plastics manufacturing company that started out manufacturing truck bed liners for the international market in Cambridge in the mid-1990s, but had expanded into the production of canopy shells, sport lids and cargo liners, amongst other things. Mr Hopkins said that in 1995 ProForm moved from Cambridge to 199 Ellis Street, Frankton, next to the GMS site, where it stayed until 2018. Since 2018 it has relocated to a new site at Foreman Road in Hamilton.

[67] Mr Hopkins told us that during the period when ProForm was located at 199 Ellis Street, it required more space for its business. To address this, it sub-let and occupied the neighbouring site we are concerned with in this case, namely the site at 203 Ellis Street, currently occupied by GMS. Mr Hopkins said that ProForm sublet the entire site from 31 August 2011 to November 2013, however at the hearing he explained that the manufacturing part of the business was moved onto the site at the end of June 2012. On 22 October 2013 a fire broke out in the building on the site, and ProForm vacated it on about 1 November 2013.

[68] At the hearing, an agreement to sublease was produced by Mr Hopkins.[51] The sub-lessor is identified in this document as Scrap Metal Recyclers Limited and the sub-lessee is ProForm Plastics. The commencement date for the sub-lease is said to be 31 August 2011, with a final expiry on 30 August 2015 and a right of renewal for two years. There are various notations concerning the rental, some of which appear to have been amended by hand. Significantly, the third schedule to the sub-lease says:

[51] Council Exhibit 6.

> The sub-lessee agrees not to use the site for metal recycling, metal bayling or stockpiling of metal for recycling while they are tenanting the site. *Or sub-lease, rent to a company engaged to scrap metal recycling.*
>
> (emphasis added)

The wording outlined above in italics is hand-written onto the document.

The arguments

[69] Counsel for GMS submitted that there is sufficient evidence for the Court to find that the site continued to be used for the processing of scrap metal until CMA went into receivership in about October 2013, and that therefore there has not been the requisite period of discontinuance for the site to have lost its existing use rights. Mr Braun submitted:

(a) the arrangements about the sub-lease with ProForm were extremely loose;

(b) the timeline in relation to ProForm's occupation is more than a little uncertain;

(c) the sub-lease contains a prohibition on the use of the land for scrap metal processing, which shows that CMA were keen to ensure that its competitors, like GMS, were kept out. This suggests that CMA were still using the site; and

(d) the presence of scrap metal processing equipment on the site is consistent with Mr Tuhoro's understanding that CMA continued to operate the site up until its voluntary administration, despite ProForm's presence.

[70] For the Council, Mr Muldowney submitted that:

(a) the respondents have produced no evidence to confirm the noise emissions from the site between August 2014 and October 2017, and have therefore failed to establish that they were operating lawfully under the old plan;

(b) in any event, ProForm's occupation of the site broke the continuous use of it as a scrap metal yard; and

(c) further, the character, scale and intensity of the activity on the site has not remained constant during the years.

[71] In short, Mr Muldowney submitted that the respondents cannot satisfy the Court that GMS has the protection of existing use rights.

Analysis

[72] The first limb of s 10(1)(a)(i) requires the respondent to prove, on the balance of probabilities, that on the date that the District Plan noise rule became operative they were operating in a manner that was compliant with the then-operative noise rule, or if not compliant with that rule, they had existing use rights arising at some earlier date that preceded the old noise rule becoming operative. We agree with Mr Muldowney that, from an evidential perspective, this is no easy task.

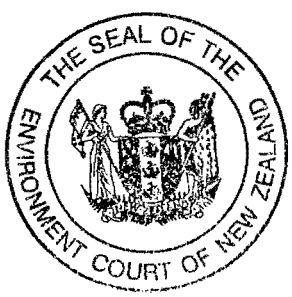
[73] The evidence establishes that GMS began operating from the site in August 2015.[52] At that time the previously operative District Plan was in place, and Mr Styles has confirmed that the relevant noise rule was Rule 5.1.1(b), which was made operative in 2012, and established a limit of $50dB_{L10}$.[53]

[74] We agree with Mr Muldowney that GMS has produced no evidence to confirm that the noise emissions from the site between August 2015, when it commenced its operation on the site, and October 2017 (when the current District Plan became operative) were compliant with this limit. In fact, the evidence of Mr Styles is that the noise measurements undertaken in 2016 and 2017 show that the noise rating levels were $57dB_{L\,Aeq}$ and 61dB respectively.[54] Mr Styles also addressed this in his affidavit in reply.[55]

[75] However, Mr Muldowney also submitted, and we accept, that assuming the noise effects have remained constant since commencement, which is what GMS contend, the evidence tends to suggest the contrary, because the current noise emissions would have been in breach of old Rule 5.1.1(b). Mr Muldowney, however, contended that regardless, GMS has produced no evidence on this point.[56]

[76] We agree and adopt Mr Muldowney's analysis of this part of the test.

[77] Regardless of this, however, existing use rights cannot be relied on by GMS if it can be established that the use of land that contravenes the rule has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative. This is where the evidence of Mr Hopkins about ProForm's activities on the



[52] Affidavit of Mr Tuhoro, paragraph 8, CBD page 420.
[53] Affidavit in reply of Mr Styles, paragraph 48, CBD page 384.
[54] Affidavit of Mr Styles, paragraph 15, CBD page 251.
[55] Affidavit in reply of Mr Styles, paragraphs 47-53, CBD pages 383-385.
[56] Closing submissions for the Council, paragraph [34].

site becomes important. The thrust of this evidence was that ProForm's sublease of the site for the plastic manufacturing part of its business from the end of June 2012 (the date of occupation of the site by the manufacturing part of ProForm's business) or 31 August 2011 (the date of the commencement of the sub-lease) until 1 November 2013 (the date of the fire) interrupted the continuous use of the site as a scrap metal yard/metal recycling facility.

[78] Several documents were put to Mr Hopkins by Mr Braun, including a photograph of the front of the site with a fire engine present,[57] various company searches,[58] and a deed of lease between the RB Ofsoski Number 2 Trust and Scrap Metal Recyclers (Waikato) Limited[59] dated 21 December 2007 which shows that the Trust was the landlord of the property we are dealing with. The term of this lease was a period of 10 years, with one right of renewal for 10 years and a final expiry date of 20 December 2027.

[79] We first deal with the challenges GMS made to the sub-lease arrangement with ProForm.

[80] We agree that there are some difficulties associated with the sub-lease. The most fundamental is that the document produced is only signed by the sub-lessee and not the sub-lessor. Furthermore, Mr Hopkins was not the person who was involved in the negotiation or preparation of the sub-lease although he could recognise the signature on the document as being that of the former general manager, now deceased. Mr Braun submitted that it was likely that the document was not prepared with the assistance of lawyers or with the landlord's knowledge or consent, however no conclusive evidence was provided to this effect.

[81] Mr Hopkins was cross-examined about the sub-lease, the intention of which was to challenge the reliability of his evidence. Mr Braun submitted that the timeline of ProForm's occupation of the site was more than a little uncertain, with the sub-lease providing for a commencement date in August 2011, however Mr Hopkins' evidence was that ProForm were not on site until June 2012.[60] As well, reference was made to Mr Hopkins' recollection that there was no metal processing equipment on site when GMS Exhibit 1 clearly shows that this was not the case.

[57] GMS Exhibit 1
[58] GMS Exhibits 2 and 3 (relevant to changes of names for the business entities involved).
[59] GMS Exhibit 4.
[60] Transcript, 12 August 2020, Mr Hopkins, page 28, line 13.

[82] We are not persuaded that these matters reflect significantly on Mr Hopkins' reliability as a witness, as regardless of whether the commencement date was that which was outlined in the sub-lease (31 August 2011), or June 2012, either of the commencement dates mentioned when calculated with reference to the fire satisfy us that ProForm was operating on the site for a period of more than 12 months. Furthermore, Mr Hopkins' clear evidence was that no metal recycling business was operating on the site when ProForm occupied it.

[83] What then to make of the photograph GMS Exhibit 1 depicting machinery associated with scrap metal recycling? We do not consider Mr Hopkins' failure to mention this until it was pointed out to him to impact on his reliability as a witness on the critical point. This is because, even if CMA remained the lawful sub-tenant, and even if an item of machinery associated with scrap metal recycling remained on the site, this does not mean that *in fact* a metal recycling business was operating there over the period of ProForm's occupation of it. Even though Mr Tuhoro believed a metal recycling business continued to be operated there, and even though Mr Braun invited us to infer that it may have been, we accept Mr Hopkins' evidence that it was not.

[84] We are satisfied that there was a period of more than 12 months when a scrap metal recycling business was not operating at the site. For this reason alone, we find that the respondents cannot satisfy us on the balance of probabilities that existing use rights apply in this case. However, even if we are wrong about this, we agree with Mr Muldowney that the respondents have not proved on the balance of probabilities that a scrap metal business was lawfully established before the rule being breached became operative or the proposed plan was notified. We are also satisfied that the scale and intensity of the operation has changed over the years to such an extent that it is not similar in character, intensity or scale to that which existed prior to the relevant rule. In this regard we accept the evidence of the residents, all of whom were clear that the noise levels from the site increased after GMS purchased its shredder.

The s 314(1)(a) argument

[85] We remind ourselves that it is for the Council to prove on the balance of probabilities that GMS's activities on the site have contravened the noise rule, and that they are likely to continue to do so if the grounds in s 314(1)(a)(i) are to be made out. The same standard and burden of proof apply to the application made by the Council for an enforcement order under s 314(1)(a)(ii).

[86] In this section we first outline the evidence from the residents followed by the evidence from GMS about how the site operates, and we then outline the evidence we heard from the acoustic experts before reaching our conclusion on this issue.

Evidence from residents

[87] Mr and Mrs Mitchell moved into their home at 16A Rimmington Drive in 2013. Mr Mitchell said that about a year later GMS began operating from the Ellis Street site. This is consistent with the evidence we heard from Mr Hopkins about the fire when ProForm were operating from the site, and Mr Tuhoro's evidence that GMS began its operation at the site in 2015. Prior to GMS operating at the site, the Mitchells had not noticed much noise from the industrial area. However, once GMS moved in, the increase in noise was immediate. Mr Mitchell made his first complaint to the Council's noise control unit about noise from the GMS site shortly after and then followed up with repeated complaints during 2015. He said that Council enforcement staff took over the noise issue at the end of 2015. In early 2017 the noise levels became a lot louder and it was Mr Mitchell's understanding that this coincided with the installation of a new metal shredder on the site. He said that the shredder often starts up at 8am and runs through the day until somewhere between 3pm and 5pm. Mr Mitchell works shift work, so that when he is working a night shift he often has difficulty sleeping beyond short periods during the day due to the noise at the GMS site.[61]

[88] Ms Christine Smith lives at 16 Rimmington Drive having purchased her home there in mid-2009. At that time, she said that she was well aware that the railway line passed close by and that there was an industrial area on the other side of the line. Like Mr Mitchell, she had not noticed much noise coming from the industrial area prior to GMS moving onto the Ellis Street site. From then on, she noticed an increase in the noise levels although she said that she did not register any complaints with the Council for the first year or two. It was after GMS installed the shredder in mid-2017 that the noise from the site increased dramatically. She said that she had not complained to the Council very often as she knew Mr Mitchell was actively doing so and she was content for him to take the lead on behalf of the Rimmington Drive residents. Ms Smith is retired.

[89] Mr and Mrs Greenfield built their home on a vacant lot at 18 Rimmington Drive in 1995. Mr Greenfield said that when they made their purchase, they were aware that the

[61] Affidavit of Mr Mitchell, paragraphs 2 and 21. CBD pages 297 and 302.

property was near an industrial area and the railway line. He said that they found the noise generated by CableCo the previous occupants of the GMS site to be irritating at times and they had complained to the Council about this at that time. However, after GMS moved onto the site, they noticed that the noise levels had increased significantly. The Greenfields lodged their first noise complaint about this louder noise at the end of 2014. In early 2015 there was a dramatic increase in noise levels which coincided with the installation of the shredder on the GMS site. Despite installing double glazing on all of the windows of their home and recladding the house with a fibreglass mesh wrap, Mr Greenfield said that there had been little if any reduction in the noise levels inside the house. It was also very unpleasant when working or sitting outside.

[90] Mrs Greenfield filed her own affidavit but added more detail about how the noise had impacted on her wellbeing over the years. Not long after GMS moved into the site, Mrs Greenfield learned that she had cancer. She went into hospital in February 2015 to receive treatment and went home after that to recover. She described the noise from GMS as terrible, and that it made her recovery very difficult. She described the noise as follows: "I would describe the noise as being like a smothering blanket wrapped over me right from the time I got sick until now. The noise is very invasive and it wears me down".[62] Mrs Greenfield said that the noise usually starts at 7am in the morning and finishes quite late in the afternoon, about 5pm Monday to Friday. She also said that the site operated on Saturdays from 7am to about 1pm. Mrs Greenfield is still undergoing treatment for cancer. She said that, even on days when the decibel levels were within the limit, sitting outside was very unpleasant because the noise was so constant.[63]

[91] In their affidavits, each of the residents described in some detail the adverse effects that the GMS noise was having on their health and well-being. From this, counsel for the Council submitted that there could be little doubt that the breach of the District Plan noise rule was both offensive and objectionable to the residents and that the effects were both significant and adverse.

The Council's inquiries

[92] Initial measurements of the noise levels from the GMS site undertaken by Council staff and the Council's acoustic consultants, the Styles Group in late 2016 showed that the noise levels when measured at the nearest property at 16A Rimmington Drive (the

[62] Affidavit of Mrs Greenfield, paragraph 3.
[63] Affidavit of Mrs Greenfield, paragraphs 6 and 7.

Mitchell's property) significantly exceeded the District Plan noise limits.

[93] In April 2017, GMS prepared a Noise Management Plan,[64] which it submitted to the Council. This plan detailed a series of measures for controlling the emission of noise from its site. These measures included placing rubber mats on the ground to cushion the impacts during the unloading and handling of scrap metal, using magnets to reduce the noise during these same operations, a budget for building a tilt slab wall on (part of) the eastern boundary as well as staff management techniques and processes to manage noisy activities.[65]

[94] In relation to hours of operation the Noise Management Plan provides the following:

> 1. Restricted hours of operation with exception for breakdowns, cleaning or non-noise producing work to;
>
> - Monday to Friday 6am to 7pm
> - Saturday 7am to 5pm
> - Sundays and public holidays closed
>
> 2. GMS will refrain from any dynamic movements of scrap metal (unloading trucks, loading containers, excavators moving scrap) outside the hours of 7am to 6.30pm Monday to Friday and 7am to 5pm Saturday.

[95] Despite the implementation of these measures including the erection of the tilt slab wall, further noise level monitoring undertaken by the Council during 2017 showed little if any reduction in the noise levels being received at the measurement location at 16A Rimmington Drive.

[96] As a result, in March 2018 the Council issued abatement notices to Mr Tuhoro (who was a director of GMS at that time but is no longer a director) and Mr Wayne Braddock (who was a director of GMS at that time but is no longer a director). We refer to these as "the abatement notice" even though three were issued, as all were the same.

The abatement notice

[97] The abatement notice required GMS to:[66]

> 1. ...
>
> A. Adopt the best practicable option of ensuring that the overall emission of noise

[64] CBD page 28.
[65] The tilt slab wall extended 21m along the eastern boundary from the south-eastern corner.
[66] Affidavit of Peter McGregor Exhibit 19B, page 175-188 CBD.

from all activities at the site does not exceed a reasonable level, being 50dB $L_{Aeq\ (15\text{-}mins)}$ as prescribed in Rule 25.8.3.7 (a) of the Hamilton Operative District Plan (hereinafter 'ODP') at any point within the boundary of any site in any Residential Zone.

B. To adopt the "best practicable option" in clause 1A you must undertake the following:

(a) install acoustic barriers or an acoustic enclosure at or around the scrap metal processing machinery; or

(b) erect an acoustic barrier along the whole of the length of the eastern site boundary bordering the North Island Main Truck Railway Line that is high enough to effectively reduce noise levels from the site; or

(c) both of the above, together with any other noise control method that would achieve the noise level stated in Rule 25.8.3.7 (a)

C. In addition to the actions outlined in clause 1B, the "best practicable option" shall also include the reduction in noise generated during the handling of scrap materials, including impact-type noise, by:

(a) placing metal and other materials on the ground or into containers, rather than dropping them from height; and

(b) picking metal and other materials up from the ground to move them, rather than dragging them along the ground; and

(c) careful handling of material, including avoiding dropping them onto hard surfaces when transferring materials from one area to another.

Note: The actions in clause 1C are required to avoid the adverse effects of impact-type noise. This type of noise attracts a +5 dB adjustment during the assessment of noise.

[98] Further, by 31 March 2018, GMS was also required to prepare another Noise Management Plan containing noise control measures, including timelines for these measures to be implemented.[67]

[99] The compliance date for the abatement notice was on or before 28 February 2019.[68]

Response by GMS

[100] In March 2018, GMS engaged Marshall Day to prepare a report on the issues listed in the abatement notices. In its report dated 31 May 2018,[69] Marshall Day concluded that the best practicable options which were available to mitigate noise emissions from the GMS site were all inadequate to reduce the noise levels for compliance with the General Residential Zone noise limits. Instead Marshall Day recommended relocation of at least

[67] Affidavit of Peter McGregor Exhibit 19B, page 176 CBD, abatement notice clause 4.
[68] Affidavit of Peter McGregor Exhibit 19B, abatement notice clause 3, page 176 CBD.
[69] Copy of MDA report included at Exhibit 20 of affidavit of Peter McGregor, page 189 CBD.

the noisiest activities from the existing site to a possible new site. It noted that at that time GMS was negotiating for an alternative site in Empire Street Frankton which Marshall Day had assessed as being suitable for accommodating the noisiest activities as the noise levels from these activities were predicted to be within the District Plan residential noise limits at the locations of the nearest neighbours to that site. We did not receive any evidence about the option of GMS relocating to the Empire Street site and why it was not taken any further by GMS.

[101] Mr McGregor advised that GMS made two extension of time requests to the Council to delay the dates for providing both its noise management plan and for achieving compliance. The Council granted the two extensions of time requests for the completion of the noise management plan (to 1 June 2019) but did not grant extensions for the compliance date.

[102] Mr McGregor advised also that GMS did not appeal the abatement notices and at no time following the issue of the notice did it provide the Council with evidence that it had implemented any noise mitigation measures.

Further Council monitoring

[103] During 2019 the Council and the Styles Group undertook further monitoring of the noise levels at 16A Rimmington Drive which confirmed that the noise levels continued to be well in excess of the District Plan limits.

Evidence from GMS about management of the site

[104] The theme of Mr Tuhoro's evidence was that nothing further could be done in relation to site management to prevent the noise limits in the District Plan being exceeded from time to time. Balancing the difficulties of machinery breakdowns with the supply of materials and other things, he did not consider there was anything further that could be done in terms of site management to ameliorate the situation. He did not, however, accept that this meant that nothing had been done, or that the noise generated from the site was as offensive or ongoing as the residents contended. He also raised the issue of train noise.

[105] Mr Tuhoro said that GMS was not the noisiest activity in the area as he had measured noise levels of 75-85dB from trains which passed by about 14 times a day. In response, Mr Styles said that 75-85dB was likely to be a Lmax level or a similar very

short-term metric. He said that it could be very misleading to compare a short-term metric such as Lmax with an average level metric such as the LAeq which is the metric adopted in the noise rule in the District Plan.

[106] Irrespective of how train noise is measured, none of the residents told us that they found train noise troublesome to them. Typically, Ms Smith told us that she had got very used to train noise and did not find it offensive in any way. She found it to be rhythmic with a gradual build up whereas the GMS noise was intrusive and irregular with a dramatic build up.

[107] Mr Tuhoro explained that GMS had undertaken considerable steps to manage the business to try and comply with the noise limits in the District Plan both before and following the issuing of the abatement notices. He told us that, in conjunction with Mr Rohan Rohimpandy, GMS had developed the first noise management plan in 2016 to respond to the complaints received from the residents in Rimmington Drive. We have already referred to the updated version which was completed in 2017, but Mr Tuhoro specifically told us that the noise management plan includes:

(a) substantially restricted hours of operation;

(b) a prohibition on throwing or dragging scrap;

(c) placement of rubber mats around the site;

(d) placement of containers at strategic locations to block noise;

(e) conversion of all vehicles to operate using rubber wheels or cleats;

(f) construction of a tilt slab wall.

[108] The tilt slab wall was constructed in late 2017[70] at a cost of approximately $200,000.[71] That wall and the temporary wall that preceded it, coupled with other operational changes, had a positive effect on noise emissions from the site, and how they affected noise levels at 16A Rimmington Drive.[72] However, and significantly, the tilt slab wall does not assist with noise generated by the shredder, which the JWS from the acoustic experts identifies is the main source of exceedance of the noise limits.

[70] Affidavit of Mr McGregor, paragraph 42, CBD 44.
[71] Affidavit of Mr Tuhoro, paragraphs 95 and 108, CBD 431-432.
[72] Affidavit of Mr Mitchell at paragraph 11 and Transcript 24 June 2020, page 23 at line 18.

[109] In addition to the cost of the tilt slab wall, Mr Tuhoro said that the restricted hours of operation cost and continue to cost GMS approximately 2-3 hours of processing time per day, at a total financial cost of $5,000-$7,500 per day.[73]

[110] GMS contended that the abatement notice required GMS to adopt one of three options to address the noise issues, one of which was to "install acoustic barriers or an acoustic enclosure at or around the scrap metal processing machinery".[74]

[111] Following the service of the abatement notice, GMS said it implemented this option by:[75]

(a) repositioning the existing enclosure around the light gauge metal processor and building it higher to enclose the processor completely; and

(b) erecting an additional acoustic wall behind the enclosure.

[112] GMS accordingly contends that it complied with the abatement notice because it implemented one of the three options listed in it. The Council disagreed with this interpretation, and Mr Muldowney cross-examined Mr Tuhoro about it.

[113] GMS also says that it continues to make improvements and modifications to increase the overall noise mitigation on the site, including by convening daily staff meetings to discuss handling practices to manage and reduce noise emissions.

Expert acoustic evidence

[114] As outlined above, the acoustic experts participated in expert conferencing and prepared a JWS. As set out in the JWS:[76]

> The primary focus of the conference was on noise mitigation methods that could form part of the BPO. This required consideration of the reduction in noise effects each method could achieve, its practicability from a business perspective and the timing and certainty of implementation and on-going effectiveness. As the experts did not have a complete understanding of some of these matters as they are not directly involved in the business, a process was agreed between the experts, counsel and the facilitator to allow the experts to gain a better understanding before the conference occurred.
>
> It was agreed that the experts would provide a list of questions in writing prior to the conference, and these were forwarded to counsel for information. GMS provided written answers to each question prior to the conference and the information was distributed to the

[73] Affidavit of Mr Tuhoro, paragraph 108.
[74] Affidavit of Mr McGregor, Exhibit 19A, CBD page 168.
[75] Affidavit of Ms Baird, CBD Exhibit 4, page 18.
[76] JWS, paragraph 10 and 11.

> experts and counsel to ensure transparency. Prior to conferencing starting on 10 June 2010, representatives of GMS, Mr Craig Tuhoro and Mr Stephen West, met with the experts so that the experts could seek further clarification of any of the written answers provided

[115] The experts noted specifically that they had relied on GMS for information on business viability, cost, constructability and health and safety issues for each of the potential noise mitigation measures. This is important, because the information provided was not independently audited, especially but not only in relation to health and safety issues, site management, or organisation of equipment or machinery on the site.

[116] The following is a summary of Mr Tuhoro's and Mr West's (GMS's) responses to questions raised by the experts about potential noise mitigation measures:[77]

> *Perimeter Noise Barrier*
> Erecting a noise barrier constructed from 5 to 7 vertically stacked containers along the full length of the eastern boundary and about half the length of each of the northern and southern boundaries would result in around 1,000 m2 of area being lost from the site. This would create workflow issues for the movement of people, trucks and excavators. Such a wall would have an overall length of 286 metres and would cost about $1.7m excluding the costs of engineering and foundations. Mr Tuhoro and Mr West said that it would also be extremely difficult to schedule construction of the wall while at the same time continuing with normal operations and managing health and safety issues. Implementing this measure was not considered practicable for the reasons of cost, impacts on workspace and health and safety.
>
> *Internal Noise Barrier*
> Space requirements for normal workflow activities also precluded the erection of an internal 5 to 7 high vertically stacked container wall around the scrap metal shredding facility. This wall would cost about $400,000 to construct exclusive of the cost of engineering and foundations. This mitigation measure was discounted for the same reasons as the site boundary container walls.
>
> *Shredder and Bin Enclosure*
> Enclosing the shredder and the vertical bin within a noise shielding building was also discounted because of its prohibitive cost and for health and safety issues around the use of diesel equipment in an enclosed space. Mr Tuhoro and Mr West noted also that isolating the shredder on its own would not resolve the noise emission issues at the site.
>
> *Tilt Slab Noise Barrier*
> In his affidavit, Mr Tuhoro advised that GMS had obtained an estimate from Fosters Construction to erect a 10 m high tilt slab boundary wall with a 3 m inbound roof. The cost estimate for a wall along the eastern boundary only was $1.5m plus GST or for the northern, southern and eastern boundaries, $3.49m plus GST. This alternative of erecting a tilt slab noise barrier walls instead of container walls was also discounted on the basis of cost.
>
> *Vertical Bin Damping Blanket*
> After processing, scrap metal is loaded into shipping containers stacked end on which when full are transported off site. Loading and transport takes about 45 minutes and involves a combination of excavators, truck and trailer, forklifts, height access equipment and operators. In answer to a potential mitigation option suggested by the experts, Mr Tuhoro and Mr West said it would be impracticable to drape each container with a mass loaded noise mitigation damping blanket.
>
> *Site Operations*
> From a site operational perspective, Mr Tuhoro and Mr West advised that noise control was a lead item at all staff meetings (as had been provided for in the 2017 GMS Noise Management Plan). Metal shredding and loading were currently limited to 5 hours per day

[77] JWS Attachment 1.

and it would be uneconomic to reduce these hours any further.

Relocation
It would take GMS about 24 months to relocate to a different site at an estimated cost of $1m ($0.5m to shift and $0.5m for added rental costs, loss of income while shifting, development costs and professional fees). Council consents would also most likely be required for a new yard.

Other Measures
Asked by the experts whether there were any other possible noise mitigation measures, Mr Tuhoro and Mr West advised that all reasonable practicable steps had already been undertaken to mitigate the levels of the noise emissions from the site.

[117] As outlined above, Rule 25.8.3.7 (a) of the District Plan, which was made operative in 2017, prohibits activities within the Industrial Zone from exceeding a noise level of 50dB LAeq (15-mins) at any point within the boundary of any site in any Residential Zone between the hours of 0700 and 2000. In the previous District Plan which became operative in 2012 the noise rule (brought forward from the Plan previous to that) had a limit of 50 dB L10. Mr Styles explained that the difference in the metric between the two plans meant that it would be reasonable to expect the measured L10 level to be roughly 3-4dB above the measured LAeq level on any given day. If the noise from GMS just complied with the 50dBL10, the LAeq level would have been approximately 46-47dB LAeq. It has therefore become easier to achieve compliance under the current District Plan compared with the previous District Plan.

[118] The noise experts agreed that NZS 6801:2008 Measurement of Environmental Sound and NZS 6802:2008 Acoustics – Environmental Noise were the appropriate standards for measuring and assessing noise (respectively) in New Zealand. They noted that NZS 6802 includes provisions for adjusting the measured noise levels to take account of:

- residual sound;
- special audible characteristics of different noise sources (SAC);
- determining a representative sound level in an environment where the sampled sound levels are variable and situations where a particular noise source occurs for part of the time only (duration).

[119] The experts agreed also that it was the noise rating level which was to be compared with the District Plan noise limit. The noise rating level allows for all necessary adjustments for duration, special audible character and residual sound in accordance with NZS 6802.

[120] While there were other noise sources in the locality, the experts took these into account as far as practical in the assessment of the residual noise levels. Adjustments were made to the measured noise levels to remove these other sources and the experts advised that they would have no bearing on GMS's noise emissions complying with the District Plan noise limits.

[121] Based on the results of all of the Council, Styles Group and MDA noise surveys conducted between 2017 and 2020, the experts assessed the noise rating level to be in the range of 48-61dB LAeq. They noted that there was a high degree of variability in the noise emissions within each day and from day to day, depending on the activities being undertaken on the site. While this made the definitive assessment of noise rating levels very difficult, based on all available data, they agreed that a noise rating level of 56-58dB was generally representative of a typical day although this could vary up or down by around 1-2dB depending on the day.

[122] Based on a noise rating level of 56-58dB, the noise emissions from GMS are 6-8dB above the District Plan limit of 50dB LAeq. The experts noted that this increase in noise level would be experienced subjectively by a receiver as a noise level that is clear and distinct to nearly doubling compared to a compliant situation.

[123] At the request of GMS, having considered the potential mitigating effect of a noise reduction wall located on or near the house boundaries, the experts concluded that such a wall would provide only minimal noise attenuation.

[124] In summary, the experts agreed that each of the options they had suggested to GMS for reducing noise emissions had been identified by GMS to be impracticable. Based on this advice, they concluded that there were no practicable mitigation options for further reducing the noise rating level generated by activities on the site. Accordingly, they concluded that the only viable "best practicable option" was to vacate the site.

[125] In cross-examination Mr Bell-Booth, the acoustic expert for GMS, accepted that an exceedence of between 6 to 8 dB over the District Plan noise limit by GMS would be "an appreciable breach of the limits".[78] Mr Bell-Booth fairly noted that the experts had grappled in joint witness caucusing with the words "considerable" and "appreciable" as they were expressed to relate to the exceedances of the noise level, noting that he was

[78] Transcript, 12 August 2020, page 13, line 10.

more in favour of "appreciable" because there are periods where "it is relatively loud but there are also periods of respite".[79]

Conclusion

[126] In our view the evidence clearly establishes that, although not continuous, the noise levels from the GMS site have consistently contravened the noise levels provided in the District Plan as they apply to the nearby Residential Zone. We accept that the exceedances of the rule are considerable and appreciable, and that when they occur they adversely affect the residents. As we have outlined above, when the noise emissions from GMS exceed the noise limits in the Plan by 6-8dB, this increase would be experienced subjectively by a receiver as a noise level that is clear and distinct and nearly double that which would be experienced if the District Plan limit of $50dB_{LAeq}$ was achieved.

[127] We are satisfied that the Council has proved, on the balance of probabilities, that GMS has and is likely to continue to contravene the noise levels provided in the District Plan in Rule 25.8.3.7. Having reached this conclusion, we are therefore satisfied that the Council has made out its case for an order to be made under s 314(1)(a)(i) of the RMA.

[128] By way of completeness, even though it is not necessary, we are also satisfied that the Council has proved on the balance of probabilities that the noise levels are such when viewed in the round and objectively to be objectionable to such an extent that they have and are likely to have an adverse effect on the amenity of the residents. Having reached this conclusion, we are also satisfied that the Council has made out the grounds for an enforcement order being made under s 314(1)(ii) of the RMA.

[129] We are satisfied that the grounds for an enforcement order have been made out in relation to GMS, however for the reasons we address later in this decision, we are not satisfied that they have been made out against Mr Tuhoro personally.

[130] Ordinarily, as a result of these conclusions and in accordance with the *Russell* decision, this would mean that we should make an enforcement order requiring compliance with the District Plan noise limit set out in Rule 25. 8.3.7(a) as the Court should not be seen to countenance continued breaches of a District Plan. However, in accordance with the *Kapiti Island* case we must still consider whether we should exercise

[79] Transcript, 12 August 2020, page 19, lines 1-5.

our discretion to refuse to make an order and if we do not, we must consider whether immediate compliance is required and the form the order may take.

Should an enforcement order be made against GMS?

[131] What factors then should we take into account when considering whether or not to exercise our discretion to make such an order? We have already referred to *Russell* and in particular the very sound public policy reasons why an enforcement order should not be made where there are breaches of a district plan rule unless there are exceptional circumstances.

[132] Mr Braun helpfully referred us to, by way of comparison, the approach taken to the exercise of a discretion when a Court considers whether to make an order for summary judgment. He referred to *Bromley Industries Limited v Martin and Judith Fitzsimons Limited*,[80] where the Court of Appeal held:

> [65] Generally the exercise of the residual discretion not to allow summary judgment will only be invoked in limited cases, such as to avoid oppression or injustice... or where the circumstances of the case disclose very unusual features which support a conclusion that the entry of summary judgment would be oppressive or unjust.

[133] We were also referred to *Rotorua Regional Airport Limited v Fischer*[81] where the Environment Court declined to make enforcement orders where the situation that led to them being required was created by the entity that was seeking the orders.

[134] GMS contends that the Court should exercise its discretion to not make an enforcement order to allow it time to relocate. Further, Mr Braun submitted that the circumstances of this case disclose very unusual features, and that it would be oppressive and unjust to issue an enforcement order, particularly one in the terms sought by the Council. Such an order, he submitted, would have the effect of immediately shutting down GMS's business at the site and a loss of employment for many of the 35-40 employees who work there.

[135] The Council agrees that some time should be allowed to enable GMS to relocate, but not the extent sought by GMS. The Council's attitude is largely to do with the extent of time over which the breaches have continued to occur, and it contends that GMS has not done sufficient to either mitigate the adverse effects by robust management, nor has

[80] [2009] NZCA 382, (2009) 19 PRNZ 580.
[81] [2010] NZRMA 105.

it fully investigated in a timely way the relocation options available to it.

[136] Allowing GMS time to relocate could be dealt with in several ways; either by refusing to make the order, adjourning the application or by making an enforcement order and staying the effect of it for a period of time to enable relocation to occur. The latter was the approach taken by the Court in *Bible College of New Zealand Incorporated v Botica, Grbavac, Botica Timber Services Limited and Waitakere City Council*[82] which has considerable similarity to this case, and which we refer to shortly.

Relocation options

[137] In his first affidavit, Mr Tuhoro outlined that when GMS sought a six-month extension of the date for compliance with the abatement notices until 28 August 2019, one of the reasons for that was to enable GMS to:[83]

(a) complete the sale of the site that the business was currently located on;

(b) find a new site for the business; and

(c) move the business to a new site.

[138] Clearly at that time, GMS was confident that these things could be achieved, otherwise it would not have sought the extension for that period of time.

[139] Further on in his affidavit, Mr Tuhoro explained that, based on the findings in the Marshall Day report, GMS concentrated on relocating.

[140] Mr Tuhoro explained that the process to find alternative sites has been difficult and has taken a considerable amount of time and effort to explore different options.[84] Ten different sites have been looked at by GMS, and Mr Tuhoro said that GMS has entered into negotiations with entities that own or control these sites both directly and through real estate agents at Colliers and Bayleys. The explanations as to why none of these proceeded are outlined in his affidavit.[85] In relation to one site, these negotiations have spanned a three-year period.

[82] EnvC A69/98, 19 June 1998.
[83] Affidavit of Mr Tuhoro, paragraph 25.
[84] Affidavit of Mr Tuhoro, paragraph 31.
[85] Affidavit of Mr Tuhoro, paragraphs 33-42.

[141] The Council has also assisted. Ms Baird's affidavit refers to two sites owned by the Council which she looked into at Mr Tuhoro's request to see if they would be appropriate for GMS to relocate to. Unfortunately, both sites proved to be either unavailable or not appropriate for metal recycling.[86]

[142] We were left with the impression that, although GMS had taken steps to look at relocation prior to the application for enforcement order, it had not communicated what in fact it was doing in this regard to the Council apart from the initial query made of Ms Baird shortly after the abatement notice was served. This was unfortunate, because it has led the Council to conclude that not much was happening in this regard. Certainly Mr McGregor's approach, which we think was reasonable, was that it was up to GMS to "make the running" in this regard, given that the abatement notice had given it time to consider its options. In the circumstances, even taking into account the nature of the industry and its importance generally to the community, the timeframe within the notice was, we think, reasonable.

[143] As it has transpired, it has been more difficult to look at suitable other sites although we were not provided with significant details about how aggressively this was pursued after the abatement notice and prior to the application for enforcement orders was filed in the Environment Court. We were left with the impression that GMS, perhaps encouraged by others, considered that because the closeness of the Residential Zone to the Industrial Zone was Council's decision, the Council should therefore come up with some sort of solution for GMS. This approach was, we consider, misguided and most unfortunate.

[144] Despite this, we were concerned to fully understand the availability of suitable sites within not only Hamilton, but towns nearby where there might be industrial land available for GMS to consider relocating to. Further affidavits were filed in relation to this from Mr Wilson for GMS and Mr de Leeuw for the Council.

Affidavit of Mr Wilson

[145] Mr Wilson has been the CEO of GMS since 6 January 2020 and is now a director and shareholder of it. Prior to that he was a partner at KPMG from 2014 to 2019 and a partner at PWC from 2008 to 2014. GMS was a client of his and he told us he was familiar with the issues to do with contraventions of the noise rules prior to becoming the

[86] Affidavit of Ms Baird, paragraph 14.

CEO of the company. It is to be noted that Mr Wilson's appointment as CEO was after the application for enforcement order was filed.

[146] Mr Wilson met with Ms Baird and counsel for the Council in mid-February 2020 to discuss ways in which the Council could assist it to relocate more quickly should a suitable location be identified. Mr Wilson deposed that "assistance could include senior planning team members supporting and expediting planning requirements".[87] Accordingly, the theme from GMS's perspective even at this time, seems to have been that the Council has some responsibility in assisting GMS to relocate, despite the fact that GMS has known about the difficulties with its current site for many years, and at least since the abatement notice was served has known that compliance with the rule was required.

[147] Mr Wilson then outlined his understanding of what was, in fact, available industrial land. This was necessary because the evidence presented instead by Ms Morris for the Council was that 197.5ha of "developer-ready" land is available in Hamilton City, and a further 60.1ha is available in Waipa. Similarly, evidence had been given that 430.2ha of such land would be available in Hamilton, Waikato and Waipa over the next three years. This evidence was based on a summary issued by Future Proof Te Tautoki in March 2020 entitled "Future Proof Industrial Land Study" (**the Future Proof report**).[88]

[148] We found Mr Wilson's evidence about land that was developer-ready helpful. He produced a table from the Future Proof report breaking down the land available in various Hamilton City industrial precincts by availability timeframes.[89]

Industrial precinct	Developer-ready (ha)
Te Rapa North	0.3
Te Rapa	33.5
Rotokauri	92.7
Frankton	12.6
Ruakura	46.1
Other	12.3

[87] Affidavit of Mr Wilson, paragraph 6.
[88] Council Exhibit 3.
[89] Affidavit of Mr Wilson, paragraph 9.

Total	**197.5**

[149] Ms Morris had indicated in her evidence that Rotokauri, Ruakura, Riverlea and Collins Road would not be suitable for GMS's operations. Based on the table in his evidence, Mr Wilson observed that this rules out approximately 60% of developer-ready land and leaves only 58.7ha of potentially available industrial land in Hamilton City that might be suitable for GMS, noting, however, that that includes the Collins Road and Riverlea industrial areas that Ms Morris for the Council had agreed would not be suitable. In addition to this, Mr Wilson rightly noted that the figures of themselves do not reveal any detail about the suitability of the sites that are available.

[150] Dealing with industrial land that might be available in towns near to Hamilton, Mr Wilson provided an attachment indicating industrial land that would be available in the Waipa District and provided us with a table from the Future Proof report showing the various Waipa industrial precincts that would be available by timeframes; 60.1ha of developer-ready land is available, 51.2ha of which is situated at Hamilton airport and 8.9ha at Leamington out of Cambridge. Mr Wilson's response was that GMS did not consider the Hamilton airport industrial land to be suitable for GMS's operations because of the unavailability of a railhead for the number of container movements required, and because he said GMS would not be comfortable operating in a flight path associated with airplane movements.

[151] We are not convinced that the latter part of this reasoning is sound, however we accept entirely that GMS's operation is reliant on container transport and rail can be a significant component of this. Mr Wilson told us that GMS considers that Leamington is too far out of Hamilton to be practical for GMS, and we understand that the same difficulties with a rail link would also arise.

[152] Mr Wilson then outlined what GMS had been doing with real estate agents from Colliers and with Fosters and iLine Construction to locate a suitable site. He outlined that there are two prospective sites that GMS is considering, both subject to commercial sensitivities, as a result of which they were referred to in the evidence as "Project Mitch" and "Project Sheriff".

[153] The details of Project Mitch were provided.[90] It involves the purchase of

[90] Affidavit of Mr Wilson, paragraph 15.

undeveloped land for which a conditional sale and purchase agreement has been entered into and which, at the time of the last sitting of the Court, was subject to GMS carrying out due diligence. Resource consent will be required. Mr Wilson assessed the project as having a 50/50 possibility of progressing further, and he estimated that it would take up to two years for GMS to be up and operating from this site. He set out his reasoning for the two-year timeframe,[91] which included contract negotiations, site design, resource consent, detailed design for building consent, building consent procurement, build, and relocation and establishment.

[154] The second option, Project Sheriff, involves an existing property, which could be purchased, but as an alternative possibly leased and repurposed. Although describing this project as being in the very early stages of development, Mr Wilson considered, if it is able to be proceed it could result in GMS operating from the site from November 2021. The shorter timeframe appears to largely relate to GMS's view that additional resource consents are not likely to be required, a lesser period of time is considered by GMS to be required for procurement, neither is a detailed design for building consent required.

[155] The options outlined provide a time range for relocation of about 1-2 years from the date of this decision.

[156] Mr Wilson described GMS as "highly motivated and working hard to identify an alternative site within Hamilton to relocate GMS's Hamilton operation".[92] We accept that this is now the case.

The Council's response

[157] Mr de Leeuw, a real estate agent specialising in commercial and industrial sales and leases, with considerable experience, gave evidence for the Council. As well as outlining his view about the industrial land supply in Hamilton and suitable sites that might be available for GMS, he described dealings with GMS in April 2019 when a property adjoining the site owned by GMS at Ellis Street was on the market for sale by auction.

[158] In relation to the site next door, Mr de Leeuw said that in May 2019 Mr Tuhoro phoned him and enquired about the auction property. Mr de Leeuw said Mr Tuhoro had advised him of the noise compliance issue that GMS was dealing with, and expressed

[91] Affidavit of Mr Wilson, paragraph 16.
[92] Affidavit of Mr Wilson, paragraph 19.

interest in, relocating part of GMS's operation to the auction property to create more distance from the Residential Zone adjacent to the site. Mr de Leeuw said that, prior to the auction, an offer for the auction property was received at a level acceptable to the vendor and GMS was provided with an opportunity to "make a deal prior to the auction date". Unfortunately, an unconditional agreement was unable to be achieved, but even more unfortunately, GMS chose not to provide any additional details about why this sale was unable to proceed.

[159] The thrust of Mr de Leeuw's evidence was that the market for tenants/occupiers has become more difficult as there is less land available, and that in terms of serviced but not yet fully-developed industrial land, growth in the Hamilton industrial market has forced land prices upwards. Sites further away from Hamilton are less expensive by, it would seem, about a third.

[160] Mr de Leeuw's opinion was that there would be fewer relocation opportunities available to GMS if the status quo was maintained, namely if the significant proportion of its activities continue to be carried out outdoors and under the current manner. Mr de Leeuw set out some options in Hamilton but noted that GMS's noise emissions may still be an issue for both sites mentioned.

[161] Mr de Leeuw referred, however, to several sites out of Hamilton that might be suitable, including the former Solid Energy site at Hamilton West, the Wool Scourer's property north of Huntly and the Meremere Power Station land. He considered that these options could be pursued immediately and if agreement reached a relocation could be achieved within a 6-12-month period, although he accepted that this timeframe was dependent on the chosen site having the correct zoning and that construction of buildings could extend the timeframe. Mr de Leeuw did not challenge Mr Wilson's assessment that building on an empty site could take about an extra 12 months.[93]

[162] Mr de Leeuw also considered the option of GMS operating in an enclosed facility, and considered such an option realistic, and if implemented, could be completed within 12-18 months.[94]

[163] As well, Mr de Leeuw outlined what he considered the GMS site could sell for. He did not see any impediment to the GMS site being successfully marketed, noting that

[93] Affidavit of Mr de Leeuw, paragraph 20.
[94] Affidavit of Mr de Leeuw, paragraph 23.

there was reasonably good demand for industrial land, and the current market favours vendors.[95]

Possible relocation of some of GMS's business to its sites in Auckland or New Plymouth

[164] The evidence for GMS was that it could not relocate any part of its Hamilton business to its other sites in New Plymouth or Auckland. Although from a business sense we can easily understand that metal for recycling from the Hamilton region is most economically processed in Hamilton, we were not provided with any detailed evidence about why this was not possible as an interim solution even if there were to be some short-term economic consequences for GMS flowing from it.

Conclusion

[165] We agree that relocation of the GMS site is the best solution, however we do not agree that a period of two years to do so is reasonable given the history of this matter. Neither do we agree that the best way to allow GMS time to relocate is to refuse to make an enforcement order. This leaves the remaining two options; either to adjourn the application as counsel for GMS submitted for a period of approximately three months to allow GMS to further advance its relocation plans in consultation with the Council, and then reconvene, or to make an order deferring the commencement date to allow for relocation to occur.

[166] While we can accept that GMS has been proactive in trying to explore options for relocation, we are not convinced that, until these proceeding were issued, those steps have been as proactive as they ought to have been. There are underlying themes in this case that have led us to this conclusion, including:

(a) the tendency to blame the Council for the situation, either for its zoning decision or blaming staff for not assisting it enough;

(b) not being prepared to offer any other mitigation to residents, who continue to experience exceedences of the noise limits in the District Plan until it relocates;

(c) relying on the size of its workforce and nature of its business to justify its continued operation exceeding the noise limit until it relocates.

[95] Affidavit of Mr de Leeuw, paragraph 25.

[167] To be clear, we do not accept that the complaints made about the Council are justified. In our view, the approach taken by Mr McGregor and Ms Baird was professional and appropriate. GMS appears not to have appreciated that its responsibility is to comply with the noise rule, and in our view has failed to appreciate that it was not sufficient for it simply to comply with the noise level provided in the District Plan as it related to the Industrial Zone, but that it was also required to comply with the noise limit set out in the District Plan relating to its activities vis a vis the Residential Zone. It was not incumbent on the Council to assist it to achieve compliance; rather it was GMS's responsibility to find a solution. We consider that Mr McGregor's approach to dealing with GMS's non-compliance has been unfairly criticised. Given that his involvement signaled that enforcement action was a possibility, it was entirely appropriate for him to remain at arms-length. In our view, it was GMS's responsibility to liaise with the Council about what it proposed to resolve the problem rather than the other way around.

[168] Another area of concern is the failure of GMS to offer anything tangible by way of further mitigation to the residents, who have continued to experience adverse effects from GMS's contraventions of the noise limits over a long period of time. The approach by GMS seems to have been that there is nothing further it can do, however we do not agree that this is the case. We consider there are other options that could, and should, be investigated. Mr Wilson's inability to provide or offer any interim measures to help ameliorate the effects the residents experience was telling. It was most surprising that, faced with an application that could effectively shut the GMS business and the site down, nothing constructive was able to be offered to the Court apart from indicating it would have to be looked at later.

[169] We accept that GMS provides an important service to the community, although it is not the only metal recycling business operating in Hamilton, but it also serves the community by employing up to 40 people at the Hamilton branch. This, however, must be balanced against the importance of such businesses complying with the rules that have been established for good purpose to protect the amenity of those that live nearby.

[170] We are persuaded that an enforcement order should be made now, but with a delayed timeframe to allow for full compliance This is a significant indulgence to GMS and will be a disappointment to the residents. We consider that this indulgence must be incorporated with further on-site mitigation measures to assist to reduce the noise levels for the benefit of the residents until that time.

What should the terms of the enforcement order be?

Botica Timber decision

[171] We referred to the *Bible College of New Zealand v Botica* case above. We now return to it because it is a case, in our view, which has considerable similarities to the current situation.

[172] The Bible College had operated its tertiary educational institution, which latterly included residential facilities on its site, since February 1961. In 1994, Mr Botica decided to establish a timber processing plant on a site adjacent to and contiguous to the southern boundary of the Bible College. A building was purpose-designed and building consent for its construction was granted in September 1994. The factory was then erected. Although Mr Botica had been advised about the noise limits ($50dBa_{L10}$) that applied to the southern boundary, issues about noise arose very shortly after the factory was erected. Between June 1995 and December 1997 various noise measurements were taken, which revealed the noise limits in the District Plan were exceeded. In October 1995, the Council issued an abatement notice that required Botica Timber to comply with the noise limit in the District Plan. Botica Timber appealed the issuing of the abatement notice. It also applied for resource consent to exceed the noise limits in the District Plan. An application was made by Bible College to the Environment Court for declarations and enforcement orders requiring Botica Timber to comply with the District Plan noise limits.

[173] At the Environment Court hearing, the applications for declaration were not opposed, and the Court was advised that the appeal against the abatement notice and the application by Botica Timber for resource consent were withdrawn as Botica Timber had reached the view that it should relocate. The issue for the Court was, therefore, whether the application for enforcement orders should be adjourned to enable Botica Timber to relocate, or alternatively, whether, if orders were made, they should be deferred to enable Botica Timber time to relocate. The debate centred on what would be "a reasonable time" for that to occur, with the Bible College submitting that it should be within a two-month period, and Botica Timber submitting that it should be allowed six months to do so.

[174] The Court helpfully outlined the principles that it considered to be relevant to the exercise of its discretion to defer, as follows:[96]

[96] EnvC A69/98, 19 June 1998 at page 23.

1. In general the absence of evidence of environmental harm and acceptance that the case is not a flagrant or reckless contravention of the law would in general be indispensable for a deferral (*Canterbury Regional Council v Canterbury Frozen Meat Limited*;[97] *AMP Society v Gum Sam*[98])

2. In exercising our discretion to defer, we may have regard to the effect of an immediate order on the employment of those affected by the order (*Auckland Regional Council v Haysom Metal Industries Limited.*[99])

3. It is of the essence of the discretion to refuse or suspend the effect of an enforcement order, that the impact on respondent be considered, so as to avoid any disproportionate unjust effect. The extent to which the impact of immediate enforcement order would be unjust on the respondent depends on the circumstances and needs to be assessed separately in each case (*AMP v Gun Sam Pty Limited* (supra)).

4. The wide discretion permits the Court to soften, according to the justice of a particular circumstances, the application of rules, which though right in the general may produce an unjust result in the particular case (*Warringah Shire Council v Sedevcic*;[100] *AMP v Gum Sam* (supra)).

[175] Applying these principles, the Court took into account the efforts made by Botica Timber to reduce the noise level at a cost of $44,000, the steps taken to look into alternative sites, the financial consequences to Botica Timber and its shareholders and 11 employees, the fact that exceedences of the noise levels only impacted nine single men's quarters of part of the site, despite the fact that the number of people on site during the working day varied between 350 and 450, the noise levels which were assessed as 'reasonable' having regard to the background ambient noise level, and the fact that Mr Botica had clearly been warned of the noise level requirement prior to establishing his factory.

[176] In the balance the Court agreed with Botica Timber that it should be allowed a six-month period to relocate.

Analysis

[177] In this case, we have decided that it is not appropriate to adjourn the application for enforcement orders, but rather make an enforcement order now but defer the commencement of it insofar as relocation is concerned.

[178] We have taken into account the following matters in reaching this decision:

- The noise exceedences have continued for a considerable period of time.

[97] EnvC A014/94, 9 June 1994.
[98] [1992] NZRMA 119.
[99] EnvC W087/92, 26 November 1992.
[100] [1997] 10 NSWLR 335.

Although not continuous, since 2015 according to Mr Mitchell, but with exceedences of the noise limits in the District Plan being formally and independently recorded since 2017, GMS has regularly exceeded the noise limits by between 6-8dB. The effect of this on the residents can fairly be described as considerable and appreciable, as when it occurs the residents will experience a doubling of the noise levels which are lawfully set in the District Plan to apply to the residential area, which are deemed to provide a reasonable level of amenity.

- While steps have been taken by GMS to reduce the noise exceedences, it has known at least since it received the 31 May 2018 MDA report that relocation was the best solution. We are satisfied that steps have been taken to explore relocation options, but that it is only recently, since this application was filed, that GMS has addressed this with what we consider is the degree of urgency that was necessary.

- There has been a tendency for GMS to blame the Council for what it has not done rather than to focus on what it needs to do to achieve compliance.

- There are only three households that are, from time to time, considerably and appreciably impacted by the exceedences of the noise limits, which can occur up to six days per week. Although there may be others impacted, we have not received any evidence we can rely on to infer that this is the case;

- GMS has not offered anything by way of mitigation to the residents apart from that which already appears in the noise management plan and the promise that it is continually monitoring on-site practices. No reduction of hours is offered.

- The constraints GMS outlined to the acoustic experts during the JWS process, upon which their advice was based, has not been independently audited either from a health and safety perspective or an operational perspective.

- GMS employs up to 40 people at its Hamilton site.

- GMS provides an important recycling service to Hamilton; however it is not the only facility to offer such services;

- Although stating that parts of its business are unable to be relocated to its other

sites, no specific reasons were provided to sufficiently explain why this is not the case, or why the noisy part of the business (the shredder) is so integrally associated with the Hamilton operation that it cannot be relocated elsewhere in the meantime, even to a temporary site and even if there is a cost associated with doing so.

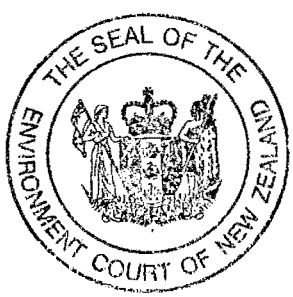
- We are satisfied there is sufficient industrial land available, in Hamilton or nearby, which while not ideal might be suitable even if GMS does not consider potential sites to be optimal from a cost or location (in the sense of distance from Hamilton) perspective.

[179] We have reached the view that an enforcement order should be made requiring GMS to comply with the District Plan noise limit, with the date of commencement being 1 December 2021, effectively a 12-month period. In our view this strikes a reasonable balance between GMS's interests and the interests of the residents who have had to put up with noise exceedences, described by the independent experts as considerable and appreciable, for many years.

[180] In the interim, until 1 December 2021, there will also be enforcement orders made requiring additional mitigation measures to be implemented to deal with the likely continued exceedences and the impact of them on the residents for the next year. In our view, the days and hours of operation of the shredder should be reduced to the extent that it should not be permitted to operate on Saturdays and, in addition, one weekday per week it should only be permitted to operate between 1.00pm and 4.00pm. We do not, however, have enough information to fully determine what the "operation of the shredder" should include. In our view, it should include anything that is likely to cause an exceedence of the noise limit associated with the shredder activity. We invite further submissions on this.

[181] Mr Styles[101] suggested, and Section D of the JWS also suggested, additional mitigation measures that could be put in place for the balance of the weekdays.[102] These included:

(a) Further scheduling the use of the main noise sources, including the shredder, vertical bin loading and deliveries of raw material to defined times of the day



[101] Affidavit in reply, Mr Styles, paragraph 63, CBD 387.
[102] JWS, page 13.

when the sensitivity to noise is lowest (for example to afternoons only);

(b) reducing the operating hours (starting slightly later in the day and finishing slightly earlier);

(c) erecting further temporary acoustic screening around the noisiest processes and machines (internally and along boundaries);

(d) moving more plant inside the existing building;

(e) removing tonal reverse beepers;

(f) conducting an independent expert review of the noise management plan to explore efficiencies, additional practicable measures or improvements that could be made to further minimise noise emissions.

[182] We require the parties (the Council and GMS) to liaise about the practicality of these measures, including how they can be independently assessed and monitored (and at whose cost) up until 1 December 2021. To be clear, the purpose of the orders we intend to make is not to *increase* the noise levels produced on the site on all days apart from Saturdays and the day upon which there are reduced hours for the operation of shredder activities, but to *reduce* them if at all possible.

[183] The parties are to report to the Court by **5.00pm**, **Friday 30 October 2020** with their proposals in relation to paragraphs [180] and [182] above.

Conclusion and result

[184] To summarise the conclusions we have reached in relation to each of the issues we identified that we were required to address:

- Has GMS satisfied us on the balance of probabilities that it has existing use rights to operate at the site so that the District Plan noise rule does not apply to it?

Answer: No.

- Has the Council satisfied us on the balance of probability that GMS's activity on the site:

(a) contravene or are likely to contravene the noise rule in the District Plan;

Answer: Yes;

(b) are or are likely to be offensive or objectionable to such an extent that there has been or is likely to be an adverse effect on the amenity of the residents?

Answer: Yes;

- Should an enforcement order be made against GMS?

Answer: Yes.

- What should the terms of that enforcement order be?

See below.

[185] Accordingly an enforcement order will be made that GMS fully comply with Rule 25.8.3. of the Hamilton Operative District Plan by no later than **5.00pm, Wednesday 1 December 2021**.

[186] An order that from the date of this order GMS is prohibited from operating its shredder and any activities associated with the shredder on Saturdays and, in addition, on one nominated weekday per week the shredder and any activities associated with it will only be permitted to operate between 1.00pm and 4.00pm.

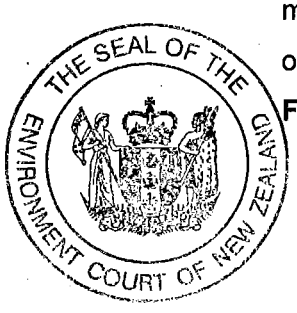
[187] The above orders require refinement in terms of:

(a) definition of what comprises the shredder (for which further submissions are sought); and

(b) details relating to the nominated weekday to which the order outlined in paragraph [186] above applies.

[188] Further mitigation measures are also required, and orders will be made in respect of them once further submissions have been received as outlined in paragraph [181] and [182] above.

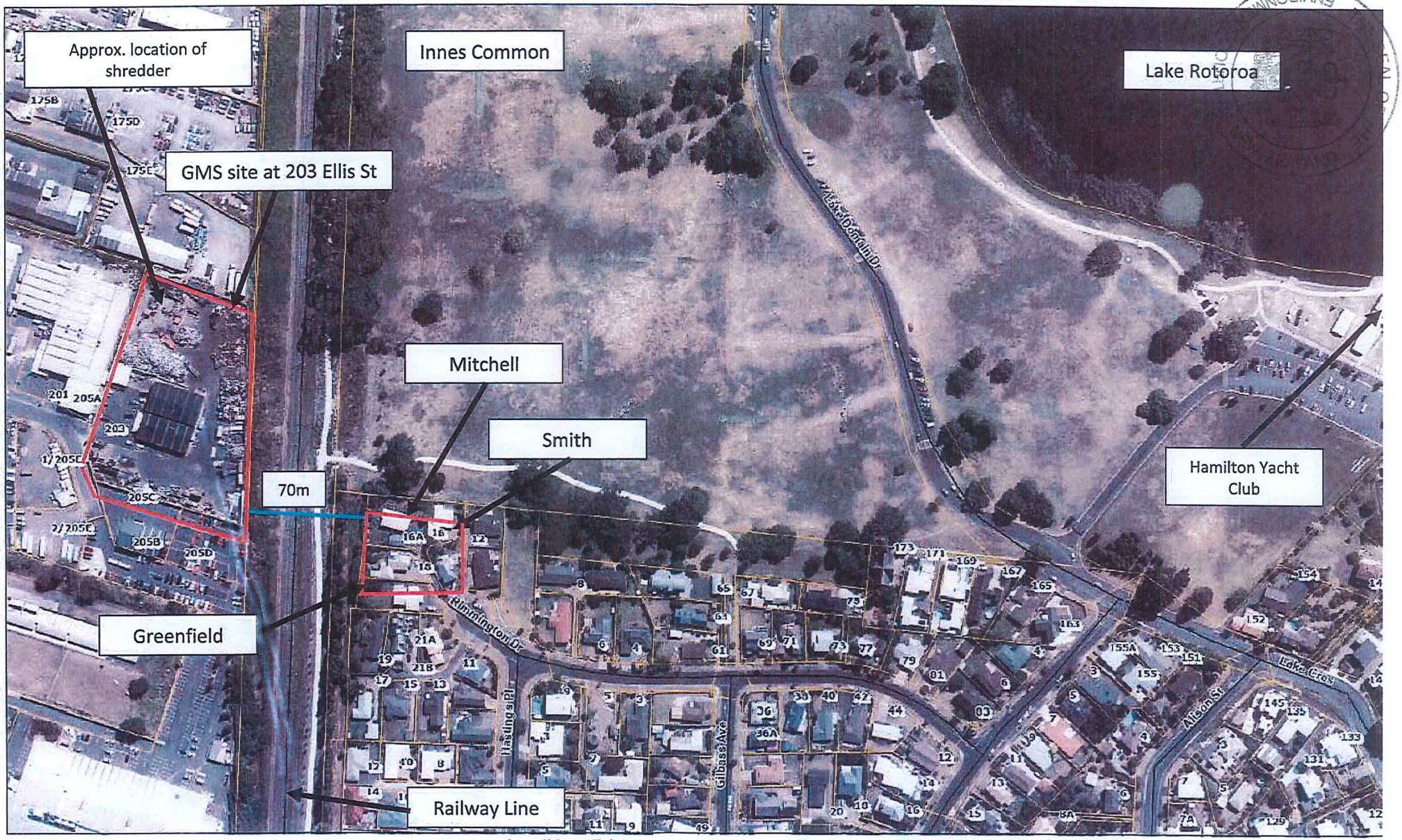
[189] For the reasons outlined, this decision is interim only in respect of the outstanding matters that need to be resolved as outlined above. The parties are encouraged to agree on the terms of the further orders, but in any event are to report to the Court by **5.00pm, Friday 30 October 2020** with their proposals in relation to them.



[190] The application for orders against Mr Tuhoro is dismissed. We see no basis for orders to be made against him personally, although we consider an order under s 314(5) to be sensible.

For the Court:

M Harland
Environment Judge



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