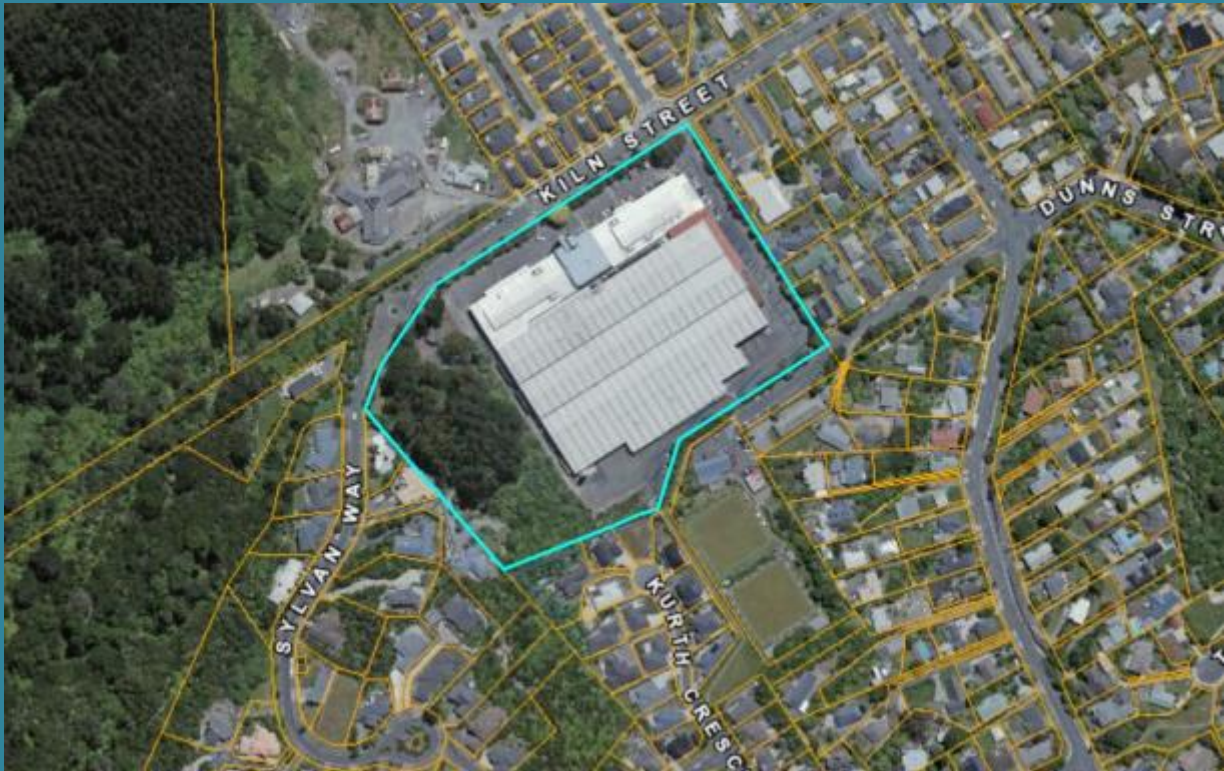


# Upper Hutt City Council's management of complaints about Farrah Breads Limited operations at 57 Kiln Street, Silverstream



Reviewer: Linda Clark

February 2023

## Contents

Introduction	3
Part 1: Background	5
Part 2: Executive Summary	7
Part 3: the Silo Complaint	11
Part 4: the Noise Complaints	15
Part 5: Information Complaints	41
Part 6: Moving forward	43
Appendix 1: Noise Reports	46
Appendix 2: Farrah's deadlines	49
Appendix 3: Table of complaints	52
Appendix 4: Terms of Reference	55

## Introduction

- 1 The Farrah Breads Limited (**Farrah's**) factory is located at 57 Kiln Street, Upper Hutt, on industrial zoned land neighbouring residential properties. From November 2019 Farrah's was the subject of a number of complaints from local residents about the erection of a 15 metre silo on site and then noise emanating from the Factory. The way the Upper Hutt City Council (**Council**) responded to these complaints has become a further cause of complaint.
- 2 On 21 September 2022 the Council approved a resolution to conduct an independent review of its handling of these complaints and to provide recommendations about how Council might conduct itself in future. In conducting this Review I have been assisted by my fellow partner at Dentons Kensington Swan Ezekiel Hudspith, who specialises in resource management. My findings and recommendations are contained in the following report (the **Report**).
- 3 Increasing intensification of urban metropolitan areas means that this Council, and councils throughout the country, will continue to be faced with challenges navigating the interactions between business and close residential neighbours. However, in keeping with the approved Terms of Reference, this Report limits its recommendations to the specific issues associated with one factory in one neighbourhood. While lessons learnt here may guide Council in managing future disputes, the particular facts of any dispute will always influence how it should be best managed.
- 4 The Terms of Reference for the Review are attached to this Report as **Appendix 4**.
- 5 Ultimately, the key issues the Review considered were:
  - a how Council responded to complaints about the factory owners constructing a silo that was higher than the District Plan allowed (the **Silo Complaints**);
  - b how Council responded to complaints about the noise emanating from the Factory (the **Noise Complaints**), which includes the noise of the silo being filled;
  - c how Council responded to and managed complaints about the Council's application of the Local Government Official Information and Meetings Act (**LGOIMA**) (the **Information Complaints**);
  - d whether the way Council responded to each of these issues followed best practice; and
  - e if not, in what other ways could Council have responded.
- 6 In accordance with the Terms of Reference, the Review also considered whether any factors associated with Council's culture, capacity and capability impacted on the way it managed these complaints.
- 7 This Review is divided into six parts:
  - a **Part 1:** Background
  - b **Part 2:** Executive Summary
  - c **Part 3:** The Silo Complaint
  - d **Part 4:** The Noise Complaints
  - e **Part 5:** The Information Complaints
  - f **Part 6:** Steps going forward - Recommendations
- 8 The following appendices are also included:
  - a **Appendix 1:** Table of noise reports

- b **Appendix 2:** Table of deadlines imposed on Farrah's
  - c **Appendix 3:** Table of complaints
  - d **Appendix 4:** Terms of Reference
- 9 To complete this Review many hundreds of documents were reviewed, including all complaints received, and interviews were conducted with Council staff, residents and representatives from Farrah's. All interviews were conducted on the basis of anonymity and so, while some verbatim quotes are included in this Report, the identity and position of each person quoted has been withheld.
- 10 The Report goes into the sequence of events involved with each kind of complaint at some length. I thought this important since residents interviewed frequently complained about a lack of information. This Report attempts to set out what happened in enough detail to allow information gaps to be filled, albeit retrospectively.
- 11 It was evident through the course of preparing this Report that the events described deeply affected individuals from all sides of the issue. The effects are still keenly felt and relationships between the parties remain tarnished by mistrust and enmity. It is to be hoped that the recommendations contained in this Report might go some small way towards charting a new course since the Factory and its neighbours must continue to live alongside each other.
- 12 I wish to thank all those who offered their experience, insights and observations to this Review.

## Part 1: Background

- 13 The Upper Hutt City Council is a local authority serving the Upper Hutt region and a population, as of the 2018 census, of 43,980. More recently the region has experienced an uptick in population and economic growth which has and continues to place increased pressure on Council services and staff. The Council is reliant for funding on a relatively small rating base of 17,304 properties,<sup>1</sup> significantly smaller than other councils in the region.<sup>2</sup>
- 14 One of the key responsibilities of any district or city council under sections 73 and 84 of the Resource Management Act 1991 (**RMA**) is to develop a District Plan and then enforce it. Under Upper Hutt's District Plan there are prescribed limits for day and night time noise, with different limits applying to different land 'zones' throughout the region, and rules around the erection of particular structures in the different zones. It is the compliance with these limits and rules that sits at the centre of all disputes relating to the Farrah's factory.
- 15 Section 9 of the RMA requires that no person may use the land in a manner that contravenes a rule in a District Plan, unless expressly allowed by a resource consent or existing use allowed by section 10 or 10A of the RMA.
- 16 The Council's role as regulator and decision-maker means it must always act fairly when monitoring and enforcing these rules and limits. All those subject to the District Plan are entitled to know that the rules affecting land use and noise are meaningful and will be applied consistently across the district.

### Farrah's and the Factory site

- 17 Farrah's is a family owned business established in 1999. It was founded from a small shop in Upper Hutt, and occupied a number of sites across the region before moving into the current premises at 57 Kiln Street in 2019 (the **Factory**)
- 18 The site at 57 Kiln Street is a designated business industrial zone and sits in a natural basin, with bush and elevated ground on the western and southern sides of the property. Entrance to the site is from a suburban street and well established residential properties are located on three sides of the Factory. The site was previously Foodstuffs' main lower North Island distribution centre.
- 19 In 2019 Farrah's applied for a series of building consents to conduct the extensive works required to transform the Foodstuffs site into the current Factory. Farrah's has invested heavily in development of the site and currently employ almost 100 workers, with production onsite 5 days a week, 24 hours per day.

### The issues relating to the Factory

- 20 The issues relating to the Factory site are set out at length later in this Report. But in short, on 28 November 2019 Council received the first complaint about the Factory. A resident contacted Council expressing concern about the height of a newly installed silo on the site which appeared to be taller than was permitted under the District Plan. The silo was 15 metres tall when the District Plan required consent for any structure taller than 12 metres.
- 21 Then in March 2020, Council began receiving complaints about noise emanating from the Factory. It took some months to identify the exact source of the noise which residents described as a constant thrum, particularly audible at night and in warmer weather. By April 2020 it was apparent that the noise was causing some residents high levels of disruption since they were reporting being unable to

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<sup>1</sup> As of data released 2 October 2019.

<sup>2</sup> Hutt City Council has a rating base of 41,830 properties. Kapiti District Council has a rating base of 25,135 properties.

sleep and/or having greatly disturbed sleep as a result. Council staff were by then receiving regular complaints about the noise.

22 By May 2020 it was evident that:

- a the silo was in breach of height restrictions, having been erected without a resource consent; and
- b the noise coming from the Factory was in breach of noise restrictions.

23 What happened after that is a matter of debate:

- a Council staff say they worked with Farrah's to fix the problems and that:
  - i The noise issue was complex, identifying how to reduce the noise took time and, initially at least, COVID restrictions made responding to complainants more difficult.
  - ii Farrah's needed to apply for resource consents and that process takes time.
  - iii Residents' concerns were taken seriously and, ultimately, mitigation measures were put in place.
- b Residents say the Council did not do enough to ensure Farrah's complied with the District Plan and consent rules. They say the Council gave the Factory owners too much leeway and allowed them to continue operating the business in breach of height and noise restrictions. They say Council minimised the affect the noise from the Factory was having on residents' well-being, with senior Council staff in particular prioritising the interests of the company owners over residents.
- c Farrah's says they took all necessary steps to fix the issues, working alongside the Council. But locating and mitigating the exact source of the noise was hard and locating relevant parts, in COVID conditions, took time. They say they applied for and obtained retrospective resource consent for the silo and they invested significant sums in mitigating the noise from fans and the HVAC (heating, ventilation and air conditioning) system inside the Factory. They say they also became the target of abuse from residents which affected how they responded to the community.

24 Throughout 2020 and 2021 the noise continued and the number of complaints, and residents complaining, grew significantly. It took until 17 August 2022 for effective mitigation measures to be finalised.

25 By October 2022, when Council resolved to conduct an independent review of these events, relations between the parties remained strained, with some residents still reporting noise emanating from the Factory was impacting their well-being.

## Part 2: Executive Summary

- 26 Farrah's was non-compliant with the Council's District Plan by installing an over-height silo and emitting noise in excess of the allowable limits from approximately May 2020 until the conditions of the resource consent were met in late 2022. This meant that residents near to the Factory lived with noise and the visual effects of an unlawful silo for a substantial period of time.
- 27 Council staff acknowledged in interviews that the matter dragged on too long. This is true. The period of time it took Council and Farrah's to resolve the night-time noise, in particular, has caused long lasting impacts on some residents. Many reported suffering long periods of interrupted or disturbed sleep, and some appear to have become over-sensitised to the effects of the noise. A small number of residents continue to suffer from sleep disturbance today.
- 28 The problems causing these disturbances were Farrah's to fix. It was required to operate its business in line with limits set out in the District Plan. When it became clear the Factory was in breach of those limits, Farrah's was required to take steps to ensure it became compliant, either by:
- a obtaining a resource consent for the silo: and/or
  - b reducing the noise or obtaining a resource consent to allow for the noise to be emitted.
- 29 Applications for resource consents do take time but the way Council approached the issues and its relationship with the locally based business meant that opportunities to secure a more speedy resolution were lost.
- 30 Council staff claim that COVID restrictions delayed its response to noise complaints. This Review accepts that the first complaints about the noise coincided with the 'Level 4' nationwide lockdown. This naturally limited how and when Council could conduct testing at homes around the Factory. But after May 2020 Council could and should have been more pro-active.
- 31 For a long time the Council opted to take a softly-softly approach with Farrah's, in part because this was a local employer during a global pandemic and in part because senior staff interpreted the tools available to enforce the rules narrowly. In early 2020 this approach – working with the company owners, holding back on issuing an abatement notice - was reasonable but over time new information became available to Council which should have prompted a reset. The new information was:
- a The nature of the noise. By the end of May 2020 Council staff knew the noise was tonal which is recognised as being more detrimental to well-being and more harmful.
  - b The number of complaints. By early 2021 the number of complaints had grown from three or four a month to more than 60 a month. Council should have recognised that the problem was serious, residents were being consistently disturbed by the noise and those steps being taken by the company were not working.
  - c The slow response from the company. By the time the noise issue had become serious Council staff already had experience working with Farrah's over non-compliance in respect of the silo. In that case, Farrah's had been slow to respond to Council requests for information.
  - d The serious health risk. By July 2021 the Medical Officer of Health had informed Council the noise was a serious risk to health.
- 32 Ultimately, under the RMA, Council has a wide discretion over how it responds to breaches of its District Plan. In this case, there is nothing unorthodox or irregular about the final outcome, whereby Farrah's obtained retrospective resource consent for silos on the site and temporary dispensation to breach noise limits while it put mitigations in place to lower the noise levels.

- 33 However, Council's role was not simply to facilitate Farrah's ultimate compliance. Its role as a regulator requires staff to lean in to the available enforcement tools when required. Also, as a regulator Council has an obligation to act in a fair, consistent, open and reasonable way. Its management of the Farrah's complaints fuelled the perception, among residents, that Council was putting the interests of the Factory above their well-being. In interviews for this Review it was evident that senior staff had not fully comprehended the full effect of the noise on residents' lives until the first day of the resource consent hearing in November 2021. That put residents at a disadvantage since neither the number of complaints, nor the results of multiple noise tests told the full story.
- 34 On the other hand, senior staff were well aware of the concerns the company owners had and, again in interviews, confirmed that they held off taking a firmer approach with Farrah's because of their fear that issuing an abatement notice requiring compliance with the noise limits would result in job losses at the Factory. Later events proved those fears to be utterly unfounded.
- 35 In the end, while the result of this process was always likely to be the granting of resource consents to Farrah's, the road to those consents would have been smoother for all parties if communication from the Council had been better managed, more consistent and more proactive. Staffing restraints played a part in the Council's communication failings. Council's decision to work alongside Farrah's was also a contributor, since it left Council staff dependent on updates and information from the company, which was sometimes scarce. A lack of training in the LGOIMA also created difficulties. But the largest factor was Council's failure to fully grasp the importance of good, clear communication as a key tool for managing a dispute of this kind.
- a Residents needed to know what was happening and they needed to know their complaints were being treated seriously. Even at times if Council staff had no progress to report, residents needed to know that Council was listening and that it was working on having the Factory operating within District Plan limits; and
  - b Farrah's needed to know what was expected of them and why.
- 36 The company owners' opted not to communicate directly with residents. As private business owners they were under no obligation to do otherwise. But that decision did leave Council as a vital go-between; an uncomfortable position in a dispute as long lasting as this one. Faced with that reality, Council needed to do more to ensure all affected residents remained well informed. This did not happen.

## Findings

### *Silo Complaints*

- 37 In relation to the Silo Complaints, the Review finds that ultimately, the onus to comply with the District Plan lay with Farrah's. Council was entitled to expect the Factory owners would move quickly to address a clear and simple breach and when that did not occur it would have been reasonable to apply pressure to obtain compliance. In our experience councils do this routinely in similar circumstances. The Review also finds:
- a The silo was installed without a building or resource consent, when it should have had both. This occurred due to miscommunication between Council and Farrah's about what aspects of the Factory work had received the requisite consents.
  - b The silo was non-compliant with the District Plan for a period of approximately two years until the conditions of the retrospective consent were granted.
  - c The decision to conflate the silo height issue with the (more complex) noise issues contributed to the delay in resolving the matter.



- d Council's decision to not require Farrah's to remove the silo was reasonable in all the circumstances (and is relatively common practice when structures are discovered to be non-compliant after they are built), but firmer steps could have been taken to ensure the effect of the silo was mitigated much sooner.

### *Noise Complaints*

- 38 The noise issue was (and to an extent still is) a substantial, complex and difficult issue to resolve. In relation to the Noise Complaints, the Review finds:
- a The noise emanating from the Factory meant Farrah's was non-compliant with the District Plan noise rules for more than two years. The Factory owners had an obligation to ensure that their business activities complied with the District Plan, and they did not meet that obligation for a substantial period.
  - b Council's initial delay in conducting noise monitoring was justified due to restrictions associated with the COVID-19 lockdown, but post May 2020 it could have taken steps to speed up Farrah's compliance with the District Plan.
  - c Senior Council staff took an overly restrictive interpretation of the role and nature of abatement notices, and also failed to keep themselves adequately briefed as to the full impact of the breaches on residents. More junior staff, who had more direct contact with affected residents, wanted Farrah's dealt with more firmly but were over-ruled.
  - d Council lacked an enforcement policy and compliance strategy. As part of this, it lacked a proper system and process for documenting the enforcement decisions.
  - e Council failed to develop a plan for effective communication with residents. This was in part due to a lack of resources, but principally because Council failed to recognise the key role communication could play in maintaining confidence in Council processes. Council failed to take active steps to ensure all affected residents were equally and fully informed.
  - f Council's decision to work closely with Farrah's to identify the causes of the noise and try to mitigate them left staff open to criticism that they favoured the company owners' interests over any concerns raised by residents. Council's decision to commission acoustic specialists Marshall Day to prepare up to five reports to identify the source of the noise (rather than just the fact of non-compliance) was an example of Council going beyond what is required of a fair and independent regulator and enforcer. The noise problem was Farrah's to fix but senior Council staff appear to have been under the misapprehension that they were under some obligation to gather more evidence. This caused further delays to resolving the issue and allowed Farrah's more time to operate in breach of the District Plan.
  - g Council failed to give adequate regard to the special characteristics of the noise. From May 2020 Council knew the noise was tonal, meaning it was likely to have a more detrimental impact on the well-being of residents. This information required Council staff to reset their approach.
  - h The final outcome, whereby Farrah's obtained a resource consent allowing the Factory to breach noise limits for a limited time while mitigation steps were installed, is entirely orthodox. But the time it took for Farrah's to be coaxed through the application process and to comply took too long.
  - i The Community Liaison Group, a requirement of the eventual resource consent designed to provide a bridge for communication between Farrah's and residents, is not working as intended.

*Information Complaints*

- 39 The Review finds that the responses that residents received to requests for information made under LGOIMA contributed to their lack of trust and confidence in Council, and improving Council's LGOIMA function will assist it to improve this going forward. The Review further finds:
- a Council acknowledges and has accepted that its LGOIMA practices needed improvement.
  - b The capability at Council of staff with technical expertise in LGOIMA was, and still is, under-resourced.
  - c Council requires a LGOIMA policy and training for all staff.
  - d All LGOIMA responses should be formally approved and signed out by the LGOIMA officer (with oversight / supervision from the Council's in-house legal team) to ensure consistency with the Act across all parts of the Council business.

## Part 3: the Silo Complaint

### What happened?

- 40 On 21 December 2018, Farrah's applied for consent to build the foundation for silos on site (the original plans included three silos), together with some other works. The application was recorded as being formally received on 8 February 2019.
- 41 Farrah's was applying for a range of building consents in stages and Council records show (and Council staff understood) that this particular application was for the foundation, not for the structure of the silo itself.
- 42 The 15 metre tall prefabricated silo was installed on a single day in November 2019. Under the District Plan (rule 20.10) the maximum height for a building in the business industrial zone is 12 metres. To erect a silo taller than 12 metres, Farrah's required a resource consent.
- 43 Council's records indicate that the first complaint about the height of the silo was received on 28 November 2019. A walk around neighbouring properties shows that the silo is clearly visible from houses located close to the Factory.
- 44 Council staff conducted a site visit on 9 December 2019, and noted 'the silo appears to be over the maximum height for the business industrial zone'. On 13 December 2019, Council emailed Farrah's asking for confirmation of the silo height. By February 2020, no substantive response from Farrah's had been received.
- 45 By 25 February 2020 Council staff had confirmed that the silo was non-compliant with the District Plan maximum height standard and needed both a resource consent and building consent.<sup>3</sup> On 27 February 2020, Council staff visited the site, advising Farrah's that a resource consent was required because the silo was over the permitted height.
- 46 On 3 March 2020, Council followed up with Farrah's about non-compliances, but (from the documents reviewed) no further action occurred until 15 May 2020 when Farrah's engaged a planning consultant to assist them apply for a resource consent. Not long after this contact with the company owners, Council began receiving complaints about the noise emanating from the Factory and by mid-2020 there appears to have been an agreement between Farrah's and Council that both issues – the silo and the noise – should be included in the single resource consent application (although there is no written record of this).
- 47 Section 91 of the RMA enables councils to defer one consent application when other 'related' consents are also required. In such cases, consents can be bundled and considered together, where this is considered appropriate 'for the purpose of better understanding the nature of the proposal'. However, in this case, there is no suggestion that the silo height and noise issue were either directly related or intrinsically linked. The silo and noise issues related to the same business / location but that, in itself, does not denote a connection of the kind anticipated by the RMA. (There was a noise issue related to the *filling of the silo* but the height of the silo was not a contributing factor to the noise, ie. had the silo been 12 metres tall or less, meaning no resource consent would have been required, the 'filling' would have still been a noise issue.)
- 48 In any case, Council continued to receive complaints and follow up enquiries from residents about the silo's height throughout 2020 (on 14 May 2020, 15 July 2020, 13 and 17 August 2020 and 11 September 2020) until the application for retrospective resource consent was received, on 4 December 2020. The application was circulated to complainants on 8 December 2020.

<sup>3</sup> Internal Council email dated 25 February 2020.

Retrospective consent was granted a year later on 7 December 2021, subject to conditions which have now been met. These included:

- a installing a surface treatment designed to reduce and diffuse glare to the upper third of the silo; and
- b screen planting of trees to mitigate the adverse visual effects of the silo.

49 Council received a total of 16 complaints about the visual effects of the silo from 9 households. A period of approximately two years elapsed from the time Council concluded the complaints had merit (i.e. the silo breached local height restrictions) until mitigations imposed by the consent were in place.

### **What were the applicable standards**

50 The applicable standards are set out in the District Plan. As noted above, the Factory is located on land zoned 'business industrial'. Under rule 20.10 of the District Plan, the maximum height of any building in the business industrial zone is 12 metres.<sup>4</sup> The silo is 3 metres higher than 'permitted' under the District Plan.

51 Under the Building Act 2004, all building work must comply with the Building Code. Under the Act and the Code a building consent is usually required for building work, except certain types of 'low risk' work. The erection of the silo required a building consent.

52 Information about both forms of consent are readily available on the Council website and trained professionals, such as architects, designers and resource planners would be expected to fully understand these standards as they applied in each area and to advise their clients accordingly.

53 Simply put, the silo was a structure which required building consent and, because it was higher than permitted under the District Plan, resource consent was also required prior to its installation.

54 In normal circumstances, when someone applies for a building consent they would also identify whether a resource consent was required. The consents are distinct and are managed by different staff at Council. Where an applicant applies only for a building consent, but a resource consent is also needed, it should be standard practice for Council staff to flag with the applicant this shortcoming prior to granting the building consent. Both the Building Act and the RMA work hand in hand such that under section 37 of the Building Act where a council considers that a resource consent is required and has not yet been obtained, the council must issue a certificate to the effect that no building work may proceed until the resource consent has been granted.

### **Meeting standards**

55 Council staff and Farrah's have different views on how it was that the silo could be installed without the necessary consents.

56 Farrah's say they believed that the resource consent for the silo foundations (stamped on documents showing a representation of the completed silo in situ) covered both the construction of the foundations and the installation of the silo. The Review accepts that they presented their plans to Council staff in good faith and were never informed further applications would be required.

57 Council staff say they understood Farrah's was filing building consent applications in stages and expected a further application would be filed in due course. The drawings for the building consent

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<sup>4</sup> The maximum height for business commercial outside the CBD is 8 metres. Different rules apply for residential properties but, for example, a residential property in a subdivision has a maximum height of 8 metres.

application state that the foundation is subject to final silo design, which implies that there was, at that stage, no set height for the silo.

- 58 In any case, it is evident that there were failures of communication between the applicant and Council staff and between Council staff across two consent teams which only came to light once a resident filed a complaint with Council about the silo's excessive height.
- 59 At the time this application was filed the Council's whole directorate (including the Planning Policy team, Resource Consents and Compliance team, Building team and Compliance Services team) consisted of just 26-30 employees and was managing high numbers of applications.

### **What could Council have done**

- 60 Miscommunications such as that outlined above will happen from time to time. It would have been better for Council staff processing the initial foundation building consent application to flag to the applicants that the silo itself may yet need resource consent (depending on its height) and/or to alert their colleagues at Council responsible for processing resource consents. Ensuring such communication channels exist would potentially avoid other applicants falling into the same trap and would ensure Council had a more complete understanding of projects under construction. However, where, as here, the final design for the structure was still not finalised, it was not unreasonable for Council staff to expect the applicant was being professionally advised and would therefore know what, if any, further steps would be required.
- 61 A separate issue is what Council could, or should, have done when it received complaints about the silo post installation. As set out in the timeline above, Council's initial response was simply to ask Farrah's for confirmation of the silo's height.
- 62 There was then a substantial delay before Council took any further action. This was followed by a further substantial delay between February 2020 (when Farrah's was advised it would need to seek retrospective consent) and December 2020 (when it in fact applied for the consent) and then from December 2021 when retrospective consent was granted until 4 February 2022 when the relevant conditions of the consent were met.
- 63 Those conditions included planting trees on the boundary of the Factory to (eventually) screen the silo from neighbours' line of sight and wrapping the highest part of the silo in non-reflective material to mitigate the glare from sun on the silo.
- 64 In what was a common theme from residents, many expressed concern that Farrah's clear breach of the height restriction was treated more leniently by Council than any similar breach committed by a residential ratepayer might be. Council staff rejected this proposition. That said, Farrah's was permitted to leave the unconsented silo in place without mitigation for more than a year.
- 65 In our experience it is rare that any building owner will be asked to remove an unconsented structure. More commonly a council will work with the owner to bring the structure into compliance through an application for retrospective consent.
- 66 Therefore, Council's decision not to ask Farrah's to take the silo down immediately was reasonable in the circumstances. However, the failure to ensure that the issue was not dealt with more quickly left residents living with the non-compliant structure without mitigation and without any certainty that mitigation was imminent. This eroded trust in Council's processes. Council could have:
- a acted faster when the initial complaint about the height of the silo was made;
  - b acted more firmly and proactively to seek information from Farrah's about the silo; and

- c required Farrah's to submit the application for retrospective consent more quickly (and independently of the application in relation to noise).
- 67 Council's decision to allow Farrah's to conflate two separate consents issues – the silo and the noise – into one retrospective application was a key decision that detrimentally affected residents. At the time, Council staff already knew the noise issue was more complex and difficult. In contrast, the silo issue was straightforward and the 'fix' was also simple – tree planting and some masking for glare.
- 68 Conflating the two issues prevented the silo issue from being dealt with more promptly. Council staff were right to work with Farrah's, but when faced with delays they could (and should) have adopted a more robust approach; for example, setting firm deadlines for improvements to be made. This in turn would have reassured residents that all ratepayers are treated consistently and could have gone some way in ensuring trust in Council processes was maintained.
- 69 Some residents were impacted by both the visual impact of the silo and the noise from the Factory. For these residents impacted by both issues Council's delay in responding to complaints about the silo's height eroded a significant amount of goodwill in Council processes. Had Council dealt with the silo issue swiftly and firmly, Council may have been able to maintain the confidence of these residents for longer, as they came to also be impacted by the noise.

### Summary of findings

Ultimately, the onus to comply with the District Plan lay with Farrah's. Council was entitled to expect the Factory owners would move quickly to address a clear and simple breach and when that did not occur it would have been reasonable to apply pressure to obtain compliance. In our experience councils do this routinely in similar circumstances.

The Review also finds:

- The silo was installed without a building or resource consent, when it should have had both. This occurred due to miscommunication between Council and Farrah's about what aspects of the Factory work had received the requisite consents
- The silo was non-compliant with the District Plan for a period of approximately two years until the conditions of the retrospective consent were granted
- The decision to conflate the silo height issue with the (more complex) noise issues contributed to the delay in resolving the matter
- Council's decision to not require Farrah's to remove the silo was reasonable in all the circumstances (and is relatively common practice when structures are discovered to be non-compliant after they are built), but firmer steps could have been taken to ensure the silo was compliant much sooner.

## Part 4: the Noise Complaints

- 70 From March 2020 until the present day residents have complained about noise emanating from the Farrah's Factory. The complaints are relatively localised but, at times, have referred to different issues; from the noise of the silo being filled, to the fans in the Factory and the HVAC systems that regulate air temperatures in the Factory.
- 71 For the purposes of this Review the noise complaints are the 417 complaints filed with Council between March 2020 and December 2021. The residents from one property complained 157 times. Another resident 130 times. In all, residents from 26 different neighbouring properties made complaints. Residents communicated with Council in a number of ways; they phoned in or emailed and, later, some contacted elected councillors directly.
- 72 A small minority of the complaints were about the sound of the silo being filled during daylight hours, but the majority consistently reported a 'droning noise', a 'thrum', or a constant humming sound, particularly at night.
- 73 Residents told this Review:
- You would get into bed and I would describe it as this deep droning hum, a low frequency hum and it would just penetrate through everything. My house is well insulated - I've got double glazing - but it just cuts through like a knife through butter.
- The noise would reverberate in such a way that you are lying in bed thinking any second plaster is going to come down from the ceiling.
- This was like having a jet plane in my house.
- It's just this constant 'eeeeeeeh' that you can't get away from.
- It sounded like a diesel truck idling outside or earth moving equipment working.
- The best way to describe it is a water blaster machine and it just has that constant vroom like that running. It kind of feels like it's in the in the walls or under the ground.
- 74 Concerningly, a small number of residents described thinking that they were 'going mad' for a period, because they were unable to identify the source of the noise that was causing nighttime disturbances. One told us:
- I didn't know who the noise was coming from, who was making it. And it wasn't till I got contacted or received something in the letterbox (from another resident)... saying are you affected by this noise... I found out that it was actually coming from the factory.
- 75 Another did not find out the source of the noise until they read about the resource management hearing in the local newspaper, more than a year after the noise first caused them troubled sleep. They said:
- So at 2am and 3am some mornings I was walking the streets in my dressing gown trying to determine where this noise was coming from and I couldn't pinpoint it anywhere specifically. It was strange and I can remember going to the doctor and saying I think I'm going nuts, hearing noises in my head, I can't sleep at night, is there something wrong with my ears or .. and the doctor saying everything is fine there didn't seem to be anything wrong.
- 76 The recorded complaints show that at certain times of the year noise from the Factory prompted higher numbers of complaints. For example, Council received 68 complaints in February 2021 and 62 complaints in March 2021. The period from August to October 2021 also attracted high levels of

complaints with more than 40 each month.<sup>5</sup>In other months, for example December 2020, Council received as few as three complaints.

### How Council initially responded to the complaints

77 In the course of this Review, each of the residents interviewed was asked to use a single word or phrase to describe their overall interaction with Council over the Farrah's complaints. Without exception they described being frustrated, misheard and unsupported. The word map below captures some of the key words used by residents.<sup>6</sup>



<sup>5</sup> A breakdown of the number of complaints is included as **Appendix 3**.

<sup>6</sup> Despite this, residents spoke highly of the two staff who they dealt with most regularly (as discussed later in this Report); as such these sentiments relate more to the overall council response.



- 78 Clearly, the issues at Farrah's Factory have had a significant effect on residents' trust and confidence in their local authority. Equally clearly, Council staff expressed concern about this and supported steps being taken to address the on-going relationships with the local community.
- 79 When the Council received the first noise complaint, New Zealand was in 'Level 4' lockdown due to COVID-19. Typically after a noise complaint is made, Council staff would visit the alleged source and test for compliance with the District Plan. But with compliance staff not listed as 'essential workers' no noise testing was possible under 'Level 4'.
- 80 Council staff did, however, make contact with Farrah's to advise them that a complaint had been received.<sup>7</sup> (Farrah's had earlier advised Council that the Factory had recently moved to 24 hour operations).<sup>8</sup> The owners told Council staff they were confident the noise did not exceed the District Plan.<sup>9</sup>
- 81 Under the District Plan, then and now, zoning (and associated activity standards like noise limits) is used as the principal method for managing the effects of various activities. Zoning recognises that different environments co-exist within a city and allows different levels of activities in those environments. The Farrah's Factory is located in a 'business industrial' zone. This means that maximum noise levels, from Monday to Saturday between 7am to 7pm, must not exceed 65 dBA L<sub>10</sub> measured at or within the boundary of any site. At all other times, including night time, Sundays, and public holidays, the maximum noise levels must not exceed 45 dBA L<sub>10</sub>.<sup>10</sup>
- 82 The neighboring properties to the Farrah's factory are in a 'residential' zone,<sup>11</sup> where the maximum noise levels are lower. From Monday to Saturday, between 7am to 7pm, noise must not exceed 50 dBA L<sub>10</sub>. At all other times, including night time, Sundays, and public holidays, the maximum noise levels must not exceed 40 dBA L<sub>10</sub>.<sup>12</sup>
- 83 The different maximum noise levels allowed in business and residential zones meant that a noise emanating from the Factory could be within the legal limit inside the Factory compound, but in breach of the legal limit when heard and measured inside the boundary of a neighbouring residential property. As a consequence of historic zoning decisions, the Factory is situated cheek by jowl to a large number of residential properties with little to no land separating the two different zones.
- 84 One further complexity is the nature of the noise itself. The District Plan at rule 32.5 provides that where special audible characteristics (such as tonal noise) are detected the maximum permitted levels should be adjusted downwards by a margin of 5dBA. The practical effect of this is that if the offending noise is/was tonal (which essentially means it is a noticeable or discrete constant sound without variation) then the legal limit will be 5dBA lower. In the residential zone that would mean night-time noise levels must not exceed 35 dBA L<sub>10</sub>.
- 85 By April 2020 residents were approaching Farrah's directly about the noise. On 3 April 2020, Farrah's emailed Council staff with the following communication:<sup>13</sup>

We believe the appropriate communication going forward is to direct anything to the UHCC and for us to have communication via yourselves where necessary.

<sup>7</sup> Email from Council to Farrah's, 31 March 2020.

<sup>8</sup> Email from Farrah's to Council, 26 March 2020.

<sup>9</sup> Email from Farrah's to Council, 31 March 2020.

<sup>10</sup> Noting that the maximum noise levels are measured at or within the boundary of any site (other than the source site) in the business industrial zone.

<sup>11</sup> Noting that houses at 28 to 40 Kiln Street have an underlying zone of business industrial. Therefore, these are subject to a District Plan night time noise limit of 45 dBA L<sub>10</sub>.

<sup>12</sup> Noting that the maximum noise levels are measured at or within the boundary of any site (other than the source site) in the residential zone.

<sup>13</sup> Note that in an earlier email from Council, on 26 March 2020, Council had advised Farrah's 'I will deal with any complaints if we do receive any'.

- 86 Farrah's stated that it was reviewing the noise at all site boundaries to 'look for opportunities for improvement' and that an action plan would be submitted to Council. It also asked for addresses where complaints were coming from so that it could focus its efforts on the areas of most concern.
- 87 On the same day Council staff replied saying, 'that all sounds good' and that it was 'confident [Farrah's] was doing everything possible to reduce any nuisance'.
- 88 This communication between Farrah's and the Council is instructive because it signals important aspects of how Council approached its role as regulator and enforcer of District Plan standards. This theme is addressed in more detail later in the Report but, in short, Farrah's was required to operate within the noise limits set by the District Plan. That requirement was non-negotiable. Yet, from the outset Council staff went beyond simply working with a local business (which is common and acceptable practice for a regulator) and instead allowed themselves to be involved in trying to fix Farrah's noise problem and, at the same time, to accept assurances given by Farrah's at face value.
- 89 Because of on-going COVID restrictions no noise testing was able to be conducted until early in May 2020. In the intervening period residents continued to complain about the noise and the effect of the noise on their well-being. On 29 April 2020 a Council representative wrote to one resident, 'I am so sorry you are still dealing with this and that I can't help you more at this time. *I will appeal to Farrah's again*' (my emphasis).
- 90 The first testing was conducted at two addresses on 6 May 2020.

### **The residents' experience of the noise**

- 91 From the outset residents reported having their sleep seriously interrupted by the night-time noise of the Factory.
- 92 In interviews for this Review they recalled being kept awake in the early hours of the morning for substantial periods or being unable to get to sleep, even if they wore noise cancelling headphones or played white noise to try to mask the sound. Some said they got little to no sleep for multiple nights in a row and experienced sheer exhaustion that affected all parts of their lives.
- 93 One said:
- The only relief I would get would be sometimes when there was a stormy night and there was plenty of wind and rain. That would kind of mask it but otherwise it was there every night. On a good night I might get to sleep about 1am. On a bad night, probably the worst I had was being awake until around 5.30am and then getting up at 6:30am and going to work.
- 94 Another resident said sleep deprivation affected 'just about every aspect of my life'. Another said 'I was so sleep deprived you feel like you can't function properly.. it was awful'. More than one resident spoke about the impact of the lack of sleep on their employment; one felt that it contributed to their redundancy and another that it led them to resign from a demanding job because they didn't feel safe driving the commute, speaking of falling asleep at the wheel. Those who worked from home reported a real impact on their ability to concentrate at home and earn a living.
- 95 The following description is typical.

Well, I'm already in tears. It's had a huge impact. I don't think people understand how hard it is to try and live a normal life on a real lack of sleep. You know, I could lose two to five hours sleep a night. You don't want to go and do things, you're grumpy. And that has an impact on relationships and that has an impact on you doing well at work. I certainly didn't take on roles or opportunities because I knew I just couldn't do it well. And you just become a bit of a zombie and you stay at home so you never get a break from it.

- 96 Sleep deprivation and associated stress impacted the health of residents. More than one spoke of increased blood pressure, another of a lowered immune system and others of profound impacts on their mental health. One resident took refuge by temporarily moving out of their home. Another reported suffering serious depression as a result of feeling stuck in the situation. Others told us they held genuine concerns for the safety of some residents who they knew to be the most seriously impacted by the on-going noise.
- 97 The impact for a small group of residents is ongoing, even now that Farrah's has been deemed compliant with the District Plan requirements. The Hutt Valley Medical Officer of Health, who has been involved in this matter, has advised Council that it is likely that these individuals are now hyper sensitive to the noise. They told us that they still have trouble sleeping when the Factory is in operation. This is discussed more at paragraphs 157 to 161 below.
- 98 The fact the noise issue began during the COVID lockdown, a time when residents could not lawfully leave their homes, was mentioned by a number of residents as a further aggravating factor. They were stuck in their houses next to a Factory that was operating day and night.
- 99 It was evident from interviews conducted with Council staff that staff who dealt directly with these residents were acutely aware of the severity of the impact the noise was having on well-being. But other staff, who had not had the benefit of hearing directly from residents, were more likely to describe the issue as affecting only a small number or as being localised or minor. One more senior staff member reflected that they only really understood the impact on the residents at the time of the resource consent hearing:
- Clearly the impact of the Factory was made very clear on that day of that hearing. It was pretty stark.
- 100 By then residents had been living with this disturbance for more than a year and a half.

### Identifying the source

- 101 Initial testing at two residential properties indicated Farrah's was not exceeding noise limits. The tests revealed:
- a at Property A L10 41dBA, L95 37dBA
  - b at Property B L10 38dBA, L95 33dBA
- 102 The tests were conducted by an experienced environmental health officer contracted to the Council (noting that the role of an environmental health officer is much broader than noise monitoring, and because of this, they are generally not noise 'experts'. This is discussed further below, at paragraph 180).
- 103 Council staff acknowledged to residents the difficulty in getting an accurate reading. The noise as reported to Council was not consistent, either between properties or over different days or times of day. Still, Council staff recognised that the noise was causing disruption even if testing had not established a breach. After the initial testing, Council staff contacted one resident whose property was tested: 'I understand that wasn't the loudest noise you have experienced'.
- 104 Further testing was carried out on 13 May 2020, including from the upper levels of one resident's home (at their request). The majority of these readings were also below the 40dBA limit in the District Plan, with one L10 reading (taken from an outdoor balcony) being 41.1. During interviews Council staff advised that there is a 3dBA allowance when considering whether a noise reading is in breach of a District Plan rule, and that the reading of 41.1 was therefore not considered in breach.

- 105 However, Council continued to receive noise complaints which the records show staff took seriously. On 15 May 2020, staff emailed one resident advising that 'it looks like the type of noise you are experiencing has special characteristics that is not triggering high decibel readings but is still causing nuisance'. By then Council staff were actively discussing what changes could be made at the Factory to reduce noise. The noise officer arranged to attend a site visit at the Factory 'to go over the facility and all of the processes so he can advise them on mitigation options'.<sup>14</sup> On 18 May 2020, Council staff emailed the resident again saying that the noise officer would check the air conditioning unit and the extractors, and asked the resident to keep a log of the times the noise was at its worst.
- 106 Finally, by the end of May 2020, Council staff had concluded two key things:
- a the source of the noise was the Factory's HVAC system; and
  - b the noise was in breach of legal limits (even without any adjustment for special auditory characteristics). Testing on 27 May 2020 showed a breach of night noise standards, at L10 48dBA and L95 44dBA.
- 107 Total noise testing data confirms that of the 26 properties where residents complained to Council, 22 were the subject of testing (at some stage). Of these 22 properties, two properties were tested a total of six times.
- 108 On 5 June 2020, Council staff wrote to Farrah's with a 'please explain' letter.

### Fixing the problem

- 109 By the first week of June 2020 Farrah's could have been in no doubt it had a noise problem it needed to fix.
- 110 By then the company had contracted an acoustic consultant, Acousafe, to conduct its own testing.
- 111 The letter sent to Farrah's on 5 June 2020 notes:
- Thank you for your continued cooperation with this matter, and we look forward to receiving a report from your consultant, confirming what remedial works will be undertaken to reduce noise from the site in order to meet District Plan noise rules and also satisfy s16 of the Resource Management Act 1991.
- We would ask that this matter please be treated with some urgency as we are mindful that the noise level currently does not comply and is reportedly causing some degree of sleep disturbance.
- 112 On 17 June 2020, Farrah's was asked if it planned to reduce its hours of operation now New Zealand had moved to 'Level 1'. Farrah's advised that it was unable to reduce the hours of operation since that would impact the business. Council staff asked if the HVAC system could be turned off at night. Farrah's responded that the HVAC needed to operate 24 hours a day when the factory was in operation, which was five days a week.
- 113 On 24 June 2020, in response to a complaint made to Chief Executive Peter Kelly about delays in resolving the on-going noise disruption, a resident was advised that 'Council officers recently met with the management of Farrah's to impress upon then (sic) the importance and most obviously the requirement to operate within the District Plan'. Mr Kelly wrote, Farrah's had:
- a contracted the services of a planning and noise consultant;

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<sup>14</sup> Email from Council to Resident, 15 May 2020.

- b advised that the planning consultant was working with the noise consultant to look at noise mitigation options, both temporary and permanent;
  - c committed to implementing noise mitigation measures;
  - d ordered a silencer for the HVAC system from overseas, and indicated that this would arrive within 2-3 weeks;
  - e conducted tests to work out what might be making the noise; and
  - f put timers on external roof fans to ensure that this noise is only emitted during the day.
- 114 The Chief Executive's response noted that 'Council officers will continue to follow up with the company' and that Council was confident the company was committed to operating within the District Plan, but that it needed time for the consultants to plan the way forward. The Chief Executive said 'Council's usual approach is to achieve compliance rather than initiating formal enforcement action immediately, this is also in line with the Attorney-General's guidelines for prosecution'.<sup>15</sup>
- 115 Council staff continued to work with Farrah's to both diagnose what precisely was the cause of the noise disturbance and to identify what remedies would mitigate it.

### Carrot or stick?

- 116 It is evident from interviews with Council staff that at or about this time there was discussion within Council about how best to get Farrah's to address the source of the disruptive noise in a timely way. Certain staff favoured issuing an abatement notice requiring the owners to take immediate steps to stop the noise and comply with noise levels. Such a notice was even drafted. But others took the view that Farrah's response to such a notice would be either to take legal action against the Council or to sack workers at the site. As one senior staff member said, 'the implications of (what might happen at the Factory if an abatement notice was issued) certainly weighed quite heavily on minds'.
- 117 As discussed later in this Report, Council did issue an abatement notice in July 2020, though a much less demanding one. Two factors led to this approach being favoured.
- a First, there was, at the most senior levels of Council, a strong view that abatement notices were a tool of last resort.
  - b Second, the seriousness of the breach was also a matter on which different Council staff held different views. Anyone who met with affected residents could plainly tell that the night-time hum or drone was particularly debilitating for some residents. But more senior staff had little to no contact with residents and were more likely to minimise the effect the noise was having.
- 118 In fact, very few Council staff ever met with residents. Instead they judged the seriousness of the breaches by the results of testing being done in selected properties and those tests only recorded breaches in a small number of properties and at relatively low decibel levels.
- 119 In addition, in 2020 the actual number of complaints was still relatively small (it is only in 2021 that Council was managing high levels of complaints) and internal emails from Council staff at the time stated that there had only been one reading from one resident's address where the result showed a breach.
- 120 On the other hand, relevantly, New Zealand was in the early and uncertain days of the COVID pandemic. Farrah's produced bread, an essential food, and was (and is) a major local employer (the Review was unable to verify the number of people employed at the time). A Council staff member notes in an internal email 'we also of necessity balance the consideration of the operation of the

<sup>15</sup> We take this to be a reference to the Solicitor-General's Guidelines for Prosecution. This is addressed later in the Report.

business and in this case we have the unique issue of lockdown restraints and explicit Government expectations that we would facilitate essential business operations over that period'. Another email notes 'there is the broader issue of the economic consequences that we must consider before we make this decision'. These were difficult issues to balance. According to one senior Council staff member:

I wouldn't say it was a Hobson's choice but we didn't want anyone unemployed in a pandemic when we don't know what the outcome of that is going to be and it seemed quite doom and gloom on some of the prognosis of what people were reporting at the time. Farrah's was an essential food criteria – that needed to keep production levels up and, you know, that was certainly one of the factors that weighed heavily.

121 These factors combined led Council staff to tread lightly.

### Abatement notice issued

- 122 On 3 July 2020, Council wrote to Farrah's advising that an abatement notice would be issued if temporary mitigation was not in place by the following Friday. On 9 July 2020 Farrah's placed a shipping container between the Factory and neighbouring houses to provide acoustic screening and the company's planning consultant advised that Farrah's was in the process of preparing a resource consent application.
- 123 Two residents subsequently advised that the temporary mitigation made no difference. Council's noise surveys revealed a 1 dBA reduction and inquiries were made with Farrah's whether it had any other options for temporary mitigation. On 15 July 2020 Council gave Farrah's a further 7 days to install additional mitigation options.
- 124 On 23 July 2020, Council finally issued an abatement notice. As noted above, this was a significantly moderated notice to the earlier draft and required Farrah's merely to prepare a noise report identifying mitigation measures. It gave Farrah's until 13 August 2020 to comply (note that Council sought legal advice about a reasonable time period for compliance).
- 125 Following this:
- a Farrah's provided its report, the Acousafe noise assessment report (the **Acousafe Report**) on 13 August 2020.<sup>16</sup> The report showed:
    - i Night-time noise from the HVAC plant showed sound levels of consistently 49 dBA to 51 dBA L10 (a breach of the night-time noise levels in the District Plan).<sup>17</sup>
    - ii Flour delivery and filling of the silo took between approximately 37 to 90 minutes a time, with the average noise being 58 dBA L10 each time (a breach of the day-time noise limits in the District Plan of 50 dBA in residential zones).
    - iii In order to comply with the District Plan, an 11 dBA reduction of noise for the HVAC unit needed to be achieved (even before any tonal penalty was applied to the limit).
    - iv In relation to the noise emitting from the pump on the flour delivery truck when filling the silo, the Acousafe Report found that noise reduction was unlikely, and so recommended that Farrah's ensure that deliveries were strictly controlled to weekdays between the hours of 8am and 6pm.

<sup>16</sup> It is worth noting that the District Plan requires noise to be measured in accordance with NZS 6801:1991 and assessed in accordance with NZS 6801:1991. The abatement notice required an assessment in accordance with the 2008 version of the Standards. Acousafe recognised this and made reference to both the 1991 Standards and the 2008 Standards in its report.

<sup>17</sup> Measured from a bank in front of the acoustic fence at [ ] Kurth Crescent, considered to be the most appropriate location to assess noise at the first story window of [ ] Kurth Crescent, in line with the requirement in the District Plan to measure at or within the boundary of any site (other than the source site).

- v The Report did not consider or assess special auditory characteristics or tonality.
- b Council sought internal feedback on the Acousafe Report, with one email noting 'the report does not appear to have covered off all requirements within the abatement notice, and leaves questions about plant that was not surveyed, or noise levels quantified. I also believe that a noise reduction of 16dBA is required for HVAC alone to meet DP noise rules at night-time'. In addition to concerns about whether all plant was surveyed (as required by the abatement notice) the abatement notice also required Farrah's to conduct monitoring over a 24 hour period, which they failed to do.
- c Council received further complaints from four additional residents.
- d Farrah's continued to explore mitigation solutions. Farrah's reduced its fan speeds on 20 August 2020 and installed a silencer on the HVAC system on 22 August 2020 (noting that the company had indicated that the silencer would arrive within 2-3 weeks in late June).

### Further fact finding undertaken by Council

- 126 Even though Farrah's own Acousafe Report provided evidence that both day-time and night-time noise levels were being breached by the company, Council decided to commission further specialist testing and engaged Marshall Day Acoustics for the task.
- 127 Since at least May 2020, Council staff had been considering the prospect that the noise emanating from the Factory was tonal in nature.<sup>18</sup> If so then, as described above, a lower legal limit would apply.
- 128 It appears that Council undertook to fund the additional assessment to satisfy itself as to the true nature of the noise and to assist it to identify possible mitigations, since despite some mitigation measures being taken by the Factory owners the Council was still receiving complaints from residents. As noted earlier in this Report, from the outset Council staff had allowed themselves to be drawn into trying to diagnose and fix Farrah's noise problem. They had no obligation to do this and, in fact, as regulators and enforcers of the District Plan their statutory role required independence.
- 129 Marshall Day Acoustics was commissioned in September 2020 and its report circulated to residents on 27 October 2020. Marshall Day used more sophisticated measuring equipment than had been available to Council's own contractor who conducted the initial noise testing. It concluded that for much of the night-time operations, the noise from the factory was observed to contain Special Audible Characteristics. In this case, it was described as tonal, meaning that adverse community responses were likely to occur at lower levels than noises without such tonal characteristics.<sup>19</sup> As set out above at paragraph 84 the fact that the noise was observed to be tonal meant that the legal allowable limit was 5 dBA lower, or for night-time noise 35 dBA L10.
- 130 However, Marshall Day recorded 'multiple noise sources contributing' to the overnight noise. This meant that it was unable to conduct a valid assessment of compliance, and therefore stopped short of finding Farrah's to be non-compliant. It did, however, note that 'the presence of [tonal noise] during factory operations is likely to provide a significant cause of the noise complaints received' by Council.<sup>20</sup>
- 131 On 5 November 2020 Council updated residents and advised that:
- a Farrah's noise consultant would investigate further and the outcome of that testing would determine the suitability of the proposed noise mitigation solution.

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<sup>18</sup> Email from Council to Resident, 15 May 2020.

<sup>19</sup> At page 10.

<sup>20</sup> At pages 10-12.

- b Farrah's had been working on potential options for the HVAC units. Once further testing and analysis had been carried out the proposed mitigation options would be presented to Council.
- c Council was 'working with Farrah's consultants to ensure the further testing and analysis of the proposed noise mitigation is completed quickly'.
- d A resource consent for both the silo and noise non-compliance would be filed once further testing and analysis had been undertaken by Farrah's consultant. Council noted 'given the results of the Marshall Day Acoustic Report and the difficulty of determining a non-compliance with District Plan noise standards as a result of background noise levels... we will not be issuing an abatement notice to stop night-time operations'.

### Retrospective resource consent application

- 132 Farrah's conducted further testing in November and December 2020. The resource consent application was received on 4 December 2020 and provided to residents on 8 December 2020. The application sought:
- a Retrospective consent for the existing flour silo, and an additional silo, both of which would breach the maximum height standard for the general industrial zone of 12 metres; and
  - b Resource consent for the Factory to exceed District Plan noise standards on a temporary basis until such time that permanent mitigation measures could be put in place (no specific timeframe was given in the application).
- 133 An amended application was subsequently submitted on 9 April 2021.

### Limited notification

- 134 Having completed the application for consent, Council was required to consider first, whether the application would be notified, and second, if it was to be notified, what the scope of that notification would be. The criteria and process to be followed when making notification decisions are set out in sections 95A-95G of the RMA.
- 135 On 13 March 2021 Council received a letter from Morrison Kent on behalf of some residents, noting that if the resource consent application was not notified the residents would issue legal proceedings.
- 136 The residents believed strongly that the application should be publicly notified. On the other hand, in the application for consent Farrah's argued strongly for the position that no notification was required. This was on the basis that 'the effects [of the proposed development] were considered to be less than minor'. Farrah's considered that while the proposal did not comply with the noise limits set out in the District Plan:
- a the operations of Farrah's did not exceed the day-time noise limits, with the exception of the filling of the silos by truck (which occurred 'only 8 times weekly for up to 1.5 hours per delivery'); and
  - b the source of the tonal noise and the night-time noise non-compliance was still being investigated and, once identified, Farrah's would ensure appropriate acoustic mitigation would be designed to address the issue.
- 137 Council engaged an external planning consultant to prepare a section 95 Notification Decision Report (**ND Report**). The planning consultant conducted the four step process required under section 95A of the RMA. The third step requires the consent authority to consider whether the activity has, or is likely to have, adverse environmental effects that are 'more than minor' (in terms of section 95D). Note that reference to effects being more or 'less than minor' were in keeping with the test



(and language) set out in the RMA. The Review acknowledges that some residents found, and continue to find, the description of the impact on their well-being as 'minor or less than minor' to be deeply offensive and upsetting.

- 138 The ND Report concluded that the adverse effects on the environment were 'no more than minor' for a variety of reasons, including (these are the statements most relevant to the noise question):<sup>21</sup>
- a 'the site has accommodated factory activities for many years, and the underlying zoning supports and anticipates such activities'; and
  - b 'the Farrah's site activities do not comply with the day-time and night-time permitted noise standards when measured at the boundaries with the adjacent residential zone (and likely at the adjacent open space zone). With the exception of residential sites located in proximity to the factory site..., compliance with the District Plan permitted noise standards is achieved more generally throughout the surrounding residential zone'.
- 139 The implication of the latter statement appears to be that only the properties close to the factory were impacted by the noise.
- 140 The ND Report then set out the four step process under section 95B of the RMA to determine if limited notification was required. Step three requires limited notification if there are any 'affected persons' (defined in section 95E as persons on whom the effect is at least 'minor').
- 141 The ND Report set out detailed reasons why it considered there to be affected persons and who those affected persons would be. It noted:
- a 'noise measurements and accompanying analysis have been undertaken specifically in relation to parties that are most likely to be potentially affected by the noise generating activities... based on the professional opinion of the respective noise experts... the potentially affected parties... are those that are located closest to the noise generating activities and/or are oriented with a clear line of site to the activities';
  - b 'as noted in [Marshall Day's] Operational Noise Monitoring report, dated 11 June 2021, it is acknowledged that other properties in the wider surrounds... may also be exposed to [noise] but the [noise] will be less than what is experienced at the properties considered [to be affected].
- 142 The ND Report focused on properties where Marshall Day or Acousafe had conducted testing. After considering a variety of factors for each property, including the noise testing results, typography, use of the property and so on, it identified 16 properties where the 'noise effects from the factory operations are considered to be minor'. It also identified 10 properties with a 'minor' impact from the over height silos (of these, 4 were properties also impacted by the noise).
- 143 On the basis of these conclusions the application was processed on a limited notified basis, with residents of 22 properties notified on 21 June 2021.
- 144 The report briefly considered the question of whether, despite its findings as to the effects of the application, the proposal should be publicly notified on the grounds of special circumstances (Step 4 of section 95A). In that regard the report stated that:<sup>22</sup>

Special circumstances have been defined as circumstances that are unusual or exceptional, but may be less than extraordinary or unique. The proposal relates to the operation of an industrial bread factory which is an anticipated activity within the Business Industrial Zone. Silos are a typical feature of factories and the nature of the noise emissions resulting from onsite activities are also commonplace in an industrial setting. As such I do not consider

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<sup>21</sup> At page 4.

<sup>22</sup> At page 6.

there to be any usual or exceptional circumstances that warrant public notification of this proposal.

- 145 The planner who authored the ND Report did not have the benefit of all of the information available to this Review and, in any case, the Step 4 process under section 95A grants any decision-maker a high degree of discretion. This Review concludes that there were grounds to consider the question of special circumstances more closely in this case. The combination of factors – the uncertainty of the noise source, its tonality, the large number of residents potentially affected, the high level of public interest, the proximity of the Factory to residences and the length of time the breach had occurred – together left it open to a decision-maker to determine that this application should be publicly notified because special circumstances existed. The fact that notification was limited – and then the way it was limited – created a new grievance for those residents concerned.
- 146 In response to the limited notification there were 13 submissions, of which 12 submissions were against the application in its entirety, one was against the noise application and neutral regarding the silo, subject to conditions. Following the close of submissions Farrah's put the application on hold and provided additional information in late September – early October 2021.
- 147 Council continued to receive complaints about the noise throughout 2021 prior to the hearing. From February 2021 and throughout all of 2021 (with the exception of June) each month saw the Council receiving higher numbers of complaints and from new complainants. By then residents had been experiencing the night-time disruption for a year (and longer) and Farrah's attempts to mitigate the problem had failed. Residents were increasingly frustrated at the lack of progress and what they perceived to be a lack of action on the part of Council.

### Resource consent hearing

- 148 The resource consent hearing, held at Wellington Racing Club in Trentham, Upper Hutt, took place on 10 and 11 November 2021. The effect of the limited notification was that only those occupants of the 22 notified properties could formally appear at the hearing. This left some residents who had complained to Council about the noise but had not been notified excluded from the process. When one resident (a complainant) asked Council staff about this, he was advised that his only option was to seek a judicial review.
- 149 Council failed to inform notified residents that they could bring other residents as 'witnesses' to the hearing, which is what ultimately occurred. This was important as it gave residents the opportunity, for the first time, to tell Council (and Farrah's) about the significant impact the noise was having on them.
- 150 Those who attended the hearing recall it being emotional, cathartic and frustrating. It is a source of on-going resentment for some residents that Farrah's owners opted not to appear in person. The owners say that by the time of the hearing they felt threatened by some residents and for this reason would not have felt comfortable at the hearing. The company owners were represented by their lawyer and watched events by video link. Council staff who spoke to the company owners after the hearing were convinced they, just like senior staff, had been affected by what they heard.
- 151 Consent was granted on 7 December 2021, subject to the following conditions:
- a A second silo was granted consent, subject to a surface treatment being applied to reduce glare to the top third of the silo and the planting of trees.
  - b Noise exceedance (for a temporary period) was granted until mitigation was installed, subject to interim mitigation to reduce noise by Christmas and also permanent mitigation for and by as follows:

- i Ceiling fans/oven fans emitting tonal noise – permanent mitigation and compliance achieved by February 2022.
  - ii HVAC – permanent mitigation installed no later than 31 January 22.
  - iii Silo filling – full mitigation installed by 1 April 2022.
  - iv Overall, full compliance with the District Plan noise limits was required by 1 April 2022.
- c There was also a requirement on Farrah's to establish a Community Liaison Group, and submit a Noise Management Plan, to provide a framework for managing future issues/complaints.
- 152 The documents show Council and Farrah's continued to receive complaints about the silo filling and overnight noise throughout early 2022. However, they also show both Farrah's and Council taking a substantially more prompt and proactive approach to complaints.
- 153 Farrah's subsequently missed the mandated deadlines for remedying the HVAC and silo filling noise non-compliances and for submitting its Noise Management Plan. On 7 April 2022, six days after the company was required to be fully compliant with its consent, Council staff issued a second abatement notice. This required Farrah's to 'cease the overnight noise non-compliance from the operation of the Factory, including the tonal noise' by 14 April 2022. Council subsequently granted Farrah's an extension of four working days, to 22 April 2022.
- 154 The firmer approach worked, and Farrah's was ultimately deemed compliant with the conditions set out in the resource consent for the HVAC night-time noise on 5 May 2022, four months after the deadline specified in the resource consent. This additional delay was unfortunate, but, as noted above, the emails appear to show a significantly more proactive approach by both Council and Farrah's.
- 155 In an email from Council to residents on 8 August 2022, it noted:
- Between Marshall Day and Acouasfe, monitoring has been undertaken to provide readings from representative locations. For night time, the measurements consistently describe a noise level of around 35 dB LA10 from steady noise sources including Farrah's and some other contaminants, which is within the 40dB night time noise limits.<sup>23</sup>
- 156 The email further noted that there is residual tonal noise that was being investigated but that the day time and silo filling noise complied with district plan standards. On 17 August 2022 Council deemed Farrah's to be fully compliant with the conditions of the resource consent.

### **A public health issue**

- 157 Unrelated to the resource consent process, residents also raised their concerns with the Medical Officer of Health. Medical officers of health are designated by the Director-General of Health under the Health Act 1956 and are part of the National Public Health Service.
- 158 In early July 2021 the Medical Officer of Health met with Council to discuss the noise coming from the Factory, noting that he believed it had become a public health issue. In an email to Council dated 29 July 2021, the Medical Officer states 'we are concerned at the long length of time taken to progress this issue and that, in itself, may have exacerbated the public health issue'.
- 159 The email then stated that:
- The public health issue is that some people residing near Farrah's have developed a hypersensitivity to noise coming from the factory. This has happened because these people

<sup>23</sup> At that time there was no tonal penalty to be applied because the overnight noise was no longer tonal in nature.

for many months were exposed [to] levels of noise, particularly low frequency noise, at a level that was above levels set [in] your District Plan. This means that even when Farrah's does comply with your District Plan these people, due to their hypersensitivity, will experience unhealthy levels of annoyance and the flow on adverse effects on health and well-being.

- 160 The Medical Officer expressed a clear belief that had Farrah's complied with the District Plan at an earlier stage then residents would have been less likely to become sensitised to noise. The documents reviewed showed Council had some further engagement with the Medical Officer of Health, and the Officer's recommendations ultimately formed part of the conditions recommended by Council's planner in the resource consent application.
- 161 It does not appear that Council has had any further substantive engagement with the Medical Officer of Health since the consent application was heard. Nor have his findings been further considered. The hypersensitivity identified by the Medical Officer is a significant health issue, albeit affecting only a small sub-set of residents. In interviews it was apparent that senior staff had not considered the ongoing impact or potential impact on any residents who had developed hypersensitivity as a result of the noise breaches.

### What is best practice?

- 162 Guidance from the Office of the Ombudsman (the Parliamentary Officer tasked with handling complaints about public sector agencies such as the Council) notes that a fair complaints process requires the person reviewing a complaint to:<sup>24</sup>
- a deal with complaints on their merits;
  - b act independently and with an open mind;
  - c take measures to address actual or apparent conflicts of interest;
  - d consider all evidence carefully;
  - e keep the complaint confidential (if appropriate); and
  - f act without undue delay.
- 163 There are also more general administrative law principles for regulators (or agencies, including local authorities) to act fairly and consistently when acting as decision-makers. Anyone making a complaint to Council about compliance with any aspect of the District Plan is entitled to have their complaint dealt with in the same way as any other complainant.
- 164 Under the RMA, Councils are tasked with carrying out compliance monitoring activities. This includes both proactive monitoring, and reactive monitoring, i.e. in response to a complaint or as an investigation into a suspected offence. The monitoring activities require councils to assess compliance with standards such as the District Plan.
- 165 The Ministry for the Environment (**MfE**) has prepared *Best Practice Guidelines for Compliance, Monitoring and Enforcement Under the Resource Management Act 1991 (Best Practice Guidelines)*.<sup>25</sup> These Guidelines include guidance for councils on who should carry out compliance monitoring and how it should be carried out.

<sup>24</sup> *Effective complaint handling*, the Ombudsman, 2 October 2021 at 13.

<sup>25</sup> Published 1 July 2018, available at: <https://environment.govt.nz/publications/best-practice-guidelines-for-compliance-monitoring-and-enforcement-under-the-resource-management-act-1991/>.

166 The Best Practice Guidelines note that when considering who should do the monitoring, councils should consider ‘who has the appropriate skills to carry’ it out and whether ‘dedicated or specialist staff’ are required.<sup>26</sup> It goes without saying that for monitoring to be effective and accurate councils need the right person for the job. Noise monitoring, in particular is a technical area that requires specialist skills, training and experience.

167 Considering what ‘best practice’ under the RMA should be more generally is a difficult question to answer. This is because, under the RMA, councils have a series of regulatory and non-regulatory tools they can use to take enforcement action and a broad discretion as to which tool to use, when to use it and with what force. As one Council staff member noted:

There is an obligation on Council through the RMA to undertake an enforcement function. How it goes about that in an individual case, it has more discretion around what it does and why.

168 The ‘tools’ available to Council include a range of escalating measures to equip staff to manage and enforce compliance. It is important to recognise that not all measures are created equal, deliberately so. Abatement notices are not the most serious steps any council can take.

Tools	Action required from recipient
Informal measures such as a verbal or written direction or formal warning letter	These are non-statutory tools. If used by Council they can be put before the Court at a later date if there are proceedings relating to non-compliance  This correspondence can be used to inform the person: <ul style="list-style-type: none"> <li>• that a breach is likely to occur or has occurred</li> <li>• that the person needs to take particular action or stop</li> <li>• of the history of the actions that lead to that communication</li> </ul>
Abatement notice (see section 322 of the RMA onwards )	Abatement notices are a tool in the RMA that can require a person to cease doing something, or to do something that is necessary to comply with the RMA or rules in a plan  They do not contain a fine, but Council can recover costs incurred from any person on whom notice is issued  If an abatement notice is not complied with, Councils can seek an enforcement order from the Environment Court, or initiate a prosecution under s 338 (it is an offence not to comply with an abatement notice)
Excessive noise direction  (For noise complaints only).  (see sections 327-328 of the RMA)	These can be used to require an occupier to immediately reduce noise to a reasonable level (typically used to deal with noisy parties etc)  Excessive noise is defined in section 326(1) of the RMA as ‘any noise that is under human control and of such a nature as to unreasonably interfere with the peace, comfort and convenience of any person’.  If the direction is not complied with the occupier commits an infringement offence for which Council can issue an infringement offence notice.  If the offence results in prosecution the maximum fine is \$10,000 with a daily fine for every day the offence continues

<sup>26</sup> At 42.

<p>Infringement notice (see section 343A of the RMA and following)</p>	<p>Delivered to a person committing or who has committed an infringement offence (defined in regulations). Results in an \$500 infringement fee and Council can also recover costs incurred from any person on whom notice is issued (section 36(1)(c) of the RMA) Notices must be issued within 3.5 months of the offence</p>
<p>Interim enforcement order and Enforcement order (see section 314-321 of the RMA)</p>	<p>These have a broad scope, including requiring a person to stop an action or to remedy or mitigate adverse effects Council can recover costs incurred in issuing the orders from person on whom order is issued (section of the 36(1)(c) RMA) Under section 338 of the RMA, failure to comply with an order is an offence</p>
<p>Prosecution</p>	<p>The most serious tool available to Council following the commission of an offence is prosecution. It is an offence to contravene (relevantly) District Plan rules, an abatement notice, or an enforcement order. Charging documents must be filed within 12 months of the offence. A successful prosecution can result in a fine up to \$600,000 (see section 339 of the RMA), and for continuing offences a daily fine up to \$10,000 for as long as offence continues. The Solicitor-General publishes Prosecution Guidelines for all prosecutions, which are intended to assist in determining:</p> <ul style="list-style-type: none"> <li>• Whether criminal proceedings should be commenced</li> <li>• What charges should be filed</li> <li>• Whether, if commenced, proceedings should be continued or discontinued, and to provide guidance for the conduct of criminal prosecutions and establish standards of conduct and practice.<sup>27</sup></li> </ul> <p>The guidelines establish a two-step process for considering whether a prosecution should be filed – first, an evidential test and second a public interest test.<sup>28</sup> It is worth reiterating that these guidelines are only relevant to the decision to prosecute, not to conduct other enforcement activities.</p>

169 The Best Practice Guidelines further provide a helpful table setting out the factors a regulator should consider in determining how to respond to non-compliance – in other words which tool to use when.<sup>29</sup> These are or relate to:

- a the impact of the non-compliance – the significance of the actual or potential effects;
- b the nature of the offending;
- c legal considerations; and
- d the desired outcome sought.

170 Balancing those four factors can be complex and, because it involves a broad discretion, requires good judgment and consistency. To assist staff in this exercise, best practice would include Council

<sup>27</sup> Published 1 July 2013, available at <https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/ProsecutionGuidelines2013.pdf> - at 1.2.

<sup>28</sup> At 5.1.

<sup>29</sup> At page 76.

having both a compliance strategy and an operational enforcement policy to help determine how best to proceed in any set of circumstances:

- a *Compliance strategy*. This is not a requirement under the RMA, but has been identified as best practice by the MfE in its Best Practice Guidelines.<sup>30</sup> A compliance strategy is intended to provide internal guidance to agencies for how compliance, monitoring and enforcement, action will be undertaken. The Best Practice Guidelines state that councils should 'as a minimum requirement... have sufficient access to resources to support... development and regular review of a compliance strategy'.<sup>31</sup> The Council does not currently have a compliance strategy.<sup>32</sup>
- b *Operational enforcement policy*. This is also not a requirement under the RMA, but is recommended in the Guidelines as in aid in providing consistency and transparency in decision-making, and to ensure enforcement decisions are robust and taken in appropriate circumstances.<sup>33</sup> During the relevant time period, Council did not have an operational enforcement policy.

171 It is worth noting that Council now has an enforcement policy (dated 2021). The Review assessed this policy against the Best Practice Guidelines and consider that it aligns largely with the guidance, although some potential improvements are identified later in Part 6.

172 While policies are an important tool to guide best practice, council staff need to be empowered to use, understand and apply these policies. This requires training, hiring and retaining sufficient numbers of staff with the sufficient expertise and ensuring that all staff in the agency know and understand the policies so they can be applied consistently across all enforcement activities. It is not uncommon for local authorities to have resourcing and capability restraints. These can be caused by limits on expenditure and / or difficulty in recruiting suitably trained staff. Managing these pressures to ensure skilled staff are deployed in key areas is and will be a constant challenge for senior management.

### **Did Council's approach align with best practice?**

- 173 When assessing Council's approach against best practice, the Review considered the following:
- a whether Council's initial monitoring was timely enough;
  - b whether Council's initial monitoring was in accordance with best practice;
  - c Council's decision to issue the abatement notice on 29 July 2020;
  - d what steps Council took after the abatement notice was issued, and whether they favoured the 'corporate' interests over the interests of the residents, as alleged by residents; and
  - e whether any of the delays after the Resource Consent decision were unreasonable.

### *Was Council's initial response to noise complaints timely?*

174 A key question for this Review was whether Council's initial response to the complaints about the noise was sufficiently prompt and proactive. It is apparent from interviews with residents and the complaints reviewed that residents felt that complaints were not being given enough weight, that noise testing should and could have taken place much faster and that this, in turn, would have allowed the matter to be resolved more promptly.

<sup>30</sup> At Part 2, page 17.

<sup>31</sup> At Part 4, page 33.

<sup>32</sup> Councils that do currently have a compliance strategy include Christchurch City Council, Auckland City Council, Nelson City Council, Otago Regional Council, West Coast Regional Council, Southland Regional Council, Canterbury Regional Council and Whangarei Regional Council.

<sup>33</sup> See Best Practice Guidelines Part 7, p73.

- 175 As set out above, the initial noise complaints were made during the first national COVID lockdown. There was a delay of approximately five weeks until noise monitoring was able to occur, when the country moved to 'Level 3' of the COVID response framework in place at the time and after Council sought dispensation for its testers to work in the community. Internal communications show that throughout the early stages of lockdown Council was actively engaged in trying to have testing to occur under lockdown conditions.
- 176 It is also clear from these documents and interviews with staff that Council neither used the lockdown as an excuse nor failed to consider whether testing during the lockdown would be possible. Given the unique circumstances at the time the initial delay between the first noise complaint and noise monitoring first occurring was reasonable.
- 177 Noise testing took place on four occasions at a variety of properties between 6 and 27 May 2020. The Review similarly does not consider that this period of time is unreasonable. Factors such as liaising with residents for access to their properties, the weather, the availability of noise testing equipment and staff availability all contributed to the period of time it took Council to conduct its first testing.
- 178 The Council's Environmental Health Officer was (and is) an employee of Hutt City Council contracted to provide services full-time to Upper Hutt. The Review considered whether the contractor arrangement with Hutt City Council caused any unnecessary delays. It did not. In practice, the staff member was considered to be a Council employee, with one senior staffer interviewed saying they considered them to be 'their own'.
- 179 More important is the question of whether Council's overall resourcing to conduct the testing was sufficient. At the time of the initial complaints, the contract arrangement with Hutt City meant that Council had only 1.4 FTE Environmental Health Officers available to it. In recent times that has increased to 2 FTE but staff interviewed indicated that further resourcing was still required. It is possible that if Council had more resourcing in its compliance monitoring team it may have been able to conclude its testing sooner but, on balance, it is not evident that staffing caused any material delay, noting again that the initial testing was concluded within a single month.

*Was Council's initial monitoring in line with best practice?*

- 180 Council's Environmental Health Officer undertook the initial testing. By way of background, Environmental Health Officers are responsible for noise, alcohol, and health nuisances in their respective areas. The Officer who undertook the initial testing was experienced in their role, having been contracted to Council for a significant period of time. While no formal training in noise testing was provided by Council to the Officer, they had practical experience and were suitably equipped for the task of undertaking noise testing at the initial stages.
- 181 Some residents have complained about the Officer and their approach to testing. The Review considers this a symptom of the larger frustration experienced by residents. Noise investigation is not a clear cut nor simple area to navigate. In relation to identifying the noise as tonal noise, it is noted that the Officer (as one council staff interviewed put it) was 'not able to determine it was tonal from [the tested] locations because you need to be able to isolate the noise source without all the background to get that tonal sound'. Both Acousafe and Marshall Day, who eventually confirmed the nature of the noise, are acoustics specialists and were better equipped to investigate complex noise issues and special auditory characteristics, such as those emitted by the Farrah's Factory.
- 182 In conclusion on this point, the Review does not consider Council's Environmental Health Officer to be at fault for not identifying earlier the tonal quality of the noise.
- 183 Council received complaints from 26 properties, of which Council tested 22 (either by its own Environmental Health Officer or Marshall Day, its private contractor). Residents expressed concern



that insufficient testing was done at some sites, or that the time of day testing was done did not coincide with times when the noise was usually loudest. The challenge with all the testing was that the noise was not consistent and factors, such as weather and the presence of other noise, which made identification and measurement of the noise difficult were outside the control of testers and the Council.

- 184 That said, by May 2020 it was evident that Council staff had begun to consider that the noise was tonal in nature and this was confirmed in October 2020 by Marshall Day and in February 2021 by Acousafe. This information was an important consideration when weighing up both the impact of the noise and its severity.
- 185 The standards recognise a lower legal threshold for tonal noise because tonal noise can have a more detrimental effect on the listener. In this case, the fact the noise was tonal provided an explanation for why some residents were reporting such severe disturbances and harm. Council staff should have given more consideration to this factor in determining how best to manage the complaints and in balancing the competing interests of all parties. Yet there is no evidence that the establishment of the fact that the noise was tonal prompted any review or reconsideration by Council staff of their general approach, which was to work with the company owner and give considerable weight to concerns about the company's interests. If nothing else, the fact the noise was tonal challenged the validity of conclusions drawn from earlier tests in which the noise was determined to be lawful (at for example measurements of 40 dBA and 41 dBA).

*Was Council's decision to issue the July 2020 abatement notice consistent with best practice?*

- 186 When Council finally issued an abatement notice on 23 July 2020 it included two separate issues, the:
- a noise caused during the day when the silo was being filled; and
  - b tonal noise being generated by the Factory.
- 187 As noted earlier in this Report, the decision to conflate the silo issue and the noise issues provided Farrah's with a long period in which the effects of the in-breach silo went unmitigated, even though mitigation would have been relatively straight-forward. This period of what residents perceived as inactivity sent an unfortunate message to locals about Council's enthusiasm for compliance.
- 188 What is clear from the interviews with Council staff is that senior leaders were reluctant to issue any abatement notice. There was a two month delay between identifying a breach of the District Plan (in May 2020 when noise testing occurred) and when Council took any formal measures, beyond its 'please explain' letter of 5 June 2020.
- 189 This reluctance explains why the eventual notice issued on 23 July 2020 was light-handed – a requirement for Farrah's to provide a report. In contrast the second abatement notice issued on 4 April 2022 required Farrah's to '[c]ease the overnight noise non-compliance' by a specified date.
- 190 Some staff described abatement notices as a 'punishment' rather than a tool to be used for ensuring compliance. One staff member said their belief was that an abatement notice 'sounds very scary' (although they noted that they had recently begun using them more often). However, reserving abatement notices for last resorts, which was the approach taken by Council in this case, imposes a handbrake on Council's effectiveness that in this case was counter-productive. Other councils more readily use abatement notices to good effect when faced with serious or on-going breaches. They can be, and are, a useful tool to require non-complying parties to take action. Yes, they exert pressure but not necessarily in an unreasonable way.
- 191 Some Council staff interviewed indicated that before an abatement notice could be issued they must conduct a balancing exercise - testing whether there was sufficient evidence of a breach and

whether acting was in the public interest - in accordance with the Solicitor-General's Guidelines for Prosecution. This misunderstands both those Guidelines and the abatement notice tool. It is not a prosecution.

- 192 In any case here senior staff appear to have convinced themselves that an abatement notice instructing Farrah's to stop the noise would have led to immediate job losses at the Factory. There is no evidence the Factory owners threatened such a thing and in fact in April 2022 when the (stronger) abatement notice was issued the owners simply complied – no litigation was filed, no workers were laid off.<sup>34</sup>
- 193 It is also clear that Council's own planning staff did advocate for a stronger response to the breaches. This Review does not criticise the decision of senior staff to overrule the recommendation of planning staff; it is always the prerogative of the executive to do so.
- 194 However, the Council's Manual of Delegations gives junior staff, including compliance officers, the authority to issue an abatement notice without sign off from senior staff. Many notices are issued in this way. But in this case, senior staff including the Chief Executive, were involved from an early stage. Again, this is not uncommon in cases such as this, where there is a high level of public interest and / or media coverage. The Best Practice Guidelines acknowledge that councils may have internal controls on the autonomy of enforcement officers.
- 195 But best practice would see more transparency applied so that all staff have clear guidance about what decisions must be referred up and why. This benefits junior and senior staff alike. In this case no Council staff could explain the delegation policy or when and on what basis senior leaders became involved in decision making about the Farrah's complaints. As noted earlier in this Report, those senior leaders were less well informed about the impact the noise breaches were having on residents which could have influenced how they exercised their decision-making powers. A lack of documentation about those factors considered by senior leadership leaves this an open question.
- 196 Further, at the time these decisions were being made all Council staff were working in something of a policy vacuum. There was no enforcement policy, no compliance strategy, and all relevant areas of Council were thinly staffed and juggling heavy workloads. A stronger policy framework and additional resourcing and training would have assisted staff at all levels to apply a more reasoned and reasonable approach to compliance.
- 197 Council could reasonably have issued a stronger abatement notice any time after May 2020 when Farrah's own acoustic report identified clear breaches of the District Plan limits. As time passed, and very little progress was made, Council had the opportunity to review its approach to the issuing of the notice and use the abatement notice tool to apply pressure to the company. Issuing the notice in May 2020 (or any time after) would not have stopped the Council from continuing to work alongside the company, as appropriate. But it may have prompted the Factory owners to move more swiftly, which would have benefited all parties, Farrah's included.

*Did Council appropriately balance the interests of all parties?*

- 198 Council's preferred approach was to work with the local company. It valued having a growing, successful business in the area. It recognised Farrah's was a major employer and, as noted above, Council staff did not want to take any action that would put jobs at risk. One staff member noted, 'you have got quite a significant business' which they had to consider. Another said, 'they are going to be here for a long time and we need to keep those relationships'.

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<sup>34</sup> As they also did after the Council threatened on 3 July 2020 to issue a notice, see discussion at paragraph 122.

- 199 Local councils across the country work hard to partner with the businesses in their districts. Local jobs and the success of local businesses will always be important. In that context, it was entirely reasonable that Council's initial engagement with Farrah's was purposefully cooperative.
- 200 One Council staff member said:
- We were looking to address the issues as they arose – i.e. identify the source and then mitigate that source and in our dealings with Farrah's that was their intent as well, to address those issues.
- 201 However, the problems emanating from the Factory carried over a prolonged period. During this time the company owners were talking to Council, engaging specialists and trying to mitigate the noise. One senior Council staffer described Council as being always hopeful that the company would identify a solution.
- 202 But at the same time, Council was faced with evidence that the Factory owners, for whatever reason, missed deadlines or required extensions to meet deadlines. This occurred across interactions over both the silo and noise issues. Local residents continued to report serious effects as a result of the noise and, as time passed, the nature of the noise was identified as being more detrimental and the number of complaints grew substantially. These factors combined ought to have alerted Council leaders to the need to reset their approach. In particular, the nature of the noise and its propensity to cause more disturbance and harm, ought to have given Council staff reason to reconsider whether more urgent action was required.
- 203 With the benefit of hindsight Council staff now acknowledge they got the balance wrong. But at the time they appear to have convinced themselves that before they could take firmer action they needed to have an evidential basis, in particular about the source of the noise. This is misguided.
- 204 The most obvious example of Council's willingness to involve itself was the decision taken in September 2020 to commission Marshall Day to conduct multiple audio tests. In fact by the time Farrah's had complied with the resource consent conditions Council had commissioned at least four reports from Marshall Day. This is no criticism of the quality of the information gleaned from those reports. But at the time the first report was commissioned there was evidence that the noise at the Factory was tonal and in breach of the District Plan. Council did not need to assume any responsibility to diagnose the problem further.
- 205 It is possible that at the time the first Marshall Day report was commissioned staff may have been influenced by the fact that in the previous month (August 2020) Council received 14 complaints, many more than any month before. By then it would also have been evident to Council staff that the problem was not receding, and the single staff member dealing with the complainants was in the difficult position of having no progress to report to residents.
- 206 However, it was sufficient that the Factory was identified as the source of the noise for Council to take active steps to ensure the owners complied with the District Plan. Identifying which precise machinery or process caused the noise was a matter for Farrah's to pursue and fix.
- 207 As noted earlier in this Report, the MfE's Best Practice Guidelines recommend councils weigh up four key factors when deciding how to manage enforcement. These include legal considerations, the desired outcomes sought (in this case, keeping the Factory operating), and also the impact of the breach. In the many documents reviewed for this Report, there is no record of if or how Council staff engaged in the necessary balancing exercise between the four key factors and / or the interests of all parties.

- 208 Senior staff told us, 'I think we got there in the end', meaning presumably that because Farrah's is now compliant with its resource consents the right balance has been struck. This ignores the fact that harm was caused and affected residents continue to feel aggrieved.
- 209 For example, residents expressed concern that Council always appeared to take Farrah's statements at face value, without verifying them. One resident said 'no one at Council appeared to have applied any critical thought to it and never verified any of the information that was provided'. Another said Council took 'Farrah's at their word' even as the company failed to meet the deadlines set by Council.
- 210 The documents reviewed appear to support this contention. One example: in the second half of 2020 Farrah's had stated that a HVAC silencer needed to be ordered from overseas and that this would take approximately 2-3 weeks to arrive. There is no evidence that this claim was tested by Council. No-one asked whether it was possible to source the part from New Zealand or for verification that it would take so long. It was taken at face value that supply chain issues were responsible for delays and / or inaction.
- 211 Council as regulator, monitor and enforcer needed to maintain independence in this dispute. Staff had a responsibility to consider the impact of the continued breaches on all parties.

*Overall management of complaints / communication*

- 212 All complaints were referred to a single Compliance Officer in the planning team. The residents were advised to direct their complaints to this person, as was noise control. As such, one staff member became the main contact point for both Farrah's and the residents.
- 213 As the number of complaints increased, Council created a system whereby complaints were logged on a central register. Not every complaint was acknowledged or responded to. Instead, Council updated residents when there were substantial developments or where complaints required a response from Council (i.e. they contained questions or something other than a simple complaint about overnight noise).
- 214 The approach also appears to have been to largely separate the complaints from what Council considered to be the main issue – working *with* Farrah's to determine the source of the issue. It does not appear that any steps were taken to identify patterns of complaints nor does it appear that Council considered whether any support or assistance should be offered to residents.
- 215 Over time, residents began to send complaints every time they were impacted by the noise. For some residents this meant that complaints were made every day. Council staff found this level of correspondence overwhelming, and on 4 February 2021, staff advised residents who regularly made complaints to collate their responses into a single weekly email.
- 216 Some residents directed complaints to the Chief Executive, Mayor and Councillors directly. The Medical Officer of Health was also contacted along with various journalists and reporters and the Office of the Ombudsman.
- 217 When interviewed, residents expressed concern about the way their complaints were handled by Council.

We felt like we [were] treated like a problem.. we [were] treated like this is something to minimise or a problem rather than being open minded about fact finding and trying to get a solution and rather treating us like people... it [has been] adversarial rather than inquisitorial.

[at the beginning] there was a real sense that we were alone.

- 218 The correspondence also shows a sense of frustration or misunderstanding by residents as to when their complaints would be acknowledged, responded to or logged in the register. The email correspondence includes comments such as:

[We] have not received even an acknowledgement from you – have you received them and have they been logged?.

While it seems like a waste of time to be continually complaining when it doesn't seem to be having any effect, I am sure that at some point someone will look at the sheer number of complaints ... and will be struck by the scope of the issue.

After yet another night of noise from the Farrah's factory droning through my house, we are mindful that we never received our weekly update from you last Friday.

I have regularly stated I am disturbed every single night I am here in our home, however have seen little point in complaining daily/weekly.

- 219 This frustration appears to have been justified. There were long periods when Council was silent and failed to either respond to complaints or provide updates to residents. Council had real challenges; as the complaints grew it was too much for one staff member to manage along with their other duties and often Council had no progress to report. That said, (as the table in Appendix 3 shows) initially Council was receiving only a small number of complaints; in the first 10 months there was only one month with more than 8 complaints. That is a manageable number. But the lack of progress in that first 10 months, and the fact that the noise continued unabated, increased the demand on Council staff. In retrospect it is clear that better management of the complaints in the initial stages may have helped avoid the flood of complaints (and increasing anger and frustration of complainants) experienced in 2021.
- 220 Residents expressed strongly the view that Council's communication was not pro-active enough. It wasn't. At no time did Council mail out any information to the community, or call residents to a meeting, or even set up a Facebook group or some similar screen-based communication tool. The vacuum was filled by motivated residents, who put notices into neighbours' mailboxes and organised meetings and submissions. This 'grass roots' type communication may have occurred in any event, but it was not helpful that this was the only way residents could become informed. It also meant that some affected residents – who were not direct neighbours – were left out of the information loop, which increased their sense of confusion and distress about the noise.
- 221 Challenged about this, some Council staff said a public meeting or any face to face contact with residents would not have been 'safe' for staff. Feelings were running high, some residents would have been angry, they said. By 2021, when the noise had been interrupting their sleep for a year or more, it is possible that some residents were angry and even volatile. But Council could and should have done more to set up good communications channels well before residents became so sleep deprived and frustrated. It is worth noting that two Council staff who had most to do with the affected residents did not feel threatened by them and, without exception, residents spoke highly of these staffers and their integrity. The failure of senior Council staff to recognise and develop a more coordinated and pro-active community outreach to this community represents a lost opportunity that could have made a substantial difference.
- 222 For example, a meeting with residents would have provided Council with an opportunity to explain how it intended to deal with the noise issues and, in turn:
- a allowed residents to properly voice their concerns and the impact this was having on their well-being;
  - b allowed Council staff to more fully understand these concerns and impacts;

- c enabled the residents to connect with one another without having to resort to newsletter drops or similar; and
- d allowed those residents who had not identified the source of the noise (see discussion at paragraphs 74 and 75 above) to understand, much earlier on, where the noise was coming from. This is significant, as the impact on this sub-set of residents was particularly severe since they resorted to thinking they were 'going mad' until they realised the noise was real.

223 Where, as here, a community issue is on-going and contentious, Council should use technology to establish an easy-access information portal where residents can ask questions and Council staff can provide updates and links to useful information. These communications tools ensure everyone is equally informed and can assist in maintaining trust, provided the information posted is accurate and timely.

### The Community Liaison Group

- 224 One of the conditions of the resource consent was the establishment of the Community Liaison Group, intended to provide direct communication between residents and Farrah's to address any ongoing noise issues. The group, made up of two Farrah's representatives and up to five residents, first met on 2 March 2022. Meetings were initially held every six weeks until the Factory was compliant with the District Plan noise limits, after which they were held quarterly for 12 months, and then six monthly thereafter.
- 225 Council does not appear to have taken an active part in this Group. Farrah's is responsible for coordinating the Group and arranges all meetings.
- 226 However, the Community Liaison Group appears to have been ineffective. Emails between residents and the Council since the Group was established show residents continue to struggle to have their concerns taken seriously by Farrah's. The following is just a sample of the email messages:

Despite numerous complaints we have not had even an acknowledgment by Farrah's of a single one of our emails this month. The only communication we have had from Farrah's since the Community Liaison Group meeting was to tell us that they would be withholding the recording made of that meeting.

Can we please get an update? And what has happened to the Community Liaison Group meetings? I haven't seen any minutes from the last one held, and there has been no indication of when the next one is.

Your neighbours are watching closely to ascertain if this Community Liaison Group will be a turning point in your relationship with them or merely a means of ticking a box for resource consent. The initial signs are not promising.

- 227 One resident when interviewed described the Community Liaison Group as 'a complete farce'. Another described it as 'lip service'. On the other hand Farrah's considers they have become the target of on-going hostility from some residents, which no amount of engagement will ameliorate. They cite as an example one resident complaining to Council about their ground-staff using a leaf blower to clear the drive. The Review saw letters sent to Farrah's, written anonymously, that are threatening and appear designed to intimidate.
- 228 However well-intentioned the notion of the Community Liaison Group may have been, establishing a vehicle such as this in a community where parties are deeply divided over a substantive issue, requires expert and independent facilitation. In the absence of that it is not surprising that the Group has failed to deliver as intended.

- 229 It is evident that the Factory owners and residents continue to speak at cross purposes. For example, at the first meeting of the Community Liaison Group Farrah's prepared a powerpoint presentation.<sup>35</sup> The presentation set out the cost of various mitigation methods Farrah's had put in place at the Factory. At that time (2 March 2022) the total cost was quoted to be \$372,000. This was important information for Farrah's which the owners believed demonstrated their commitment to sort out the noise issues. Residents, on the other hand, interpreted this as the company being only concerned with its own business.
- 230 Email correspondence up to late 2022 further indicates that the relationship between the parties remains tense. There are ongoing issues chronicled in emails (beyond the substantive concerns about HVAC and ceiling fan noise) such as the noise from rubbish trucks and staff coming and going from the site. That such minor issues have also become irritants simply speaks to the breakdown in community relations that is the after-effect of the silo and noise complaints.
- 231 Farrah's has an ongoing duty under section 16 of the RMA to adopt the best practicable option to avoid unreasonable noise (above its continuing obligations to meet the conditions of its resource consent), and Council has an ongoing obligation as regulator in this regard. All parties need an effective communication mechanism to ensure that residents can raise concerns about noise with both Farrah's and Council.
- 232 The Community Liaison Group is not the right vehicle for this. It is not working as intended, because it is not improving communications between residents and the company. Farrah's is required to keep the Group going, but it was evident that neither party considers the exercise to be fruitful.

### Community impact

- 233 The issues at Farrah's have clearly had a profound impact on the affected residents who live nearby.
- 234 Beyond the impact of the noise, residents also spoke about the impact that pursuing the matter has had on their wellbeing, mental and physical. A number of residents have spent many hours, over many months trying to get the Factory to operate within the District Plan rules.
- 235 It was also apparent in interviews that the matter has impacted Council staff. Some cried as they recalled the effect their involvement in the dispute has had on them personally. One Council staff member spoke of visiting the area at night, in their out of work time, to investigate the noise and visiting residents in their homes.
- 236 It is also evident that there has been an impact on Farrah's, particularly on the Factory owners.
- 237 Just as the delay in resolving the matter impacted residents' trust and confidence in Council, the delays have negatively impacted Farrah's. At the start, the residents engaged with both Farrah's and Council in a polite and collegial fashion. However, as time has gone on, attitudes have hardened.
- 238 The prolonged continuation of the noise disturbance, coupled with the way in which Farrah's has engaged with the community (or failed to engage with the community) has led to increased levels of frustration. The Review finds that Farrah's had been the target of 'hate mail', both in physical form and online. The tone and nature of some of the targeting Farrah's received is unacceptable, but it is reflective of the very real frustration and distress some residents were feeling and Farrah's failure to acknowledge that.
- 239 Every business is entitled to run its affairs as it sees fit, within the law. The issue for Farrah's was that it was breaching the law (or the District Plan). The way it subsequently managed those breaches and the remedying of those breaches meant from the outset the company chose not to engage positively with residents, or acknowledge the harm and distress the noise (in particular) was causing

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<sup>35</sup> Dated 2 March 2023.

them. Instead, Farrah's has communicated exclusively with Council. A more constructive approach may have been better for everyone, including the company owners. This is not a view they share.

### Summary of findings

The noise issue was (and to an extent still is) a substantial, complex and difficult issue to resolve. The Review finds:

- The noise emanating from the Factory meant Farrah's was non-compliant with the District Plan noise rules for more than two years. The Factory owners had an obligation to ensure that their business activities complied with the District Plan, and they did not meet that obligation for a substantial period.
- Council's initial delay in conducting noise monitoring was justified due to restrictions associated with the COVID-19 lockdown, but post May 2020 it could have taken steps to speed up Farrah's compliance with the District Plan.
- Senior Council staff took an overly restrictive interpretation of the role and nature of abatement notices, and also failed to keep themselves adequately briefed as to the full impact of the breaches on residents. More junior staff, who had more direct contact with affected residents, wanted Farrah's dealt with more firmly but were over-ruled.
- Council lacked an enforcement policy and compliance strategy. As part of this, it lacked a proper system and process for documenting the enforcement decisions.
- Council failed to develop an effective communication plan with residents. This was in part due to a lack of resources, but principally because Council failed to recognise the key role communication could play in maintaining confidence in Council processes. Council failed to take active steps to ensure all affected residents were equally and fully informed.
- Council's decision to work closely with Farrah's to identify the causes of the noise and try to mitigate them left staff open to criticism that they favoured the company owners' interests over any concerns raised by residents. Council's decision to commission acoustic specialists Marshall Day to conduct up to five reports to identify the source of the noise was an example of Council going beyond what is required of a fair and independent regulator and enforcer. The noise problem was Farrah's to fix but senior Council staff appear to have been under the misapprehension that they needed to gather more evidence. This caused further delays to resolving the issue and allowed Farrah's more time to operate in breach of the District Plan.
- Council failed to give adequate regard to the special characteristics of the noise. From May 2020 Council knew the noise was tonal, meaning it was likely to have a more detrimental impact on the well-being of residents. This information required Council staff to reset their approach.
- The final outcome, whereby Farrah's obtained a resource consent allowing the Factory to breach noise limits for a limited time while mitigation steps were installed, is entirely orthodox. But the time it took for Farrah's to be coaxed through the application process and to comply took too long.
- The Community Liaison Group, a requirement of the resource consent designed to provide a bridge for communication between Farrah's and residents is not working as intended.



## Part 5: Information Complaints

- 240 The Local Government Official Information and Meetings Act 1987 (**LGOIMA**) provides individuals and organisations with the ability to request any information held by local authorities such as the Council.
- 241 LGOIMA is important. When a Council gets it right, it can help to foster genuine trust and confidence about council decision-making and processes. Giving LGOIMA prominence and priority (even when a council gets a relatively small number of requests, as is the case here) promotes a culture of openness and transparency within the organisation and champions positive engagement with requesters and other stakeholders.
- 242 The LGOIMA is underpinned by the principle of availability – that is, that information is to be made available unless there is good reason for withholding it. Where a request is made under LGOIMA, Councils have 20 working days to scope the request, locate the relevant information and consider whether information can be withheld or the request refused.
- 243 The Public Records Act 2005 sits alongside LGOIMA and establishes a regulatory framework for records management for public sector agencies.
- 244 Some residents used LGOIMA (and the Privacy Act, to request personal information) as a tool throughout the relevant time period. The Terms of Reference for this Review asked it to consider whether the Council's requests were in accordance with best practice.
- 245 From the email correspondence reviewed, it was apparent that residents were concerned about how Council responded to their LGOIMA requests. Some residents escalated these concerns by complaining to the Ombudsman, with two complaints against Council being upheld. In one case, the Council had withheld information it was not entitled to under LGOIMA and in another, the Ombudsman found:<sup>36</sup>
- I have formed the final opinion that Council's response to the request was unreasonable. The Council has acknowledged that it did not provide the information within scope initially and has now taken a number of steps to ensure that all information within scope has been identified.
- 246 This Review did not consider it needed to look beyond the findings of the Ombudsman. Council's LGOIMA responses to the Farrah's related information requests demonstrated an inadequate understanding of the legislation and how to apply it.
- 247 Council receives a relatively small number of LGOIMA requests, approximately 10 per month. That said, some requests can be complex and responding to them within the time allowed requires a good knowledge of the Act, judgment and cooperation from other staff who may hold the documents relevant to the request. In respect of the Farrah's issues Council received approximately 10 requests.
- 248 The Review finds that:
- a The team managing LGOIMA requests was at the time, and still is, under-resourced. There is one staff member that works on LGOIMA requests part-time. Council would benefit from allocating additional resourcing in this area to ensure that requests are properly identified, acknowledged and responded to.
  - b At the time the first LGOIMA requests about Farrah's were received, LGOIMA staff were operating on short term contracts with relatively high turnover.

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<sup>36</sup> Final Opinion dated 22 November 2021.

- c The current process allows each business unit within Council to process and sign out LGOIMA requests related to their unit (eg. Strategy, Partnerships and Growth; Finance, Risk, and Digital Solutions; Asset Management and Operations). Yet staff receive no LGOIMA training and there are no policies and procedures beyond a short process flow diagram. Training and policies and procedures will help to ensure that all staff understand their obligations under LGOIMA and the Privacy Act. It will in turn ensure that requests are handled in accordance with the legislation and consistently across the organisation.
- d Council faces administrative challenges due to the lack of proper procedures in place for handling LGOIMA requests. This means it can be difficult to ascertain what has been released under previous LGOIMA requests. There is also no procedure in place for 'back up' staff to pick up LGOIMA work if the current staff member is unable to work. As above, policies and procedures will ensure that requests are handled appropriately and consistently.
- e Under-resourcing, coupled with a lack of training and policies and procedures means that Council has no formal (or informal) resilience plan for LGOIMA. Having a single LGOIMA officer means the Council's capability is vulnerable. Additional resourcing, clear policies and training for all staff will help to resolve this vulnerability.
- f The current process is not centralised, since each business unit takes responsibility for processing requests. This approach makes it difficult for the Council to maintain a consistent approach to LGOIMA requests and further it reduces the likelihood that staff processing the requests will have the necessary technical expertise. Centralising responsibility for LGOIMA within the legal team would help to address both of these issues.

### Summary of findings

Council's responses to LGOIMA requests about the Farrah's Factory are reflective of the challenges and circumstances listed above. The responses that residents received contributed to their lack of trust and confidence in Council, and improving Council's LGOIMA function will assist it to improve this going forward.

- Council acknowledges and has accepted that its LGOIMA practices needed improvement
- LGOIMA was, and still is, under-resourced and requires centralisation and other changes to ensure there is the necessary resilience required for this important function
- Council requires a LGOIMA policy and training for all staff
- All LGOIMA responses should be formally approved and signed out by a LGOIMA officer (with oversight / supervision from the Council's in-house legal team) to ensure consistency with the Act across all parts of the Council business

## Part 6: Moving forward

- 249 The Terms of Reference for this Review ask for consideration of what lessons can be learned to assist the Council in future. Opportunities for improvement are identified throughout this Report, and in addition, set out below are a number of Recommendations.
- 250 The Farrah's issues were in many ways (though not all) bread and butter issues for any city council. A local business operating close to residential properties causes the local residents some disturbance and Council is called upon to referee and, if the business is breaching the legal limits, to make sure it complies.
- 251 To help Council staff navigate this kind of scenario the following should be considered:
- a Ensuring policies and procedures are fit for purpose. In particular:
    - i Introduce a LGOIMA policy and training for all staff on LGOIMA, and consider the structure of the LGOIMA team to ensure Council's in-house legal team has oversight over the LGOIMA function.
    - ii Consider additional resourcing in the key areas of LGOIMA, planning and environmental health. Resourcing is a particular challenge for Council given its low ratepayer base but 'Tier 1' status. The Review recommends it give careful and active consideration to ensuring that is able to adequately perform key functions. If permanent additional resourcing is simply not possible, Council should implement a checks and balance system to ensure that when a complex matter arises additional temporary resources can be appropriately allocated.
    - iii Make changes / clarifications to the current Enforcement Policy to both set out what steps can be taken and who is authorised to take them. For example:
      - A There is a list of factors to consider when making enforcement decisions (see page 6), but no clear description of when these apply as part of a process. The factors listed are all very compliance focussed (i.e. seriousness of breach, conduct of the offender, likelihood of reoffending etc). These could be broadened to correspond to the four factors listed in the MfE Guidelines. For example, the 'desired outcomes' (e.g. keeping the factory open) are a legitimate consideration (and were clearly an important consideration for council staff in the Farrah's case, even if this was not formalised), but do not easily fit under the factors listed in the Enforcement Policy (which raises the risk that the Policy is not followed).
      - B On the section 'responsibilities for enforcement action' (see page 7):
        - There is a reference to a Council Investigating Officer who will take a number of basic actions (like investigating). This role is not defined in the RMA which instead refers to an enforcement officer. Also the Delegations Manual does not include such terminology (despite the Enforcement Policy stating that it does). These documents need to be aligned to avoid confusion.
        - There are references to 'more serious enforcement options' that require Manager approval. It is unclear what these are (but potentially an abatement notice to cease operating would be in this category); it is unclear who in Management is intended to make decisions in this regard.
        - The section "Prosecution – our approach" (see page 8) talks about the Prosecution guidelines, but not who within Council can make the decisions required leading up to a prosecution and the process for it.

- The tail end of the process is described on page 9 (Responsibilities for Prosecution Action) - legal review must be sought, and an ultimate decision on prosecution rests with the CE/Director. However, there are some steps that precede this: after the investigation, but before legal review, someone needs to decide that this case should be put forward for prosecution. That component of the process should be clearly explained.
- C Consider formalising and recording the decision making process regarding the enforcement action(s) to be taken. In this regard the MfE Guidelines note that “while experienced officers just ‘know’ when action needs to be taken, this knowledge still needs to be verbalised and committed to paper” – and goes on to provide a template for enforcement recommendations to be made to an enforcement decision group.<sup>37</sup>
- D The policy gives the Chief Executive discretion on the decision to prosecute. Given the possibility of conflicts of interest, it may be prudent for Council to have an enforcement decision group where more than one person can make this decision. This will ensure that the public have more confidence in the decision.
- iv Introduce a Compliance Strategy (see paragraph 170a above).
- v Incorporate MfE’s Best Practice Principles into the training and induction programmes for all planning and compliance staff.
- b Review Council communications plans to ensure that staff are able to roll-out pro-active and clear communications initiatives targeted at a specific issue or community. (Council may already publish targeted communications in the course of its ‘business as usual’ but the Review did not look into this since it was beyond the scope of the Terms of Reference.)

252 The Farrah’s case also included added complications, including the special nature of the noise, the duration of the problem and the difficulties the company had in identifying a ‘fix’. To address the fall-out from all of this the following is recommended:

- a All residents who complained about the Factory should be provided with a copy of this Report, as should the Factory owners.
- b Council should make a formal apology, to those residents who made a complaint, for the time taken to resolve the matter, and for the way in which it communicated with them.
- c Council should approach each resident individually to ascertain whether they would prefer an apology in writing or in person.
- d In addition, a public apology, on Council’s website or in the local newspaper, is appropriate due to the number of residents that were impacted by the delay in progressing and resolving the noise non-compliance and the possibility that there are further residents who have not complained, but who were also impacted.
- e The Community Liaison Group is a requirement of the resource consent. Council is not responsible for this Group, but it is not doing what was intended, which is acting as a constructive communication bridge between Farrah’s and local residents. This has consequences for all parties, including Council. Council should consider either varying the consent, taking a more active role in the Group or establishing an alternative communications forum in which residents can ask questions and receive updates or relevant information. Some residents continue to report noise disturbance and relationships between the parties are heavily

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<sup>37</sup> MfE Guidelines at p 76-77.

scarred and distrusting. Council might think of this additional outreach as a type of insurance policy in the event of further disagreement between locals and the factory owners.

- f For the small number of residents still heavily impacted (interviews indicate fewer than five residents may be in this category) Council should consider targeted mitigation. These residents are still experiencing the effects of noise from the Factory, even after Farrah's has been deemed to be compliant with the District Plan. In correspondence with the Medical Officer of Health, he has indicated to Council that these residents have become 'over-sensitised' to the noise issue, such that they cannot 'unhear' it, despite the substantial effort that has gone in to mitigating the volume. This small group of residents should be offered further help in the form of a contribution towards de-sensitization training or some other service to be determined by agreement between the resident and Council.

## Appendix 1: Noise Reports

Date of report	Tester	Date and location of testing	Results
	Council	6 May 2020 evening Field Street	41 dBA L10
		6 May 2020 evening Dunns Street	38 dBA L10
	Council	13 May 2020 evening Field Street	36.4 dBA L10
		13 May 2020 evening Dunns Street	26.9 dBA L10
		13 May 2020 evening Kurth Crescent	41.1 dBA L10
	Council	22 May 2020	Visited site and determined two noise sources: trust extractor fans and HVAC Pump system. HVAC determine to be the likely source.
	Council	27 May 2020 overnight Kurth Crescent	48 dBA L10
13 August 2020	Acousafe	30 July 2020 Kurth Crescent	Morning (flour delivery tanker visit): 71 dBA L10 Evening: 49–51 dB L10
27 October 2020	Marshall Day	17–22 September 2020 Dunns Street	Factory operating: 32–44 dBA L10 Factory not operating: 31–42 dBA L10
		17–22 September 2020 Field Street	Factory operating: 39–47 dBA L10 Factory not operating: 34–44 dBA L10
		17–22 September 2020 Kurth Crescent	Factory operating: 44–49 dBA L10 Factory not operating: 44–46 dBA L10
		17–22 September 2020 Kiln Street	Factory operating: 36–45 dBA L10
		17–22 September 2020 Sylvan Way	Factory operating: 36–44 dBA L10
		17–22 September 2020	Factory operating: 37–46 dBA L10

Date of report	Tester	Date and location of testing	Results
		Kurth Cres	
19 February 2021	Acousafe	22 January 2021 evening Southern boundary of site on Dunns Road close to the entry of the bowling club	L52 oven fan is the source of the tone at the bakery
11 June 2021	Marshall Day	20–28 April 2021 Dunns St	Daytime: <30–50 dBA L10 Daytime silo filling: 46–50 dBA L10 Nighttime: <30–44 dBA L10
		20–28 April 2021 Field Street	Daytime: 37–52 dBA L10 Daytime silo filling: 48–50 dBA L10 Nighttime: 30–46 dBA L10
		15 May 2021 Field Street	Operational: 41–42 dBA L10 Closed-down: 41–42 dBA L10
		20–28 April 2021 Field Street	Daytime: 34–48 dBA L10 Daytime silo filling: 45–47 dBA L10 Nighttime: <30–43 dBA L10
		20–28 April 2021 Kurth Crescent	Daytime: 42–50 dBA L10 Daytime silo filling: 61–67 dBA L10 Nighttime: 40–47 dBA L10
			Weekday day: 44–50 dBA L10 Weekend day: 42–54 dBA L10 Weekday night: 42–47 dBA L10 Weekend night: 40–46 dBA L10
		15 May 2021 Kurth Crescent	Operational: 40–35 dBA L10 Closed-down: 38–40 dBA L10
		15 May 2021 Kurth Crescent	Operational: 40–42 dBA L10 Closed-down: 38–40 dBA L10

Date of report	Tester	Date and location of testing	Results
		20–28 April 2021 Kurth Crescent	Daytime: 36–49 dBA L10 Daytime silo filling: 57–63 dBA L10 Nighttime: 34–41 dBA L10
		20–28 April 2021 Kurth Crescent	Daytime: 32–45 dBA L10 Daytime silo filling: 43–49 dBA L10 Nighttime: 30–37 dBA L10
		20–28 April 2021 Kurth Crescent	Daytime: <30–32 dBA L10 Daytime silo filling: 43–49 dBA L10 Nighttime: <30–33 dBA L10
		20–28 April 2021 Kurth Crescent	Daytime: <30–35 dBA L10 Daytime silo filling: 43–52 dBA L10 Nighttime: 31–39 dBA L10
3 November 2021	Marshall Day	26 October 2021 evening Field Street	43–47 db LA10
		26 October 2021 Kurth Crescent	43 db LA10



## Appendix 2: Farrah’s deadlines

Topic	Original Deadline And Any Additional Deadlines	Date Farrah’s Complied With Deadline	Number Of Days Past Deadline
Noise complaints	Informal request to Farrah’s from Council to mitigate noise following initial complaints. No deadline.	<b>26 March 2020.</b> Curtain slider truck parked to buffer noise.	0
Council directed Farrah’s to have temporary noise mitigation ‘by the end of Friday next week’	<b>10 July 2020.</b>	Farrah’s put shipping container in place <b>9 July 2020.</b>	0 but measure ineffective (caused reduction of 1dB only).
Following on from shipping container, Council required Farrah’s to have ‘installed further mitigation’ within 7 days.	<b>22 July 2020.</b>	Council’s planner responded – asked to see noise recording. Farrah’s undertook further testing on 30 July 2020. No further measures put in place.	Deadline not met.
23 July 2020 Abatement notice  Required Farrah’s to produce and submit to Council an acoustic report outlining all noise activities and including permanent mitigation measures.	<b>13 August 2020.</b>	Farrah’s engaged Acousafe Consulting & Engineering Ltd to prepare noise assessment report, delivered on <b>13 August 2020.</b>	0 but report did not meet all aspects of abatement notice.
April 2021 – September 2021  Resource consent application	<b>30 March 2021:</b> Further information was sought by the Council on 16 March 2021. Farrah’s needed to respond within 15 working days per section 92A of Resource Management Act 1991, being 30 March 2021.  <b>August 2021:</b> Farrah’s requests a delay to the resource consent process so that they can devise a plan for noise mitigation.  <b>September 2021:</b> Farrah’s request a further delay to the	<b>9 April 2021:</b> Council received amended resource consent application.  Late September – early October:  <b>27 September 2021:</b> Silo dimensions and design plans.  <b>5 October 2021:</b> Revised landscaping plans.	Extensions provided to Farrah’s to allow them to meet deadlines for requests for information.

Topic	Original Deadline And Any Additional Deadlines	Date Farrah's Complied With Deadline	Number Of Days Past Deadline
	<p>resource consent process after failing to meet August deadline.</p>	<p><b>8 October 2021:</b> Visual assessment of the proposed silo(s).  Details of proposed noise mitigation measures (no specific date given).</p>	
<p>7 December 2021  Resource consent application decision</p>	<p><b>15 December 2021:</b> Farrah's to supply a Noise Mitigation report to Council's Compliance Officer for certification confirming the source of the noise identified in the Marshall Day memo.</p> <p><b>16 December 2021:</b> (10 working days from commencement of consent) Farrah's to implement interim noise mitigation to addresses on Kurth Crescent until such time as flour silo filing equipment is installed and complies with daytime noise limits.</p> <p><b>16 December 2021:</b> (10 working days from commencement of consent) Farrah's to install a surface treatment to the silo to reduce glare.</p> <p><b>20 December 2021:</b> temporary noise mitigation measures to be in place.</p> <p><b>21 December 2021:</b> (15 working days from commencement of consent) final Noise Management Plan must be submitted to Council.</p> <p><b>31 January 2022:</b> permanent HVAC noise mitigation measures must be installed. Photographic evidence to be submitted to Council no later than <b>4 February 2022</b>.</p> <p><b>15 February 2022:</b> permanent noise mitigation measures to be</p>	<p><b>August 2022:</b> Farrah's deemed to have achieved full compliance.</p> <p><b>Dec 2021:</b> source of noise confirmed to be ceiling fans. Fans reprogrammed to prevent them running at maximum speed between 7pm and 7am.</p> <p><b>4 Feb 2022:</b> Noise Management Plan submitted</p> <p><b>March 2022:</b> silo filling noise deemed to be compliant.</p> <p><b>May 2022:</b> HVAC noise deemed to be compliant.</p>	<p>4 / 5 months past deadline for full compliance.</p> <p>3 months past deadline for HVAC noise.</p> <p>3 months past deadline for silo filling noise.</p> <p>2 months past deadline for Noise Management Plan to be submitted.</p> <p>No delay for ceiling fan noise, but still operating overnight (just not at maximum speed).</p>

Topic	Original Deadline And Any Additional Deadlines	Date Farrah's Complied With Deadline	Number Of Days Past Deadline
	<p>implemented to ensure compliance with the District Plan.</p> <p><b>1 April 2022:</b> any remaining noise emission of the factory must comply with District Plan noise limits.</p> <p><b>April 2022:</b> second abatement notice issued requiring full compliance by 14 April as Farrah's still not compliant.</p>		

### Appendix 3: Table of complaints (up to granting of resource consent)

Noise complaints	
Complainant	Number of complaints
Property A	157
Property B	130
Property C	33
Property D	18
Property E	10
Property F	9
Property G	9
Property H	9
Property I	7
Property J	7
Property K	6
Property L	4
Property M	2
Property N	2
Property O	2
Property P	2
Property Q	1
Property R	1
Property S	1
Property T	1
Property U	1
Property V	1
Property W	1
Property X	1

Noise complaints	
Complainant	Number of complaints
Property Y	1
Property Z	1
<b>Total</b>	<b>417</b>

Noise complaints per month	
Month	Number of complaints
March 2020	1
April 2020	8
May 2020	6
June 2020	5
July 2020	4
August 2020	14
September 2020	6
October 2020	3
November 2020	3
December 2020	3
January 2021	17
February 2021	68
March 2021	62
April 2021	24
May 2021	11
June 2021	9
July 2021	18
August 2021	40
September 2021	40

Noise complaints per month	
Month	Number of complaints
October 2021	42
November 2021	21
December 2021	12
<b>Total</b>	<b>417</b>

Silo complaints (visual)	
Complainant	Number of complaints
Property A	3
Property B	3
Property C	2
Property D	2
Property E	2
Property F	1
Property G	1
Property H	1
Property I	1
<b>Total</b>	<b>16</b>

## Appendix 4: Terms of Reference

### Independent review of the Upper Hutt City Council's management of noise complaints relating to Farrah Bread Limited operations at 57 Kiln St, Silverstream

#### Background

- 1 Farrah Bread Limited (**Farrah's**) operates a commercial bakery in a large industrial building on land zoned General Industrial under the Upper Hutt District Plan (2004). There are no restrictions or notations registered in the District Plan that affect the site.
- 2 The neighbouring properties are zoned Residential or Open Space.
- 3 From November 2019 the Upper Hutt City Council (**Council**) received a number of complaints from local residents about first the erection of a silo on the bakery site and then about noise emanating from the site.
- 4 The noise complaints were investigated by Council staff in May 2020.
- 5 Throughout the rest of 2020 noise assessment reports were commissioned separately by Farrah's and the Council.
- 6 On 4 December 2020 Farrah's applied for resource consent seeking retrospective approval of the existing flour silo and for the construction of an additional silo and also for consent to exceed District Plan noise standards. An amended application was subsequently filed on 21 June 2021.
- 7 Residents complained to the Office of the Ombudsman about the Council's failure to issue an abatement notice to Farrah's to cease operating overnight and about the Council's failure to address the construction of a flour silo on site. Residents also complained to the Ombudsman about the Council's decision to redact information when responding to requests made under the Local Government Official Information and Meetings Act 1987 (**LGOIMA**).
- 8 A Hearing Commissioner appointed by the Council pursuant to section 34A of the Resource Management Act 1991 granted the retrospective resource consents on 7 December 2021, subject to specific conditions.
- 9 It is accepted that the Farrah's operation was non-compliant with the District Plan noise standards for approximately 18 months.
- 10 On 21 September 2022 the Council approved a resolution to conduct an independent review of the Council's handling of the Farrah's noise issue.

#### Reviewer

- 11 The Council has appointed Dentons Kensington Swan partner Linda Clark (**Reviewer**) to undertake the review, based on the recommendation of the Independent Member of the Risk and Audit Committee.
- 12 The contract manager at Upper Hutt City Council is the Chief Legal Counsel.
- 13 During the course of the Review, the Reviewer will provide regular progress reports to the Chief Legal Counsel, the Chair and the Independent Member on the Risk and Audit Committee. Any issues relating to access to information or availability of interested parties to this Review will be initially raised with the Chief Legal Counsel and subsequently escalated to the Independent Member, if required.

## Purpose

- 14 The purpose of this Review is to review the way the Council responded to and managed the issues raised about the Farrah's site from November 2019 and to comment on what, if any, lessons can be learned to assist the Council in future.

## Scope of the Review

- 15 The Review is to focus on the actions, or omissions, of Council processes and procedures. In particular, it will review:
- a How the Council responded to and managed complaints relating to Farrah's from November 2019 up to and until the granting of the consents in December 2021 and to the date of the start of the review, 31 October 2022;
  - b Whether the Council's response has been in accordance with best practice;
  - c How the Council fulfilled its obligations as a regulator in regard to the management of the resource consent process;
  - d Whether the Council's regulatory approach has been in accordance with best practice;
  - e How the Council responded to and managed LGOIMA requests relating to the issues being raised about the Farrah's site;
  - f Whether the Council's response has been in accordance with best practice;
  - g How the Council communicated with local residents concerned about the Farrah's site; and
  - h Whether the Council's communication has been in accordance with best practice.
- 16 The Review is expected to provide recommendations about how the Council might conduct itself in future, which may include recommendations to introduce processes and procedures or amend, stop or affirm current processes and procedures. This may acknowledge that some Council processes and procedures have already amended over the time period in question.
- 17 The scope of the review will consider the role of both Council Administration and Governance.
- 18 The Review will consider whether any factors associated with culture, capacity and capability of the Council impacted on the application of best practice in order to clarify the opportunities for future improvement.
- 19 For the avoidance of doubt, this is not a review of the consents granted. The Reviewer will make no findings about how the consents are being currently complied with, but will consider the scope elements outlined in 15 above in regard to Council's role regarding any current engagement.

## Matters for the Review to consider

- 20 The Reviewer will carry out this Review by:
- a Completing a desk top review of all relevant documents setting out how the Council received, managed and responded to complaints about the Farrah's site from November 2019 to the date the review was initiated. This will include:
    - i correspondence between residents and the Council;
    - ii correspondence between Farrah's and the Council;



- iii minutes or notes taken at meetings held between residents and Council staff and/or between Farrah's and Council staff;
  - iv minutes and notes that were taken by the Hearing Commissioner;
  - v decisions by Hearing Commissioner, the Auditor-General and the Ombudsman;
  - vi the applications for resource consent;
  - vii any internal communications and/or discussion between Council staff and/or with elected councillors about the applications; and
  - viii submissions for or against the applications for resource consent.
- b Completing a review of Council policies and procedure guidelines, for administration and governance relating to:
- i resource consent applications;
  - ii noise complaints;
  - iii LGOIMA requests; and
  - iv stakeholder communications.
- c Completing a review of what would be considered best practice in the circumstances, taking into account guidance from the Office of the Ombudsman, the Auditor-General and case law, and where appropriate referencing government agency guidance (eg; Ministry for the Environment), LGNZ or other Local Authorities.
- 21 Conducting interviews with interested parties. This should include:
- i [Resident A];
  - ii other interested residents<sup>38</sup>;
  - iii representative/s from Farrah's;
  - iv current and if appropriate, previous Council Officials<sup>39</sup>; and
  - v anyone else the Reviewer considers would assist her inquiry.

### Delivery of a report

- 22 The Reviewer is to prepare a written report to be presented to the Risk and Audit Committee no later than February 2023. The exact date of delivery will be determined by agreement between the Reviewer and the Chair of the Risk and Audit Committee.

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<sup>38</sup> This should be offered to all residents who have either made complaints or engaged in the hearing review ie: not limited to notified residents.

<sup>39</sup> This will include the Mayor, Chief Executive, Chief Legal Counsel, Director – Policy, Director for Strategy, Partnerships and Growth, Resource Consents and Compliance Manager, Current (and also ideally Previous Director Planning and Regulatory Services) and the Local Government Official Information Act team; unless otherwise agreed with the Independent Member on the Risk and Audit Committee.