

WSL



IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of appeals under clause 14 of Schedule 1 of the Act

BETWEEN

VIADUCT HARBOUR HOLDINGS LIMITED

(ENV-2009-AKL-000065)

AND

MANSONS (TCLM) LIMITED

(ENV-2009-AKL-000076)

Appellants

AND

AUCKLAND COUNCIL
(formerly AUCKLAND CITY COUNCIL)

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge Newhook sitting alone under section 279 of the Act

IN CHAMBERS at Auckland

CONSENT ORDER

Introduction

[1] This consent order relates to the following topics:

[a] Topic 2009-304-000322 *Comprehensive Area Structure Plan – Quarter Area 3*; and

[b] Topic 2009-304-000362 *Quarter Plan E – Marine Activity*.

[2] VHHL is the only appellant involved in Topic 2009-304-000322 *Comprehensive Area Structure Plan – Quarter Area 3*. This topic is resolved by this order.



[3] VHHL and Mansons TCLM are the appellants involved in topic 2009-304-000362 *Quarter Plan E – Marine Activity*. The interests of VHHL and Mansons TCLM Limited in this topic are otherwise withdrawn.

[4] The Court has read and considered the notice of appeal, and the memorandum of the parties dated 23 March 2011 in relation to these topics.

[5] The following persons have given notice of an intention to become a party to the above appeal under section 274 of the Act, and have signed the memorandum of the parties setting out the relief sought:

[a] Auckland Council (formerly Auckland Regional Council)

[b] Australasian Solvents and Chemical Company P/L;

[c] Infratil Infrastructure Property Limited;

[d] Marstel Terminals Limited;

[e] New Zealand Transport Agency;

[f] Pier 21 Limited;

[g] Prism Properties Limited;

[h] Sanford Limited;

[i] Sealink Travel Group New Zealand Limited;

[j] Wynyard Bulk Liquid Industry Group;

[k] Tramco Holdings Limited;

[l] Viaduct Harbour Holdings Limited;

[m] Viaduct Harbour Management Limited; and

[n] The National Trading Company of New Zealand.

[6] The Court is making this order under section 279(1)(b) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands for the present purposes that:

[a] All the parties to the proceedings have executed the memorandum requesting this order; and



- [b] All the parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Act, including in particular Part 2.

Order

- [7] Therefore the Court orders, by consent, that the Auckland Council is to amend Plan Modification No. 4 to the Operative District Plan and Plan Modification No. 33 to the Proposed District Plan in the following manner:

- [a] Amend 14.9.4 *Resource Management Strategy* by amending section **Quarter Area 2 (North Gaunt)** as follows:

...

Development within Quarter Area 2 will assist to reduce the potential to draw traffic throughout the Quarter and will facilitate convenient utilisation of bus services operating along Fanshawe Street. Quarter Area 2 (like Quarter Area 1) is in relative proximity to Fanshawe Street and is not adjacent to the coastline. These factors, together with the synergies that can be gained from association with existing commercial activities (Quarter Area 1 and Viaduct Harbour Precinct) and the proposed underground railway station (see Annex 15), means that Quarter Area 2 is well disposed to commercial development. The commercial office floor area allocations reflect this.¹ ~~The~~ Certain sites in the block between Beaumont Street and Daldy Street is are suitable for marine industry and fishing industry activities at ground level and will assist in reinforcing a marine and fishing character in the western side of Wynyard Quarter.

- [b] Insert a new Development Control 14.9.12.13 *Marine and Fishing Activities at Ground Level* as follows:

14.9.12.13 Marine and Fishing Activities at Ground Level

- a) Except as specified in rule b) below, activities at ground level shall be restricted to the extent and in the manner identified on Quarter Plan E.**

¹ The following amendments to this paragraph will be made by draft Consent Order #15 (Office):

~~Development within Quarter Area 2 will assist to reduce the potential to draw traffic throughout the Quarter and will facilitate convenient utilisation of bus services operating along Fanshawe Street. Quarter Area 2 (like Quarter Area 1) is in relative proximity to Fanshawe Street and is not adjacent to the coastline. These factors, together with the synergies that can be gained from association with existing commercial activities (Quarter Area 1 and Viaduct Harbour Precinct) and the proposed underground railway station (see Annex 15), means that Quarter Area 2, accordingly, it is well disposed to commercial development. The commercial office floor area allocations reflect this, with over 50% of the available floor space located within Quarter Area 1 and 2.~~



b) Activities at ground level on a site identified on Quarter Plan E as Transitional Ground Level Activity shall be limited to marine and fishing industry and/or marine and fishing retail until any of the following occurs on that site:

i) The marine and fishing industry and/or marine and fishing retail activity at ground level occurring on the site as at 1 November 2009 has either relocated off-site or ceased operating from the site; or

ii) The lease (including all rights of renewal) for the site existing as at 1 November 2009 which, as at 1 November 2009, is used for marine and fishing industry and/or marine and fishing retail activity at ground level expires; or

iii) The road widening works along the frontage of the site authorised by a designation are constructed.

At the time any one of items i) – iii) above occur on the site, the limitation to marine and fishing industry and/or marine and fishing retail is lifted from that site and those activities listed at clause 14.9.6 may establish at ground level.

Explanation:

The purpose of this control is to provide for marine and fishing industry and marine and fishing retail activity at ground level on specific sites identified on Quarter Plan E. Some flexibility has also been built into the control to allow specific sites identified as Transitional Ground Level Activity to accommodate other activities in the future.

[c] Amend Quarter Plan E in the manner shown on the attached diagram by:

- [i] Deleting the ground level activity restriction on the site to the west of Central Park;
- [ii] Inserting a notation into the key "Transitional Ground Level Activity (see clause 14.9.12.13b)*";
- [iii] Reducing the measured dimension where permanent accommodation is subject to a no-complaint covenant along the Gaunt Street and Pakenham Street frontages in Quarter Area 2, from 40 metres to 28 metres.
- [iv] Reducing the measured dimension for sites in Quarter Area 1 fronting Beaumont Street where activity is limited to marine and fishing industry and marine fishing retail only at ground level along the Gaunt Street frontage, from 57 metres to 40 metres, and



changing the notation to "Transitional Ground Level Activity (see clause 14.9.12.13b)";

[v] Changing the notation for the Sailors Corner site from "Areas where ground level activity is limited to marine + fishing industry and marine and fishing retail only" to "Transitional Ground Level Activity";

[d] Insert the attached template covenant document as a new non-statutory annexure, Annex 16, entitled "Template no complaint covenant".

[8] The Court orders, by consent, that:

[a] Topic 2009-304-000322 *Comprehensive Area Structure Plan – Quarter Area 3* is otherwise dismissed:

[b] In relation to topic 2009-304-000362 *Quarter Plan E – Marine Activity*:

[i] The interests of VHHL and Mansons TCLM Limited are otherwise withdrawn; and

[9] There is no order as to costs in relation to this order.

DATED at Auckland this

16th

day of

June

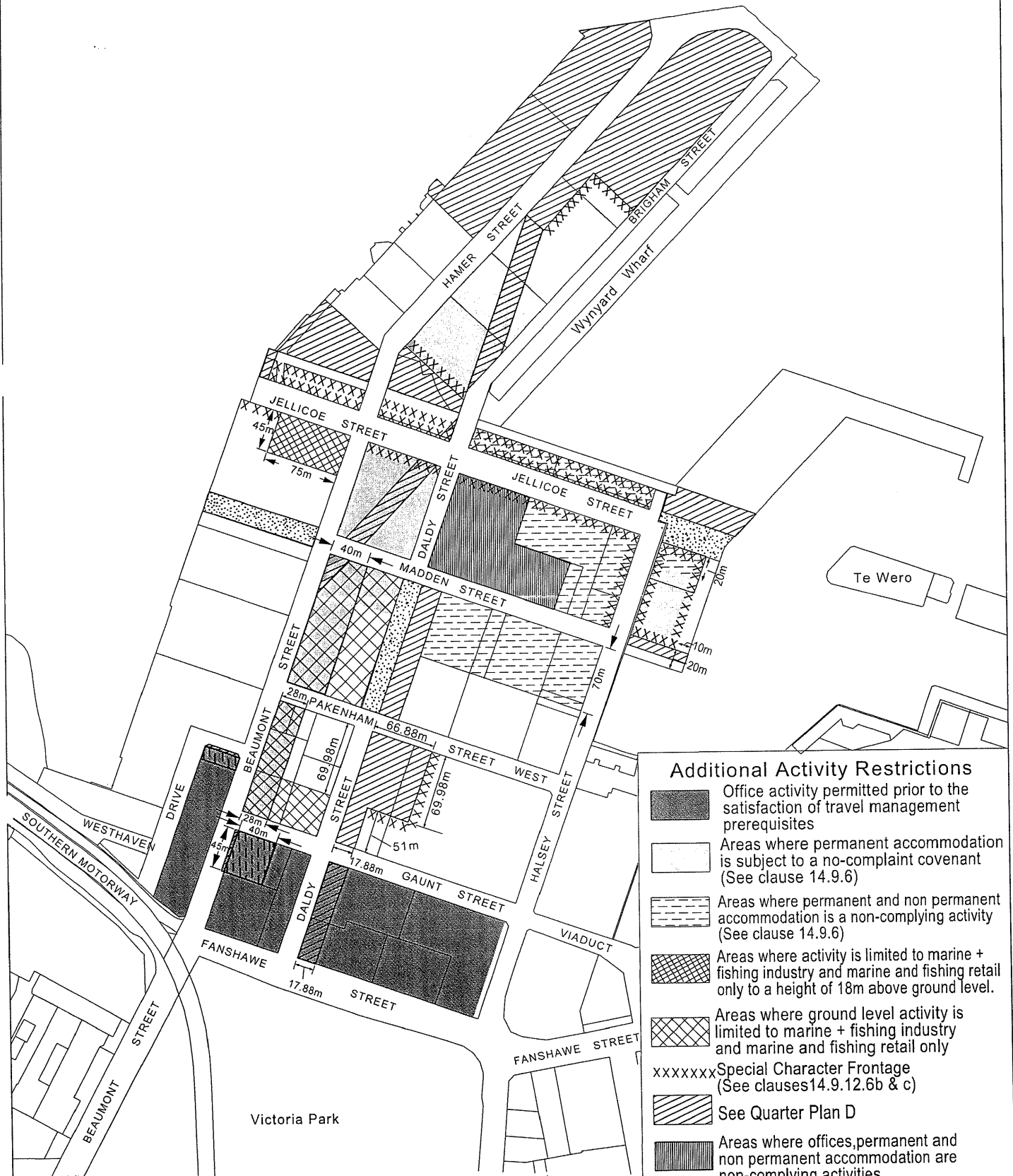
2011













L J Newhook

Environment Judge





Additional Activity Restrictions

-  Office activity permitted prior to the satisfaction of travel management prerequisites
-  Areas where permanent accommodation is subject to a no-complaint covenant (See clause 14.9.6)
-  Areas where permanent and non permanent accommodation is a non-complying activity (See clause 14.9.6)
-  Areas where activity is limited to marine + fishing industry and marine and fishing retail only to a height of 18m above ground level.
-  Areas where ground level activity is limited to marine + fishing industry and marine and fishing retail only
-  Special Character Frontage (See clauses 14.9.12.6b & c)
-  See Quarter Plan D
-  Areas where offices, permanent and non permanent accommodation are non-complying activities
-  Designated Road
-  Transitional Ground Level Activity (see clause 14.9.12.13b) *



DEED OF LAND COVENANT

between

[]

and

[]



Simpson
Grierson



THIS DEED dated the _____ day of _____ []

BETWEEN [] (Covenantor)

AND [] (Beneficiary)

BACKGROUND

- A. The Covenantor is registered as proprietor of an estate in [] in the land more particularly described in the First Schedule (**First Land**).
- B. The Beneficiary is registered as proprietor of, or is entitled to occupy and use the land more particularly described in the Second Schedule (**Second Land**).
- C. The Beneficiary carries out Marine Industry and/or Fishing Industry and /or Industry activities from the Second Land, which results or is likely to result in adverse effects being experienced by people in the vicinity of the Second Land. These adverse effects may be generated by noise, vibration, bright lights, traffic congestion, reduced air quality, odour and other usual incidences of Industry, Marine Industry and Fishing Industry, which may have consequences beyond the boundaries of the Second Land, including on the First Land.
- D. The current zoning of the Second Land provides for Marine Industry and/or Fishing Industry and/or Industry activities.
- E. Residential activity is provided for on the First Land pursuant to the current zoning of the First Land. The development of residential activity on the First Land in a manner that provides an acceptable level of amenity to the residents may require the adoption of special management techniques, operational features or design elements in order to mitigate adverse effects from the Beneficiary's Marine Industry and/or Fishing Industry and /or Industry activities carried out on the Second Land.
- F. The Covenantor has agreed with the Beneficiary:
- (a) to accept for itself and its successors in title to the First Land and any part of or interest in the First Land a restriction (in accordance with the terms of this deed) on any ability to object to any Marine Industry and/or Fishing Industry and/or Industry activities carried out on the Second Land.
 - (b) to enter into this deed on the terms and covenants contained herein; and
 - (c) to register this deed against the computer freehold register(s) and computer interest register(s) to the First Land.

IT IS AGREED:

1. INTERPRETATION

In this deed unless the context indicates otherwise:

1.1 Definitions:

Central Area Plan means the Auckland City District Plan (Central Area Section) 2004 as amended by Plan Change 4;



Fishing Industry has the meaning set out in clause 14.9.15 of the Central Area Plan;

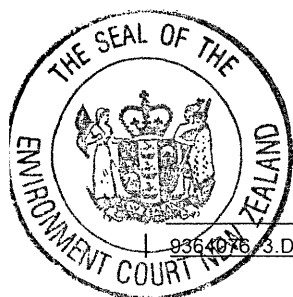
Marine Industry has the meaning set out in clause 14.9.15 of the Central Area Plan;

Noise Area 2 has the meaning set out in clause 14.9.12.8 and Quarter Plan J of the Central Area Plan;

- 1.2 **Defined Expressions:** expressions defined in the main body of this deed have the defined meaning in the whole of this deed including the background;
 - 1.3 **Gender:** words indicating one gender include the other genders;
 - 1.4 **Headings:** section, clause and other headings are for ease of reference only and will not affect this deed's interpretation;
 - 1.5 **Negative Obligations:** an obligation not to do anything includes an obligation not to allow that thing to be done;
 - 1.6 **Parties:** references to parties are references to parties to this deed;
 - 1.7 **Persons:** references to persons include references to individuals, companies, corporations, partnerships, firms, joint ventures, associations, trusts, organisations, governmental or other regulatory bodies or authorities or other entities in each case whether or not having separate legal personality;
 - 1.8 **Plural and Singular:** words indicating the singular number include the plural and vice versa;
 - 1.9 **Schedules:** the schedules to this deed and the provisions and conditions contained in the schedules have the same effect as if set out in the body of this deed;
 - 1.10 **No Limitation:** references to anything of a particular nature either before or after a general statement do not limit the general statement unless the context requires;
 - 1.11 **Sections, Clauses and Schedules:** references to sections, clauses and schedules are references to this deed's sections, clauses and schedules;
 - 1.12 **Statutes and Regulations:** references to any statutory provision include any statutory provision which amends or replaces it, and any subordinate legislation made under it; and
 - 1.13 **District Plans:** references to any District Plan include any instrument that amends or replaces it.
2. **Acknowledgement of effects:** The Covenantor acknowledges that the First Land is in close proximity to the Second Land on which the Beneficiary undertakes Marine Industry and/or Fishing Industry activities. The Covenantor also acknowledges that the carrying on of the Beneficiary's Marine Industry and/or Fishing Industry activities may occur on a 24 hour per day basis and may involve noise, vibration, light spill, glare, traffic congestion, reduced air quality and odour which may generate adverse environmental effects, which residents of the First Land may find disturbing and inconvenient.



3. **Entitlement to carry out activity:** The Covenantor acknowledges that the Beneficiary is entitled to carry out its Marine Industry and/or Fishing Industry activities on the Second Land.
4. **Noise levels:** The Covenantor acknowledges that the Beneficiary's Marine Industry and/or Fishing Industry activities operate and may continue to operate at night at the noise levels set out in rule 14.9.12.8.2 of the Central Area Plan, any existing resource consents for those activities or under existing use rights when measured 1 metre from the façade of any building located in Noise Area 2. These noise levels are set out in Annexure 1.
5. The Covenantor for itself and its successors in title to the First Land (or any part of it) hereby covenants, acknowledges and agrees with the Beneficiary and its successors in title to the Second Land or any part of it as a positive covenant for the benefit of the registered proprietors and users from time to time of the Second Land, that the Covenantor will henceforth and at all times hereafter observe and perform all the stipulations and restrictions contained in the Third Schedule and this deed to the end and intent that each of the stipulations and restrictions shall, in the manner and to the extent prescribed, forever enure for the benefit of, and be appurtenant to, the whole of the Second Land and every part thereof.
6. The Covenantor acknowledges that the terms and covenants contained in this deed shall bind and run with the First Land and the Covenantor shall do all things necessary to effect registration of this deed against the computer freehold register(s) and computer interest register(s) to the First Land.
7. **Separate interests:** Where the Covenantor is the registered proprietor or proprietor of an estate in leasehold which is of a separate and definable interest in the First Land in respect of which a separate instrument of title has issued (**separate interest**), the obligations of the Covenantor set out in this deed will relate only to the Covenantor's separate interest and not a separate interest of any other registered proprietor of the First Land or any part of or interest in the First Land.
8. **Indemnity:** The Covenantor agrees that it will at all times indemnify the Beneficiary from all proceedings, costs, claims and demands in respect of breaches by the Covenantor of the terms and covenants contained herein and implied on behalf of the Covenantor which occurred while the Covenantor was the registered proprietor of the First Land.
9. **Conduct of Marine Industry and/or Fishing Industry Activities:** The Beneficiary must conduct its Industry, Marine Industry and/or Fishing Industry activities in accordance with the provisions of any relevant plan and/or resource consent granted to it, and/or any existing use rights, in relation to Industry, Marine Industry and/or Fishing Industry activities.



Executed as a deed.

SIGNED by [] as Covenantor:

Full name of director/authorised signatory

Signature of director/authorised signatory

Full name of director/authorised signatory

Signature of director/authorised signatory

Witness:
(if other than two directors sign)

Signature of witness

Full name of witness

Occupation of witness

Address of witness

SIGNED by [] as the
Beneficiary

Full name of director/authorised signatory

Signature of director/authorised signatory

Full name of director/authorised signatory

Signature of director/authorised signatory

Witness:
(if other than two directors sign)

Signature of witness

Full name of witness

Occupation of witness

Address of witness



FIRST SCHEDULE
(Land)

The [] interest(s) in computer freehold register/computer interest register [] being [].



SECOND SCHEDULE
(Second Land)

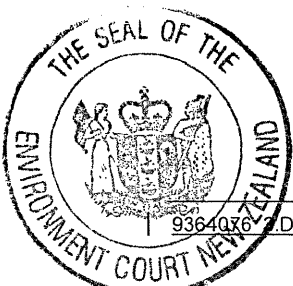
Describe the Second Land



THIRD SCHEDULE (Covenants)

The Covenantor agrees that it shall not lodge or permit to be lodged with the Environment Court, the High Court, Auckland City Council or the Auckland Regional Council or any other territorial or other authority having jurisdiction, any objection to the Beneficiary carrying out its Marine Industry and/or Fishing Industry and/or Industry activities from the Second Land. In that regard the Covenantor agrees it shall not:

1. Lodge, permit to be lodged or encourage any other party to lodge with the Auckland City Council, the Auckland Regional Council or any other territorial or other authority having jurisdiction any submission in opposition to any application by or on behalf of the Beneficiary for resource consent to carry out Marine and / or Fishing Industry and/or Industry activity on or in connection with the Second Land or for a change to the terms and conditions of any such resource consent.
2. Lodge, permit to be lodged or support or encourage any other party to lodge or support any complaint with the Auckland City Council, the Auckland Regional Council or any other territorial or other authority having jurisdiction regarding the carrying out by the Beneficiary, its servants or its invitees of Marine and / or Fishing Industry and/or Industry activity on or in connection with the Second Land.
3. Make, support, permit to be made or encourage any other party to make or support any application to the Environment Court for a declaration or enforcement order regarding the carrying out by the Beneficiary, its servants or its invitees of Marine and / or Fishing Industry and/or Industry activity on or in connection with the Second Land.
4. Make, support, permit to be made or encourage any other party to make or support any application to the High Court or any other judicial body for an injunction, declaration or other order concerning the carrying out by the Beneficiary, its servants or its invitees of Marine and / or Fishing Industry and/or Industry activity on or in connection with the Second Land.



Annexure 1

Noise Source Location	Noise Limit		Noise Receiver Location
	Day 7am - 11pm	Night 11pm - 7am	
Noise Areas 1,2,3,4	L ₁₀ 60dBA	L ₁₀ 55dBA L ₁₀ 66dB @ 63Hz L ₁₀ 62dB @ 125Hz L _{max} 90dBA	Noise Area 2

