

## GET OUT OF THE ROAD – PLANNING TO AVOID REVERSE SENSITIVITY

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### 1. Introduction

Reverse sensitivity may arise where sensitive activities are introduced to an environment where existing effects-intensive activities take place, such as a new residential development in close vicinity to an airport. If left unchecked this has the potential to lead to unacceptable conflict between activities.

Lawfully established existing activities can give rise to off-site impacts or nuisance elements which affect surrounding land. They may cause emissions or vibrations which go beyond the boundaries of the site; or activities associated with the land use may create adverse effects on nearby land, such as increased traffic. There are a number of important activities which are vulnerable to complaints of reverse sensitivity including airports, quarries, ports, and state highways, as well as power generation and productive rural activities such as viticulture.

This paper will first define the concept of reverse sensitivity, before providing case study examples illustrating the impact of reverse sensitivity on major infrastructure projects and rural industries, as well as the tools which may be employed to manage cross-boundary conflict.

### 2. Reverse sensitivity defined

Reverse sensitivity was first judicially defined in *Auckland RC v Auckland CC* (1997) 3 ELRNZ 54, and there have been many and varied definitions of reverse sensitivity provided in subsequent decisions and articles. However, Judge Thompson in *Affco NZ Ltd v Napier CC* 4/11/04, EnvC W082/04, found the following definition helpful:

“Reverse sensitivity can be understood as the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for that land. The ‘sensitivity’ is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as to not adversely affect the new activity.” See Bruce Pardy and Janine Kerr, “Reverse Sensitivity – The Common Law Giveth, and the RMA Taketh Away”, (1999), p 94

In the past, existing activities that produced adverse external effects were located in industrial or rural areas, which were sufficiently distant from residential areas or other sensitive activities. However, in the past few decades, the expanding New Zealand population and economy has seen growth and intensification of residential development occur closer to established activities; effectively eroding former buffer areas. Further, this increased economic growth has often resulted in the existing activities themselves growing in scale, sometimes with associated increases in their off-site effects.

The removal of such buffer areas, however, leads to potential amenity conflict — a significant issue in both rural and urban districts. Uncontrolled residential migration to rural areas can result in reverse sensitivity at the rural-residential interface. Romantic visions of pastoral landscapes usually do not take into account the reality of a working rural environment, resulting in increasing pressure on productive industries to maintain the expected idyllic amenity for their new residential neighbours. Meanwhile, urban residential intensification and expansion has led to amenity conflict between new dwellers and regionally important industries such as ports, quarries and airports.

As the law regarding reverse sensitivity currently stands, courts will look at the existing activity and assess whether its adverse effects can reasonably be internalised. In making such an assessment, the importance of the continued presence of the activity in the area is relevant, as is the likelihood of the proposed sensitive activity restricting the rights of the existing activity in a “more than minor” way (*Winstone Aggregates Ltd v Matamata-Piako DC* (2005) 11 ELRNZ 48; *Golden Bay Cement Ltd v*

*Whangarei DC*, 3/2/05, EnvC A015/05). Other important factors include the zone in which the proposed activity is to be located, and the landscape in question, as well as the potential for other compatible uses which would not create reverse sensitivity issues. More recently, the Environment Court in *Ngatarawa Development Trust Limited v Hastings DC*, 15/4/08, EnvC W017/2008 set out an additional factor when determining whether to restrict the development of potentially sensitive activities, this involves the consenting authority looking at the impact of the effects, and if it is low-impact, considers whether it is better to incur occasional relatively minor adverse effects than to impose controls on sites owned by others.

However, despite the courts' general acceptance that the acknowledgement of reverse sensitivity issues is necessary to protect existing productive industries from new developments, there are still some reservations that the concept may be used to create an illegitimate buffer zone around an existing use: see *Affco NZ Ltd v Napier CC* 4/11/04, EnvC W082/04.

### 3. Recent case law

*Environmental Defence Society Inc v Taupo District Council* 14/9/09, Judge Whiting, ENC Auckland A084/09

This appeal concerned the appropriate subdivision rules to control subdivision development in the rural environment of the Taupo District. Sade Developments No.2 Ltd (**SDL**) and Cheal Consultants Ltd (**CCL**) sought new rules giving discretionary status to cluster subdivision developments creating residential lots with average density of 1 per 4-10 ha instead of 1 per 10ha with a cluster group containing no more than 10 allotments (excluding access lots) with each allotment containing no more than 1 dwelling house or accommodation unit. Contact Energy Limited (**Contact**) was a Section 274 Party to the appeal due to its interests in the Wairakei-Tauhara Geothermal area. The Proposed Plan provided that "Each cluster area will be no less than 1000m from the Wairakei-Tauhara Geothermal area." If this rule were to be breached the activity would be treated as a discretionary activity. Contact sought that non compliance would result in non complying status.

Counsel for Contact submitted that Contact managed reverse sensitivity effects (noise from drilling) by moving people out of their houses for the duration of drilling. However this would become impossible when one house becomes a cluster of 5 or 10. The Regional Policy Statement provided strong direction to avoid the establishment of incompatible land uses over or in proximity to the geothermal area. The Court concluded this direction needed to be provided for in the rules, as cluster style subdivision close to the geothermal area had the potential to exacerbate reverse sensitivity effects when compared to conventional subdivision. This rule only applied to cluster subdivisions and all allotments created pursuant to the Cluster subdivision rule requires a consent notice to be registered preventing any further subdivision, or the creation of more than one new dwelling on that allotment.

*Ngatarawa Development Trust Limited v Hastings DC*, 15/4/08, EnvC W017/2008

This case involved an appeal against Hasting District Council's decision to grant consent to Ngatarawa Development Trust Limited (**Ngatarawa**) to enable the subdivision and construction of housing and associated infrastructure on land owned by the Hawkes Bay Golf Club Inc. Ngatarawa appealed against parts of the decision reducing the number of residential lots, other appellants, who included users of the neighbouring aerodrome, and owners/occupiers of neighbouring land, appealed against the grant of the consents in their entirety.

The aerodrome users and Gourmet Blueberries Ltd were concerned that the noise effects generated from their activities, such as the noise from aeroplanes and the noise from orchard operations such as bird scaring devices and machinery would result in their operations being unduly restricted with the introduction of the new residential subdivision. The *Ngatarawa* decision followed established case law principles regarding reverse sensitivity, but is important in the reverse sensitivity body of case law for establishing an additional factor to be considered when determining whether to restrict the development of potentially sensitive activities. The Court stated at paragraph 25:

...where there is a low-impact effects scenario existing beyond the emitting site boundary it is

usually better to incur occasional relatively minor adverse effects than to impose controls on adjoining sites owned by others. It is inevitable that some lawful activities will at times be unable to totally internalise their effects and the law does not require that. This is generally understood by those who choose to bring themselves within range of an effect emitting activity. But residential occupiers in particular may have a different view and it is they who have the greatest potential to generate reverse sensitivity effects.”

Summing up in regards to the aerodrome, the Court stated that there needs to be a measure of robustness concerning the effects of reverse sensitivity. Also, “those who might come to the golf course to live have to expect some noise, and just have to have accept that as a fact of life, or not come at all.” Overall the Court found that reverse sensitivity issues alone would not have resulted in a successful appeal, but looked at the round with all other adverse effects, the resource consents should be declined.

#### 4. Case study 1 – Major infrastructure

The following hypothetical example will discuss issues surrounding a major infrastructure application and timing involved with the process. It will examine the need to provide solutions for conflict at the boundary, when adjoining landowners wish to develop their land in an incompatible way, such as residential subdivision.

##### *The scenario*

A major infrastructure development is proposed in the rural environment, such as the development of a wind farm for electric power generation. Generally, there is a need for significant consultation with affected parties to be entered into and the consenting process can be lengthy and time consuming.

However, after the major infrastructure application has been announced (or lodged with Council), an adjoining landowner applies for resource consent to subdivide their rural property into residential lots. The subsequent residential activity may have the potential to significantly compromise the proposed major infrastructure development due to the need for an applicant to demonstrate acceptable noise and visual effects from the wind turbines.

Purchasers of the adjoining sections could be unaware of the major infrastructure development as it would still be tied up in the process of acquiring consent without any development occurring on the ground. This could result in further complaints regarding reverse sensitivity effects such as noise, and purchasers could potentially join future appeals as s 274 parties to oppose the granting of consent.

##### *Potential solutions – Priority rules*

If the major infrastructure development is sought by a requiring authority, there is the possibility that a notice of requirement could be sought or that a designation is already in place to afford planning protection for the development. However, if the designation does not cover adjoining land there is a question regarding the extent to which it can deal with appropriate land uses.

Protection is presently afforded under case law in cases of priority (commonly referred to as the “priority rules”) - where applications are competing for the same resource. The *Central Plains Water Trust v Ngai Tahu Properties Limited & Canterbury Regional Council* [2008] NZCA 71 decision (under appeal) determined that priority was accorded to the first application filed that was not ‘a nullity’. The Court declined to overturn earlier case law which had established that the test was ‘readiness for notification’ which leaves open that this test will still apply in other circumstances. Once priority has been established Council is then required to reach a determination on the prioritised application, “on its merits without regard to other [competing applications]” *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257.

In the case of wind farm projects, activities on adjacent land which result in reverse sensitivity issues can frustrate an application just as effectively as another wind farm proposal seeking access to the same wind resource.

##### *Questions*

Should the priority rules be extended to cover the situation where there are incompatible land-uses intended on adjoining or proximate properties? If it were agreed that the priority rules should be extended, how would such change come about in the absence of legislative reform? Would it be via judicial declaration, or could Consenting Authorities take the initiative through their regional and district planning documents and codify the priority rules with an extended application as noted above.

#### *The future environment*

Taking this scenario a step further, consider whether a major infrastructure application should form part of the future environment for consideration in neighbouring consent applications. *Queenstown-Lakes District Council v Hawthorn Estates Ltd* [2006] NZRMA 464 examined the definition of the term “environment”. The key finding of the Court was that the term encompasses the future environment to the extent development is “reasonably foreseeable”. The question before the Court was whether the future environment could encompass discretionary activities in circumstances where an application for resource consent had yet to be made.

It is arguable that once a resource consent application has been lodged, the effects of a proposed discretionary activity become ‘reasonably foreseeable’. However *Hawthorn* has been interpreted to exclude such activities from the future environment on the basis of one sentence in the decision which reads, “We think the legitimate considerations should be limited to those we have just expressed.” This sentence has been taken to refer to matters specified earlier in the relevant paragraph, which were, permitted activities under a district plan and resource consents which have been granted where it appears they will be given effect to.

If strictly adhered to, this interpretation could result in perverse outcomes as the future environment would not include equally reasonable foreseeable events such as controlled activities that cannot be declined, permitted activities under a Regional Plan, and activities which could be carried out by way of designation.

Comments made in the *Hawthorn* decision should be considered in the context of the matters before the Court on that occasion to avoid the unintended results mentioned above. Consenting authorities can arguably adopt an approach that is consistent with the priority rules where applicants are competing for the same receiving environment (cf the same resource) and take the view that the decision only excludes (from the future environment) discretionary activities which are not the subject of an existing application.

While this approach has much in common with the policy rationale behind the priority cases, it is inconsistent with the express wording of *Hawthorn*, and the approach presently remains untested before the Courts.

#### **5. Case study 2 – The Wairarapa Combined Plan – rural activities and controls**

Operations on vineyards often result in effects which can cross boundaries of adjoining landowners. Some of the operational effects of note are noise from bird scaring devices and frost protection measures (frost fans and the use of helicopters), which all can impact upon neighbouring properties. The potential for these effects to cross boundaries coupled with their necessity in vineyard operations requires a thoughtful approach to be taken in the formulation of plan changes to avoid or mitigate as much as possible foreseeable conflict.

In 2005 the three Wairarapa District Councils (Masterton, Carterton and South Wairarapa) began the process of formulating a Proposed Combined District Plan (the **Combined Plan**), under the Resource Management Act. New Zealand Winegrowers (**NZ Winegrowers**) was interested in this process on numerous grounds, particularly with regard to reverse sensitivity effects.

#### *Inappropriate subdivision in the rural zone*

At the outset, NZ Winegrowers submitted successfully that at the forefront of the planning process in the Rural Zone there is a need to “enable primary production to operate without unreasonable restriction”. Additionally, it was successfully submitted that the Combined Plan should make reference at the “Issue”

level regarding the operational requirements of primary production activities, and the fact that these will have effects which are both anticipated and expected in the Rural Zone. NZ Winegrowers supported mechanisms such as buffer zones and no complaints covenants that minimise the potential for conflict at the rural-urban interface and sought to include direct reference to these mechanisms at the policy level in the Combined Plan, however this was not adopted by the Commissioners.

A key concern of NZ Winegrowers was that if such relatively low and unrestricted levels of subdivision, proposed by the Combined Plan, and as recommended by the planner were to be retained, then development controls became extremely important, particularly in relation to lot shape, design and location of building. After mediation between a number of parties interested in the subdivision controls, lot size and frontage requirements emerged as the two primary techniques used for managing rural subdivision. Generally, 4ha was set as the minimum lot size throughout all rural zones, this improved on the initial proposed minimum average lot size of 1ha in the Masterton and Carterton Districts and 2ha in the South Wairarapa. The number of complaints due to reverse sensitivity is clearly related to the number and proximity of neighbouring homes there are, therefore securing a greater minimum lot size area for subdivision was an imperative for NZ Winegrowers. NZ Winegrowers had initially sought tougher restrictions in its submissions, seeking a 10ha minimum lot size. Although this was not accepted by Council it highlighted reverse sensitivity issues associated with minimum lot sizes for subdivision in the rural zone and the fact that these concerns should be taken into account when preparing District Plans.

#### *Bird scaring devices*

The visual amenity offered by vineyards, and the romantic notion of living in the country is a draw card for people moving into lifestyle blocks. However, the operational reality of primary production can clash with this romantic vision. Bird scaring devices are an integral part of crop protection and constitute a source of conflict at the interface between rural activities and lifestyle blocks. Protecting viticultural crops from bird damage involves scaring techniques which heavily rely on the use of audible means to discourage or frighten birds away from crops. NZ Winegrowers engaged in an extensive consultation process with stakeholders in the region to establish suitable noise control provisions in the Wairarapa, based on provisions successfully sought by Marlborough winegrowers.

The Combined Councils proposed restrictions on the number of audible events that could occur in any one hour (6). Restrictions were also proposed on the number of bird scaring devices that could be located on a single landholding (one device per four hectares). Following an appeal by Horticulture NZ (in which NZ Winegrowers was a s 274 party) and after successful mediation, a consent memorandum was signed providing for ten audible events in any one hour from devices located beyond a 300m setback limit from the notional boundary of any rural or residential zoned dwelling. This 300m setback was also used as a point where there could be more than one bird scaring device per landholding. The introduction of a setback requirement to loosen the proposed restrictions was based on Horticulture NZ involvement in the development of a similar rule in the Gisborne District Council Plan and adopting that wording for the Wairarapa setting.

#### *Other concerns*

In this instance the proposed provisions regarding frost protection were acceptable and no appeals were entered into. However, there are ongoing problems in the Marlborough and Hurunui districts with proposed district plan provisions concerning bird scaring and frost protection devices. In order to provide consistency and certainty for primary producers dependant upon using such measures, National Standards akin to those promulgated for wind farm noise would offer clear direction for planners in this area. In the meantime as can be seen in this example, submitters have to engage in a time consuming and costly plan change process and where appropriate, draw Councils' attention to provisions in other district plans to avoid "re-inventing the wheel" with provisions that prevent primary production operating without unreasonable restriction. Sufficient direction via National Standards would expedite the planning process.

#### *Other measures*

Although the submission by NZ Winegrowers to provide direct reference to "No complaints covenants" in the Plan was rejected in this case, they can still be applied and are a common voluntary mechanism

used to restrain incoming activities from complaining about the adverse effects of an existing activity. Such covenants are usually proposed by an applicant attempting to gain resource consent for an incoming activity as a means of responding to reverse sensitivity concerns by the operator of an existing activity. The covenants usually consist of an acknowledgement of a lawfully established activity, a pledge not to complain in respect of that activity, and constraints upon seeking changes to that activity.

Such an undertaking may be either agreed as a condition of consent under s 108 RMA or as a private agreement, and can be registered on the title of the receiving site under s 109 RMA. If a no complaints covenant is imposed as a condition of consent under s 108, it must meet the test in *Newbury DC v Secretary of State* [1981] AC 578, and may not be imposed without the consent of the applicant: *Ports of Auckland Ltd* [1998] NZRMA 481.

However, no complaints covenants do nothing to lessen the effects emitted from neighbouring properties. They are simply a tool to limit complaints from neighbouring properties. Nevertheless they can be appropriate mechanisms to control the behaviour of adjoining landowners.

## 6. Conclusion

The foregoing discussion has covered a number of measures that have the potential to address reverse sensitivity concerns, where incompatible land uses are located on adjoining properties.

With regard to the hypothetical infrastructure case study raised, the changes proposed to the consent “priority rules” would guarantee priority for major infrastructure applications first in time to lodge an application, but tied up in the processes of consent. Alternatively if such proposals were considered to be too expansive, interpreting *Hawthorn* in a manner that would see consent applications forming part of the future environment would allow greater involvement in adjoining landowner consents as affected parties.

The Plan Change process can also be an opportunity to provide input to Councils from primary producers and industry regarding reverse sensitivity. District and Regional Plans are an obvious starting point to provide direction in the area of reverse sensitivity. The key point is for Councils to strike a balance between mitigating adverse effects and enabling primary producers and industrial users to operate without unreasonable restriction. Other measures that can help in the development of Regional and District Plans are National Standards and National Environmental Standards, and the use of restrictive covenants

What is for certain is that reverse sensitivity effects must be taken into account in both the planning and resource consenting processes to avoid significant conflict at the interface between rural or major infrastructure activities and residential development.