

REVERSE SENSITIVITY

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Introduction

Reverse sensitivity is now firmly established as a concept and as an effect under the Resource Management Act 1991 (“RMA”). Reverse sensitivity may arise where new sensitive activities are introduced to an environment where existing effects-intensive activities take place. 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.

Over the past decade, a toolbox of mechanisms has been developed in response to reverse sensitivity concerns at a local, regional and national level. This includes special zoning provisions, resource consent conditions, use of “no complaints covenants” along with some guidance at the national level.

“Reverse Sensitivity”

The concept of reverse sensitivity does not originate directly from the provisions of the RMA, but instead has evolved through case law to become the label for a particular kind of effect. Reverse sensitivity responds to the need to consider existing activities when assessing the effects of introducing a new and potentially conflicting activity into the environment.

Reverse sensitivity was first judicially defined in *Auckland Regional Council v Auckland City Council*,¹ with many and varied definitions of reverse sensitivity provided in subsequent decisions and articles. However, Judge Thompson in *Affco New Zealand v Napier City Council*² 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.”³

¹ *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205, 206.

² *Affco New Zealand Ltd v Napier City Council*, unreported, Environment Court Wellington, W082/2004, 4 November 2004, Thompson J.

³ Bruce Parry and Janine Kerr, “Reverse Sensitivity – The Common Law Giveth, and the RMA Taketh Away”, (1999) , p. 94

Consequences of Reverse Sensitivity

As the above definition suggests, reverse sensitivity involves the vulnerability of existing activities to attack from incompatible activities. This concept has been accepted as a significant resource management concern, which must be effectively managed to protect existing activities from unjustified complaints.

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.

From the experiences of territorial authorities and regional councils, amenity conflicts are most prevalent where there is a high rate of land use changes, particularly where the population of an area is increasing or rapidly changing, with people moving into the area holding different amenity values and expectations.⁴ Conflicts between existing and new activities, may result in abatement notices, adversarial proceedings, and/or Court action. However, it is often the case that existing activities were legitimately established in accordance with rules and standards of the relevant district plan or have existing use rights by virtue of section 10 of the RMA. Notwithstanding, existing activities are, like all resource users, subject to the same ongoing obligation to avoid, remedy or mitigate any adverse effects.

The application and development of the concept of reverse sensitivity by the courts is outlined below. As indicated in the following section, the courts are willing to undertake a variety of measures to address tensions over effects from existing activities.

Case Law

Pre-RMA: *Arataki*

Before the RMA was introduced, the Town and Country Planning Act 1977 ("TCPA") allowed Councils to direct and control development as well as to make choices on behalf of the local community over whom they had jurisdiction. It was under the TCPA that the concept of reverse sensitivity was first applied. The term "reverse sensitivity" was not used, but managing the land so as to avoid reverse sensitivity situations was consistent with the direct and allocative land use controls under the TCPA. For example, in *Arataki Honey Ltd v Rotorua District Council*⁵ a consent was granted for a camping ground on property adjacent to a large honey complex. Arataki Honey appealed the consent, arguing that the presence of its bees posed a threat to users of the camp site, and that future restrictions on the operation of its activities might occur. Principal Planning Judge Turner observed that the case was a

⁴ Rural Amenity Conflict Report – MFE, "Managing Rural Amenity Conflicts", February 2000, March 2001, Ref: ME 372; ME 372A, p. 33.

⁵ *Arataki Honey Ltd v Rotorua District Council* (1984) 10 NZTPA 180.

rare situation “where an established use is opposing the introduction of a new use in the neighbourhood because of what the established use perceives as *its* likely effect on the proposed use.”⁶ The Tribunal found that the potential reverse sensitivity issues were sufficient grounds to refuse consent for the camping ground, as Arataki’s operations were likely to be restricted if the camping ground was built.

Key Post-RMA decisions

The concept of reverse sensitivity has gained in prominence since the enactment of the RMA. The development of the concept has been greatly enhanced by the important Environment Court decisions of *Winstone Aggregates Ltd v Papakura District Council*⁷ and *Winstone Aggregates Ltd v Matamata-Piako District Council*⁸.

In *Winstone Aggregates v Papakura District Council*. Winstone Aggregates Limited, a quarry company, (“Winstone”) owned a large piece of land in the Papakura District. The land contained both an established quarry and a site for a future quarry. Winstone, along with the Auckland Regional Council, appealed the proposed Papakura District Plan on the grounds that it did not adequately cater for the protection of mineral resources. Winstone’s submission on the proposed plan had been that the plan should make provision for a 500 metre buffer around the quarry zone, and that within the buffer, land uses that could be affected by quarry operations should be prohibited. However, Winstone did not own the land in the proposed buffer zone. Essentially, Winstone was proposing that land held by private third parties be used as a buffer to insulate the quarry from future restrictions or mitigation measures that new activities would seek to impose upon it. The Environment Court held that territorial authorities did have jurisdiction to make allowance for reverse sensitivity by the creation of a buffer zone on lands other than that of the established use. The Court also emphasised that activities should internalise their effects unless it is shown that they cannot reasonably do so. However, only those effects which cannot be reasonably internalised will provide the basis for constraints on nearby land-use activities.

The requirement of internalising effects in preference to granting unnecessary buffer zones was re-emphasised in *Winstone Aggregates Ltd v Matamata-Piako District Council*. In *Winstone* a number of appellants proposed that a buffer zone should be provided for in the Matamata-Piako District Plan to protect industrial and intensive farming from reverse sensitivity pressures. The appellants included Winstone, Fonterra, Inghams and poultry farmers. The Court recognised the “corrosive effect that continued complaints at a high level can have on a company’s continued confidence in operating in an area”, before setting out the following key principles:

- (a) activities should internalise their effects unless it is shown, on a case by case basis, that they cannot reasonably do so;
- (b) there is a greater expectation of internalisation of effects of newly established activities than of older existing activities;
- (c) total internalisation of effects within the site boundary will not be feasible in all cases;
- (d) to justify imposing any restrictions on the use of land adjoining an effects emitting site, the industry must be of some considerable economic or social significance locally, regionally, or nationally.

⁶ Ibid, 183 (emphasis in original).

⁷ *Winstone Aggregates Ltd v Papakura District Council*, (Environment Court, Auckland, A 96/98, 14 August 1998 (interim) and A49/02 26 February 2002).

⁸ *Winstone Aggregates Ltd v Matamata-Piako District Council*, Environment Court, Wellington, W055/04.

With regard to Winstone's Motumaoho quarry, the Court accepted that constraining the potential of the quarry would jeopardise the efficient use of that resource and that it was appropriate to take into account Winstone's internalisation costs, given the importance of the quarry to the Auckland region.⁹ However, the Court did not accept that a buffer was required for the Fonterra Morrinsville plant, nor the Inghams processing plant.

The 2004 decision of *Golden Bay Cement Ltd v Whangarei District Council*¹⁰ adopted the principles identified in the *Winstone* decisions, and reaffirmed the importance of any public benefit which may be obtained from the existing activity. The Court held that particular emphasis should be placed on the regional and national importance of the quarry resource. The quarry had internalised its activities as far as it reasonably could be expected to do so, and the external effects had already been authorised. A compromise solution was reached which addressed the relevant reverse sensitivity issues and potential conflict, with the area closest to the quarry face zoned Countryside and the rest zoned Living One.

The current position

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. 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.

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,¹¹ with Pardy and Kerr arguing that restricting new activities on the ground of reverse sensitivity has the effect that "established uses effectively obtain the right to cause adverse effects to nearby vacant land."¹²

Mechanisms

As reverse sensitivity has gained increasing prominence as a significant resource management issue, a variety of mechanisms have been utilised at a private, local, regional, and, more recently, a national level to address concerns.

From the case law above, it is clear that where the existing activity is sufficiently important, reverse sensitivity may be a legitimate reason for restricting new land uses. It may justify declining resource consent,¹³ imposing conditions on consent,¹⁴ or restricting or prohibiting activities in local plans.¹⁵ These various mechanisms for resolving reverse sensitivity issues, along with others, are outlined below.

⁹ *Winstone Aggregates Ltd v Papakura District Council*, (at [10]).

¹⁰ *Golden Bay Cement Ltd v Whangarei District Council*, unreported, Environment Court Whangarei, A015/2005, 21 & 22 October 2004, Newhook J.

¹¹ *Affco New Zealand Ltd v Napier City Council*, unreported, Environment Court Wellington, W082/2004, 4 November 2004, Thompson J.

¹² Pardy and Kerr, p. 99.

¹³ *McQueen v Waikato District Council*, Planning Tribunal, Hamilton, A 45/94, 20 June 1994, Judge Sheppard.

Assessment of Reverse Sensitivity as Part of the Resource Consent Process

As part of the assessment of effects under section 104 of the RMA, existing activities and the effects they create are addressed as component parts of the natural and physical environment. They contribute to, and partly define the amenity in any rural area. The suitability of proposed activities is often assessed in terms of looking at the nature of existing activities in the vicinity and determining whether any restrictions on the proposed activity are warranted to avoid or minimise reverse sensitivity issues.

The issue of reverse sensitivity can result in restrictive resource consent conditions for new, potentially sensitive, activities. In relation to a proposed subdivision, conditions could relate to the permitted density of subdivision, size of allotments, nominated building platforms, and minimum buffer distances from boundaries. However, in some instances it may be entirely inappropriate for the proposed activity to be located in close proximity to existing operations. In such situations, incompatibilities between the existing and proposed activities may mean that resource consent is denied.¹⁶ For example, in both *Independent News Ltd and Auckland International Airport Limited v Manukau City Council* and *Gargiulo v Christchurch City Council*¹⁷, each international airport opposed resource consent applications for residential dwellings on the grounds of reverse sensitivity due to adverse noise effects. In both cases the courts found the reverse sensitivity effects potentially serious enough to justify refusing consent.

Concern has been raised that there is potential to create injustices if a development opportunity is restricted as a result of the poor performance of an existing activity. Thus, care is needed to ensure that the existing activity has first exhausted all avenues in internalising and/or avoiding, remedying or mitigating any adverse effects.¹⁸

“No Complaints Covenants”

“No complaints covenants” 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 section 108 of the RMA or as a private agreement, and can be registered on the title of the receiving site under section 109 of the RMA. If a no complaints covenant is imposed as a condition of consent under section 108, it must meet

¹⁴ *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145 (HC); *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601.

¹⁵ *Winstone Aggregates Ltd v Papakura District Council; Wellington International Airport Ltd v Wellington City Council*, Environment Court, Wellington, W 102/97, 19 November 1997, Judge Kenderline.

¹⁶ *Gargiulo v Christchurch City Council* (Environment Court, C137/2000, 17 August 2000); *Independent News Ltd and Auckland International Airport Limited v Manukau City Council* (2004) 10 ELRNZ 16; *Wilson v Selwyn District Council* [2005] NZRMA 76.

¹⁷ *Gargiulo v Christchurch City Council*.

¹⁸ Pardy; RACR, p. 82; *Winstone Aggregates*.

the test in *Newbury District Council v Secretary of State for the Environment*,¹⁹ and may not be imposed without the consent of the applicant: *Ports of Auckland v Auckland City Council*.²⁰

No complaints covenants have been successfully used by various industries when faced with increased residential activity in their immediate vicinities. For example, the Auckland District Plan Central Area Section 14.6.6.1 provides that building for accommodation in the Britomart Precinct will be a permitted activity where the site is subject to a no complaints covenant in favour of the Ports of Auckland. In *Sugrue v Selwyn District Council*²¹, proposed restaurant operators covenanted not to complain about odour from an existing neighbouring piggery, provided that the effects were no greater than the effects which were lawfully established at the date of the covenant. Despite the increased use of such covenants, concern has been expressed by the Environment Court regarding the efficacy of covenants when they are not accompanied with measures to mitigate cross boundary effects.²²

Regional and Local Planning

The *Auckland Regional Council* decision established the principle that a Council can include provisions that provide for reverse sensitivity within a Plan.

Recognising and providing for important existing activities and addressing their potential vulnerability to reverse sensitivity effects, in the objectives and policies of a regional or district plan, is an effective way to ensure that a consent authority considers these effects when preparing rules in the plans and when making other relevant planning decisions. The importance of a policy framework which recognises reverse sensitivity issues and the need to protect existing activities was illustrated in *Wellington International Airport Limited v Wellington City Council*.²³ In this case, consent for a proposed four level household unit building to be located within the Air Noise Boundary of the Airport was upheld, with one of the main reasons for the granting of consent being the fact that the Wellington District Plan did not have a strong policy thrust requiring the protection of airport operations.

Zoning

District plan zoning can be a highly effective mechanism to reduce the potential for reverse sensitivity issues. Many district plans provide for a range of rural and urban zones, reflecting the varying activities and expected amenity standards within each zone. For example, rural areas may be identified as general rural or working rural zone, and urban areas may have different residential / industrial zones with specific amenity standards and objectives. Different effects-based standards for these zones may then be set so that suitable amenity conditions for the particular zone are maintained.

Zones may also provide for certain classes of activities in certain areas as “discretionary activities” rather than controlled or permitted, to provide an opportunity to review all issues and impose conditions, or refuse consent as appropriate.²⁴

¹⁹ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

²⁰ *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601.

²¹ *Sugrue v Selwyn District Council*, Environment Court 43/04.

²² *Calapashi Holdings Ltd v Marlborough District Council* (High Court, Blenheim, CIV-2004-485-001419, 22 March 2005, Ellen France J) at [29].

²³ *Wellington International Airport Limited v Wellington City Council*.

²⁴ RACR, p. 82.

In determining amenity standards, it is necessary to identify standards which are reasonable having regard to effects and amenity conditions created by existing legitimate activities; amenity effects created by activities that do not have consent or do not comply; and expectations of existing activities and their neighbours.²⁵ Legitimately established existing activities and the physical resources associated with those activities must be included and considered as part of assessing effects on the environment.

Differentiated zones can also be used to direct certain types of effects to certain parts of a zone, resulting in less amenity conflicts between productive activities and residential activities.²⁶ The Hastings District Plan requires that, where a site is situated within 400 metres of an Intensive Rural Production activity, the Land Information Memorandum must state any effects from the existing activity which may adversely affect the site, and provide a notation that the property will be subject to rural amenity standards. In the urban context, there is a specific provision for the Auckland International Airport within the Manukau District Plan regarding the potential that activities sensitive to aircraft noise, if inappropriately located, could constrain the efficient use and development of this nationally and regionally significant piece of infrastructure.²⁷

Special zoning may be effectively utilised to protect a particular industry from reverse sensitivity pressures. An example of this mechanism is the Hastings District Plan's "Te Mata Special Character Zone". This Zone recognises the importance of established viticulture activities, and makes specific provision for the separation of viticulture and rural residential development.

Mitigation Measures

A variety of mitigation measures may be undertaken or imposed in order to alleviate reverse sensitivity issues, including buffer strips and minimum site or lot size requirements.

A number of district plans also include specific recognition of certain existing activities, and 'buffer zones' or 'buffer strips' where certain new potentially sensitive activities have a different activity status in response to reverse sensitivity concerns. In *Upper Clutha Environmental Society v Queenstown Lakes District Council*, reverse sensitivity issues associated with locating a residential subdivision in close proximity to the existing Rippon vineyard were required to be mitigated by a thirty metre buffer strip of Kanuka.

A variation on the 'buffer' mechanism is the purchase of land to provide a buffer between an activity and adjoining properties, with the buffer land leased back on terms that enable the activity to continue without complaints or constraints from occupants of the buffer area. However, for many smaller industries in areas of highly valued land, such a purchase may be cost prohibitive.²⁸

Setback distances can also be used to restrict the location of a proposed activity in order to protect that activity from the adverse effects of an existing activity. Examples include requiring all new dwellings to locate a minimum distance from all boundaries in order to minimise the impact of noise from the surrounding environment.²⁹

²⁵ RACR, p. 36; *PH van den Brink ****; *Contact Energy Ltd v Waikato Regional Council & Taupo District Council* (A04/2000).

²⁶ RACR, p. 57.

²⁷ Policy 13.4.11 of the Manukau Operative District Plan 2002.

²⁸ RACR, p. 84.

²⁹ RACR, p. 68.

Other regional / local mechanisms

Regional Council planning documents often provide for a Metropolitan Urban Limit (“MUL”) as a means of restricting potentially incompatible urban development in rural areas.

Councils may also take a long range planning view of issues such as residential growth and prepare studies to assess and manage potential reverse sensitivity issues. For example, see the Marlborough Townships and Small Settlements Growth Study. This study provides a detailed outline of the various forms of predicted growth and change in the Marlborough region and anticipates reverse sensitivity and resource allocation pressures.

Reverse sensitivity issues are also being addressed as part of the preparation of second generation district plans. Examples of such district plans include the Proposed Combined Wairarapa District Plan, and the Proposed Hamilton District Plan. Relevant provisions in these plans include the use of minimum set backs, buffers, and the requirement for reverse sensitivity issues to be considered as part of the resource consent decision making process.

National Guidance

Non-statutory mechanisms, such as national guidance documents, also have the potential to become helpful tools in promoting effective planning outcomes, as well as addressing reverse sensitivity issues. This potential had remained untapped until the 2007 Guidance Note on Planning for the Wine Industry.³⁰ This was the result of collaboration between New Zealand Winegrowers, the Ministry for the Environment, Local Government New Zealand, and representatives of councils in wine-making regions. The Guidance Note identifies key issues currently affecting the wine industry and discusses how these can be addressed in regional and district plans. Whilst the Guidance Note is the first to be prepared for a specific industry, there is no reason why other industries could not work toward the preparation of such guidance to address their specific concerns.

Conclusion

Since it was first raised in the *Arataki* decision, reverse sensitivity is now firmly established as an important effect which must be addressed to prevent unnecessary conflict between incompatible uses. Post-*Arataki*, the general approach taken by the courts has been to seek internalisation of adverse effects of existing activities, consistent with the provisions of the RMA, while recognising that some valuable and important activities will not be able to reasonably do so and that this may require limitations on adjoining land.³¹

Whilst reverse sensitivity issues may be viewed as the inevitable consequence of urban growth and expanding residential development, it is essential that reverse sensitivity concerns are addressed as part of the planning process. A wide toolbox of mechanisms, including regional and local planning, resource consents and no complaints covenants, as well as national guidance, is available for this task.

³⁰ Launch of Planning for the Wine Industry Guidance Note, Quality Planning website, 28 September 2007, (<http://www.qualityplanning.org.nz/plan-topics/wine-industry.php>).

³¹ *Winstone Aggregates; Independent News Limited and Auckland International Airport Limited v Manukau City Council; Wilson v Selwyn District Council*.