

BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision No: W 017 /2008

ENV-2007-WLG-000044-45-47 & 48

IN THE MATTER

of appeals under s120 of the Resource
Management Act 1991

BETWEEN

NGATARAWA DEVELOPMENT TRUST
LIMITED

HAWKES BAY GLIDING CLUB & Ors

D and G MAGON & Ors

GOURMET BLUEBERRIES LIMITED

Appellants

AND

THE HASTINGS DISTRICT COUNCIL

Respondent

Court: Environment Judge C J Thompson, Environment Commissioner K A Edmonds,
Environment Commissioner W R Howie

Heard at: Napier on 10 - 13 March 2008. Site visit: 19 March 2008. Closing submissions
received 31 March 2008

Counsel: A McEwan for Ngatarawa Development Trust Ltd

H E S Hamilton & B S Chote for Hawkes Bay Gliding Club, D & G Magon & Ors

B I J Cowper & B A Watts for Gourmet Blueberries Ltd

B W Gilmour for the Hastings District Council

DECISION OF THE COURT

Decision issued: 15 APR 2008

A. The appeal by Ngatarawa Development Trust Ltd is declined. The other appeals are

allowed.

Costs are reserved



Introduction

[1] In a decision dated 6 March 2007 a Commissioner appointed by the Hastings District Council granted subdivision and land use resource consents to Ngatarawa Development Trust Ltd to enable the subdivision of, and construction of housing and associated infrastructure on, land presently owned by the Hawkes Bay Golf Club Inc at 114 Valentine Road, Bridge Pa, near Hastings.

[2] Ngatarawa Development Trust Ltd, the applicant, has appealed against part of the decision reducing the number of residential lots, but it has redesigned the proposal, which now has fewer lots than originally proposed. The other appellants, who include users of the neighbouring aerodrome, and owner/occupiers of neighbouring land, have appealed against the grant of the consents in their entirety.

Background

[3] In 1969 the newly formed Hawkes Bay Golf Club Inc purchased the land from the predecessor to the District Council and set about establishing an 18-hole golf course. In its halcyon days the club's membership exceeded 800 playing members, but presently it has about 420 members and it is not in a strong financial position. It is, as its President Mr Michael Maguire describes it, asset rich but cash poor. Much of its mobile plant and equipment is in need of replacement, requiring expenditure of not less than \$250,000. Fixed plant, including the irrigation equipment, is also due for replacement at a likely cost of over \$500,000. Mr Maguire says that traditionally the club has been a *working man's* golf club, and it is important to keep subscriptions as low as possible. Presently they are some \$700pa but, given the necessary future expenditure, the prospect is that they will need soon to be closer to \$1,000pa, a figure he fears will meet considerable market resistance. The club has therefore been looking for alternative solutions to the financial challenges it faces.

[4] One possible solution has been presented by Ngatarawa Development Trust Ltd (Ngatarawa), which has proposed using some of the club's land for a housing development.

The proposal, as it now stands, is to redesign the golf course and to create four areas within it where a total of 95 residential units can be built. Some 29 residential lots are proposed at the western end of the site. Towards the centre of the property, between the front and back 9



holes, a mixed community is proposed, comprising three standard residential lots, eight two-storey villa lots and an apartment building with eight apartments. Close to the Clubhouse and members' facilities a further two-storey apartment building comprising eight apartments is proposed, together with six two-storey villas and ten single-storey villas. There will also be a single residential house site at the end of the row of single-storey villas. At the eastern end of the golf course a further 22 residential lots are proposed, some of which will not have a direct frontage to the golf course but they will retain access to it. Also, close to the present entry to the site off Valentine Road there will be a single tennis court and croquet green, with a sports pavilion and pool. The balance of the land will be held in common ownership through an incorporated society, of which all landowners will be members. The golf club will retain the right to use the course and facilities, on payment of an annual fee.

Site and area description

[5] The golf club land is 56.43ha in area and is a rectangular shape about 1600m long and 400m deep, with the longer axis running approximately north-east to south-west. The residential developments will occupy between 6.8ha and 10ha. (The figure varied somewhat between witnesses, probably as a consequence of the progressively revised layouts of lots and infrastructure). Around most of its perimeter are agricultural and horticultural blocks, the latter being vineyards, orchards and the Gourmet Blueberries operation. On one block at the northern end of the land there is a *pinus radiata* wood lot. To the north-east the Hawkes Bay Equestrian Trust Inc has an equestrian centre. On the southern corner another golf club, the Hastings Golf Club, (the course being known as *Bridge Pa*) adjoins the land on an angle. On the south-western boundary and next to the Hastings Golf Club land is the Hastings, or Bridge Pa, Aerodrome. The suburb of Flaxmere is about 1.5 - 2km to the north, with agricultural/horticultural land intervening. The Hastings City CBD is about 7km to the east.

Activity status

[6] It is common ground that, overall, both the proposed subdivision and the land use are *non-complying* activities in terms of the District Plan, operative since 2003. They must therefore be able to pass either of the s104D thresholds – ie that their adverse effects are not more than minor, or that they are not contrary to the objectives and policies of the District Plan. If they can do so, they may then be assessed under s104 and Part 2.



Hastings Aerodrome

[7] It is necessary to describe the aerodrome and its operations in some detail because it assumes importance in discussing direct noise effects and reverse sensitivity. The aerodrome's main sealed runway (Runway 01/19) is aligned approximately north-south. It is 1075m in length and relatively narrow. It is restricted to aircraft weighing under 7,500kg. There is also a shorter (884m) and partly sealed runway aligned approximately east-west (Runway 11/29). The northern end of runway 01 is about 80m from the golf club boundary and its extended centreline runs across the golf course, about midway between the club house and the proposed housing development at its eastern end.

[8] In 1976 runway lighting was installed to enable night air ambulance operations, now undertaken by Skyline Aviation Ltd, a company of which Mr Michael Toogood is managing director. Mr Toogood is also managing director of Ngatarawa, and his family interests are the shareholders of that company. The Aero Club's commercial flight training arm is Air HB Ltd which operates a professional air training operation having a current full-time student roster of 30. This training operation also requires some night operations.

[9] There are 30 aircraft hangars on the aerodrome with nine such hangars, two Aero Club buildings and two student temporary accommodation units having been built between 2001 and 2007, with more hangars now in the planning stages. There are presently 55 aircraft permanently based on the aerodrome and many more visit for maintenance and repairs at two commercial maintenance facilities, Hawkes Bay Aviation Ltd and Avionics Hawkes Bay Ltd. There are ten aviation-related businesses and three clubs (gliding, skydiving and the Aero Club) based on the aerodrome. In addition the Hastings Air Training Corps No 11 Squadron, with 30 cadets, is about to move its base to the aerodrome. The RNZAF has based exercises on the aerodrome, extending over two weeks, with 200 personnel living on site for that period.

[10] Mr Bruce Govenlock is presently secretary of the Aero Club, but gave evidence in his private capacity and did not profess to speak for the club which takes a position the opposite from his own. He has calculated that 46 people are directly employed on the aerodrome, with a further 20 more employed in the Hastings offices of aerodrome-based businesses. He estimates the direct contribution of the aerodrome and its businesses to the regional economy



as being in excess of \$10Mpa. In addition, there is the indirect economic benefit to the region of the fertiliser, herbicide and pesticide spraying and topdressing services provided from, or supported by, the aerodrome.

[11] There was an irreconcilable conflict in the evidence about the numbers actually involved, but during the frost season (September to November) a number of helicopters can operate off the aerodrome during at night for frost protection on local orchards and vineyards. Helicopters operate off the aerodrome for agricultural/horticultural and general work throughout the year.

[12] The standard flight path for powered aircraft on the main 01 (ie north-facing) runway is a left-hand circuit, meaning that aircraft taking off from that runway will turn to the left on achieving a safe height to do so. For powered aircraft the downwind leg (ie in preparation for a landing on runway 01) runs down the western side of the aerodrome. Prevailing winds mean that this is the most frequently (about 70% of operations) used runway and it was the one which occupied the greatest attention in evidence. The point at which a climbing aircraft will achieve a safe manoeuvring height after take-off will depend on many variables – wind direction and speed and air temperature for instance, but most of all the performance characteristics of the aircraft itself. Self-evidently, a corporate jet and a Tiger Moth will demonstrate different climb-out profiles. There was no agreement on what is a minimum safe manoeuvring height. The 1953 Regulations prescribed 500ft, but the current Regulations do not. But the weight of opinion, as we understood it from such knowledgeable witnesses as Mr William Lamb and Mr Bernard Lewis, is that 500ft is regarded as best practice, and we adopt that as a reliable guide.

[13] Conflicting depictions of *typical* tracks of aircraft in the runway 01 circuit were also presented to us; some showing aircraft consistently making a left turn over, or very close to, the northern boundary of the golf course. Others, from the opposing camp, showed those turns being made at or beyond the mid-way point between the golf course and the southern boundary of Flaxmere. The characteristics and typical track of the Aero Club's principal basic training aircraft, the Piper PA38 Tomahawk, seemed to receive most focus, although effects on the Club are not, for reasons we shall come to, in issue. Nevertheless the Tomahawk tracks can be taken as an example of light single-engine aircraft using the runway. We noted



the comments of Mr Max Dixon, a very experienced instructor, who said that he had taken a student on his Private Pilot's Licence test, in a Tomahawk, at the aerodrome just days before the hearing. He told the student to fly a standard circuit off runway 01 in an 8kt wind, and he flew it just as he had been taught – climbing on full throttle at 75kts, achieving a climb rate of 500-600 ft per minute, and making a left-hand turn at 500ft. The turn occurred at the point mid-way between the golf course and the Flaxmere boundary. Mr Brian Anderson, a private pilot who operates his own aircraft from the aerodrome, said that in his view the Sample Track "A2" showing left turns at around the mid-point between the golf course and Flaxmere was ...*typical*. For what it is worth, what those two witnesses said was confirmed by our own observations of a Tomahawk in the circuit, using runway 01, on the afternoon of our site visit.

[14] All of that said, we must accept that there is a commonly, if not universally, followed track of aircraft making their left-hand turns close to the golf course's northern boundary. We also accept that the present pattern for aircraft approaching the aerodrome and making a standard rejoin to the circuit for runway 01 is to come in from the east and cross the centre of the aerodrome. We return to the point in paras [20] and [21] and conclude that there is undoubtedly a potential for noise complaints.

[15] The Hawkes Bay Gliding Club operates on a grass runway running parallel to the eastern side of runway 01/19. The evidence is that during gliding training on weekends there may be more than 20 launches of gliders being towed by a towplane, per day. Gliding operations have a right-hand circuit off the grass runway, which means that towing aircraft and gliders, when turning after takeoff, turn in the opposite direction to powered aircraft so as to keep separation. We were told by Mr David Davidson that the club pilots generally regard about 400ft as a good compromise between a safe manoeuvring height, and a horizontal distance that would allow a reasonable chance of turning back to the airfield in the event of a rope break or similar mishap soon after take off. Depending on wind conditions, a towplane and glider would typically achieve 400ft at a point close to the northern boundary of the golf course. This would mean that they would be turning away very close to being overhead the proposed houses at the eastern end of the golf course.

[16] There were some, very faint, suggestions that at some time in the future Hastings aerodrome might be a base for scheduled passenger services and, still more faintly, that its



owner/operator might be given status as a requiring authority to enable it to compulsorily acquire land for future expansion. So there is no doubt about it, we make it clear that we regard such possibilities as presently being unsupported speculation, and have taken no account of them.

Section 104D – adverse effects

Approvals of the proposal

[17] The owner and operator of the aerodrome is the Hawkes Bay and East Coast Aero Club Inc, which has operated from it since 1932. It is important to note that the Aero Club, as a legal person, has given its written approval to the Ngatarawa proposal. As at the date of hearing the consent had not been withdrawn and that means that in terms of s104(3)(b) the Court must not have regard to any effects of the proposal on the Aero Club. Persons who are members of the Aero Club have expressed opposition in their individual capacities, as have other users of the aerodrome. While drawing a distinction between effects on those persons, and on the Aero Club, is not easy in practical terms, the attempt must be made. The other occupiers and users of the aerodrome do so under contractual or licence arrangements with the Club but their right to have effects on them considered are not subsumed by the Club's approval.

[18] The Hawkes Bay Equestrian Trust Inc, the owner of the equestrian centre on land bordering the north-east of the site, has also given its written approval to the proposal.

The other aerodrome users' positions

[19] In short, the concern expressed by Mr Govenlock and other witnesses of a similar view is that the aerodrome is a regionally significant asset, providing employment directly and indirectly, and services to rural industries which are important to the Hawkes Bay economy. Additionally, it provides a recreational resource for many, other than those coming under the umbrella of the Aero Club. Even if a suitable site could be found, the affected users of the aerodrome could relocate only at what Mr Govenlock believes would be prohibitive cost. Putting 95 residential units in such close proximity to its activities would, he believes, be likely to generate a level of complaint about noise that would be politically irresistible and lead to the aerodrome's use being unreasonably restricted, or stopped altogether. This is the phenomenon known as *reverse sensitivity*, to which we shall return shortly.



[20] We heard from two well-qualified acoustics witnesses, Mr Nevil Hegley for Ngatarawa and Mr Richard Finley for the opposing appellants. There is a consensus that NZS 6805:1992 provides the appropriate standard for assessing airport noise, and that an external noise level of 55dBA L_{dn} is considered reasonable for a residential environment. This would translate to a level of 45dBA L_{dn} inside a dwelling, with open windows. There was no agreement on where the contour of a 55dBA L_{dn} would actually fall *on the ground* however, because each witness was working off different, and irreconcilable, patterns of flight paths typically followed off runway 01. Mr Hegley worked off patterns provided to him which showed the left-hand turns being made at about mid-point between the golf course and Flaxmere. Mr Finley had been given patterns showing the turns being made above or very close to the golf course. What Mr Hegley had been given squared with his experience with other, and generally larger, airports where the approaching and departing aircraft follow a *straight in – straight out* pattern.

[21] We find it impossible to satisfactorily resolve this issue, in the sense of being able to say that one view is right, and the other wrong. The District Plan does not include noise contours for the aerodrome and, within aviation safety parameters, there is no control over the tracks that aircraft may follow when crossing the golf course. We can be no more definite than to say that, for so long as the present situation continues, houses in any of the clusters of the proposal will regularly be exposed to aircraft noise at levels higher than the generally accepted level of 55dBA L_{dn} .

Reverse sensitivity

[22] Some lawfully existing activities may produce adverse effects on their surrounding environments, or at least they are perceived to do so. Reactions to those effects, or perceived effects, by way of complaints or actions in nuisance can stifle their growth or, in extreme cases, drive them elsewhere. That stifling, or that loss, may be locally, regionally or even nationally significant. If an activity likely to emit adverse effects seeks to come into a sensitive environment, the problem should be manageable by designing appropriate standards and conditions, or by refusing consent altogether. It is when sensitive activities (usually, but not always, residential activities) seek to establish within range of a lawfully established but noise-emitting activity that management may become difficult. This is the concept of *reverse*



sensitivity. There is a useful description of it in an article by Bruce Pardy and Janine Kerr: *Reverse Sensitivity – the Common Law Giveth and the RMA Taketh Away* 1999 3NZJEL 93, 94:

Reverse sensitivity is 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 the 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 not to adversely affect the new activity.

It is well settled law now that reverse sensitivity is an adverse effect, and is therefore to be avoided, remedied or mitigated.

[23] There may be different management solutions for different activities and sites, but there are some discernible principles. First among them is the view that activities should internalise their effects unless it is shown, on a case by case basis, that they cannot reasonably do so. For an airfield, the complete internalisation of aircraft noise is self-evidently not possible, unless its site area is so vast that neighbours are pushed beyond range. Nor is it likely that Gourmet Blueberries could do so, given the nature of its operations. That said, there is no absolute requirement in the RMA that internalisation of effects must be achieved. See eg; *Catchpole v Rangitikei District Council* (W35/03).

[24] Secondly, to justify imposing restrictions on the use of land adjoining an effects-emitting site, that activity must be of some considerable economic or social significance locally, regionally or nationally.

[25] Thirdly, 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.



'No complaints' covenants

[26] As well as measures such as noise insulation in the houses, landscaping and so on, Ngatarawa proposes so-called *no-complaints* covenants as one of the ways of dealing with reverse sensitivity issues. The owners of the incoming activity (ie properties in the residential development) would be contractually required to not complain about or take any enforcement action against the adverse effects being emitted by the existing neighbouring activities. The creation of such a covenant would be a condition of the consent under s108 RMA, and could be registered on the title of the receiving sites under s109. Prospective owners of the receiving sites would therefore have notice of the covenant and would be able to decide whether or not to buy on those terms. It is plain that a condition imposed under s108 must meet the tests in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, that is, it must:

- be for a resource management purpose
- fairly and reasonably relate to the development authorised by the consent to which it is attached
- must not be unreasonable, in the sense that no reasonable authority could have imposed it.

Most cases seem to have assumed that such a condition meets those tests, but in *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601, Baragwanath J found that the imposition of such a condition without the consent of the applicant was not lawful:

...neither a council nor this Court may order an unwilling party to surrender, as a condition under s108, the right as affected party to receive notice of an application under s93(1)(e), to make submissions under s96, and to appeal under s120.

And in *Christchurch International Airport v Christchurch City Council* [1997] NZRMA 145 at 158, Tipping J was at pains to emphasise that his view that a *no complaints* covenant was not unlawful was confined to a consideration of Bill of Rights issues, and not to vires or reasonableness under the RMA.

[27] Ngatarawa, as mentioned, is volunteering such an arrangement, so the *Ports of Auckland* issue does not immediately arise. Such covenants do not avoid, remedy or mitigate the primary effects – nothing becomes quieter, less smelly or otherwise less unpleasant simply because a covenant exists. On their face, they might avoid or mitigate the secondary effect of



the ensuing complaints upon the emitting activity. But all they really mean is: *If you complain, we don't have to listen*, and there are issues about such covenants which have not, to our knowledge, been tested under battle conditions. We are not to be understood as agreeing that they are a panacea for reverse sensitivity issues.

Reverse sensitivity – other nearby activities

[28] Mr Jonathan Wiltshire gave evidence about the intensive orchard to be developed, as a permitted activity by his family trust on land adjoining the western boundary of the golf club. This will mean that the edge of the orchard, comprising some 39,600 trees, will be about 7m from the common boundary. In common with the aerodrome users, he has understandable concerns that placing 29 houses close to that boundary will generate complaints about machinery noise, odour and dust, all of which will inevitably be generated by the orchard operations and which will not be able to be internalised.

Conclusions on reverse sensitivity

[29] We accept that the aerodrome, and the horticultural activities surrounding the golf club are locally and regionally significant activities, and we certainly recognise the possibility that the secondary effect of reverse sensitivity may arise. But we think that there does need to be a measure of robustness about this. Those who might come to this golf course to live have to expect some noise, and just have to accept that as a fact of life, or not come at all.

[30] And, in any event, if there are complaints of a level that begin to cause issues, aerodrome users may have possibilities open to them, short of unreasonable restrictions on their activities. For instance, a local “rule” that aircraft climbing out from runway 01 should not turn before the mid-point between the golf course and Flaxmere (except of course when safety dictates otherwise) would go a long way to avoiding aircraft directly overflying the proposed houses at either end of the golf club’s land, while not imposing any unreasonable restriction on aviation. We noted that experienced pilots said that they already attempted to do something similar, in not directly overflying the edge of Flaxmere, simply in the interests of being a *good neighbour*.



[31] We take account of reverse sensitivity as an adverse effect in coming to our overall view. Had it stood alone, we doubt that it would have been enough to carry the day, but when added to the issues we are about to discuss, it certainly helps settle our views.

Gourmet Blueberries Ltd's position

[32] Gourmet Blueberries now owns a total of 113ha adjoining the boundaries of the golf club, with the common boundary on the northern side of the golf club land extending for some 540m. Some 38ha is already planted, with overhead netting and irrigation etc in place. This produces some 500 tonnes of fruit pa. The company proposes to expand production into the balance of its land on that northern boundary, with a total of some 80ha to be planted. It too is concerned about the possibility of reverse sensitivity: - complaints from residents on the golf club land about adverse effects of noise in particular, but also spray drift, and odour, and of the impact on visual amenity arising from the hail netting and other structures on its land.

[33] The company also has a concern about the possible direct effects of District Plan noise restrictions on its operations. The Plan contains limits for noise that may be generated from any site, with the levels of noise to be measured at the boundaries, or notional boundaries, of neighbouring residential properties. At present of course there are no residential properties there, and there is no issue. The proposal would insert 29 dwellings close to the Gourmet Blueberries boundary, immediately creating a requirement for it to comply with the noise limits. Its operations require the use of a variety of machinery, and the employment of large numbers of people, particularly during harvesting. It fears that it may simply be unable to comply. The company is a significant contributor to the local and regional economy. All up, it will invest some \$20M in its Hawkes Bay operation, and its crop has a present annual value in the vicinity of \$9M. At the height of the harvest it presently employs up to 450 people on the property, and this is likely to increase to around 1000 when production expands. Its location close to Flaxmere and Hastings, and the pools of potential labour they contain, is an important factor for it.

Effects on Gourmet Blueberries and general Rural Land Use

[34] The focus of Ngatarawa's evidence was on the reverse sensitivity effects and it paid little attention to the limitations that would be placed on the use of adjoining land following the erection of dwellings within the golf course. Mr Denis Nugent, Gourmet Blueberries'



consultant planner, gave evidence that the development would create an adverse effect on surrounding activities in terms of the noise rules in the District Plan, and the same issues arise with other surrounding activities also.

[35] An adverse effect that Ngatarawa cannot mitigate is the creation of many more notional boundaries than the District Plan permits in the *Rural* zone or *Plains* sub-zone. The District Plan applies noise level controls at notional boundaries, in addition to noise level controls at property boundaries. A notional boundary is ...*a line 20 metres from the façade of any dwellinghouse, or any building being part of a residential activity, visitor accommodation ... or the legal boundary, whichever is closer to the dwellinghouse or building.*

[36] The proposed development would create of the order of 80 more notional boundaries than the Plan permits on the golf club land, with more than half of the new notional boundaries around or close to the perimeter of the site, exacerbating the effect. Even if the subdivision was the four lots allowed by the Plan as a *controlled* activity, they would likely be rural in character, with their boundaries further from the noise source, and their residents more likely to be accepting of a rural noise environment.

[37] Rural activities need only meet a noise standard of 65dBA L₁₀ at the boundary of the site (if there is no dwelling on the neighbouring land) and 50dBA at the notional boundary of dwellings on adjacent sites during the day, reducing to 40dBA at night (Table 14.2.8.1-1). Rule 14.2.8.3(1) exempts vehicles and mobile and portable machinery from these noise levels, provided the best practicable option is adopted to ensure the noise does not exceed a reasonable level. Additionally, Rule 14.2.9 provides special noise requirements, different from those in Table 14.2.8.1-1, for audible bird scaring devices, hail cannon, and frost protection fans, including separation distances from residences.

[38] In practical terms, in respect of Gourmet Blueberries' operations, there is nothing presently on the golf course site that requires them to achieve a noise level below 65dBA on the boundary of any Gourmet Blueberries' land. With the erection of a dwelling at the western end of the site, Gourmet Blueberries is going to have to comply with a noise limit of 50dBA at a point as little as 10m from its existing operation between 7 am and 7 pm Monday to Friday and 7 am to 12 noon on Saturdays, reducing to 40dBA at all other times. A similar,



but lesser, effect will occur for the planned expansion on the land now owned by Gourmet Blueberries: - a future environment in the sense discussed in *Queenstown Lakes DC v Hawthorn Estate Ltd* [2006] NZRMA 424. This same effect will apply to other potentially productive land adjoining the residential use proposed near the boundary of the golf course.

[39] On top of that, there is the restriction on the permitted activity status of audible bird scaring devices of a noise limit of 115dBC peak between sunrise and sunset at the notional boundary of any residential building. The guide in Rule 14.2.9 suggests that rotating gas guns or gas guns pointing towards the relevant boundary if located within 150 metres, with a smaller separation for gas guns fixed away from the relevant boundary and/or noise barriers used, may not comply with that performance standard and be at risk of enforcement action. The outcome sought is controlling bird-scaring devices so as to avoid excessive intrusion on adjoining residents. That would be relevant to a resource consent application, which may be less likely to be granted given the effects on golf course residents.

[40] For frost protection fans as a permitted activity (Rule 14.2.9.3), there is a need for users to adopt the best practicable option to avoid creating an unreasonable level of noise. While the separation distance refers to any residential zone, it is a guide as to what would be considered as being the best practicable option, and an unreasonable level of noise. That separation distance is 300m from the boundary of any residential zone, with a location as close as 100m subject to their being fitted with equipment demonstrated to comply with a limit of 65dBAL₁₀ at the boundary. For a resource consent application, the outcome sought is to control frost protection fans so as to reduce adverse effects for residents in the area.

[41] Users of hail cannons as permitted activities (Rule 14.2.9.2) must adopt the best practicable option to avoid creating an unreasonable level of noise, with no hail cannon to be used within 200 metres of any residence not located on the same site. The outcome sought, and relevant to any resource consent application, is the controlling of hail cannons so as not to endanger the hearing of neighbouring residents, or to avoid excessive intrusion on people in residential areas.

[42] All these noise restrictions would have the potential to trigger the requirement for a rural undertaking activities connected with the soil resource to obtain a resource consent.



There is no certainty that a resource consent would be granted, or that conditions imposed would be acceptable for rural production, given the *urban* nature of the proposal. We had no map or plan demonstrating the areal extent of these restrictions. However, it is clear that they could cover a significant land area, and there was no agreement from most of the neighbours of the adjoining rural land to accept such restrictions.

Section 104D – objectives and policies of the District Plan

[43] We had evidence from four planners. Mr Matthew Holder covered all planning aspects. Mr Greg Osborne gave evidence on potential reverse sensitivity effects from aircraft noise and Mr Michael Foster on potential impacts of the continued operation and expansion of Bridge Pa aerodrome. Mr Denis Nugent dealt with those aspects that would affect Gourmet Blueberries. We also had extensive submissions from Counsel, and we should say that we found Mr Cowper's submissions particularly helpful on Plan issues.

[44] Mr Holder gave evidence that the proposal would not be contrary to the overall intent of the objectives and policies of the District Plan. Mr Nugent gave evidence that the objectives and policies of the district plan set a clear strategy for development on the Heretaunga Plains, comprising four elements. He listed the first as maintaining the productive potential of the soils, including for new and innovative production methods or species. He saw the second as development that is not based on the productive use of the soils should not hinder the use of adjacent land for productive rural activities. The third was that rural productive activities are entitled to create adverse effects that would not be acceptable in urban areas provided these adverse effects are kept to a level reasonable for amenity values of a rural area. Finally that the potential for conflict between adjacent activities should be minimised. He considered the proposal is contrary to that strategy for two reasons. It proposes to place residential activities on a site surrounded by potentially incompatible activities and would remove the potential for this land to be put to any other productive rural use in the future.

[45] Mr Foster was of the opinion that the proposal would be contrary to objectives and policies of the Plan referring to Bridge Pa Aerodrome, because of the potential for the development to impose limitations on its future operations and its ability to grow. He considered the plan provisions establish that the aerodrome is a key district resource withstanding it is not listed as a regionally significant piece of transport infrastructure in



the Regional Policy Statement) with a long-standing expectation that the aerodrome will continue to grow. Mr Osborne considered the objectives and policies of the district plan did not put any priority on protecting the aerodrome from reverse sensitivity concerns from neighbours about aircraft noise.

Rural Resource Strategy

[46] The Rural Resource Strategy has as an objective to promote the maintenance of the life-supporting capacity of the Hastings District's rural resources at sustainable levels (RO1). A second objective is to enable the efficient, and innovative use and development of rural resources while ensuring that adverse effects associated with activities are avoided, remedied or mitigated (RO2). A third objective is to enable the effective operation of land based production activities within established amenity levels in the rural areas of the Hastings District (RO3).

[47] The policies for the Rural Resource Strategy include enabling rural activities which might generate adverse effects such as noise or smell, to operate in rural areas in accordance with accepted practices, without being significantly compromised by other activities demanding higher levels of amenity (RP2). Another policy is to provide for the establishing of a wide range of activities which complement the resources of the rural area, provided that the sustainability of the natural and physical resources of the area is safeguarded (RP3). Also the policy is to manage rural land close to urban areas to avoid sporadic and uncontrolled conversion to activities that will individually or cumulatively adversely affect the sustainability of the rural resource base (RP5).

[48] Redeveloping the site would not remove any additional *Rural/Plains* land from agricultural use, given its current use as a golf course. However, the life supporting capacity of the land would be lost by being built over with housing and roading and fragmented into land parcels too small to farm, foreclosing opportunities for efficient and innovative uses of the land, such as blueberry production (RO1, RO2 and RP3). The proposed development would result in the establishment of landholdings incapable of supporting a ...wider range of

activities that can retain the life supporting capacity of the Plains resources (RO3 and RP3 and Plains zone PLO3). The proposed intensive residential use would juxtapose conflicting uses with associated adverse effects (RO2). Far from internalising and dealing with its



adverse effects, the proposal does the reverse by potentially constraining rural production activities on adjacent land. The development would not ensure the continued "right to farm" for neighbouring sites.

[49] The amenity level needs and expectations of the golf course residents would not fit within established amenity levels in the rural area (RP2). Reverse sensitivity could be a problem and restrain rather than enable rural production and land uses (RO2 and RO3). Worse than that, the presence of residential uses around the perimeter of the golf course would impose real constraints on accepted practices in the rural area (RP2). Activities on neighbouring properties that could occur as of right under the permitted activity category would require a resource consent, and that could be declined or made subject to conditions. The sustainability of surrounding productive land uses could therefore be undermined and the activities would not safeguard the sustainability of natural resources (RP3 and RP5).

Plains Zone

[50] The *Plains Zone* carries through the themes, and even some of the wording of the Rural Resource Strategy and *Rural Zone* objectives and policies. Relevant provisions are:

Objectives:

PLO1 To maintain the life-supporting capacity of the unique resource balance of the Heretaunga Plains.

PLO2 To avoid, remedy or mitigate potential adverse effects of land use activities on the rural community, adjoining activities, marae, and the economy.

PLO3 To provide for the establishment of landholdings on the Plains which can accommodate a wider range of activities that can retain the life-supporting capacity of the Plains resource.

PLO4 To ensure that existing levels of amenity associated with existing land based primary production on the Plains are maintained.

Policies

PLP1 Enable the establishment of a wide range of activities provided they maintain the life supporting capacity of the soil resource of the Heretaunga Plains for future use.

PLP2 Ensure that subdivision results in properties on the Heretaunga Plains capable of supporting a diverse range of activities that utilise the soil resource in a sustainable manner.

PLP4 Control the adverse effects of activities on the community, adjoining activities, and the environment.



PLP5 Activities locating in the Plains Zone will need to accept existing amenity levels associated with well established land use management practices involved with the sustainable use of the soil resource.

PLP6 Limit the scale and intensity of the effects of Commercial Activities in the Plains Zone in order to ensure the sustainable management of the soil resource and to mitigate adverse effects.

PLP11 Noise levels should not be inconsistent with the character and amenity of the Plains Zone.

PLP12 Activities which support tourism development on the Plains and are based on the sustainable management of resources will be encouraged.

PLP14 Provide for the continued use and development of the Bridge Pa Aerodrome within its existing site.

[51] The proposal would fragment and convert rural land for residential uses that would conflict with neighbouring land uses and diminish, rather than maintain, the life-supporting capacity of the Plains for the future (PLO1, PLO2 and PLP1). The presence of residential activities at such intensity and in the locations proposed would potentially have adverse effects on adjoining activities and the economy as a consequence of rural production limitations (PLO2). The intensive nature of the proposed residential development would make it difficult for neighbouring land users to continue existing activities while maintaining existing amenity levels (PLO4).

[52] The proposal would not sustainably utilise the soil resource (PLP2). It would constrain the uses to which both the golf club land and neighbouring land could be put, rather than enabling a wide range of land uses (PLP2). The effects of conflicting rural and residential land uses would not be controlled, with the minimal separation distances between new residential activities and agricultural activities (PLP4). Golf course residents could not be forced to accept the existing amenity levels associated with well-established land management practices (PLP5) and there would be the potential for reverse sensitivity conflicts (PLP6). The establishment of a residential enclave in the middle of a working rural environment adjacent to an aerodrome would fail to recognise that activities in the *Plains* Zone generate significant amounts of noise and to protect their continued economic operation (PLP11). The proposal

would not meet the imperatives for the encouragement of tourist and recreation activities in the *Plains* Zone given the adverse effects (PLP12). There would be likely demands by



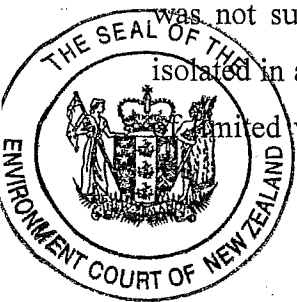
residents and visitors for the restriction of rather than the continued use and development of the Bridge Pa Aerodrome (PLP14).

Urban development and strategic urban directions

[53] The Hastings District Plan provides direction for new urban developments in Urban Development and Strategic Urban Directions. Relevant objectives are to establish an effective, and sustainable, supply of residential land to meet the current and future demands of the Hastings District Community (UDO1). A second objective is to minimise the expansion of urban activity onto the versatile soils of the Heretaunga Plains (UDO2). A third objective is to continue to promote infill development and the redevelopment of existing residential areas (UDO3). A fourth is to minimise future environmental hazards, at the urban/rural interface (UDO4).

[54] Relevant policies are to implement an urban development strategy which ensures that there is adequate residential land to meet demand and so avoid pressure for rezoning land on an ad hoc basis for residential development (UDP1). Also to ensure that a diverse range of residential development opportunities are available throughout the district (UDP2). There is also a policy to investigate a range of alternative urban development strategies for the future which avoid, remedy or mitigate adverse effects, including minimising effects on high quality and versatile soils in terms of their life supporting capacity and the reasonably foreseeable needs of future generations (UDP3). Another policy is to manage the extent and effect of the rural-urban interface (UDP4). Finally, there is a policy to encourage higher density development, as both a short and long-term mechanism, to avoid, remedy or mitigate adverse effects including the effects on high quality and versatile soils (UDP5).

[55] The proposed subdivision may go some way towards supplying residential housing demands for those wishing to live on a golf course (UDO1). However in terms of the objective of effective and sustainable supply, there is no certainty of the future success of the golf course. Once the land is subdivided into small parcels and sold, and particularly when houses and apartments are erected, the situation would be irreversible. If the project overall was not successful in saving the golf course, the end result would be clusters of housing isolated in a rural environment. In addition, the residual golf course land would potentially be of limited value for production, given the proximity of the houses within it and around its



perimeter. In any event, there would be urban encroachment onto the soils that are, at the least, suited to blueberry production (UDO2).

[56] The proposal is the kind of ad hoc development that the Plan aims to avoid (UDP1). The result would be an inappropriate interface between rural land uses, aerodrome activities and intensive residential development (UDP4).

Subdivision

[57] There is an objective to provide for the subdivision of land which supports the overall objectives and policies for the various zones and promotes sustainable management of natural and physical resources (SDO1). A further objective is to ensure that sites created by subdivision are physically suitable for a range of land use activities allowed by the rules of the District Plan (SDO3).

[58] The proposal would not create sites that are physically suitable for a range of permitted activities. The residential activities could not support a productive activity on the land.

Recreation

[59] There is an objective to provide for the establishment, operation, development and maintenance of land for reserves and recreation activities, while ensuring that adverse effects on the environment are avoided, remedied or mitigated (REO1). Another is to provide for the continued operation and development of regionally significant recreational facilities, while protecting the amenity of adjoining properties and the operation of activities provided for as *permitted* in the adjoining zones. Also there is a policy to ensure that places of assembly and any recreation activities undertaken there are located, designed and operated in a manner that will not adversely affect the environment, including adjoining activities and the character and amenities of the area where they are located (REP2).

[60] The proposal would result in improvements to the golf course, but would not provide any additional golfing opportunities to the District. For the residents in and around the golf course it would provide a more readily enjoyed recreational experience. The Aerodrome is the only recreational resource for aviation enthusiasts in the District, while there are other golf courses. The potential effect of the development on Bridge Pa Aerodrome's recreational



activities is not known. However, it is clear that the development would compromise legitimate adjoining existing and potential land uses, and the working rural amenity otherwise permitted in the surrounding area, and would be inconsistent with the Recreation objectives and policies to that extent.

Transport

[61] There are relevant objectives and policies as follows:

Objective

TO6 To promote the continued use and development of Bridge Pa Aerodrome in a manner that remains sensitive to the environmental and amenity values of adjoining communities.

Policies

TP7 Review in conjunction with the Hawkes Bay Aero Club and the wider Bridge Pa community, future development opportunities, constraints and environmental consequences associated with the continued growth and development of the Bridge Pa Aerodrome.

Explanation

The Bridge Pa Aerodrome is a key resource of the District. ...

Any extension of the aerodrome is likely to have direct impact on the District road network, and on the local Bridge Pa community. The Council will work with the Hawke's Bay Aero Club and the community to establish a long term future plan for the aerodrome and establish the environmental bottom lines for the operation of the aerodrome, and the community.

TP8 Manage the effects associated with the operation of the Bridge Pa Aerodrome on adjoining activities.

Explanation

Noise associated with the use of Bridge Pa Aerodrome will generate negative effects on adjoining land uses. The District Plan will control the establishment of activities which are incompatible with the operation of the aerodrome, as well as establishing appropriate noise limits for the operation of the aerodrome and its associated activities.

The proposal would be contrary to the objectives and policies on the Bridge Pa Aerodrome, in introducing urban-style residential uses which would be subject to unreasonable noise effects. As Mr Foster identified, there is a need for the review referred to in Policy TP7.

Overall Assessment of Plan provisions

[62] The proposal would therefore be contrary to key objectives and policies, particularly the overall thrust of the Rural Resource Strategy, *Plains* zone, Urban Development and Strategic



Urban Directions, and Subdivision sections of the District Plan. It would therefore not meet the gateway test in s104D.

Conclusion on the s104D thresholds

[63] We find that it is not appropriate to permit the number of notional noise boundaries surrounding working rural land to proliferate beyond the number permitted by the District Plan. To do so would unreasonably and unfairly constrain the activities properly located in the *Plains Zone*. The adverse effects of the proposed development on the use of the rural land surrounding the golf club land would individually, and more so cumulatively, be more than minor. As discussed in paras [20] and [21] there would, we consider, be direct adverse noise effects on the proposed housing within the golf course site. The conclusions expressed about reverse sensitivity upon aerodrome users and other surrounding owner/occupiers, while not decisive standing alone, reinforce our view that on any reasonable assessment the adverse effects of the proposal will be significantly more than minor.

[64] For the reasons we have outlined, our clear conclusion is that the proposed activities will plainly be contrary to the objectives and policies of the District Plan. We are conscious of course that a *non-complying* activity will be unlikely to find support in the Plan's provisions, and that is not the test we apply. We consider that there is irreconcilable conflict between the proposal and the Plan's objectives and policies.

[65] That being so, the consents cannot be granted in terms of s104D(1). We should add though that even if it might be thought that we have applied too rigid a test in considering s104D, we would not have granted the consents under s104, and we can briefly outline why that would be so.

Section 104(1)(a) – positive effects

[66] Whether the Ngatarawa proposal will actually succeed, at least to the point of revitalising the golf club's financial position, is not an issue for us. We must deal with the resource consent issues on the assumption that what is proposed will be commercially viable.

On that basis there will be positive effect for the economic wellbeing of the club, and at least the social wellbeing of its members. For those who come to the amenity of living on the golf land, there will also positive effects for their social (ie golfing) wellbeing.



Section 104(1)(a) – adverse effects

[67] We have discussed the adverse effect of reverse sensitivity, and the direct effects on Gourmet Blueberries of noise restrictions, and there is nothing that need be added to those points.

Section 104(1)(b) - Regional Plan and Policy Statement

[68] Mr Nugent points out that the RPS contains, in section 3.5, Objective 16:

For future activities, the avoidance or mitigation of nuisance effects arising from the location of conflicting land use activities.

And Policy 6

To recognise that the future establishment of potentially conflicting land use activities adjacent to, or within the vicinity of each other is appropriate provided no existing land use activity (which adopts the best practicable option or is otherwise environmentally sound) is restricted or compromised. This will be primarily achieved through liaison with territorial authorities and the use of mechanisms available to territorial authorities, which recognise and protect the ongoing functioning and operation of those existing activities.

Those provisions, as one would expect, are matched by the District Plan provisions, which we have already extensively reviewed.

Section 104(1)(c) – other relevant matters

[69] As we have had occasion to mention in a recent decision – *McKenna v Hastings DC* (W016/2008) – the credibility and integrity of the District Plan as an instrument for avoiding, mitigating and remedying adverse effects is an issue that can be dealt with as an ...*other matter ... relevant and reasonably necessary to determine the application*. Because this proposal is, in our judgement, so irreconcilably contrary to the provisions of the District Plan, to allow it would call into question the ability of the Council to use the Plan as a means of managing the potential effects identified during the Plan development process.

Part 2 matters

[70] There are no relevant issues arising under s8 or s6. In terms of s7, paras:

(aa) *The ethic of stewardship,*

(b) *The efficient use and development of natural and physical resources,*

(c) *The maintenance and enhancement of amenity values,*



(f) *Maintenance and enhancement of the quality of the environment, and*

(g) *Any finite characteristics of natural and physical resources,*

were all raised to a greater or less extent. Without needing to repeat what has been said in discussing effects and Plan provisions, we see it as unlikely to promote stewardship, or the efficient use of resources, or to have regard to the finite resource of the *Plains* zone land, to allow this proposal when it is likely to bring about restrictions on the use of neighbouring land for productive purposes. While the surrounding land, and the golf course land itself, may not comprise elite soils there is more than enough evidence to persuade us that, as with the Gourmet Blueberries land, they can be very productive under the right regime.

Section 290A – the Council's Decision

[71] Section 290A requires us to *have regard* to the Council's decision – in this case of course it is the decision of the Commissioner to whom, for good reason, the Council delegated its decision-making role. We find ourselves in fundamental disagreement with that decision on key points. In considering adverse effects, the Commissioner regarded the issue of reverse sensitivity, insofar as it arose at all, as largely being dealt with by *no complaints* covenants. While, taken alone, the reverse sensitivity issue may not have been decisive for us, we did not regard it as having been dealt with to the point that we could put it aside entirely.

[72] While the Commissioner noted that a representative of Gourmet Blueberries spoke against the proposal, the concerns of that company about the direct effects of noise limits did not seem to have been expressed to him in the same way as they were to us, and we found that position influential.

[73] It was the Commissioner's view that the proposal was not contrary to the objectives and policies of the District Plan. For the reasons outlined, our view is that it plainly is contrary to them.

Result

[74] For the reasons outlined, it is our view that the resource consents should not be granted. Formally, the appeal by Ngatarawa Development Trust Ltd against the condition is declined, but the appeals by the other parties against the grant of the resource consents are allowed.

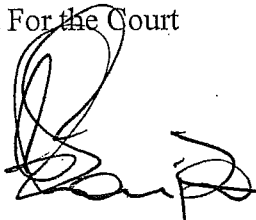


Costs

[75] Costs are reserved. Any applications should be lodged by 9 May 2008, and any responses lodged by 23 May 2008.

Dated at Wellington this 14th day of April 2008

For the Court



C J Thompson

Environment Judge

