Decision No. W 0055/2004

ORIGINAL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of references under Clause 14 of the First Schedule to the Act

BETWEEN WINSTONE AGGREGATES
(RMA 788/98)

INGHAMS ENTERPRISES (NEW ZEALAND) PTY LIMITED
(RMA 831/98)

ENVIRONMENTAL FUTURES INC
(RMA 840/98)

MORRINSVILLE FEDERATED FARMERS & OTHERS
(RMA 791/98)
Appellants

AND THE MATAMATA-PIAKO DISTRICT COUNCIL
Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge C J Thompson
Environment Commissioner R M Dunlop
Environment Commissioner B R Gollop

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

HEARING at Te Aroha: 15 – 19 March 2004 and at Auckland: 22 – 24 March 2004. Site visits 17 March 2004.

COUNSEL/APPEARANCES:

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R Macky for Inghams Enterprises (New Zealand) Pty Limited

A Dormer for Environmental Futures Inc - EFI

J R B Kingston for Morrinsville Federated Farmers

P F Majurey and B Matheson for Fonterra Co-operative Group Limited (s274 party)

J D Lynch for Richmond Limited (s274 party)

J G Goodyer for V E Rutherford (s274 party)

M L Wallace for himself, Harbottle Road Residents and A Blattler (s274 parties)

A M B Green and J D Young for the Matamata-Piako District Council

INDEX

INTERIM DECISION

Introduction

[1] The Matamata-Piako District is blessed with land of high natural fertility and is intensively farmed over much of its area. Relevant to the issues before us, the Fonterra Group has two dairy factories in the district, which together process more than 900 million litres of milk per year and directly employ some 370 people. Inghams has contracts with more than 20 farmers to raise millions of broiler chickens per year and has a substantial processing plant, presently being expanded. Winstone Aggregates has a significant quarry, producing aggregates for use in the district, and beyond. Although its property is not directly the subject of these references there is a substantial meatworks operated by Richmond, and there are other rural industries based on primary production also.

[2] How all these industries can, in resource management terms, co-exist with other activities is the common thread through these references. Sustainable co-existence is important because, inevitably, industries of these kinds and scales may produce effects on their surrounding environments, or at least people believe they do. In turn, reactions to those effects, or perceived effects, by way of complaints or actions in nuisance can give rise to pressures on the industries that can stifle their growth or, in an extreme case, drive them elsewhere. That stifling, or that loss, may be locally, regionally or even nationally significant. If an industry or 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 effect emitting industry or activity that management may become difficult. This is the concept known as *reverse sensitivity*. A very helpful definition of the concept is given in an article by Bruce Tardy and Janine Kerr: *Reverse Sensitivity – the Common Law Giveth and the RMA Taketh Away:*

> 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.

The central issue

[3] In a number of previous decisions this Court has held that reverse sensitivity is itself an adverse *effect* in terms of s3 RMA [eg *Winstone Aggregates & Auckland Regional Council v Papakura District Council* (A49/02) para [12] and *Independent News Ltd v Manukau City Council* (A103/03)]. That has a significant consequence. If reverse sensitivity is an adverse effect, then there is a duty, subject to other statutory directions, to avoid, remedy or mitigate it, so as to achieve the Act's purpose of sustainable management.

[4] Whether one should deal with an adverse effect by avoiding it, remedying it or mitigating it is a question of judgement in each case. It will depend on a matrix of issues; for instance, the nature of the effect; its impact on the environment and amenities; how many people are affected by it; whether it is possible to avoid it at all and, if so, at what cost. In some circumstances remedy or mitigation may suffice. In others they will not, and avoidance will be the appropriate option. Dealing with reverse sensitivity as an adverse effect poses another issue. The reactions of people to a real or perceived emitted effect can vary widely, often being conditioned by their background. Some may stoically endure it, not notice or place weight on it, while others may complain vociferously. Those subjective, sometimes even irrational, responses cannot be accurately predicted, save that it may be assumed that if there is anything to complain about, sooner or later somebody almost certainly will do so. We recognise the *corrosive* effect that continued complaints at a high level can have on a company's continued confidence in operating in an area. That said, we do not accept that unjustified complaints need have, or be regarded as, an adverse *reverse sensitivity* effect. Such complaints can and should be recognised for what they are. Whether complaints are justifiable in any given circumstance can turn on a mix of considerations, including the general environment, existing use rights, compliance with applicable consent conditions and perceptions of whether the *best practical option* has been adopted. Existing plants with older equipment and dated operations may be more vulnerable to reverse sensitivity pressures than those newly established. But if an attempt to deal with the issue is to be made there is little point in trying to deal with reverse sensitivity at the stage where people have any plausible cause for complaint. The goal should be to remove a possible source of complaint completely, or at least to minimise it to the point where any complaint can be plainly labelled frivolous or vexatious. This has been discussed in terms of the emitted effect being the

primary effect, and the complaining response, the reverse sensitivity, being the secondary effect.

[5] Logically, the most efficacious response is to avoid or eliminate the primary effect altogether. That could be done by closing down the emitting activity, which might though be socially or economically undesirable. It is to be remembered that *sustainable management* includes enabling people and communities to provide for their social and economic wellbeing. Removing, for instance, Fonterra's operations from Matamata-Piako would be a very significant regional loss in terms of wages revenue alone. Alternatively, managing the primary effect could be done by upgrading processes and technologies, but the desired improvements may not exist, or be unsustainably expensive. It may be that the best that can reasonably be done is a combination of process and technology improvement, and/or some degree of isolation of the emitting activity from other, incompatible, activities to the point where they cease to have adverse effects on each other, or at least that any adverse effects would be very minor. It does not answer the point to say that the emitting activity exists lawfully under the RMA, and should therefore be regarded as exempt from nuisance action. Section 23(1) RMA specifically provides that that is not the case. The judgment in *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 confirms that to be so.

[6] This range of possibilities has been reflected in various decisions of this Court and its predecessor bodies. *In Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council* (No2) (1993) 2 NZRMA 574, consent to the construction of a rendering plant was refused because the Planning Tribunal regarded its odour emissions as unacceptable because they could not be prevented, or internalised to the site. In *PH van den Brink (Karaka) Ltd v Franklin District Council* [1999] NZRMA 552 and in *Hill v Matamata-Piako District Council* (A65/99) the Court found, on the evidence before it, that the offensive odours and noise could, with appropriate conditions, be internalised to the sites and that it was reasonable to impose that requirement on them. But in the *Winstone Aggregates* decision cited in para [3], the Court found that not all of the adverse effects could be internalised and that, if the quarry was to continue in operation [and it was thought desirable that it should] then it was reasonable to impose a buffer zone around it even though that would restrict the activities of surrounding landowners. In a more recent decision; *Sugrue v Selwyn District Council* (C43/04), the

receiving property was required to take quite substantial measures to minimise the possible adverse effects of odour from a nearby piggery on a restaurant proposed for the receiving site.

Some principles

[7] So there may be different solutions for different activities and sites, but there are some discernible principles. First among them is the view that in every case activities should internalise their effects unless it is shown, on a case by case basis, that they cannot reasonably do so. That is a view previously expressed and confirmed in decisions already cited in paras [3] and [6]. The *Sugrue* decision was one decided on its own facts and should not be read as diluting the principle that emitted effects are to be avoided, remedied or mitigated by the emitter, to the greatest degree reasonably possible.

[8] There is a greater expectation of internalisation of effects of newly established activities than of older existing activities. That is because new activities are not encumbered by existing plant and processes and have easier access to contemporary technology. Also, the older activities may be restricted by their sites which may have little scope for *within boundary* buffers. On that aspect, we agree with the evidence of the Council's consultant planner, Ms Ralph [in particular paras 41 and 56 of her brief]. It is our view that new activities are also subject to society's progressively higher expectations of improved environmental performance. If those expectations impose higher entry costs then, in the end, society will probably pay for those expectations through higher prices for whatever is produced at the relevant site.

[9] That said, it is recognised that having done all that is reasonably achievable, total internalisation of effects within the site boundary will not be feasible in all cases and there is no requirement in the RMA that that must be achieved. See eg; *Catchpole v Rangitikei District Council* (W35/03).

[10] 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.

[11] If that point is reached, and the only feasible means of protecting the industry from reverse sensitivity is to impose restrictions on surrounding land, [ie an external *buffer zone*] any such controls on the use of land beyond the emitting site boundary should be in the form of a discretionary or a restricted discretionary, rather than a non-complying, status for the sensitive activity. Otherwise, there is a distinct risk that, de facto, one creates what was described in the decision in *Wellington International Airport Ltd v Wellington City Council* (W102/97) at p47 as a *tacit prohibition*. We would require a very robust s32 analysis to satisfy us that non-complying status would be justified on the *Nugent* tests: see *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481, 484. We say more about s32 at para [20]ff. For the moment it will suffice to say that we saw no such justification, and that at least some of the parties; eg the Council and Inghams, moved at least partly towards that position, accepting that a discretionary status would be appropriate.

[12] Where there is a low probability and 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. We pause to note here that *low probability and low impact* is not one of the express s3 definitions of *effect,* but the s3 definitions are not an exhaustive list. This approach was supported by Federated Farmers' evidence before us as *the lesser of two evils.* We think that eventually Mr Wallace came to this view also. It is inevitable that some lawful rural activities will at times be unable to totally internalise their effects. As described in para [9], the law does not require that. This is generally understood and accepted by those who live and work in rural areas. Having said that, we recognise that rural – residential *life-stylers* in particular may have a different view and it is they, together with those living in settlements near emitting sites, who generally have the greatest potential to generate reverse sensitivity effects. We think that there does need to be a measure of robustness about this. Those who come to the countryside to live have to expect some rural smells, and they may just have to face the choice of accepting that as a fact of life, or accepting that there may be controls placed on how they use their land.

The Council's position – issues, objectives, policies and rules

[13] As originally notified in November 1996, the Council's proposed plan recognised that issues of reverse sensitivity were likely to arise where rural industry, or industry generally, was in proximity to residential activities. Treating reverse sensitivity as an adverse effect, it

took the view that in preparing its plan, it had a duty to avoid, remedy or mitigate those effects. We do not now need to go into detail, but in broad terms it imposed buffer zones around what were described as *scheduled* industrial sites or intensive farms. Within 500m of the boundary of such a site, or within 300m of effluent treatment ponds, the erection of a dwelling was to be a non-complying activity. Subdivision of rural land with a dwelling site within 500m of any such site was also to be non-complying.

[14] After hearing submissions, the Council modified its approach somewhat. It withdrew the buffer zone from around the industrial sites, largely because it was encouraging the operators of those sites to use Development Concept Plans [DCPs] to manage effects on and from industrial sites, and to provide for the future development of them. DCPs are site specific and, in effect, are a form of *spot zoning*. That is a term which has come to have some perjorative overtones, but here that should not be so. Ms Ralph described DCPs as reflecting historical resource consent conditions and potential long-term (10-year) expansion plans, as advised by the respective operators. As she points out, in most cases they contain considerable areas of buffer land about the manufacturing operations. Often that buffer land is used for the spraying of treated wastewater. Site specific environmental effects have been analysed through the plan preparation process, leading to agreed levels of on-site environmental management. In some cases off-site environmental effects have been agreed with neighbouring residents and operators. For example the Fonterra–Waitoa, BOP Fertilizer-ICHEM and Inghams plant sites have a noise control boundary encroaching into neighbouring sites. Our belief is that those industrial sites in the District which have adopted DCPs [now seven in total, with others under discussion] appear to be generally in a better planning position than those which have not and, in particular, are better able to co-exist with their neighbours. We think that the Council is to be congratulated and encouraged to pursue this initiative.

[15] During and after the hearing the Council has again modified its position and now suggests amendments to the proposed plan. In summary, for some sites there would still be a buffer zone approach, in combination with the site specific DCP, where agreement can be reached with individual operators on the terms for a DCP. Particular provisions for intensive and litter poultry farms are also proposed. It suffices at this juncture to record that it is proposed new farms provide suitable buffers to sensitive off-site activities and that any

sensitive activities seeking to locate in proximity to existing farms should obtain a resource consent. Also pertinent are various developments in the parties' positions communicated to us in the written final submissions of counsel. These included:

i) An acceptance by the Council and others that activities regulated for reverse sensitivity reasons should have discretionary or controlled activity status (rather than non-complying);

ii) Section 1.4.27 Reverse Sensitivity assessment criteria to include a non-complaints covenant, or similar. The wording submitted by the Council and Fonterra for Section 1.4.27 are similar but not the same.

iii) That Rule 1.4.15 Intensive Farming and Litter Poultry Farming include a third limb allowing the buffer to encroach onto adjacent land holdings where the adjacent landowner has given written consent in the form of a non-complaints covenant, or similar. EFI sought that *and/or occupiers* be added after *landowner* [footnotes 2 and 4];

iv) Advice that EFI has signed a draft memorandum of consent on the first bullets in the Council's revised Rule 1.4.15, which specify buffer distances to be achieved for new intensive and litter poultry farms and the relevant measurement points whilst recognising that:

> .....as a discretionary activity there should be the ability of consent applicants to demonstrate that a lesser separation distance may be appropriate .....where for example suitable odour control measures are proposed. [footnotes 1 and 3]

[We apprehend that EFI also supports other changes to the Rule also.]

v) Various changes are also proposed by the Council to the Sustainable Management Strategy, Issues, Objectives and Policies but do not require elaboration at this juncture.

Opposition to the buffer zone solution

[16] At the time of submissions on the proposed plan, and now, there was and is a substantial body of local opinion opposed to the concept of dealing with reverse sensitivity by way of external buffer zones, or at least to such zones being applied on a universal basis. Federated Farmers, EFI, Mr Rutherford and Mr Wallace and his associated interests, represented this viewpoint before us. We hope it is not over-summarising their positions if we say that their opposition is grouped around two central themes. First, that it is unreasonable, unfair and, for EFI at least, contrary to the common law, for the consequences of one person's generated effects to be visited upon another person, particularly without a right of compensation. That,

they argue, is the consequence of imposing a buffer zone around an industrial site or intensive farm, wholly or partly on land belonging to an adjoining owner. That owner has restrictions placed upon the possible uses of the land, without compensation and without having in any way been responsible for the primary effect. Their solution is to require internalisation of adverse effects.

[17] Mr Dormer for EFI put his client's position in terms of contrasting reverse sensitivity doctrines with common law principles relating to the law of nuisance. Where his argument got to was that EFI accepts that the public good can justify restrictions on private property rights and that such a position is authorised by the RMA if certain conditions are present (see eg; *Gargiulo v Christchurch City Council* (C137/00) para [72]). But, a consideration of the law of nuisance will illustrate how limited in justification, and extent, those limitations should be. Put another way, before limitations can be placed on the use of land of innocent owners, a rigorous benefit/cost analysis should be undertaken.

[18] Secondly, they argue that in many cases the buffers and attendant controls are unnecessary: - that the industries and the Council are over-reacting to the possibility of complaint from surrounding owners many of whom have, in fact, been living in close proximity to these industries and sites for years without conflict or complaint. This is especially the case with intensive forms of farming, notably the litter poultry farms since Inghams altered the composition of its feed stock to mitigate adverse odour effects.

[19] From what we have already said it will be apparent that we have some sympathy with those views. We have already touched on the first general ground. Sympathy with the position of the *innocent* neighbouring owner is the principal reason why the Courts have required emitting sites to internalise effects, to the greatest extent reasonably possible. That is why we have regarded that as first amongst our principles. [See para [7]]. But, in the abstract, there may be sites, particularly those already long established, which simply cannot totally do so, but whose continued presence is locally, regionally, or even nationally important. In those cases, there is no alternative but to compromise the first principle. The task then is to do so in a way that leaves the rights of the affected landowners as unrestricted as possible. It is always to be borne in mind that the right to use land is not totally unfettered, and that fetters are not accompanied by a right to compensation: - see s9 and s85. For the

second general ground, the evidence we heard from individual farmers, and the positions arrived at by participants such as Winstone Aggregates and Inghams, give considerable [but not universal] support to that position and have assisted us in coming to the views we have.

Section 32 Analysis

[20] First, we should record that it is common ground that we are to deal with this matter on the law as it existed before the amendments to the RMA effective from 1 August 2003. Issues about the plan provisions under s32 have been raised in the context of references under the First Schedule to the Act, and thus comply with s32(3). The requirement to follow s32 is made the plainer by the provisions of s74(1).

[21] It is of course the case that the Council is not required to produce any one document detailing its s32 inquiries and considerations. The pre-2003 sections 32(4) and (5) provided as follows:

> *(4) Every person on whom duties are imposed by subsection (1) shall prepare a record, in such form as that person considers appropriate, of the action taken, and the documentation prepared, by that person in the discharge of those duties.*
>
> *(5) The record prepared by a local authority under subsection (4) in relation to the discharge by that local authority of the duties imposed on it by subsection (1), in relation to any public notifications specified in subsection (2)(c)(i), shall be publicly available in accordance with section 35 as from the time of that public notification.*

[22] Those provisions make it self-evident that the record need not be contained in any one document, or be in any particular form. If confirmation of that is required, see *Ngati Kahu v Tauranga District Council* [1994] NZRMA 481. But the record should contain an adequate audit trail of the Council's considerations of all of the factors in s32(1)(a), leading to it being satisfied that the plan provisions are, in terms of s32(1)(c), necessary in achieving the purpose of the Act and the most appropriate means of exercising the relevant functions, having regard to the merits of other means of doing so. It is those two factors, necessity and appropriateness, that are crucial and to which we shall return in looking at the separate industries and sites. The Council has in fact produced one document described as a s32 record. It is dated 1 October 1996 and was, we assume, contemporaneous with the publication of the proposed plan. It records that benefits, costs and alternatives have been considered and

recorded in other documents, and have been debated in various fora. It also records a chronology of events under a number of heads. Notwithstanding all of that, we have reservations about whether there is a record of sound justification, in general, for the 'buffer' approach. For instance, we note para 33 of Ms Rolfe's brief of evidence:

> The reason why these Rules [2.2.3.9 and 6.1.1.5 – dwellings and rural lots within 500m of a scheduled site] were included is that at the time Council was aware that industry could not totally internalise its effects. It considered that recognition should be afforded due to the significance of the sites, which provide considerable employment and revenue to the local, regional and national economies.

But there is very little in the material to explain to us why that decision was come to, and whether the approach was really ever considered on a *case by case* basis.

[23] The weight to be given to an inadequate s32 analysis is a matter for the Court's judgement. It is the substantive and not the procedural effect of any inadequacy or absence that is important. It is the merits of the challenged plan provision that are to be considered in the light of any s32 inadequacy; the provision itself cannot be declared invalid for that reason. See *Kirkland v Dunedin City Council* [2001] NZRMA 97.

[24] We think the following are possible alternative courses of action for dealing with reverse sensitivity issues:

- Do nothing. [Viable only where, after robust investigation, it is clear that the primary effect is so unlikely, or so minor and/or infrequent that measures to avoid, remedy or mitigate it would be disproportionate].
- Require all emitting activities to completely internalise adverse effects.
- A combination of best practice option and buffer zones either within or outside the emitting site, together with a status for activities within external zones.
- Use Development Concept Plans for all emitting sites specifying performance standards to be met at or beyond a nominated boundary.
- Impose conditions of consent for new emitting sites and new receiving activities.

What is appropriate may differ for different activities and sites, and possibly for new and existing activities. What is necessary is an examination of each activity and site for which reverse sensitivity is a potential issue, and to decide which alternative best fits.

'No complaints' covenants

[25] The possibility of using so-called no-complaints covenants as a means of dealing with reverse sensitivity issues in at least some circumstances was raised by Ms Macky for Inghams in particular, and has since been adopted by the Council. Broadly, they could be used in a situation when a proposed new receiving activity is objected to by the operator of the emitting site. As part of the process of attempting to gain the necessary consent, the owner of the incoming activity would offer an undertaking, in effect, not to complain about or take any enforcement action against the adverse effect being emitted. Commonly the covenant would also prohibit the receiving owner from objecting to the obtaining of any further resource consents by the operator of the emitting site. The giving of such an undertaking would be agreed as a condition of the consent under s108 RMA, and could be registered on the title of the receiving site under s109. Later prospective owners of the receiving site 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.

[26] 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] It may be that the emitting operator's objection to the incoming activity would be removed, or at least blunted, by the offering of such a covenant in the course of negotiations. But on the state of the law as it seems to be, we see difficulty in having a no-complaints covenant as a formal part of the assessment of an application for a discretionary or restricted discretionary consent. Unless the provision was very carefully worded, the almost inevitable result of that would be, de facto, to impose a requirement to agree to such a covenant, and that would be unlawful. We offer some thoughts about drafting possibilities in the Appendix.

The Regional Plan

[28] The Proposed Waikato Regional Plan did not occupy a prominent place in the parties' consideration of these issues, although we drew attention to it in the course of the hearing. Reflection since has confirmed our view that the Plan justifies more attention, particularly when thinking about effects such as odour. We start with the proposition that, in very broad terms, it is the role of a territorial authority to control the location of activities with actual or potential air quality implications. The role of a regional council is to control discharges of odour that may have adverse impacts on air quality. In the present context it is obvious that the effectiveness of regionally prescribed controls will influence the type, and the degree, of control required from the territorial authority.

[29] At the risk of extending the length of this decision, we think it might be helpful to set out at least some of the Regional Plan provisions that seem to us to bear on the issue of odour, which is particularly relevant to the Inghams reference. We can begin by referring to Regional Objective 2: *No significant adverse effects from individual site sources on the characteristics of air quality beyond property boundary.* Its related Principal Reason is: *These effects need to be internalised by the discharger even if that means purchasing buffer zones or re-designing processes to ensure that the objective can be achieved.*

[30] Regional Policy I at 6.1.3 provides for discharges as permitted or controlled activities where, inter alia:

...[b] there are no objectionable effects as a result of odour beyond the property boundary.

This requirement is repeated in 6.1.8: Standard Conditions for Permitted Activity Rules and Standard Terms for Controlled and Restricted Discretionary Activity Rules [p409]. There is

an explanation that the permitted activity rules allow for thresholds designed for minor or low scales of activity:

...therefore, if an operator adopts good practice techniques then adverse effects on air quality should not occur.

The Principal Reasons for Policy 1 explain that:

Activities have been classed as permitted and controlled on the basis of the likelihood that they can achieve the outcomes in Policy l. They continue at p401: *Case law has indicated that where a use is established, people may have to accept a level of effect from the discharge provided the discharger is doing everything they reasonably can do to minimise the effect [ie using BPO]. This suggests that Policy I may not always be able to be met for existing uses but the policy thresholds should be met for new uses.*

[31] Section 6.1.7.1 deals specifically with territorial authority and regional council responsibilities for Air Quality. Among other things, the Regional Council:

...will work with territorial authorities to reduce duplication and inconsistency in the management of air quality under the RMA. Section 6.1.7.2 (3); Land Use Planning, provides:

...making available to the public information about significant or objectionable sources of discharges to air and surrounding sensitive areas, and promote territorial authorities to include information in the Land Information Memoranda.

The Principal Reasons refer specifically to the Regional Council retaining:

..the enforcement and monitoring responsibilities for these discharges... and the application of the preceding plan provisions to intensive litter farms.

[32] Section 6.1.15.2 provides for Controlled Activities – Discharges from Existing Intensive Indoor Pig and Broiler Chicken Farms requires that activities have to be lawfully established or authorised before notification of the regional plan. Limb a. of the section requires compliance with the performance standard in 6.1.8 (a) - (e). Sub-section (b) of 6.1.8 provides:

The discharge shall not result in objectionable effects of odour beyond the boundary of the subject property.

Limb c. requires that there shall have been no verified complaints of objectionable odour that have resulted in enforcement action in the 2 years prior to the consent application. The Regional Council reserves control over measures to avoid, remedy or mitigate adverse effects on neighbouring dwellings and properties; emission control methods; and management plan

contents: ie everything of interest to the Court on these references. If the standards and terms are not complied with the activity becomes a restricted discretionary activity under 6.1.15.3. It is explained that if good practice is observed, adverse effects beyond the boundary should not occur. Good practice is said to be outlined in the relevant Poultry Association of NZ Code of Practice (1995). Interestingly, the Principal Reasons explain, in respect of existing sheds covered by 6.1.15.2, that:

The nature of these activities is that the risk of them generating objectionable odours increases if the scale or intensity of the operation changes. As long as the operation remains at its current scale Council can be confident that it should not breach the permitted activity conditions.

[33] If that is correct, then in terms of the principles we have set out, we can see little justification for reverse sensitivity controls on adjoining properties. We point out that what we have just set out comes from a plan that speaks of the need for effective territorial authority/regional council integration.

[34] Further, Section 6.1.15.3 provides for a restricted discretionary activity Rule - Discharges from Intensive Indoor Farms. This would catch any existing sheds not complying as a controlled activity under 6.1.15.2, and new sheds requiring district council land use consent under Rules 1.4.15(i) and (ii). The discretion is restricted to eight matters. Condition 6.1.8 (b), requiring no objectionable odour beyond the boundary is a standard condition. See p409-410 of the Proposed Regional Plan.

[35] As we read the Plan the Regional Council will be able to impose a requirement for management plans on existing sheds, require any necessary physical shed upgrading (including mucking out pads, ventilation, fans etc) and impose a no offensive or objectionable odour beyond the boundary condition. It is to be noted that such a condition does not mean no odour past the boundary. It is to be noted also that the Regional Council consent process will over-ride existing use rights in accordance with s20A RMA.

[36] Section 6.4.1 sets out Guidelines for Assessing Odour. 6.4.1.2 contains Modelling Guidelines for Determining Levels of "Acceptable" Odour for Resource Consent Applications. The guideline is to be used primarily when assessing new activities, but may

also be applied to existing activities where appropriate; for example where options for improvement are being investigated. Three alternative approaches are included, two of which allow for: One hour average concentrations of odour as predicted by an ISC-type atmospheric dispersion model shall be assessed against a guideline for no objectionable odour of 5 OU.m3 divided by the appropriate peak-to-mean ratio from Table 6-6. This is a quite demanding standard for testing for objectionable effects and relates back to 6.1.8(b), and the standard conditions for sheds as permitted, controlled and discretionary activities. We conclude that any existing sheds being re-permitted as controlled activities will be required to perform to a high standard, avoiding objectionable (but not all) adverse odour effects across their property boundaries.

[37] Against that background, we now turn to look at the sites and activities particularly in issue.

Winstone Aggregates: Motumaoho Quarry

[38] Winstone Aggregates is not now incorporated under that name, but is in fact a division of Fletcher Concrete and Infrastructure Ltd. It does however continue to trade as Winstone Aggregates and it is convenient to continue to use that name. The live issue with this site is noise. Mr Wallace has a particular interest in the site – its gate is something of the order of 200m from his house on Harbottle Road. Winstones now agrees that it does not need a 500m buffer at this site, but believes that two strategically placed Quarry Noise Boundaries [QNBs] will suffice to avoid, or sufficiently mitigate both the primary and secondary effects. This is a demonstration of how, on a careful analysis of the real issues and possible tailored solutions, the need for an arbitrarily dimensioned buffer can fall away. Winstones is to be commended for this approach. There is some element of good fortune here, in that the next stage of development of the quarry takes the working faces away from the area of greatest potential adverse effect; ie the properties on Harbottle Road. But the stockpile areas, and the crushing plant, remain relatively close to the Harbottle Road entrance. We think that there can be little doubt that the regional importance of the resource; the impracticality of internalising all noise effects, and the quarry's vulnerability to reverse sensitivity pressures justifies, in this case, controls on subdivision and erection of dwellings in a carefully delineated buffer zone. We note that Federated Farmers accepted that the modified Winstone stance was appropriate and the Council is quite comfortable with it also. Mr Wallace argues that the proposal remains

objectionable. He argues that Winstones could do more to internalise noise by the creation of bunds and the like, before it looks to imposing restrictions on his land. On the evidence we heard, and having regard to the outcome of the recent expansion resource consent application, we think that Winstones has taken all reasonable steps to internalise its adverse effects, and appears to comply, in general, with the terms of its resource consents.

[39] We endorse, although not entirely, what Winstones have sought by way of reduced relief; namely the south-east and north QNBs that extend, to a limited degree, over two adjoining properties. In respect of the south-east QNB, the adjoining owner has consented. The north QNB extends over part of the Wallace property to a maximum width of 200m at the eastern end, and 120m at the western [or Harbottle Road] end. At the outer boundaries of the QNBs the daytime noise limits will be 55dBA L10, and 45 dBA L10 at night, with a night-time Lmax of 70dBA.

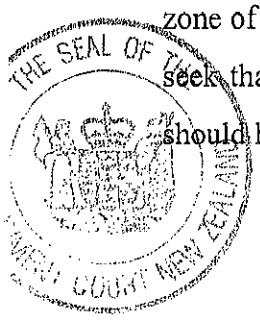
[40] For the reasons already outlined [para 11] we do not though agree that residential activity, or subdivision for residential purposes should be a non-complying activity, even when, as here, the buffer zone has been tailored to the site and the issue.

[41] In summary, we think this approach can be supported because:

- the quarry extension has recently been through a thorough resource consent process that found the noise levels mentioned to be appropriate;
- we heard no expert acoustic evidence to the contrary;
- the areas beyond the quarry boundary are relatively small and do not impose an unreasonable limitation on the use and development of the affected land;
- the noise levels now proposed are little or no different from those that applied at the notional boundary of the nearest existing dwelling under earlier resource consents.

Fonterra: Waitoa plant

[42] The plant has a DCP in the proposed district plan. Fonterra continues to seek a buffer zone of 500m from the boundaries of both the Waitoa and Morrinsville plants. It continues to seek that any new housing and subdivision within the buffer zone around the Waitoa plant should have discretionary status (although Mr Majurey indicated, and subsequently confirmed



in his final submissions, that it could accept a restricted discretionary status). For the buffer zone around the Morrinsville plant, it seeks a discretionary status for housing and subdivision in the rural zone and controlled status in the residential zone.

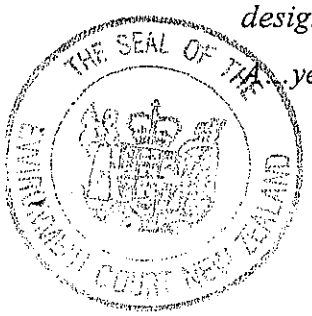
[43] Waitoa is a large milk processing plant, by almost any standard. It includes a wastewater treatment plant of about municipal size. Its product mix means that it operates virtually year-round. Given the plant's scale, the varied age of its equipment and its location relative to the Waitoa settlement, we can understand why the question of protection from reverse sensitivity has emerged. But for the reasons we shall expand upon shortly, we are not convinced that a case has been made out to protect the plant from reverse sensitivity by imposing a buffer zone on neighbouring land around it. Noise was identified as the principal possible primary effect. Odour, including from the waste-water plant, and particulates could conceivably also be of concern, but we heard no evidence to suggest that either is a current issue.

[44] The potential for reverse sensitivity arises from the existing and possible future pattern of surrounding land use. The plant's southern boundary is hard against SH 26 and there is a substantial existing settlement fronting it and on roads leading off the opposite side of the Highway. The company has spent considerable money buying and removing more than 20 houses along the southern frontage of SH 26, thus creating a buffer zone of sorts. Additionally, the remaining settlement has been *zoned out* by the Council; its zoning having been changed from *residential* to *rural.* The company has also removed more than 40 houses from the former company-owned village on the western side of the plant within its boundaries. Despite all of that, the Waitoa settlement has numerous houses in relatively close proximity to the plant. There is also a scattering of rural dwellings within 500m of the plant boundary. But there is little evidence of recent subdivision resulting in new dwellings. Mr Rademeyer's evidence [para 78] was to the effect that rural subdivision in the district as a whole is at a relatively low level and that such as there is primarily results in larger lots unlikely to be attractive for *lifestyle* purposes.

[45] Of concern was the evidence that in respect of noise the plant's present resource consents are not being complied with to quite a significant degree. The emission of noise is subject to limits which are to be achieved at the Noise Control Boundary (NCB). That

follows the site boundary except where it runs along the south side of SH 26. Details of the non-compliance were set out in the report of noise surveys conducted by Mr T Windner of Design Acoustics, attached as an appendix to the evidence of Mr Ross McCowan, General Manager-Infrastructure, for Fonterra. We have considered what Mr Majurey said about that evidence in his closing submissions. But we remain concerned that the company's principal witness, Mr McCowan, demonstrated that while the company does continue to commit resources to the issues, it has a rather unilateral, even cavalier, attitude towards compliance with its resource consent; in particular noise effects at the plant boundary, or at the relevant NCB. In particular we have in mind passages such as the following [transcript p 216ff – cross examination by Mr Kingston]:

> *Q...do you mean to say in paragraph 34, that while you accept that you've got a duty under s16 of the Act, in regard to the reduction of noise, you're proposing not to reduce noise unless you make a decision for expansion?*
>
> *A...No I'm saying that there has to be a degree of reasonableness around the decision to mitigate the noise levels further and my – I guess from a technical point of view, my understanding is that the, sort of, the mitigation of noise is an iterative sort of approach. You knock off the noisiest pieces of kit first and then you work down – as you do that, there are more pieces of equipment which become apparent that create noise nuisances and you have to go through the whole process again. It doesn't happen overnight.*
>
> *Q...So you are envisaging a five or ten year programme in the reduction of noise?*
>
> *A...I'm envisaging an ongoing programme.*
>
> *Q...Yes. Are you non-complying at the present time in many respects?*
>
> *A...Well I understand from the noise survey that we are exceeding the noise levels at the noise boundary in some areas.*
>
> *Q...In some areas. So you are non-complying in some areas?*
>
> *A...if exceeding the noise level at the boundary is non-complying ...*
>
> ...
>
> *Q...Yes. Would you anticipate that your programme of expansion would be designed to be in compliance of your obligations of the noise control boundary?*
>
> *A...yes.*



Q...in other words your present problems in that regard are partly historical, are they not?

A...absolutely.

...

Q...you would expect that your ongoing programme of improvement will mean that your noise performance will improve in the next few years?

A...I agree that our noise compliance will improve ...

Q...yes.

A..... given our programme of ongoing improvement of mitigation of noise ...

Q...so that whereas at the present time complaints about noise could be legitimately made by people in the vicinity of your plants, in the future you would hope that no such complaints could be justified by non-compliance?

A...no I am saying there comes a stage in the improvement of the historic plant where it doesn't become reasonable to keep pouring money out. ...

Q...let me be clear about that. You are saying you would improve to some distance but you may still decide it is unreasonable to carry on improving, notwithstanding s16?

A...I think that my view is that – or my understanding is that there is the terminology reasonable in the RMA and the debate over what that is. We obviously have a view on what reasonable is.

Q...yes. Have you, given that attitude about reasonableness, ever sought to oppose the standards that the rules impose on you?

A...on a number of occasions.

Q...I see. And I take it from your expression that they have not been very successful?

A...well suffice to say that the actions have been expensive.

Q...and not productive?

A...relatively.

Q...and so once again, your attitude to s16 is partly a reflection of the fact that you consider that unreasonable standards are imposed on you?

A...yes.

Q...and if you had a 500 metre buffer of course your process of ongoing improvement could be slowed down no doubt?

A...yes and we would be, on behalf of the farmer shareholders, we would be better employ the capital somewhere else.

A similar theme was picked up in cross-examination by Mr Wallace at page 219ff.

Q...Mr McCowan, just following on that last line of questions, you are familiar with the resource consents and the private plan achieved that the company achieved in 1993?

A...relatively in the dark distant past.

Q...and at that time, as I understand it, or could you confirm that as far as new plant that was constructed after the date of that plan change you were required to comply with the noise conditions at your noise control boundary?

A...yes.

Q...and therefore the existing plant, the company had to comply after seven years. Is that correct?

A...I can't recall the seven year detail Martin.

Q...so if that was confirmed to be the case that you were required to meet that after a period of seven years in order to correct some of those historical situations in the course of capital evaluation, if that was proved to be the case would your attitude still be that compliance with today's conditions is unreasonable if you think that it's throwing money after old plant?

A...in the essence of what your question – yes.

Q...so you still think you shouldn't necessarily have to comply?

A...not to the absolute letter.

[46] In summary, it was Mr McCowan's evidence that Fonterra would decide whether it regarded the amount of capital to be spent to achieve compliance with the resource consent conditions as disproportionate. If it came to that conclusion, it would not attempt to comply and would rather take the view that this capital was better applied to other purposes, including those that would increase shareholders' returns.

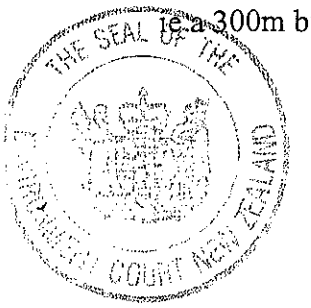
[47] We are concerned that what all of this amounted to was a request by Fonterra to impose controls on neighbouring land, by way of a 500m buffer zone, when it was not prepared to

commit itself to the programme of works required by its resource consent; a consent that it had negotiated with the Council and had agreed to abide by. Moreover, it was a consent that it has a legal obligation to comply with, quite aside from its general obligations under s16 and s17 RMA. There was no compelling evidence that established a potential for reverse sensitivity if the company was actually complying with its consent conditions bearing in mind that these, together with the DCP and other proposed district plan provisions (for instance Rules 5.5.1 and 5.5.2) are designed to avoid, remedy or mitigate adverse effects at the plant boundary.

[48] Nor did Mr Chrisp's evidence establish the case for a universal 500m buffer on an objective basis. Mr Chrisp's argument that other land, for example in the coastal environment, also has development constraints is flawed because, as other witnesses pointed out, those controls flow from the resources themselves rather than the need to protect the interests of the neighbouring owner.

[49] For those reasons we have a major difficulty about imposing a 500m buffer around the whole plant. We ask ourselves the question *was there sufficient evidence to show that Fonterra was complying with its consent conditions and, in particular, had done everything it reasonably could to internalise adverse noise effects?* The answer must be *No*. Applying the principles we have described in para [7]ff the first justification for imposing restrictions on neighbouring land is not made out. To apply a buffer in those circumstances would certainly not comply with s32, or with the *Nugent* principles.

[50] It is possible that a 300m buffer around the Waitoa wastewater plant could be justified for odour reasons based on the similar approach for municipal wastewater treatment plants, to which it is similar in scale. Regrettably, we heard no evidence specifically directed to the effects of this plant. But we can accept that effects may not be reasonably internalised and that from a public health point of view, some separation distance between the plant and incompatible activities is almost certainly desirable and justifiable. On a pragmatic basis, and in the absence of any specific opposition, we are prepared to endorse what has been suggested; ie a 300m buffer zone around the plant extending, if necessary, into adjoining properties.



Fonterra: Morrinsville

[51] In contrast to the relatively isolated Waitoa plant, the Fonterra Morrinsville plant has a largely urban setting. It is situated on the southern boundary of the town, with its neighbouring properties being mostly commercial, but there are residential areas close by also. To the east and the south of the plant there is undeveloped land zoned both residential and rural. Somewhat surprisingly for such a setting, there is no evidence that there are significant complaints; in fact the evidence was to the opposite. There has been a virtual complete absence of complaints other than occasional incidents of alarms and the like being heard at night. These have been nuisance type complaints, rather than complaints about ambient noise levels or any other enduring adverse effects.

[52] In recent years there has been significant expansion and renovation of plant and equipment at this factory at a cost of some $15M. It now contains a butter plant and two milk powder dryers. That expansion has not created noise complaints – indeed we imagine that the updating of equipment has reduced that potential. On the evidence we heard Fonterra has succeeded in internalising the adverse effects of this plant notwithstanding the close proximity of other activities, including residential activities. In the absence of any evidence that effects cannot be reasonably internalised, we are brought to the conclusion that a buffer would impose unnecessary restrictions on neighbouring land, and require otherwise unnecessary resource consents for little wider benefit. In that regard, we refer again to the principles we discussed earlier, and to the analysis necessary under s32 and the *Nugent* principles.

[53] The only parts of the surrounding area that gave us doubt are the undeveloped land in the residential zone to the east and possibly the rural zone to the south and the southeast. But there was no more than a suggestion that they might be more sensitive than the existing developed areas, and in the absence of any more positive evidence, we see no justification for taking it further.

Litter poultry farm buffers – existing farms

[54] The exact number varied somewhat between witnesses, but there are presently of the order of 30 litter poultry farms in the District. They are contracted to produce broiler chickens for Inghams, on a tightly controlled basis. While Inghams appear to currently enjoy a monopoly in the area, we remind ourselves that this may not always be the case, and related

plan provisions must be sufficiently robust to accommodate a change in this situation. Inghams supply the day-old chicks, the feed, the litter for the shed floors, and they remove and process the chickens at the end of the 6-week growing cycle. The sheds are then cleaned and disinfected over a two-week period before a growing cycle starts again. There are thus 6 cycles per shed, per year. If the projected expansion of the size and number of sheds over the next 5 years or so comes to pass, something of the order of 24 million chickens per year will be produced in the District. We find this satisfies the *principle* in para [10]. A significant feature of this type of farming is the large increase in size and capacity of the newer sheds. Older farms typically were one shed operations containing up to 10,000 chickens per cycle. Farms currently being built typically contain two to four sheds with each housing around 25,000 chickens. [Rademeyer; paras 64-65] It is obvious that the potential for adverse effects [usually odour, although dust and noise may also feature] increases accordingly, although there is not an absolute correlation. It seems that shed management and feed composition are much more critical than numbers of birds. [Rademeyer; para 54-55]

[55] It was apparent from the evidence we heard that odour has been a significant issue with these farms. There was a major history of complaint from neighbouring landowners and occupiers, even in strictly *rural* areas, about offensive odour from the sheds, even the older and smaller ones. By and large, that situation has much improved. Complaints about odour are now rare. Improved shed management and, in particular, changes in the composition of the supplied feed have mitigated that adverse effect very significantly. Nevertheless, the industry acknowledges that intensive farming of this kind has the potential to produce unpleasant conditions for others, particularly nearby residents.

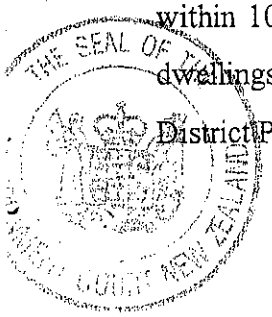
[56] The establishment of a chicken broiler farm presently involves a substantial capital outlay. On average a new farm will contain two to four sheds and that will cost up to $2.5 million. The need for care and planning in the siting of such structures is obvious. The Inghams' reference is distinguished from the others by the fact as between themselves the Inghams and the Council have agreed on terms for existing chicken farms and for new chicken farms. This involves the recognition that existing intensive farms need to have some protection through reverse sensitivity provisions in the plan, and that they will almost invariably not be able to provide their own on-site buffer zones. But there is also recognition that new chicken farms will be expected, substantially at least, to internalise their adverse

effects by providing the necessary buffer zones within the farm property and not on neighbouring properties.

[57] Part of the Council's rationale for agreeing to this regime is that poultry farms have been and must in the future be established in the rural zone: - there is simply nowhere else for them to go. To that extent, it is reasonable to provide protection for them. What was finally proposed is that new dwellings within 250 metres of the nearest shed of an existing poultry farm should have discretionary status, as would the subdivision of a rural lot. We note Mr Rademeyer's [para 81] analysis which concludes that a 250m buffer would mean that, because of the sizes of the lots surrounding the existing litter farms, no neighbouring property would be prevented from being able to build a dwelling. Obviously the ability to choose exactly where on the property a dwelling could be built will be restricted in many cases, and there will be consent application costs, but that analysis does provide some comfort. In contrast, retaining the original 500m buffer would have resulted in about 66 properties being unable to have a dwelling built on them without seeking a resource consent.

[58] We have asked ourselves whether we can reconcile this agreed position with the principles we have set out. This has caused us more difficulty and debate than any of the other activities, but in the end we think we can, for existing litter farms at least. Our reasons, broadly, are these. Many of the existing farms are on relatively small sites; ie a few hectares, and with short distances between the sheds and the property boundaries. While it is a reasonable requirement that objectionable odours do not cross the boundary, it is inevitable that there will be some odour emitted at times. Although the potential for reverse sensitivity pressures may be less in Matamata-Piako than in peri-urban areas around major centres, it cannot be ruled out. Notwithstanding Mr Rademeyer's subdivision data the general trend seems to be one of increasing *life-style* residential activity in rural areas, especially within commuting distance of large towns.

[59] In addition to odour, there could be objections to [fan] noise with a standard of 40dBA at night at the notional boundary of the nearest dwelling [Rule 5.2.5]. Dwellings can locate within 10m of the boundary [Rule 3.2.1(iii)] and a poultry farmer has no control over new dwellings bringing the notional boundary closer to existing sheds. Other relevant Rural zone District Plan Rules are:



- A second dwelling as a permitted activity, and a third as a controlled activity.
- Although the minimum Rural zone lot size is 8 ha as a controlled activity, it is possible to create one rural residential site of 2,500 – 10,000m2 as a discretionary activity from a title existing as at November 1996 [Rule 6.1.1 3c].

[60] In general, the existing land use consents and the pending Regional consents (Rule 6.1.15.2) require that odour be internalised to the extent that there is no objectionable discharge across the boundary. One can not reasonably require much more given the practicalities of the activity. However, in practical terms, there will inevitably be residual odour and/or noise at times, with the potential to generate reverse sensitivity effects, and we need to recall that the law does not require total internalisation; see para [9]. In contrast to the large industrial sites, the effects of these farms are likely to be fairly standard – odour and noise. There is more justification therefore in treating them in a generic way. We need to recognise that existing sheds are different from new developments in terms of their on-site location, technology and related environmental performance. We need also to recognise that the industry is of considerable economic and social local, and probably regional, significance.

[61] We have some comfort too in the fact that the parties have agreed that any affected activity should require a discretionary or restricted discretionary consent, rather than being regarded as non-complying.

[62] As something of an aside, we also commend the Council for including information about nearby effect emitting sites on LIM reports for neighbouring pieces of land. This is a sound non-regulatory method of helping to manage both primary and secondary effects.

[63] We think that the end result is consistent with the Court's findings about the integrated management responsibilities of territorial authorities under s31. It seems compatible also with the Court's rejection of propositions that the planning process should not protect people from their own folly, or have no sympathy with those who bring themselves within range of a potential nuisance: see *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205.

[64] We are inclined to agree with Mr Keane's reasoning on why there is no single suitable buffer distance. So we have to accept that if there is one it will, to some degree at least, be arbitrary. We do observe though that it would not be alone in this amongst RMA development controls. Sometimes a single figure may be the only pragmatic solution. For instance, in a perfect world, one might suggest a DCP for each farm, so that these issues could be tailored to each circumstance, but to do so would be to impose an impossible burden on all involved. So 250m seems a reasonable solution in the absence of empirical data on odour and noise levels.

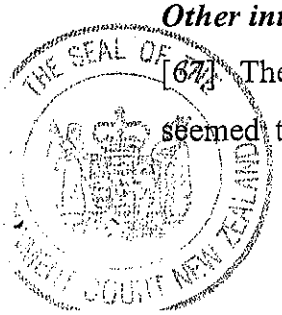
[65] The question of replacement of existing litter farm sheds is unlikely, we think, to create practical problems. If an existing shed is replaced with one so similar that its effects are the same or similar in character, intensity and scale, then it is most unlikely that a fresh consent will be required – there will be an 'existing use'. The economics of litter farm operations are now such, we are told, that it would be impractical to replace an old, small shed with one of similar dimensions. If an older, small shed is to be replaced with a large one of the dimensions currently in vogue a consent will be required, and the proposition will have to be considered on its merits. High among those will be its potential for adverse effects on its neighbours.

Litter poultry farm buffers – new developments

[66] What we have said about existing sheds generally does not apply to *green fields* poultry farm developments. For new litter farms, compliance with the proposed Rules and, if applicable, the poultry farming Code of Practice will require, in effect, their establishment on properties large enough to provide a self-contained 250m buffer unless an alternative arrangement is agreed with the adjoining owner(s) in accordance with Rule 1.4.15(iii). Inevitably, that will require larger and more expensive blocks than might previously have been the case but, as we have already commented, that has to be accepted as the cost of coming into an industry at a time when expectations of being an environmental *good neighbour* are higher than before.

Other intensive farming

[67] The proposed provisions relating to other forms of intensive farming (eg piggeries) seemed to be relatively uncontroversial. There appeared to be a general acceptance, from



which we do not differ, that their effects could be of a quite different scale from litter poultry farms, and that the provisions of proposed Rule 1.4.15(i) were justifiable. Mr Dormer raised a valid point about the definition of an intensive farm as including one that contains more than 10 pigs. We think that could be readily enough clarified by confining the definition to *10 weaned pigs*. On that general point however, the draft Order does not seem to set a quantified threshold for other types of intensive fanning. Without some certainty, the Rule may not be workable.

[68] Discussion of this topic may be a convenient point to return to the provisions of the Proposed Regional Plan, and its relationship with the District Plan. Rule 1.4.15 allows the District Council to duplicate the Regional Council's regulation of odour/particulate discharges, which we think is inappropriate. In addition, we are not at all sure what *To determine the appropriate level of odour management* means. We think that the District Council should ascertain what matters it needs to regulate, given its s31 land use functions, and leave the Regional Council to regulate the actual discharges (possibly including waste water). [We have some further comment to make about this Rule in the Appendix]. We think it is wrong in principle for two governments to be regulating the same thing. There will be almost inevitable consequences in cost, duplication, potential inconsistency, blurred accountability and so on. Such a situation should have no place in a contemporary integrated resource management process, particularly given the provisions of s30 and s31 RMA.

Inghams – processing plant at Waihekau Road

[69] Inghams has a substantial processing plant on Waihekau Road, not far from the Te Aroha town boundary. The site is nearly 60ha in area, a substantial part of which is open pasture used to spray irrigate plant effluent. It is also subject to a DCP in the proposed plan. The plant is presently being expanded to accommodate the increased chicken production already referred to. The land use resource consent obtained in 2003 to authorise that expansion (that being a discretionary activity) imposed a number of conditions on the plant. Included in those was the requirement for an environmental management plan requiring procedures to be adopted at the site to ensure compliance with the consent conditions. Among them are conditions relating to air quality, noise and traffic management.

[70] In particular, the condition relating to odour has the requirement:

That there shall be no odour or particulate matter as a result of activities authorised by this resource consent that causes an objectionable or offensive effect beyond the boundary of this site.

[71] Inghams also obtained Regional Council consent for discharges to land, water and to air. The air discharge consent includes the same odour condition as the land use consent obtained from the Council. The consent conditions also require Inghams to adopt the *best practicable option* which is defined in s2 as:

...The best method for preventing or minimising the adverse effects on the environment having regard, among other things, to-

(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and

(b) the financial implications, and the effects on the environment, of that option when compared with other options; and

(c) the current state of technical knowledge and the likelihood the option can be successfully applied.

[72] Ms Macky submits that this definition supports the proposition that complete internalisation is not required and can also be taken as supporting, in appropriate cases, the concept of a buffer zone to control the receiving environment so that incompatible activities are carefully managed. She also submits that the concept of internalisation to the greatest reasonable extent possible is accepted, but that Inghams remain concerned that there may be times when odour is perceptible beyond the boundaries of the site and that may possibly give rise to both compliance issues and to reverse sensitivity pressures. We accept of course that odour may be perceptible beyond the boundary, at times. But the point is whether that odour will be objectionable or offensive. The FIDOL factors [Frequency, Intensity, Duration, Offensiveness and Location] come into play in that assessment, and it is a question as to which limb of local government is best placed to govern those possible effects.

[73] For those reasons, Inghams continues to support the establishment of a 500m buffer zone measured from the boundaries of the site at Waihekau Road. Ms Macky supports Mr Green's comment at paragraph 3.22 of his submissions that:

> *... the buffer zones now proposed by the Council... are not intended to "legitimise" adverse effects emitted by industries. Those effects are controlled by the relevant provisions of the resource consent or DCP applicable to the particular sites. A buffer zone protects against the effects of the existence of sensitive activities on other activities in the vicinity that may lead to restraints and the carrying on of those activities.*

Ms Macky accepts that perhaps the last of those words might more accurately read ... *'the lawful carrying on of those activities'* and acknowledges, of course, that buffers are not a license to operate unlawfully.

[74] But that said, the case for imposing a 500m [or indeed, any] buffer around the Inghams plant was not pursued with any particular vigour. Importantly, we heard no *case by case* evidence about it at all, let alone evidence from which we could draw the conclusion that the plant, once fully operational, will be unable to reasonably contain its adverse effects within its boundaries. In the absence of such evidence, we think that what we have already said about *principles* will make it clear that in the absence of such evidence we can find no justification for imposing restrictions on neighbouring land around this plant.

Summary

[75] The Court has the function, under Cl 15 of the First Schedule, to confirm, modify, delete or amend the Plan, after it has heard the parties. It is not necessarily though the appropriate organisation to draft or redraft the finer points of the Plan's provisions to give effect to its decision. We think that should be done by the Council, with leave to any party to return to the Court if there are particular issues which require resolution or clarification. To that extent, this decision should be regarded as an interim one. We attach as an Appendix a series of points which have occurred to us as we have worked our way through the issues, and which may repay attention in the drafting process. We wish to emphasise that these are intended to draw attention to practical issues. They are not to be regarded as drafting models, or in any sense as formal Directions from the Court.

[76] Subject to drafting issues, in general terms we propose to direct that the Proposed Plan be modified in the following respects:

Winstone Aggregates: Quarry at Matumaoho

To be controlled by a Development Concept Plan with the Quarry Noise Boundaries as now sought. Subdivision and residential activity within the Quarry Noise Boundaries are to be discretionary or restricted discretionary activities.

Fonterra — Waitoa Plant

To be controlled by a Development Concept Plan but without a 500m buffer outside its boundaries. The 300m buffer around the Wastewater Plant is to remain.

Fonterra - Morrinsville Plant

To be controlled by a Development Concept Plan but without a 500m buffer outside its boundaries.

Existing litter poultry farms

To be dealt with broadly as contained in the draft Orders, with 250m buffer zones extending from the shed walls.

New litter poultry farms

To be dealt with broadly as contained in the draft Orders, without buffer zones extending beyond the boundaries of the property on which they are situated unless approved under Rule 1.4.15(iii).

Other intensive farms

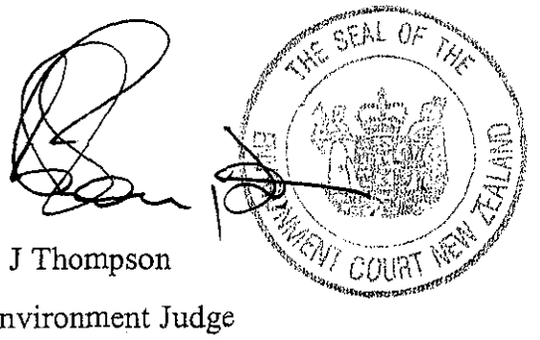
Broadly, to be dealt as proposed in the redrafted Rule 1.4.15, with buffer zones.

Inghams - Processing Plant

To be controlled by a Development Concept Plan but without a 500m buffer outside its boundaries.

DATED at WELLINGTON this 18th day of June 2004

For the Court



C J Thompson

Environment Judge

Appendix – Drafting Suggestions

Intensive farms and Litter farms – Rule 1.4.15

1. Why does sub-section (ii) deal with particulates but (i) not? Do no types of intensive farming have the potential to generate dust?

2. The wording of (i) could be better. An improvement would be to list the matters controlled, and the requisite performance standard where there is one, and to then state that council may consider the provisions of the COP when exercising its discretion?

3. The introduction to subsection (ii) could usefully cross-reference the additional matters to be considered. Other matters arising from (ii) are:

- Ms Macky at p5 of her Final Submission sets out an expanded list of matters to be included in the management plan required in the 5th bullet (she says 4th but it is the 5th of Mr Green's material. (The ref to section Rule 4.1.15 is a typo). Ms Macky's expanded list is preferable to the Council's as the specifics go beyond *neighbour communications* to include management considerations relevant to BPO and the internalisation of effects.

4. The Council has submitted assessment criteria for activities in the buffer in its Reply [refer Green's Appendix 1 p2ff Rule 1.4.27 Reverse Sensitivity]. Whilst capable of polishing they are reasonable. In the substantive decision, we have discussed our concerns about the principle of no-complaints covenant. It may be that detailed drafting could overcome those concerns. The start point may be Rule 1.4.27 (e). There may not be a problem with this being an assessment criterion in a situation where it is being truly volunteered and there is no suggestion of taking rights from a party. The concern is that any mention of it may impose a de facto requirement. On the other hand it may be *good* because it means a person can develop closer to an emitter if prepared to trade off potential effects for some perceived benefit(s), and it may also negate complaints from subsequent owners.

5. It may be possible to construct something along the lines Ms Macky uses (drawing from Ms Ralph) at paragraph 20 of her Final Submissions. Also, a covenant in this situation may be consistent with its use where a new intensive or poultry farm is proposed, but all the buffer can not be provided on-site [refer Mr Green's Reply Appendix 1 p5 Rule 1.4.15(iii). The

drafter would need to be aware that the parties propose using the same type of instrument in Rule 1.4.15 (iii), which regulates new farms.