Before an Independent Hearings Panel
appointed by the Waimakariri District Council

under:	the Resource Management Act 1991
in the matter of:	Submissions and further submissions in relation to the proposed Waimakariri District Plan, Variation 1 and Variation 2
and:	Hearing Stream 6: Space and Recreation Zones, Rural Zones
and:	**New Zealand Pork Industry Board** Submitter 169

Legal submissions on behalf of the New Zealand Pork Industry Board

Dated: 2 October 2023

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LEGAL SUBMISSIONS ON BEHALF OF THE NEW ZEALAND PORK INDUSTRY BOARD

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Introduction

1 These legal submissions are provided on behalf of the New Zealand Pork Industry Board (*NZ Pork*).

2 NZ Pork is a submitter (#169) and further submitter (#49) on the proposed Waimakariri District Plan (*proposed Plan*).

3 In regard to the Rural topic, NZ Pork is seeking a number of amendments to ensure that:

3.1 highly productive land across the General Rural Zone (*GRUZ*) and Rural Living Zone (*RLZ*) is able to provide for primary production;

3.2 reverse sensitivity effects are managed; and

3.3 plan provisions appropriately enable activities essential to the safe and efficient operation of the pork industry across the Waimakariri District.

4 Evidence has been filed for:

4.1 Mr Ian Barugh, who has over 50 years' experience in the New Zealand pork industry, including 30 in his current role as the Technical Manager with NZ Pork and its predecessor, whose evidence addresses pig farming systems and effects; and

4.2 Dr Lynda Murchison, Environment and Planning Manager with NZ Pork, whose evidence focuses on describing current issues with odour complaints and reverse sensitivity with commercial pig farms in Waimakariri and Selwyn Districts; and

4.3 Mr Vance Hodgson, consultant planner, for NZ Pork and Horticulture New Zealand.

5 NZ Pork also relies on the evidence filed for earlier Hearing Streams 1 and 5.

6 These submissions focus on:

6.1 highly productive land and versatile soils; and

6.2 reverse sensitivity.

7 NZ Pork's submission points and proposed relief are discussed in full in the evidence of Mr Hodgson. NZ Pork maintains its other original and further submissions in their entirety, unless otherwise amended in these submissions or the evidence noted above.

Pig farming in the Waimakariri District

8 Mr Barugh and Dr Murchison's evidence explains that there are 10 commercial indoor piggeries within the Waimakariri District. These piggeries are located across the RLZ and the GRUZ. In addition to the piggeries, these operations include leases or contracts to spread effluent across adjacent or nearby land.

9 Mr Barugh is also aware of two small-scale, free-range outdoor operations in the Waimakariri District. His evidence is that the Waimakariri District is suitable for these systems, given soil types and climate considerations, and that outdoor pig farming may be an option for some farmers wanting to reduce greenhouse gas emissions in the future.

10 Ms Cairn's evidence for NZ Pork from Hearing Stream 1 explained that:

10.1 the New Zealand pig industry is a highly productive specialised livestock sector and well-integrated within New Zealand's primary production economic base;

10.2 the industry has downstream and upstream inputs in terms of economic activity from New Zealand's primary production sector including feed inputs, equipment and animal health supply, transport, slaughterhouse facilities and further processing;

10.3 New Zealand's pig farmers produce around 45,350 tonnes of pig meat per year for New Zealand consumers, representing around 38% of pig meat consumed by the domestic market;

10.4 across the country there are less than 90 commercial pork producers, being a relatively small but significantly integrated

sector of the New Zealand agricultural economy, with total economic activity associated with domestically farmed pigs approximately $750 million per annum in 2018;

10.5 pig farmers in New Zealand have a firm grasp of environmental issues and demonstrate a high level of innovation and environmental stewardship;

10.6 the New Zealand pork industry has committed significant time and resource to Sustainable Farming Fund projects centred on environmental initiatives, including development and implementation of Environmental Guidelines (attached to Mr Barugh's evidence) and Nutrient Management Guidelines;

10.7 profit margins for the industry remain tight, so compliance costs and future uncertainty are key issues.

11 Over 63% of piggeries in New Zealand are located in Canterbury, including all outdoor piggeries, The Waimakariri District therefore plays a significant role in this highly productive industry, with significant potential for growth in the future, provided the regulatory framework does not prevent this.

Highly productive land and versatile soils

12 NZ Pork is seeking a number of amendments to the introduction and provisions for the rural zones to better recognise primary production and associated versatile soils and highly productive land.

13 In response to Minute 7 of the Panel, providing submitters with an opportunity to comment on the Waimakariri District Council's position that the National Policy Statement for Highly Productive Land 2022 (*NPS-HPL*) does not apply to the notified Rural Lifestyle Zone (*RLZ*), NZ Pork does not dispute that the NPS-HPL excludes land proposed to be zoned RLZ from being recognised as 'highly productive land' to which the NPS-HPL applies.[1]

14 It is important to acknowledge, however, that the NPS-HPL does not exclude consideration of adverse impacts on primary production, land or versatile soils, for example, beyond the areas that are specifically considered 'highly productive land'.

NPS-HPL

15 The NPS-HPL came into force on 17 October 2022 and sets out a regime for the protection of 'highly productive land' for use in land-based primary production.[2] While the NPS-HPL was developed

[1] Clause 3.5(7)(b)(ii) – does not include land subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

[2] NPS-HPL, policy 1.

under the Resource Management Act 1991 (*RMA*), it is intended that the NPS-HPL will be transitioned into the National Planning Framework under the Natural and Built Environments Act 2023 (*NBA*) in time.

16 The NPS-HPL relies on the Land Use Capability (*LUC*) system, which categorises land into eight classes. Land that is classed as LUC 1 is the most versatile, productive and has the fewest limitations, making it best suited to food and fibre production. LUC 8 is the least versatile and productive and has the greatest number of limitations. LUC classes 1, 2 and 3 are protected by the NPS-HPL.

17 The NPS-HPL requires each regional council to notify a proposed regional policy statement (*RPS*) mapping land in their region as highly productive land that:[3]

17.1 is zoned general rural or rural production; and

17.2 is predominantly LUC 1, 2 or 3 land;[4] and

17.3 forms a large and geographically cohesive area.

18 District councils will then incorporate the same maps from the RPS into district plans automatically, using the RMA section 55(2) process, without a submissions and hearings process. In the interim, district councils must apply the NPS-HPL to land that is zoned rural general or rural productive and identified as LUC 1, 2 or 3.[5]

19 District councils must avoid the rezoning, subdivision or inappropriate use or development of highly productive land unless the exceptions in clauses 3.6 to 3.10 apply.[6] Importantly for NZ Pork, clause 3.11 of the NPS-HPL states:

3.11 Continuation of existing activities

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[3] NPS-HPL, clause 3.5.

[4] It also provides for regional councils to map land that is zoned general rural or rural production, but is not classed as LUC 1, 2, or 3 land, as highly productive land if the land is, or has the potential to be, '*highly productive for land-based primary production in that region'*. For example, a site that due to soil type, location and climate is suitable for viticulture, even if not LUC 1-3.

[5] But not land identified for future development or land that is already subject to a plan change to rezone it to urban or rural lifestyle at the time the NPS-HPL comes into force.

[6] This includes exemptions for use and development retaining the overall productive capacity long-term, subdivisions on Māori land, or subdivision for specified infrastructure avoiding or mitigating potential loss of highly productive land.

> *(1) Territorial authorities must include objectives, policies, and rules in their district plans to:*
>
> *(a) enable the maintenance, operation, or upgrade of any existing activities on highly productive land; and*
>
> *(b) ensure that any loss of highly productive land from those activities is minimised.*
>
> *(2) In this clause, existing activity means an activity that, at the commencement date:*
>
> *(a) is a consented activity, designated activity, or an activity covered by a notice of requirement; or*
>
> *(b) has an existing use of land or activity protected or allowed by section 10 or section 20A of the Act.*

20 Mr Hodgson has explained that this clause is particularly important for enabling intensive indoor pig farming to respond to changing animal-welfare legislation and practices, including the rebuilding and the expansion of a building's footprint.

21 For this reason, the s 42A report writer's recommendation to include an amendment to RURZ P2(2)(a), which is about enabling activities that directly support primary production or activities with a functional need to be located in rural zones, to 'avoid' rather than 'minimise' adverse effects on versatile soils and highly productive land is opposed on the basis that:

21.1 this change would not align with Policy 8 of the NPS-HPL, which requires that HPL is *protected* from *inappropriate* use and development;

21.2 clause 3.9 of the NPS-HPL mentions *avoiding inappropriate* use and development of HPL that is not land-based primary production;

21.3 clause 3.11 provides for the continuation of existing activities on 'highly productive land' where the loss of 'highly productive land' is minimised.

22 In our submission, an '*avoid'* policy in RURZ P2 would be too blunt,[7] and does not reflect the nuance of the NPS-HPL that it is only *inappropriate* use and development that should be avoided and is

[7] The word "avoid" means "not allow" or "prevent the occurrence of": *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZKS 38 at [96].

internally inconsistent with the chapeau of (2) to *enable* activities that directly support primary production.

NPS-HPL Guide to Implementation

23 In his evidence, Mr Hodgson refers to the document *The National Policy Statement for Highly Productive Land: Guide to implementation*, March 2023, including relevant guidance relating to:

23.1 determining a supporting activity, including where an intensive indoor primary production activity or glasshouse may be considered as an integrated part of a wider arable or pastoral farm system through the transfer of nutrients to support the activities of surrounding HPL (Clause (3.9)(2)(a));

23.2 ensuring rules to enable the maintenance, operation, or upgrade of any existing activities are tailored to enable specific scenarios, where the territorial authority anticipates the need for activities to expand Clause (3.11(1)(a);

23.3 taking an integrated management approach, thinking about the rural environment holistically and the role of other primary production activities that are not reliant on the soil resource.

24 Relevant to the discussion of reverse sensitivity later in these submissions, the Guide to implementation also addresses cumulative loss and reverse sensitivity effects associated with subdivision and land use. The Guide states:

> *The NPS-HPL contains strong direction through Policy 6 and Clause 3.7 that rural lifestyle zoning of HPL should be avoided. The rationale is that it is inappropriate to:*
>
> - *use Aotearoa New Zealand's most productive land for low-density housing, and*
>
> - *prevent future productive use of this land through allowing fragmented ownership and the construction of dwellings and hardstand areas that have the potential to cause reverse sensitivity effects on land-based primary production activities.*

25 While this publication has no official status, it represents the Ministry for the Environment's best efforts accurate at the time of the publication, to help stakeholders, including local authorities, understand and implement the NPS-HPL. It is therefore authoritative as an aid to interpreting the intentions of the Ministry, as the authors of NPS-HPL, in preparing the NPS.

Consultation on changes to the NPS-HPL

26 Mr Hodgson's evidence also identifies that feedback is currently being sought by the Ministry for the Environment and Ministry for Primary Industries on potential amendments to the National Policy Statement for Highly Productive Land NPS-HPL.

27 One of the issues identified in the consultation document is a lack of clear consent pathway for development and relocation of intensive indoor primary production and greenhouses on 'highly productive land'. The consultation is open for submissions until 31 October 2023.

28 In addition to the consent pathways already identified in clauses 3.9 and 3.11, the government is considering providing a bespoke pathway for developing and relocating intensive indoor primary production and greenhouses on 'highly productive land', subject to specific tests being met, such as functional or operational tests.

29 Previous feedback from primary sector groups, including NZ Pork, found that in most circumstances, the existing options did not provide a *clear* consent pathway for the development of new intensive indoor primary production and greenhouses on 'highly productive land'.

30 As Mr Hodgson has correctly noted, while this consultation document has no official status, the progression of this, or any other changes to the NPS-HPL, will be important for the development of the proposed Plan (subject to timing). The Council is required to prepare and change any district plans in accordance with a national policy statement, in accordance with section 74(1)(ea) of the RMA.

31 In the event that the NPS-HPL is amended during this proposed Plan process, it would be appropriate to give effect to the amended version of the NPS-HPL, in light of the approach taken in *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* where the High Court considered the question of which freshwater policy statement ought to be given effect to, following an appeal and the referral of a provision back to the decisionmaker for reconsideration (in this case a Board of Inquiry):[8]

> *[183] As the Freshwater Policy Statement 2014 will be the operative Freshwater Policy Statement when the Board reconsiders Rule TT1(j), the Board should give effect to that policy. This approach:*

[8] Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council [2014] NZHC 3191 involving Plan Change 6 to the Hawke's Bay Regional Management Plan.

> *(1) recognises that the Executive wants the Freshwater Policy Statement 2014 to be implemented as promptly as possible; and*
>
> *(2)* ***best reflects the requirements of s 67(3)(a) of the RMA*** *which requires the Board to give effect to any national policy statement.*

32 Therefore, where there is scope to do so within the process, the Hearing Panel could give effect to any future amendments to the NPS-HPL to the extent practicable.

33 Regardless of any amendments, both the Guide to Implementation and the Discussion Document make it clear that the NPS-HPL never intended to outright prevent activities such as intensive indoor primary production from being located on 'highly productive land'.

34 Furthermore, were the NPS-HPL to be repealed or significantly scaled back, it remains the case that land and soils must be protected under the RMA and the Canterbury Regional Policy Statement 2013 (*CRPS*).

RMA and RPS protections

35 Starting with the purpose of the RMA, to promote the sustainable management of natural and physical resources, section 5(2) defines sustainable management as managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their […] wellbeing and health and safety while (b) safeguarding the life-supporting capacity of air, water, **soil**, and ecosystems.

36 Section 7, other matters, includes as matters to have particular regard to (b) the efficient use and development of natural and physical resources and (g) any finite characteristics of natural and physical resources. Natural and physical resources are defined as including land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

37 The CRPS defines versatile soils as "*land classified as Land Use Capability 1 or 2 in the New Zealand Land Resource Inventory*". Soils are specifically addressed in Chapter 15, which:

37.1 applies across the whole region;

37.2 acknowledges that soils have both extrinsic and intrinsic values and ensuring the good management of soils is of regional significance;

37.3 refers to soil versatility as an expression used to describe the land use capability of soils, soil quality and soil erosion identified as the main issues for the region;

37.4 includes Objective 15.2.1 and Policy 15.3.1 that relate to the maintenance of the elements of soil quality, which also determines the versatility of soil and the economic benefits able to be derived from it;

37.5 directs territorial authorities to set out objective and policies in their district plans that help ensure land use activities and land management practices do not cause significant long-term adverse effects on soil quality.

38 Chapter 5 of the CRPS focuses on land-use and infrastructure, with some parts applying across the entire region, and others only applying outside Greater Christchurch, these provisions generally recognise that:

38.1 while development is important, where not appropriately managed it can result in significant adverse effects on the environment, affecting the ability of people to provide for their needs, both in the present and in the long term;

38.2 Objectives and policies in Chapter 5 ensure that the natural and physical resources that contribute to Canterbury's economy are maintained and enhanced, particularly in areas valued for existing and future primary production;

38.3 this is to be achieved across the entire region by locating development so that it functions in a way that enables rural activities that support the rural environment including primary production, avoids adverse effects on significant natural and physical resources and avoids conflicts between incompatible activities.[9]

39 The section 42A report states that the protection of versatile soils is not relevant within the Greater Christchurch boundary.[10] This appears to be based on a narrow reading over Chapter 5 of the CRPS, without taking into account the broad region-wide direction in Objective 5.2.1, and doesn't appear to consider Chapter 15 Soils. Chapter 6 of the CRPS relates to the recovery and rebuilding of Greater Christchurch and doesn't specifically mention soils, but does recognise the potential for adverse effects on existing agricultural industry, including reverse sensitivity effects.

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[9] See Objective 5.2.1 in particular.

[10] At [819].

40 Mr Hodson's evidence is that, across both the GRUZ and RLZ, the value of these areas of highly productive land for primary production cannot be ignored. That approach is consistent with the CRPS.

Reverse sensitivity

41 Reverse sensitivity effects are the adverse effect of establishing sensitive/incompatible activities in the vicinity of existing lawful uses, and the potential for that establishment to lead to restraints on the carrying out of the existing uses. Or, as the Court has stated: [11]

> "*it is the effect of the new use on* existing *uses that is the problem, not because of the direct effects of the new use but because of incompatibility which in turn may lead to pressure for change*".

42 Reverse sensitivity effects are an adverse effect for the sustainable management purposes of the RMA. In implementing this purpose, the Pork industry (and the Council itself in exercising its statutory functions) also has a duty under section 17 of the RMA to avoid, remedy or mitigate those effects so as to achieve the Act's sustainable management purpose.

43 Across the Pork industry, farmers strive to internalise their effects wherever reasonably possible, consistent with the Good Management Practice guidelines for pig farming. However, total internalisation of effects in all situations is not feasible, nor is it required under the RMA.[12] The general principle, established in case law, is that activities should internalise effects wherever reasonably possible.[13] Reverse sensitivity is therefore not about an activity that is *non-compliant* (i.e. acting outside the parameters of the resource consent). Rather it is the perception of what is appropriate or what compliance should "look like" that is the issue.

44 In respect of NZ Pork's submission point 169.92 seeking the inclusion of wording "*lawfully established*" included in clause 6 of RURZ-MD8 Setbacks, it is important to recognise that reverse sensitivity effects can occur in relation to activities that:

44.1 are permitted in the relevant plan;

44.2 have existing use rights as an activity that was established as a permitted activity in a previous plan, but is no longer permitted; or

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[11] *Joyce Building Limited v North Shore City Council* [2004] NZRMA 535, para [22].

[12] *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48, para [7-9] and *Catchpole v Rangitikei District Council,* W35/03.

[13] *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48, para [7-9].

44.3 a consented activity.

45 These three categories of activities can be collectively referred to as "*lawfully established*", as opposed to being permitted, for example.

46 The legal basis for which reverse sensitivity should be considered when considering the suitability of plan provisions has been considered in:

46.1 the decision of the Environment Court in *Auckland Regional Council v Auckland City Council* confirmed that local authorities have an obligation to not include provisions in plans that would allow sensitive activities to locate in the vicinity of activities which produce adverse effects;[14]

46.2 the Environment Court in the *Auckland Regional Council v Auckland City Council* also made it clear that local authorities have obligations under section 31 to include provisions in district plans which regulate against sensitive activities locating in the vicinity of activities which produce adverse effects, particularly by leading to restraints on the carrying out of those activities.[15] The decision was in the context of consideration whether rules in a plan could provide for non-industrial uses in industrial areas. The Court held that the non-industrial uses should be restricted and stated that the process of planning [emphasis added]:

> *"would be apt to integrate the effects of the proposed activity and the effect of other activities in the vicinity, and to control the actual or potential effects of the use of land. In our opinion, to reject provisions of the kind proposed, on the basis of leaving promoters to judge their own needs, of not protecting them from their own folly, and of failing to consider the effects of those who may come to the nuisance,* ***would be to fail to perform the functions described for territorial authorities****. It would also fail to consider the effects on the safety and amenities of people who come to premises as employees, customers and other visitors."*

47 It is well recognised that residential occupiers have the greatest potential to generate reverse sensitivity effects, and a greater degree of control that seeks to minimise the risk of reverse sensitivity effects is therefore justified.[16] This is discussed in more detail by Mr Hodgson.

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[14] *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205.

[15] *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205.

[16] *Ngatarawa Development Trust Ltd v Hasting District Council*, W017/08.

Reverse sensitivity and pig farming

48 Mr Barugh states that there are five potential effects on amenity values from pig farming systems: odour, dust, noise, traffic generation and building form. However, the vast majority of complaints about pig farming from neighbours relate to odour. In his considerable experience, most odour complaints made to or about commercial pig farmers from neighbouring properties arise from effluent storage, treatment and spreading as fertiliser, rather than from the animals themselves.

49 Dr Murchison's evidence and experience is that complaints are nearly always made by people who move into an area where a pig farming activity is already established and tend to be living on small rural lifestyle blocks (4 hectares or less). Dr Murchison agrees, consistent with the caselaw outline above, that there is an onus on pig farmers to undertake all reasonable steps to ensure they operate at GMP and that any odour is reasonable for an activity of this nature. However, Dr Murchison is aware of examples where, despite farmers operating within industry approved good management practices, and complaints being investigated by the Regional Council and deemed unfounded, the complaints continue and escalate.

50 The control of discharges of contaminants into air is a regional authority function under section 30(1)(f). For the same reason, a territorial authority may not directly control discharges of contaminants to air as a component of integrated management of effects (a section 31(1)(a) function) but may consider odour as a matter of amenity in resource consent applications for example, as an actual and potential effect on the environment of allowing an activity pursuant to section 104(1)(a).

51 The Environment Court has observed the limit of this consideration is the extent to which a consent authority is *"concerned with the potential* [*odour*] *effects as a result of the land use"*[17] (i.e. and not a direct consideration of or provision for odour *per se*). In practice, this means that when considering District Plan provisions odour will have relevance to informing wider land use controls in the way described in the Ministry for the Environment Good Practice Guide for Assessing and Managing Odour 2016 - i.e.:

> ***1.3.1 Roles and responsibilities***
>
> *Under the RMA, the primary responsibility for managing air quality lies with regional councils and unitary authorities. Regional councils also have responsibilities under the Resource Management (National Environmental Standards for Air Quality) Regulations 2004.*

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[17] *Wilson v Selwyn District Council* [2003] NZRMA 350 at [24].

> *Territorial authorities do not have a specific air quality management function under the RMA.*
>
> *Territorial authorities do, however, have the main responsibility for land use, which includes the location of activities that may discharge odours, such as:*
>
> - *activities involving agrichemical application*
> - *industry*
> - *intensive farming*
> - *transport infrastructure (roads, ports, airports).*
>
> *District councils also have primary responsibility for managing the location of activities that are sensitive to discharges to air (eg, residential zones). Through managing land use therefore, district plan provisions manage the air quality effects of activities on sensitive land uses.*

52 The need to control reverse sensitivity at a plan level (rather than through, for example, covenants on neighbouring land), is also very well demonstrated by Dr Murchison's evidence. Reverse sensitivity is of particular concern to NZ Pork given the proposed Plan seeks to rezone a significant area from general rural zoning under the operative Plan, to RLZ under the proposed Plan. As already outlined, this RLZ contains five existing indoor piggeries.

53 This area of proposed RLZ should be treated as a '*working zone*', consistent with the statement of the Environment Court in *Road Metals Company Limited v Christchurch City Council*[18] (a case concerning quarrying but it is submitted equally applicable here):

> *[113] …. We must repeat that the Rural Zone around Christchurch, like the rest of New Zealand, is a business zone. It is an eclectic mix of activities and, almost inevitably, quarrying is one of the activities within it. We note that in this case, as in other cases, it is the rural-residential component which struggles with the range of activities conducted in this Rural Zone, be it quarrying, cropping, silage making, intensive farming (piggeries) and the like. Rural character and amenity does not equate to noise-free peace and quiet, and clear air. If there is an expectation by residents that this area will eventually be more intensively developed for residential use, it is certainly not one that the Court can see as being generally*

[18] Unreported, Environment Court at Christchurch, C163/06, 1 December 2006, Smith J.

appropriate. Quarrying is a vital component of the character in this area and is likely to continue to be so.

54 Mr Hodgson's evidence discusses that RURZ-P8 is the primary policy for reverse sensitivity, working with the other policies for the rural zones to achieve RURZ-O1 and RURZ-O2.

55 Mr Hodgson considers that the proposed Plan could be improved to provide a more robust structure to address reverse sensitivity effects in an environment where factors like historical subdivision, the distribution and use of highly productive land (and versatile soils) and the future of food production require policy and methods to support primary production.

No-complaints covenants

56 It has been a consistent experience for NZ Pork that no-complaints covenants are not effective for dealing with either amenity effects or reverse sensitivity effects.

57 No-complains covenants are occasionally imposed as part of consenting requirements, whereby a covenant is registered on the certificate of title to a piece of land that restricts the owner and future owners from complaining about the lawful effects emitted from a neighbouring property.

58 In respect of amenity effects, the removal of ability to complain does not remove the fact that people are still exposed to odours and noise and a certain percentage will still be highly annoyed. As Judge Thompson said in *Ngatarawa Development Trust Ltd v Hastings District Council* (W017/2008):[19]

> *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.*

59 Further, no complaints covenants are only binding on the parties on the title to the encumbered property. A council would generally not have any responsibility to enforce these types of covenants. Therefore, when considering resource consent conditions, effects addressed by these types of covenants may still need to be

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[19] *Ngatarawa Development Trust Ltd v Hastings District Council* W017/08, at [27].

considered. Covenants are not binding on any other third parties, such as tenants or minors. The experience of NZ Pork is that there is a significant burden associated with having to monitor and enforce what is considered to be ineffective covenants, particularly given the time and costs of monitoring and enforcement.

60 In one of the examples mentioned by Dr Murchison, the owners of a pig farm that is the dominant land for the purposes of several no-complaints covenants over more recently created rural lifestyle lots has not been able to obtain information from the Regional Council as to the identity of the complainant, which makes it impossible to enforce the covenant.

Enforcing a no-complaints covenant

61 While processes to enforce a breach of a no-complaints covenant will largely depend on what is written in each individual covenant instrument, it is common practice to give written notice to a neighbour specifying the breach, the remedy for the breach, and the consequences that will follow should the notice not be adhered to.

62 The normal remedy for a breach of a negative covenant is to obtain an injunction restraining acts in breach of it, including preventing the complaint being made or heard, and perhaps damages. If and when enforcement action is taken for breach of a no-complaints instrument, the person being sued can simultaneously apply to have the instrument varied or extinguished. If circumstances have changed significantly since the time the instrument was entered into, the Court would have the discretion to modify the instrument rather than enforcing it.

63 Enforcing a no-complaints covenant therefore requires going to Court, and runs the risk that the covenant could be modified or cancelled.

Conclusion

64 In light of the important social and economic outcomes provided by the pork industry, it is critical that its safe and efficient operations are enabled in the proposed Plan.

2 October 2023

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