ORIGINAL

Decision No. A103/2003

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two appeals under section 120 of the Act

BETWEEN **INDEPENDENT NEWS AUCKLAND LIMITED**

(RMA 901/01)

AUCKLAND INTERNATIONAL AIRPORT LIMITED

(RMA 906/01)

Appellants

AND **THE MANUKAU CITY COUNCIL**

Respondent

AND **CENTRAL GARDENS LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner C E Manning
Environment Commissioner D H Menzies

HEARING at Auckland on 3, 4, 5, 6 and 7 March 2003

APPEARANCES

Mr R Brabant for Central Gardens Limited
Mr S Brownhill for Manukau City Council
Mr D A Nolan and Ms C J Somerville for Auckland International Airport Limited

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION

Introduction

[1] The single main issue on this appeal is the potential for conflict between the owners and users of the Auckland International Airport and future residents of household units likely to be affected by the noise of landing aircraft.

[2] The appeal concerns an application for consent by Central Gardens Limited for the development of 349 household units on a Business 5 zoned site, at 18 Lambie Drive, Manukau City. The site is identified by the Manukau Operative District Plan 2002, as being subject to moderate and high levels of aircraft noise from aircraft operations at Auckland International Airport.

[3] The site is located directly beneath the westerly approach path for aircraft landing at the airport. Recognising the effect of noise generated by such aircraft, the district plan has endeavoured to minimise conflict between the development and use of the airport, and activities which are sensitive to airport noise. This is achieved by the adoption of rules for the purpose of limiting aircraft noise levels of more than Ldn 65 dBA to the high aircraft noise area[1] and noise levels of more than Ldn 60 dBA to the moderate aircraft noise area[2].

[4] The district plan also contains land use controls in relation to activities sensitive to aircraft noise[3] in the high aircraft noise area and moderate aircraft noise area. Household units, and therefore this development as a whole, are classified as activities sensitive to aircraft noise. Such activities in the high noise area are a non-complying activity. The majority of the site is located in the high aircraft noise area, with only the northern portion of the site located in the moderate aircraft noise area.

[5] The Council granted consent to the application on 12 September 2001. Auckland International Airport Limited appealed the Council's decision, primarily on the reverse sensitivity effects on the airport arising from the development. Independent News Auckland Limited, an industrial neighbour, also appealed on reverse sensitivity grounds, however that appeal was resolved. A draft consent order

[1] Referred to in the plan as HANA.
[2] Referred to in the plan as MANA.
[3] Referred to in the plan as ASANS.

was filed, the terms and conditions of which, formed the basis for the conditions of consent sought by Central Gardens.

[6] The Council initially resolved to defend its decision to grant the consent. Since the time of filing the appeals, the aircraft noise area rules of the then proposed plan (which was made operative, in part, on 21 October 2002) have changed as the result of a consent order issued by the Environment Court on 10 December 2001. As a consequence, the activity status of the proposal changed from discretionary to non-complying[4].

[7] Following the amendments to the proposed plan, the Council considered it necessary to review the proposal under the operative plan and determined not to support its original decision.

The locality and the proposal

[8] The property is zoned Business 5 under the district plan. It is 2.82 hectares in area with access legs to Lambie Drive and Ryan Place. It is effectively a rear site, although the width of the access leg at Ryan Place results in it meeting the district plan definition of a front site.

[9] The property is surrounded on three sides by industrial uses of various kinds, which include printing premises, a pressurised tank testing facility which releases odourised gases, warehousing, heavy vehicle servicing and panel beating.

[10] Immediately to the north of the site is an existing residential area with frontage to Ihaka Place. The north-east corner of the site adjoins the playing fields of the Seventh Day Adventist School which has frontage to Puhinui Road. The site is undeveloped and is basically flat (and gently contoured).

[11] The proposal is to construct, for residential use, 4 apartment towers, 23 terraced-houses, and 6 studio warehouse units. Associated with that development are the required site works, infrastructure facilities, parking, landscaping and facilities for the use of residents. These are to include a recreation building that would have a gym, lap pool, small shop and café. There would also be an outdoor

[4] At the time of the Council hearing it was also assessed as a non-complying activity under the then operative transitional plan.

swimming pool and changing room. Areas of open space around the buildings will be landscaped to provide a level of amenity for the development, as well as additional passive recreation areas.

[12] The 4 apartment tower blocks are to be arranged in a square configuration in the middle of the site, with recreation areas and the office/reception/gym building between them. Manager's accommodation will be on the upper level of that building. There will be two levels of parking for occupants, visitors, service vehicles and the like; one below ground, and one above.

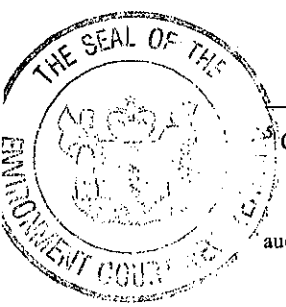
[13] The two-storied terraced houses are proposed to be built along the northern boundary at the interface with the adjoining Residential zone. Parking for these terraced houses is contained within each unit entitlement area.

[14] The six studio warehouse units with associated parking are proposed on the part of the site that has access to Ryan Place. These warehouse units provide an opportunity for small businesses to establish in premises that have flexible manufacturing/storage opportunities, office and living space.

[15] The main vehicle and pedestrian access to the property is from Lambie Drive. This has been designed as a two-way internal road providing access to all units. It will also comply with the requirements for emergency vehicle access. Vehicle and pedestrian access is also available through Ryan Place.

[16] The apartment towers each have 8 floors, with 10 apartments per floor, giving 80 apartments per tower. In addition, there are two levels of parking in each tower. The approximate height of each tower is 32.5 metres. There will be 320 apartments in total, 192 one-bedroom units and 128 two-bedroom units.

[17] The buildings comply with all the development controls and have been purpose-designed to meet the Council's latest Acoustic and Ventilation Standards for activities sensitive to aircraft noise.[5]



[5] Compliance with rule 5.21.4 – refer paragraph [48].

The hearing

[18] The hearing took place over a period of 5 days. During that time we heard extensive opening submissions from counsel. We also heard from a number of witnesses namely:

- Mr D J Snell, architect and designer of the proposal;
- Mr J M Burgess, traffic engineer;
- Mr A L McKenzie, mechanical engineer;
- Mr N I Hegley, acoustical consultant;
- Ms J A Hudson, planning and resource management consultant;
- Mr D J Medrickey, the project manager for the proposal – all called by Central Gardens.
- Mr J M McShane, environment and planning manager for the Airport Company;
- Mr D Osborne, planning consultant;
- Mr C W Day, acoustical consultant;
- Mr S Milne, executive director of the Board of Airline representatives of New Zealand Incorporated – all called by the Airport Company.
- Mr M A Nielson, resource management planner for the Council.

[19] At the conclusion of the evidence leave was given for the Airport Company and Central Gardens to file closing submissions. Two memoranda by Central Gardens and a memorandum by the Airport Company were filed – the last on Monday 19th May 2003. The closing memoranda were detailed and extensive, totalling in all 119 pages.

[20] In the interests of brevity we have not been able to address all of the matters referred to in the submissions and in the evidence. However, we have had regard to all that was said.

The relevant statutory setting and the legal framework

[21] As the proposal is a non-complying activity, sections 104 and 105 of the Act apply. The following parts of section 104 are relevant:

(i) subject to Part II – section 104(1);

(ii) the actual and potential effects on the environment of allowing the activity – section 104(1)(a);

(iii) the regional policy statement – section 104(1)(c); and

(iv) the district plan – section 104(1)(d).

[22] We are also required to determine whether the proposal satisfies the gateway criteria in section 105(2A). We therefore propose:

(i) firstly, to identify and discuss the relevant general criteria in section 104;

(ii) secondly, to discuss the gateway criteria in section 105(2A); and

(iii) thirdly, to exercise our discretion under section 105(1)(c).

Section 104 matters

Part II

[23] Section 5 is the "lodestar" of the Act. It was described in this way in ***Lee v Auckland City Council***[6]**:**

> In effect, section 5 of Part II of the Act is the only section in the present Act which contains the philosophy of sustainable management as its purpose, and the proscriptive criteria against which effects (as defined in section 3) and the plan provisions may be measured. Section 5 under the 1993 Amendment to the Act may be considered the "lodestar" which guides the provisions of section 104 and in this appeal we are guided by the over-arching purpose of sustainable management as defined.[7]

[24] The approach taken to the application of section 5 is now settled by several clear and consistent decisions[8].

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[6] 1995 NZRMA 241.

[7] At page 248.

[8] See *New Zealand Rail Limited v Marlborough District Council* 1994 NZRMA 70; *Trio Holdings Limited v Marlborough District Council* 1997 NZRMA 97; *North Shore City Council v Auckland Regional Council* 1997 NZRMA 59 (upheld on appeal in *Green and McCahill Properties v Auckland Regional Council* 1997 NZRMA 519); *Eden Park Trust Board v Auckland City Council* (A130/97); *Aqua Marine Limited v Southland Regional Council* (C126/97); and *Solid Energy New Zealand Limited v Gray District Council* (A8/98).

[25] The application of section 5 was summarised in ***New Zealand Rail Limited*** as follows:

> Part II of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not a part of the Act which should be subject to strict rules and principles of statutory construction which aims to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which is intended to allow the application of policy in a general and broad way.[9]

[26] The general approach taken by the Courts has been described as the "overall judgment" approach.[10] This requires an overall broad judgment of whether the proposal would promote the sustainable management of natural and physical resources. Such a judgment allows for comparison of conflicting considerations and the relative scale and degree of them[11], and their relative significance in the final outcome[12].

[27] Sustainable management requires that the use, development and protection of physical resources, in this case the Airport and the Central Gardens' site, be managed in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing – a matter that we will return to later in this decision.

[28] Also of relevance in this case is section 7, particularly:

(i) The ethic of stewardship – sub-paragraph (aa);
(ii) The efficient use and development of natural and physical resources – section 7(b);
(iii) The maintenance and enhancement of amenity values – section 7(c);
(iv) The maintenance and enhancement of the quality of the environment – section 7(f); and
(v) Any finite characteristics of natural and physical resources – section 7(e).

[9] Page 72.
[10] *Aqua Marine*, page 141.
[11] *North Shore City Council*, at page 93.
[12] *New Zealand Rail Limited.*

The relevant statutory instruments

The relevance of earlier plans

[29] We have already adverted to the fact that when the application was first assessed, the relevant district plan provisions included those under the transitional plan and the proposed plan. Since the time of filing the appeals, the proposed plan has been made operative and some of the plan provisions that the application is to be assessed against have changed significantly. All parties agreed that under section 88A of the Act, the operative plan is the only relevant district plan in terms of sections 104 and 105 of the Act.

The Auckland Regional policy statement

[30] Issue 2.3.4, contained in the "regional overview and strategic direction" section of the regional policy statement, is directly relevant to this appeal. It states:

> Regionally significant physical resources, including infrastructure, are **essential** for the communities' **social and economic wellbeing.** The location, development and redevelopment of infrastructure is of strategic importance in its effects on the form and growth of the region. However, the long-term viability of regionally significant infrastructure and physical resources can be compromised by the adverse effects, including cumulative effects, of other activities. These regionally significant resources can equally give rise to adverse effects, including cumulative effects on the environment, and on communities. **They can be adversely affected by conflicts if sensitive uses are allowed to develop near them or if they are inappropriately located.** (emphasis added)

[31] The policy statement goes on to say that regional infrastructure includes airports and airport flight paths. Examples of significant regional infrastructure are given in Appendix D. That appendix includes, as an example of regional infrastructure, the Auckland International Airport.

[32] The following key issues are identified in the policy statement (as part of Issue 2.3.4) in relation to regional infrastructure:

- Provision (or non-provision) of infrastructure is a major influence in the overall pattern and direction of regional development.
- The need for expansion, replacement or upgrading of infrastructure in order to avoid environmental problems and/or to increase the capacity of infrastructure to accommodate growth.

- The need to avoid, remedy or mitigate the adverse effects generated by proposed changes to infrastructure and to consider alternative ways of avoiding or remedying them. Relocation of infrastructure or restrictions on the location of infrastructure or restrictions on the establishment of sensitive land uses in close proximity may be required to overcome the environmental problems faced.

- An absence of co-ordination between infrastructure providers and other agencies responsible for urban growth and development may increase the likelihood of adverse effects.

[33] From these issues and the policy statements flow the "Strategic Direction" for the Auckland Region. Strategic objectives in 2.5.1 relevantly include:

> 1. To ensure that provision is made to accommodate the Region's growth in a manner which gives effect to the purpose and principles of the Resource Management Act, and is consistent with these Strategic objectives and with provisions of this RPS.
>
> ...
>
> ...
>
> 6. To promote transport efficiency, and to encourage the efficient use of natural and physical resources, including urban land, infrastructure, and energy resources.

[34] Strategic policy 2.5.2(3) further states:

> 3. Urban development is to be contained, within the metropolitan urban limits shown on Map Series 1 and the limits of rural and coastal settlements as defined so that:
>
> ...
>
> (iii) **urban intensification at selected locations** is provided for and encouraged. Selection of these places will take into account, amongst other things, any **significant adverse effects which arise from the interaction with any regionally significant infrastructure** and other significant physical resources. (emphasis added)

[35] Strategic policy 2.5.2(6) states:

> 6. Provision is to be made to enable the safe and efficient operation of existing regional infrastructure which is necessary for the social, and economic wellbeing of the region's people, and for the development of regional infrastructure (including transport and energy facilities and services) in a manner which is consistent with this strategic direction and which avoids, remedies or mitigates any adverse effects of those activities on the environment.

[36] The Airport is identified as a significant regional infrastructure in the regional policy statement. The statement notes that reverse sensitivity effects on regionally significant infrastructure must be taken into account when selecting locations for urban intensification.

The operative district plan

[37] As the proposal is a residential activity and the site is located in the Business 5 zone, the planning witnesses addressed both Business 5 and residential provisions of the plan. We have regard to those provisions. However, as we consider that the proposal fits comfortably within the relevant provisions of both the Business 5 and Residential zones, we do not propose to discuss them.

[38] Of particular concern to the issues raised by the appeal, are the objectives and policies relative to the Auckland International Airport. Section 17.6 of the district plan contains most of the resource management issues, objectives and policies relating to the operation of the airport, including the issue of aircraft noise and reverse sensitivity to that noise.

[39] Section 17.6.2.1 of the plan emphasises the local, regional and national importance of Auckland International Airport. This is reinforced in issue 17.6.2.2 which states in part that:

> There are significant positive effects arising from the operation of Auckland International Airport and it is important that the Airport is recognised and provided for so that it can serve the wider community, both now and in the future.

This is further reinforced by objective 17.6.3.8 which states:

> To recognise and provide for the positive effects arising from the operation of Auckland International Airport and to take these into account when considering any adverse effects of the Airport on the environment.

[40] The effect of aircraft noise is raised as an issue in Issue 17.6.2.7 which states:

> Amenity values and quality of the environment in some areas may be adversely affected by aircraft arising from use of the existing runway at Auckland International Airport.

The issue statement goes on to say:

> ...the District Plan recognises the importance of limiting the amount of additional residential development in areas affected or potentially affected by high aircraft noise (ie: aircraft noise levels greater than Ldn 65 dBA).

The issue statement having specifically identified additional residential development as a particular type of sensitive activity that should be limited within the high aircraft noise area, then goes on to state that:

> This is because, while it is possible to acoustically insulate dwellings and other activities sensitive to aircraft noise, it is not possible to use such methods to mitigate the effects of aircraft noise on the external environment.

[41] Issue 17.6.2.9 is also relevant. It states:

> The location of activities sensitive to aircraft noise in areas where high and moderate aircraft noise levels cannot be avoided creates incompatibilities between the operation of Auckland International Airport and land use activities.

The issue statement refers to as yet undeveloped areas of the City which are planned to accommodate regional growth and notes that parts of these areas will be adversely affected by aircraft noise. It then goes on to say:

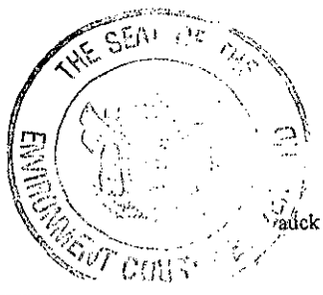
> Although they will still be able to be developed for residential purposes, as they are not within the High Aircraft Noise Area on the Planning Maps, they may require appropriate measures to be taken to mitigate aircraft noise such as the installation of acoustic insulation and ventilation systems. Within the High Aircraft Noise Area, the establishment of new Activities Sensitive to Aircraft Noise should generally be avoided, as people will inevitably be exposed to noise in the external environment.

This is further emphasised by objective 17.6.3.7 which says:

> To minimise conflict between the development and use of Auckland International Airport and activities which are sensitive to aircraft noise.

[42] In our view, policies 17.6.4.9, 10 and 11 are also relevant. They state:

> Policy 17.6.4.9
>
> The adverse effects of high and moderate levels of aircraft noise arising from the use of the existing runaway at Auckland International Airport on the amenity values and quality of life in existing and future residential areas of the City and on Activities Sensitive to Aircraft Noise in other areas should be avoided, remedied or mitigated.



The "Explanation/Reason" for Policy 17.6.4.9 says:

> The adverse effects of use of the existing runway can be avoided by limiting the location of sensitive activities in areas of high cumulative noise. Activities Sensitive to Aircraft Noise are defined in the District Plan to include activities, such as household units, hospitals, educational institutions, and rest homes. Adverse effects may be remedied or mitigated by the installation of acoustic insulation and ventilation systems in the case of buildings containing activities which are sensitive to aircraft noise within areas of high or moderate aircraft noise.
>
> ...
>
> and;
>
> Policy 17.6.4.10
>
> The location of new activities which are sensitive to aircraft noise in areas subject to high aircraft noise levels, (areas identified as being within the Ldn 65 dBA contour or higher are subject to high aircraft noise levels) should generally be avoided unless the adverse effects of those activities on Auckland International Airport can be avoided, remedied or mitigated.
>
> ...
>
> and further;
>
> Policy 17.6.4.11
>
> The location of new activities which are sensitive to aircraft noise in Business zones and the Mangere-Puhinui Rural zone which are subject to moderate aircraft noise levels, (areas identified as being between the Ldn 60 dBA contour and the Ldn 65 dBA contour are subject to moderate aircraft noise levels) should only occur if the adverse effects of those activities on Auckland International Airport can be avoided, remedied or mitigated.

[43] Interestingly the "Explanation/Reasons" for policies 7.6.4.10 and 7.6.4.11 says:

> The Airport and its flight paths are identified in the Auckland Regional Policy Statement as regionally significant infrastructure. The establishment of Activities Sensitive to Aircraft Noise within the High Aircraft Noise Area or, in the case of the Business Zones within the High or Moderate Aircraft Noise Areas, has the potential to compromise the sustainable management of that infrastructure.

[44] It is also worthy of note, that under paragraph 17.6.5 headed "Strategy for Aircraft Noise Management and Land Use Planning of Areas Affected by Aircraft Noise" the plan says:

> Areas of the City currently affected by aircraft noise arising from the use of the existing runway will continue to be affected. The degree to which some areas are affected may increase over time. In particular, there is an area within the Main Residential Zone which is bounded by Puhinui Road in the north, the NIMT in the west and the Grayson/Brett Avenue and Liverpool Avenue Business 5 land in the east and south which is and will continue to be within the High Aircraft Noise Area. Long term it is not desirable that this area remains zoned for residential purposes. It is the Council's intention to initiate a plan change and, subject to the outcome of that change, to set in place a programme to assist the transition of the area from residential to business zoning. It is envisaged that the Council would work with property owners and residents and stakeholders in the area to ensure that any such transition is as smooth as possible.

[45] The relevant issues, objectives and policies of the plan are given effect to by the rules and restrictions contained in the conditions of Designation 231 which relate to the Auckland International Airport and the rules in Chapter 5.21.

[46] Of importance is the definition of ASAN in Chapter 5.21:

> **"Activity sensitive to aircraft noise"** or **"ASAN"** means household units, minor household units, pre-schools/education facilities, schools, other educational facilities, childcare centres and other care centres, residential centres, hospitals, other health care facilities, rest homes and other homes for the aged.[13]

We note that activities sensitive to aircraft noise include a range of other activities in addition to household units. It is therefore necessary, when considering an application for a resource consent for an activity in one of the aircraft noise areas, to have regard to the type of activity that is subject to the application for consent.

[47] Under rule 5.21.2 an activity sensitive to aircraft noise shall be a non-complying activity save for some exceptions which are not relevant to these proceedings. Any such activity is subject to the acoustic standards and terms in rule 5.21.4. As mentioned, the proposal complies with the acoustic standards and terms of rule 5.21.4 and the relevant general development and performance standards.

[48] We also note, by way of analogy, rule 5.21.4C(g) which contains the following assessment criteria:

> **Nature, size and scale of development**
>
> (g) In the case of ASANS in the Business Zones in the MANA and in the case of any ASAN, (except household units, minor household

[13] Page 1, Clause 18 – Definitions, Plan.

> units and educational facilities) elsewhere in the MANA, whether having regard to all the circumstances (including location in relation to the Airport, likely exposure of the site to aircraft noise, noise attenuation and ventilation measures proposed, and the number of people to be accommodated), the nature, size and scale of development is likely to lead to potential conflict with and adverse effects upon Airport activities.

[49] The plan provides a two-fold method for managing the effects of aircraft noise, while at the same time providing for the continued operation and sustainable management of the airport as a significant physical resource. Firstly, by restricting the manner of the airport's operation by noise limitations and imposing obligations on the airport owners to acoustically insulate existing dwellings in areas affected by high and moderate aircraft noise. Secondly, by containing issues, objectives, policies and rules that control the establishment of activities sensitive to aircraft noise in the areas most affected by aircraft noise.

[50] Mr M A Nielson, a resource management planner for the Council, pointed out what he considered to be three particularly important points to draw on the district plan policies and accompanying explanations. These are:

(i) Policy 17.6.4.10 which specifically states that new sensitive activities in the high noise aircraft area should be avoided unless the effects of those activities can be avoided, remedied or mitigated;

(ii) Issue 17.6.2.7 indicates that the outdoor component of residential activities cannot be insulated from aircraft noise; and

(iii) The "explanation/reasons" to policies 17.6.4.10 and 17.6.4.11 state that new sensitive activities in the high noise aircraft noise areas have the potential to compromise the sustainable management of the airport.[14]

[14] Nielson, EiC, paragraph 17.17.

[51] We also consider it pertinent to refer to the "Anticipated Environmental Results" listed in clause 17.6.7 which relevantly states:

> From the identification of the resource management issues and the objectives, policies and rules for the Airport the expected environmental outcomes are identified as follows:
>
> - A reasonable quality of amenity values in rural, business and public open space zones adjacent to and neighbouring the Airport.
> - Avoidance of new Activities Sensitive to Aircraft Noise within the High Aircraft Noise Area.
> - Acoustic treatment of activities sensitive to Aircraft Noise within the High and Moderate Aircraft Noise Areas.

[52] On analysis, we are satisfied that the issues, objectives, polices and rules of the district plan demonstrate that generally, high density residential accommodation within the high noise areas should be avoided. The reason for such an approach is to avoid actual and potential effects on the airport, including the adverse effect of reverse sensitivity.

Effects of the proposal

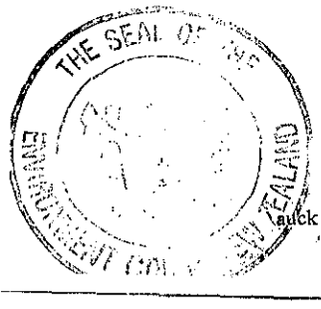
Positive effects

[53] In our view, a number of positive effects will result from the proposal. These include:

(i) the proposed development represents an efficient use and development of land and resources in that it will utilise a large area of land that has remained vacant for some time;

(ii) the proposal will enable people to reside close to employment opportunities and public transport, hence, it promotes more efficient use of transport networks and other infrastructure; and

(iii the site is designed and landscaped so as not to undermine or adversely affect either the adjacent industrial or residential areas.



Reverse sensitivity

Introduction

[54] As already noted, the single main issue in this case is the potential for conflict between the owners and users of the Airport and future residents of Central Gardens. It was submitted by Mr Nolan, on behalf of the owners of the airport, that reverse sensitivity effects on the airport will inevitably flow from granting the consent. Reverse sensitivity is relevant to section 105(2A)(a) "adverse effects on the environment", and section 104(1)(a) "actual and potential effects".

[55] The Airport Company's concern is succinctly encapsulated in paragraph 4.8 of the evidence of Mr Osborne where he said:

> Turning to the key issue of aircraft noise and reverse sensitivity, ...it is common ground that the site is exposed to high levels of aircraft noise. In the context of this application, the term "reverse sensitivity" refers to the likely sensitivity of new residents of the proposed residential complex to aircraft noise and the potential effect that resulting complaints or pressure from those residents could have on the future operations of Auckland International Airport.[15]

[56] Mr Osborne's comments reflect the reasons for appeal contained in the notice of appeal which assert that the proposed development:

> ...would expose a large number of people to moderate to high levels of aircraft noise in an area where residential uses are not expected to be located. The granting of consent therefore fails to take into account, or to adequately take into account, the reverse sensitivity effects of the proposed development on Auckland International Airport.

[57] Reverse sensitivity as a concept, although not specifically referred to in the Act, has been recognised as an effect that requires consideration.[16] In ***Auckland Regional Council v Auckland City Council*** the Environment Court defined reverse sensitivity as:

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[15] Osbourne, EiC, paragraph 4.8.

[16] See for example, *Arataki Honey Limited v Rotorua District Council,* A70/84; *McQueen v Waikato District Council,* A45/94; *Auckland Regional Council v Auckland City Council,* 1997 NZRMA 205; *Winstone Aggregates Limited* and the *Auckland Regional Council v Papakura District Council,* A96/98; *Wellington International Airport Limited & Ors v Wellington City Council,* W102/97; *Hill v Matamata-Piako District Council,* A065/99; *Winstone Aggregates Limited v Papakura District Council,* A49/02; *Gargiulo v Christchurch City Council,* C137/00; upheld on appeal to the High Court AP32/00, 6 March 2001, Hansen J.

> The term refers to the effects of the existence of sensitive activities on other activities in their vicinity, particularly by leading to restraints in the carrying on of those activities.[17]

[58] The term was defined in the article "Reserve Sensitivity – the Common Law Giveth and the RMA Taketh Away", by Bruce Tardy and Janine Kerr as follows:

> 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 to not to adversely affect the new activity.

[59] It is the appellant's position that to allow intensive residential development on this site would expose large numbers of residents to an unacceptable level of noise, with the inevitable consequence that they would endeavour by such means as complaints, lobbying of politicians, submissions on future district plans and the like to have the operations of the airport curtailed or at the very least restricted.

[60] Counsel for Central Gardens Limited contended, that the building would be designed with sufficient acoustic protection and ventilation systems to achieve a high quality internal environment. It further submitted that potential residents were likely to be more inclined to live an indoor lifestyle and that the complex offered good indoor recreation facilities; in any case the development was situated in an area where high levels of noise were permitted from industrial activities and notices on titles would inform potential owners of the surrounding noise environment.

[61] Mr Brabant made an analysis of the cases involving resource consent applications. He referred us to cases such as ***McQueen*** and ***Aratiki*** where the Court's attention was focused on whether or not the effects of the existing use were so significant that the proposed new use should not be permitted at all.

[62] Here, Mr Brabant argued, the challenge to the consent is somewhat different – it postulates complaints in the future, but more importantly postulates that when the provisions of the district plan fall due for review in the future, the airport would be placed at risk by the actions of the residents. Mr Brabant went on to argue, that it is only at this latter stage of the chain of events postulated by the airport that an actual effect on the airport could arise. That is because justified complaints of

[17] At page 206.

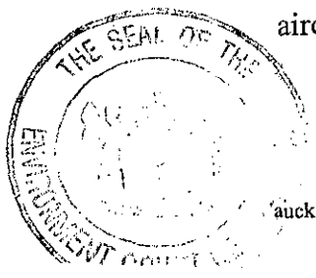
aircraft noise exceeding the rules of the district plan, could not form a basis for opposing the grant of consent, as the airport would be required to modify its operations to comply. Nor can unjustified complaints form a basis for overturning the consent granted by the respondent. The argument rather is, that those who complain, said to be including the residents of this proposed development, will become part of a potential group of opponents of continued aircraft operations as presently permitted by the district plan. Mr Brabant submitted that such a proposition is so speculative that it falls outside the legitimate scope of reverse sensitivity.

[63] Reverse sensitivity effects are not circumscribed by the rules of a district plan. In most, if not all cases, when the benign activity comes within the effects radius of the established activity, the established activity is acting within the rules of the relevant plan. Notwithstanding, complaints can be the first sign of a ground swell of opposition that can chip away at the lawfully established activity. It is this ground swell and its growth which can create potential to compromise the sustainable management of the established activity.

[64] Complaints, whether justified or unjustified in terms of the provisions of the district plan, are just one of the elements that contribute to the reverse sensitivity effect as claimed by the owners of the Airport. As we understand the Airport's case, it is the combination of a number of elements including complaints, lobbying of politicians, submissions on future district plans and the like which create the reverse sensitivity effect.

[65] We agree with Mr Nolan, that in principal, there is no rationale distinction between this case and cases such as ***Arataki.*** In ***Arataki,*** the concern was over the bees from the existing and lawful bee-keeping activity annoying or stinging the proposed campers, who could then be expected to take action against the bee-keeper. With an Airport, there are no bees, but instead there is aircraft noise, discharging from the lawful airport activities and reaching the site of the proposed new residents, with the potential to lead them to take action against the airport.

[66] The issue raised by Mr Brabant as to whether the proposition postulated by the Airport Company is speculative, is a question of fact to which we now turn. We deal with the alleged reverse sensitivity effects firstly by considering the impact of aircraft noise on residents, and secondly, by assessing likely cumulative responses.



Aircraft Noise

[67] Aircraft noise comes as a series of loud single events. The usual way of measuring it is to average the level of noise over a period, to produce a figure described by the phrase Leq. To gain a better idea of the disturbance caused by noise, a 10dBA penalty is added for night time noise (between 10pm and 7am) and the figure is expressed in dBA (Ldn). This differs from the way industrial noise is usually assessed. Industrial noise tends to be more continuous and is usually described by the level exceeded for 10% of the time (L_{10}). When asked to give the court some idea of the relationship between the various types of measurement, Mr C W Day, an acoustical engineer experienced in dealing with airport noise who was called by the appellant, gave the general formula $65dBA_{L10} = 62dBA_{Leq} = 67dBA_{Ldn}$ (where the number of loud single events are equally divided between day and night). The acoustic engineer called by the applicant, Mr N I Hegley, concurred with this description of relationships of the various methods of noise measurement.

[68] Aircraft noise contours are produced by taking the various noise levels produced by the combination of aircraft that will use an airport, distributing them onto their various flight paths and times of use and producing an Ldn figure. This figure is averaged over some months or even a year to obtain a figure that is representative of varied patterns of use, wind conditions and the like. Like other major airports, Auckland International Airport has set its noise contours by looking to potential future use and estimating the number and combination of aircraft expected to use it in 2030. The $65dBA_{Ldn}$ contour passes through the application site, leaving two thirds of the site where the apartment blocks are to be built in the high noise area.

[69] Current aircraft noise on the site varies from $60.5dBA_{L10}$ to $62dBA_{L10}$ and is expected to rise with increased use of the airport. Mr Day told us that the predicted increase in noise level for residents under the flight path from the existing runway would be 4 to 5 dBA Ldn and that such an increase is noticeable. This was not disputed.

[70] Witnesses called by the Airport Company told us that there were limited means available to the airport to reduce noise from its operations. Mr S Milne, the executive director of the Board of Airline Representatives in New Zealand, told us that there was little opportunity to reschedule night-time arrivals and departures away from their present time slots. He said that major overseas airports such as

Heathrow and Sydney operate under significant restraints including curfews. As a result of this, many overseas flights to and from New Zealand can only land and take off during certain "scheduling windows" and that New Zealand had to fit in with those slots. New Zealand, as a small country at the far end of the globe, has no ability to bring about a change to operations or curfews at those other airports to accommodate any curfew that future residents may wish to impose here, and the likely result of restrictions would be aircraft simply not travelling to New Zealand, with dire consequences for the country.

[71] Mr Milne also gave evidence, that while small incremental gains are being made in the noise performance of newer aircraft, they were not likely to be nearly as significant as those made prior to 1990. He described studies by the International Civil Aviation Organisation, which indicated that the cost of relatively modest improvements in noise performance would include higher operating costs, fuel burn, energy costs and air emissions; they concluded that there is limited potential for further reductions of noise at source and such reductions would involve significant costs. Mr Milne opined that the economics of airline operations are such that airlines would be unwilling or unable to upgrade aircraft prematurely merely to service the New Zealand routes, and that, if district plan requirements aimed to enforce such measures, the likely consequence would be the withdrawal of some services and significant fare increases on others. None of this evidence was seriously disputed.

[72] It was the applicant's case that such pressures would either not arise, or need not prevail because the residents would not experience significant adverse effects from airport operations due to the design of the complex and the surrounding environment of industrial noise.

[73] A condition of consent proposed by the applicant was that the combination of building materials used would create an internal noise environment in all habitable rooms of $35dBA_{L10}$ with exterior doors and windows of habitable rooms closed when the noise level at the boundary of the adjacent INL industrial site was $65dBA_{L10}$. Another condition was proposed to ensure that air quality was maintained in the enclosed environment by mechanical outdoor ventilation and/or air-conditioning capable of maintaining a temperature of not more than 25°. Further conditions prevent future alterations reducing the effectiveness of the buildings' acoustic design without council consent, and require the owner, among other things, to inform prospective residents of noise from overhead air traffic.

[74] Mr Hegley and Mr A L McKenzie, a graduate design engineer working for Economical Services Limited, the firm contracted to design mechanical services for the proposal, described in their evidence how the internal environment within the apartments could be achieved. Mr McKenzie told us that sufficient design work had been done to ensure that the required ventilation and air-conditioning installations could be incorporated into the buildings. This was accepted by the other parties.

[75] In the opinion of both Mr Hegley and Ms J A Hudson, a qualified planner with 22 years experience called by the applicant, the implementation of these conditions would ensure that residents of the building did not suffer adverse effects from aircraft noise.

[76] The first argument advanced to support this proposition was that residents of the apartments were likely to have chosen a predominantly indoor life-style. Ms Hudson commented that the nature of the development was such that residents were not reliant on access to outdoor living areas to have an acceptable quality of life and high standards of amenity. Mr Hegley likewise preferred this style of development to lower density development with increased outdoor areas for this site. He said "it is preferable to construct apartments on the site for people who do not want an outdoor lifestyle".

[77] No research was brought to our attention which showed that apartment-dwellers do not also enjoy the outdoors. Mr Day however commented that one of the advantages of living in a development like the one proposed was to take advantage of the more useable large outdoor recreation areas. He said that on this site the high external noise environment would significantly degrade these areas. He also noted the balconies attached to most units, and when asked about this in cross-examination told us that the balconies make up 20% of the total floor area for some of the apartments.

[78] Mr Day also referred us to the study of Bradley[18], which examined responses to aircraft noise in Toronto, Osaka, Oslo, Switzerland, the United Kingdom and Sydney. He pointed out that the climate in the northern hemisphere centres would require both insulation of at least the significance proposed for this development and the closing of windows and doors for long periods. Yet these centres, with higher density housing than Sydney showed a higher adverse response to aircraft noise,

[18] *Bradley (1996) Determining Acceptable Limited for Aviation Noise, Internoise 96*

despite the generally lower density housing and emphasis on outdoor living in the New South Wales capital. However, in cross-examination, he acknowledged that in the locations he had referred to it did get hot in the summer.

[79] We note that the property developer employed by the applicant to assist with the development of the site, Mr D J Medricky, acknowledged that the residents would have a variety of needs for open space. He told us that the architects design "has achieved a range of differing areas which have a multiple and varied use. This has been created with a mix of gardens, grass areas and elevated paving areas with seating and pergolas. It was important to have a variety of these different spaces to cater for the range of needs of the potential occupants". It is also proposed to provide an outdoor pool and barbeque area. We do not believe these areas have been provided for no purpose, and while potential residents will have varied needs, we find that there will be an expectation on the part of residents to enjoy both their balconies and the outdoor facilities of the site.

[80] The second leg of the applicant's argument was that the noise generated by the airport would not differ markedly from that permitted by the surrounding industrial properties, and for that reason residents would not perceive it as a nuisance. It was Mr Hegley's evidence that an agreement had been reached between the parties that if the noise from an adjacent industrial site was designed on the basis of 65dBA_{L10} and 90dBA_{L}max at the site boundary, the proposal would be within an acceptable limit for residents. He opined "It would be illogical for a level of 65-66dBA_{Ldn} not to be found acceptable for the same site simply because the noise came from a different direction".

[81] This was not the opinion of Mr Day. When pressed on this point by counsel for the applicant he told us that the noise level at the boundary of the site was restricted to 65dBA_{L10}. If noise at this level was produced from the INL site it would have reduced to 60dBA_{L10} by the time it reached the eastern façade of the site and to 50dBA_{L10} on the farthest side from the source. Even if the noise came from two sources contemporaneously, we infer that it would have considerably reduced by the time it is experienced in the central open air facilities. There would be no similar reduction in aircraft noise.

[82] Mr Day also disputed the statement that industrial noise controls the noise environment; moreover aircraft and industrial noise were different in kind and required different forms of assessment.

[83] We were not convinced by the second leg of the applicant's argument. The universally agreed difference in the measurement techniques used to assess aircraft as opposed to industrial noise, (Ldn as opposed to L_{10}) inclines us to the view that the types of noise are different in kind and in effect, and we accept Mr Day's evidence that the impact of industrial noise will diminish as distance from the site boundaries increases.

[84] The final argument of the applicant was that any noise effect on future residents of the apartments could not be considered adverse, because they had voluntarily and in full possession of the facts chosen to live in a noisy environment. Mr Hegley distinguished future residents from the average house or apartment buyer on the basis that they would be advised of both the adjacent industrial zone and noise from the airport. "They will be required to acknowledge these facts so that all owners can make an informed decision prior to purchasing an apartment." Ms Hudson proposed an amendment to condition 24 of the consent to make the noise situation clearer by replacing the words "overhead air-traffic" with the words "moderate to high levels of aircraft noise".

[85] This raises the question of whether the court should intervene to protect people from an adverse effect they have knowingly subjected themselves to. For the respondent council, which took a neutral stance in the proceedings, Mr Brownhill appositely referred us to the view taken by the Court in *Auckland Regional Council v Auckland City Council*. Referring to submissions based on leaving promoters of enterprises to judge their own locational needs, not protecting them from their own folly or failing to consider the position of these who come to a nuisance, the Court said:

> We consider that these submissions do not respond to the functions of territorial authorities under the RMA. ... To reject provisions of the kind proposed on the basis of leaving promoters to judge their own needs, or not protecting them from their folly and to failing [sic] to consider the effects [on] those who may come to the nuisance would be to fail to perform the functions prescribed for territorial authorities. It would also fail to consider the effects on the safety and amenities of people who come to the premises.[19]

With respect, we agree.

[86] We find that there would be an adverse effect on occupants of the premises from noise, and that those effects are properly of concern.

[19] [1997] NZRMA 205 at p 214

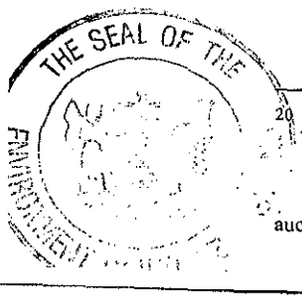
Permitted Baseline

[87] To assess the extent of those effects, we must consider how far those effects exceed those which are permitted by the plan. It was the respondent's submission that no activities fall within the permitted baseline for this site. Mr Brownhill referred us to the Court's decision in *Kalkmann v Thames – Coramandel District Council*[20] for the proposition that only permitted activities fall within the permitted baseline. He referred us to rule 14.12.3.1 by which the council reserves control over activities within 30 metres of a residential boundary in a business zone. Mr Brownhill then argued that because the activities contained within this application cannot be compartmentalised, the permitted baseline must be based on what could take place as of right within the whole application site.

[88] We do not agree. While this proposal cannot be compartmentalised, we can imagine a situation where provided an activity did not spill over into the 30 metres adjacent to the residential zone, it could occur as of right on what is a large site. In this respect we concur with the closing submissions of Mr Brabant.

[89] Among permitted activities beyond the 30 metre buffer with the residential zone are offices, and travellers accommodation. The applicant submitted that these uses could be situated in buildings identical to the apartment towers proposed except for the requirement for insulation. Mr Hegley noted that the effect of such an office –building would be to expose workers and office staff to a level of noise beyond what would be reasonable for a residential site. Ms Hudson likewise opined that there was no good reason to distinguish between the requirement of an occupant of traveller's accommodation for a good night's sleep and that of a permanent occupant of residential premises.

[90] Mr Osborne, disagreed. He noted that travellers' accommodation was not included amongst "Activities Sensitive to Aircraft Noise", opining that it was not sensitive compared with residential accommodation. He suggested that a hotel guest would have a totally different reaction to permanent residents, and that permanent residents lack the flexibility of hotel guests to seek a change of room or move to another establishment quickly. We concur with the views of Mr Osborne.



[20] A152/02 at paragraph 102

[91] We also find an element of fancy in some of the permitted activity scenario suggested by the applicant. For example when Mr Day was asked to compare the effect of noise on occupants of the apartments with that on occupants of an uninsulated office block, he responded that he was required to make some assessment of the materials used in construction, and had not encountered within the last fifteen years an office block of this size where the materials used did not provide some noise protection.

[92] Mr Brabant put to us that public open space was a permitted use on site, presumably to suggest, that for this reason we should give less weight to the appellant's evidence that adverse effects of aircraft noise on the open air areas of the site could not be mitigated. We consider that the users of public open space, as parks, sports fields and the like have different expectations than users of outdoor areas connected with their residence.

[93] We have considered the possibility of office-blocks or travellers accommodation being constructed on the site under the permitted baseline and the possibility of public open space being created. We find that when the effects of allowing this proposal are compared with that baseline the adverse effects on occupants remain significant.

[94] It was the appellant's case that when large numbers of residents are exposed to significant aircraft noise, this would inevitably lead to an attempt on the part of some residents to limit those impacts, and that if such an attempt was successful, the effects on Auckland International Airport, the Auckland economy, and even the New Zealand economy would be very severe. In considering the evidence on this matter we note that the word effect includes in its definition "any potential effect of low probability which has a high potential impact".

Response of residents to aircraft noise

[95] We now turn to the likely perception and response of the residents of the 349 household units who would be exposed to moderate to high levels of aircraft noise. Evidence for both the applicant and the Airport indicated that the proposed units may accommodate some 1000 people.

[96] The number of household units currently located within the high aircraft noise area in Manukau City is estimated to be 350 dwellings[21]. This proposal involves an additional 255 household units in the high aircraft noise area in this proposal. Mr Osborne noted that this is seven times the average net density of the adjacent residential area.

[97] As we have already mentioned, in considering the likely reaction of these new residents to the noise effect from overhead aircraft, Mr Day referred to a study of community responses to aircraft noise undertaken by Bradley.[22] Bradley compared the responses from six different overseas communities exposed to varying levels of aircraft noise expressed in Ldn dBA. At a level of Ldn 65, the Bradley graph indicates that a third of the community is likely to be highly annoyed about the noise. Mr Day noted that the Bradley study supported earlier findings by Schultz on the subjective response of communities to environmental noise.[23] From these studies Mr Day extrapolated the increase in people likely to be highly annoyed by aircraft noise in Manukau City to be more than 70% from this one proposed development.[24]

[98] Mr Brabant was critical both in cross-examination and in his submissions of the fact that full copies of those studies were not provided. In his closing submissions he said:

> In my submission it must be a matter of serious concern that a full copy of the study relied upon by the appellant in opening submissions and in cross-examination of the applicant's witnesses, was not made available.

This criticism of Mr Day was founded on lengthy cross-examination where it was alleged by counsel that the Bradley Report could not be relied on in the present circumstances.

[99] The Bradley Report was referred to in Mr Day's statement of evidence circulated prior to hearing. Central Gardens had its own acoustical consultant to subject the report, and the use made of it by Mr Day, to expert scrutiny. Mr Hegley had ample opportunity through evidence in rebuttal, to respond to Mr Day's usage of the report. He did not do so. Consequently Mr Nolan did not cross-examine him on this issue.

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[21] Evidence of CW Day, at 8.4

[22] Bradley (1996) *Determining Acceptable Limits for Aviation Noise*, Internoise 96

[23] Schultz (1978) *Synthesis of social surveys on noise annoyance,* J. Acoustic. Soc. Am., 64, 2, 377-405.

[24] Evidence of CW Day at 8.4

[100] In our view, in the absence of any challenge to the report or the use put to it by Mr Day, either in expert rebuttal evidence or by way of notification from counsel, we reject the criticism. Mr Day as an expert witness was relying on what appeared, from the circulated evidence, to be an internationally accepted study. If its use by Mr Day was to be challenged, then this should have been signalled and substantiated in the rebuttal evidence. In such a case we would expect the experts to then confer.

[101] We likewise reject the criticism that Mr Day was "evasive and adversarial". In our view such criticism was not warranted.

[102] We have regard to Mr Brabant's extensive cross-examination of Mr Day. Notwithstanding, we find that the Bradley study is a strong basis from which we can conclude that generally, for a population living in an external noise environment of Ldn 65, approximately 33% of the population are likely to be highly annoyed.

[103] Mr Hegley discussed in some detail the proposal and proposed conditions which he then assessed against the relevant provisions of the district plan. He concluded:

> The issue of whether residential activity should be allowed in the HANA as a matter of policy is outside my area of expertise, but I can say that this "greenfields" development will provide superior protection from aircraft and industrial noise then are enjoyed by its industrial neighbours in the adjoining residential zone.[25]

He opined that the number of proposed residents on the site is irrelevant because the same acoustic protection is required, whether for one new resident or a number.

[104] Mr Mendricky, also called by the applicant, submitted an analysis of complaint reports from Auckland Airport. From his analysis of those complaints he stated that there were only two complaints about noise from the high aircraft noise as compared to the relevant 110 complaints elsewhere from those listed in the complaint report summary. From this assessment, and his understanding of overseas research he seemed to be suggesting that the Court could conclude that there would be few people in the high airport noise area (within the proposed development) who would be annoyed or highly annoyed about the noise from over-flying aircraft.

[25] Hegley, EiC, paragraph 8.2.

[105] Mr Milne, the Executive Director of the Board of Airline Representatives of New Zealand (BARNZ), presented information on the wider issue of public opposition and complaints to aircraft noise at airports, on the basis of his many years of experience acting for BARNZ. He described discussions and negotiations in both the Auckland Airport Aircraft Noise Community Consultative Group (ANCCG) and the Wellington Airport Air Noise Management Committee (Wellington Committee).

[106] He told us that the Auckland Consultative Group, which has been meeting regularly since 1997, has a role in public consultation, the Noise Management Plan for Auckland Airport, Airport designation and monitoring. Mr Milne stated that a focus of the bi-monthly Auckland Group and Wellington Committee meetings is individual noise complaints received. The Auckland Group is presently reviewing noise complaints generated by noise that is Ldn 4dBA less than the level anticipated in the future.

[107] He stressed that the increase in traffic movements and size of aircraft using Auckland International Airport will result in a noticeable increase in the noise level from the present level. He noted from his experience in the transport sector as well as with the two committees, that community response tends to be less negative when members of the community are convinced that those responsible are taking steps to minimise noise.

[108] Mr Milne noted that unlike some other airports such as Wellington, where aircraft approach and depart over sea, half of all Auckland aircraft movements are over Papatoetoe and Manukau, and in the prevailing westerly winds, all landings are over these areas. Despite the seeming geographic advantage that Wellington Airport may enjoy, political pressure from Wellington residents from within the moderate to high aircraft noise area resulted in a bylaw which required Air New Zealand to 'hush-kit' aircraft and the imposition of a night curfew and noise abatement procedures for aircraft take off and landing. The promulgation of the Wellington City District Plan in 1994 drew resident submissions seeking further constraints on airport operations. A combination of noise abatement constraints outside the RMA, and planning restraints now apply to Wellington Airport.

[109] These potential impacts can be contrasted with the current situation at Auckland International Airport where, with the exception of the imposition of the noise contours, and associated controls, there is not a curfew or other such limitation to use of the existing runway. However, Mr Milne stated that as a direct result of

opposition from residents living close to the proposed second runway, a night -time curfew and other operational restrictions will apply to this runway. He was concerned that a future plan review would provide further opportunity for consideration of constraints on the Airport.

[110] The concern of BARNZ members, said Mr Milne, was that the substantial residential development proposed within the high aircraft noise area would result in resident and airport conflict about operation of the existing runway. This in turn he saw leading to bitterness and cost for all parties, including complaints and pressures for curfews and reduction in operations of the main runway. He opined that it was not only complaints that may lead to restrictions on the airport from highly annoyed residents, but pressure on the Council, community action groups (such as the 'Residents Against the Northern Runway' group), and instigation of opposition to aircraft operations.

[111] We also heard evidence about the imposition of curfews and operational constraints on other major airports such as Sydney Airport as the result of reverse sensitivity concerns about noise.

[112] While evidence seems to indicate that public pressure is more volatile and vociferous if there is a marked or proposed change in airport operations, nevertheless we find there to be a clear relationship to the number of people exposed to high aircraft noise and the introduction or increase in restraints on airport operations. The potential risk of operational constraints to this regional transportation resource posited by the witnesses, particularly Messrs Day and Milne, resulting from a sizeable increase in residents living in the high aircraft noise area, a significant proportion of whom would be highly annoyed by noise, therefore seems entirely realistic.

The gateways – section 105(2A)

[113] The first gateway requires us to determine whether the adverse effects on the environment as proposed to be remedied and/or mitigated, and taken as a whole, are more than minor.[26] It should be clear from our discussion of adverse effects, that we consider that to allow the proposal will be a catalyst likely to precipitate community

[26] See *Stokes v Christchurch City Council* C108/99.

reaction against the owner and users of the Airport, as a consequence of reaction to moderate to high aircraft noise.

[114] Such a community reaction would, in our view, be a direct reverse sensitivity effect that is more than minor. Consequently, the proposal fails to pass through the first gateway.

[115] The second gateway requires us to determine whether the activity proposed will be "contrary" to the relevant plan. A proposal which is a non-complying activity cannot for that reason alone be said to be contrary. The word contemplates being "opposed to in nature different to or opposite...also repugnant and antagonistic..."[27]. The second gateway process involves an overall consideration of the purpose and scheme of the plan as expressed in its objectives and policies, rather than a checking of whether the non-complying activity fits exactly within the detailed provisions of the plan[28]. A non-complying activity, is by reason of its nature, unlikely to find direct support from any specific provision of the plan[29].

[116] In the present case, the objectives and policies of the district plan recognise that above certain cumulative noise levels, measured in Ldn dBA, aircraft noise can cause a significant nuisance in noise-sensitive areas.[30] The district plan also recognises the regional significance of the airport and its flight paths, and their potential for effects on activities sensitive to high aircraft noise compromising the sustainable management of that infrastructure.[31]

[117] However, the plan does not prohibit sensitive activities, including residential accommodation, from establishing in high aircraft noise areas. Rather, it makes such activities non-complying. It further directs that such activities should generally be avoided "unless the adverse effects of those activities on Auckland International Airport can be avoided, remedied or mitigated".[32] Further, it provides for mitigation measures by way of acoustic and ventilation standards. However, in this case we hold that the effects of this activity on the considerable open air areas of this

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[27] *New Zealand Rail v Marlborough District Council* 1994 NZRMA 70 (HC at 80), 1993 2 NZLR 641 (HC).
[28] See *Eldersly Park Limited and Southern Moore Holdings v Timaru District Council and Countdown Properties Northland Limited* 1995 NZRMA 433 (HC).
[29] *Arrigato Investments Limited and Evensong Enterprises Limited v Auckland Regional Council and Rodney District Council* 2001 NZRMA 481 (CA) paragraph 17.
[30] See in particular Policy 17.6.4.8 and "Explanations/Reasons" for that policy.
[31] See Policy 17.6.4.11 and "Explanations/Reasons" for that Policy.
[32] See Policy 17.6.4.10.

complex cannot be adequately mitigated, and at the very least, the proposed development sits uncomfortably alongside this policy.

[118] Activities sensitive to aircraft noise cannot be said to be contrary to the district plan. Nor is residential accommodation per se contrary to the plan. However, the district plan specifically adopts an approach that seeks to limit reverse sensitivity effects on the airport[33]. The objectives and policies achieve this by requiring the reverse sensitivity effects to be avoided, remedied or mitigated. In some circumstances the remedying and/or mediation measures will suffice. In others they will not, and the "avoiding" aspects of the objectives and policies will come into play.

[119] In the present case, some 349 homes are proposed in an area identified in the district plan as being within the high and moderate air noise areas, and where the physical resource sought to be protected is New Zealand's largest international airport. In our view, the "avoiding" elements of the plan's objectives and policies predominate in this case. There is a plain and unambiguous thread of protecting the airport from increased residential density in the high aircraft noise area. We find that a residential proposal of this magnitude is contrary to the objectives and policies of the district plan.

Discretion – section 105(1)

[120] Having found that the proposal fails to pass the two gateways test, there is no need for us to consider the exercise of our discretion. However, in case we are wrong, we would exercise our discretion against granting the consent.

[121] The importance of the Auckland International Airport to the regional and national infrastructure and the need to ensure sensitive uses are developed so as to avoid conflict are not disputed. This is reflected in the relevant statutory instruments. The district plan manages the effects of aircraft noise. It also seeks to limit residential accommodation in the areas most affected by aircraft noise, in order to avoid adverse effects on the occupiers of such accommodation and thus in turn avoid the potential adverse effects of reverse sensitivity on the Airport.

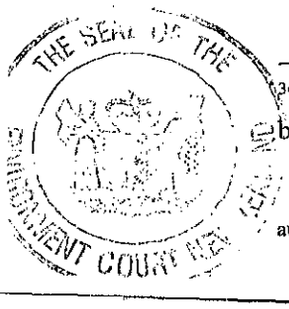
[33] See in particular Policy 17.6.4.9 and 17.6.4.11 and the "Explanation/Reasons" for those policies.

[122] Of particular significance is the emphasis in issue 17.6.2.7, which explicitly recognises the importance of limiting the amount of residential development in areas affected or potentially affected by high aircraft noise (aircraft noise levels greater than Ldn 65) because it is not possible to mitigate the effects of aircraft noise on the external environment. As Mr G J Osborne stated, this issue applies directly to the circumstances of the current case, where an acoustically insulated internal environment is proposed to be created, but nothing can be done to protect the residents from the effects of high aircraft noise when enjoying the outdoor recreational areas provided for in the development. This proposal can be contrasted with other examples of sensitive activities such as hospitals and, perhaps, aged care facilities where patients and inhabitants are bed-ridden and immobile and have no expectation of enjoying the external environment.

[123] In our view we should have regard to the nature, size and scale of the development[34]. The proposal will expose up to 1046 additional residents to high levels of noise in their home environment. It provides for reasonably generous outdoor recreational areas. It creates an activity which the plan recognises as being sensitive to aircraft noise in an area subject to high aircraft noise levels. While the proposed noise attenuation and ventilation measures would apply to the indoor recreational facilities and the units themselves, this will not, in our view, adequately protect recreation areas.

[124] We have discussed at some length the evidence relating to the potential adverse effects of reverse sensitivity. We have measured our findings against what we have found to be the "permitted baseline" We found that aircraft noise will have an adverse effect on the residents. We also found that when the effect of allowing this proposal are compared with the baseline, the adverse effects remain significant. Further, we found there to be a clear relationship to the number of people exposed to high aircraft noise and the introduction of, or increase in, the strength of opposition to airport operations.

[125] While the proposal results in a number of positive effects, they are outweighed by the likely reverse sensitivity effects which could affect an Airport which is the most important international gateway for New Zealand.



[34] See by way of analogy rule 5.21.4C(g) which requires the nature, size and scale of development to be had regard to for an ASAN in the Business Zone in the MANA.

[126] We also have regard to Part II matters, particularly those mentioned earlier in this decision. Section 5 does, among other things, direct that decision makers sustainably manage resources so that they meet the reasonably foreseeable needs of future generations. Section 7(d) and (e) are also particularly relevant. To allow a proposal that has the potential to conflict with such an important component of New Zealand's national infrastructure would not, in our view, be an efficient use and development of resources.

[127] We exercise our discretion against granting the consent.

Determination

[128] The appeal is allowed and the Council decision is set aside.

[129] Costs are reserved but it is our tentative view that costs should lie where they fall.

Independent News Auckland Limited (RMA 901/01)

[130] The parties to this appeal have settled and presented a memorandum of consent together with a draft consent order. Following the determination of RMA 906/01 no consent order will be approved.

DATED at **AUCKLAND** this 24th day of June 2003.

For the Court:

R Gordon Whiting
Environment Judge