

**BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL APPOINTED
INDEPENDENT HEARINGS COMMISSIONER GINA SWEETMAN**

IN THE MATTER

of the Resource
Management Act 1991
("RMA")

AND

IN THE MATTER OF

Section 357 objection to
the decline of a non-
notified subdivision
consent SUB22/48013
at 118 Wortley Road,
Lepperton, New
Plymouth

**MEMORANDUM OF COUNSEL
FOR THE APPLICANT AARON STEPHENS**

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MAY IT PLEASE THE COMMISSIONER:

1. With reference to the Commissioner's Minute # 4 dated 15 December 2025 – and with specific reference to numbered paragraph 3 therein – Counsel for the Applicant provided to the Commissioner a full copy of the Decision of the Court of Appeal in Far North District Council v Te Rūnanga-ā-iwi o Ngāti Kahu CA 705/2011 [2013] NZCA 221 (and updated the Commissioner as to the inadvertent part of the case name being wrong in Counsel's submissions dated 12 December 2025 (referred to in those submissions as Far North District Council v Carrington Farms Limited at para 51 – the “Carrington Farms Limited” reference being inadvertently incorrect).
2. In terms of the Commissioner's abovementioned Minute paragraph 3 bullet point 2 the Commissioner has asked the applicant to provide copies and summaries of any more recent case law to those cited (in Counsel's legal submissions) that is relevant to the use and appropriateness of no-complaints covenants.
3. In that regard Counsel provides together with this Memorandum the Environment Court's recent decision in New Zealand Defence Force v Selwyn District Council [2025] NZEnvC 210 – which Counsel has found to be the most recent useful decision in this context.
4. The New Zealand Defence Force (NZDF) case involved two related appeals associated with the appropriate management of reverse sensitivity effects related to NZDF activities and the West Melton Rifle Range (WMRR) – relevant to this discussion, one of those being an appeal by the NZDF against a decision regarding various provisions in the Proposed District Plan relevant to the WMRR.¹
5. The WMRR had existed since the 1940's and was subject to a designation under the partially operative Selwyn District Plan stated as “Defence Purposes – Military Training Area” – and was used primarily as a rifle range – within the General Rural Zone (which had been encroached on by considerable rural lifestyle development moving progressively closer to the WMRR and consequently making it vulnerable to reverse sensitivity effects). The NZDF and Council were agreed on the need to protect the WMRR – and to manage noise emanating from same – and any reverse sensitivity effects – however they disagreed on the most appropriate way to achieve those objectives².
6. All NZDF facilities came within the definition of “important infrastructure” – and the Proposed Plan contained objectives and policies frameworks that recognised the need for managing reverse sensitivity effects in respect of same; and contained an

¹ See paras [1]-[9]

² See paras [10]-[21]

objectives and policies framework that recognised the need for managing reverse sensitivity effects on important infrastructure including various avoidance directives³.

7. NZDF sought amendments to the Proposed Plan provisions and, inter alia, sought a requirement for registration of a “no-complaints” covenant for new noise sensitive activities within a 55 dB overlay by way of a controlled activity resource consent – together with a requirement for a restricted discretionary activity resource consent where a covenant is not agreed to by an applicant. There were also other matters dealt with by the Court in that case and many were not that contentious – but the reverse sensitivity issues were relatively contentious⁴.
8. There were also two section 274 parties who challenged the “no-complaints” covenant on various grounds such as it would cause properties to be devalued, and would be detrimental, would curtail rights to complain if noise levels were excessive etc⁵.
9. Expert witness caucusing/conferencing was directed by the Court between noise experts and planning experts and there was some disagreement about the merits of a “no-complaints” covenant approach; although the noise experts did agree that the intent of a covenant was to protect WMRR from potential reverse sensitivity effects – and that it might, for example, have provided a degree of forewarning to undertake a noise sensitive activity and possibly result in fewer people living within the overlay – but that it would have no impact on actual noise emissions – and there was still a duty for the NZDF to comply with section 16 RMA irrespective of a covenant – and that covenant that focused on the making of complaints may have the effect of discouraging legitimate complaints that warrant investigation⁶.
10. The planners also disagreed on some issues although also agreed that a covenant would not protect noise sensitive activities from WMRR noise – a covenant could result in legitimate complaints not being made – registering such a covenant would provide a degree of forewarning (although there were different views as to how much effect that would have in keeping out potentially sensitive newcomers) – there was a difference between land use and subdivision, and a covenant was considered to be more appropriate at the time of subdivision, since the subdivision process generally creates new titles on each of which the covenant is placed. The Court also noted that the planning experts also expressed differing views whether or not a no-complaints covenant would be at odds with a Noise Management and Communication Plan (NMCP) or complementary to it⁷. In that regard the Court noted “As discussed elsewhere in this decision,

³ See paras [22]-[24]

⁴ See paras [25]-[28]

⁵ See paras [30]-[47]

⁶ See paras [52]-[60]

⁷ See paras [61]-[72]

*such a dichotomy may well be resolved by replacing the label 'no-complaints covenant' with the label 'reverse sensitivity covenant'*⁸.

11. For the reasons set out - the Court ultimately decided to include the covenant sought by the NZDF (as noted at para [95]). From paragraph [97] to the conclusion of the case the Court then focused on the contentious issue pertaining to the NZDF's request for a "no-complaint" covenant which the Court discussed further and explained was "*inaptly*" described as such⁹.
12. At paragraph [117] the Court noted the most contentious aspect of the NZDF's appeal related to the request for a rule requiring what was termed a "no-complaints" covenant within the 55 dB overlay - and proposed a template for such a covenant requiring that occupiers of the land must not do certain things as set out in that paragraph¹⁰.
13. Further at paragraph [121] the Court noted that the Council was fundamentally opposed to the covenant as it opposed the notion that people should be prevented from making submissions under the RMA or from opposing various aspects of the designation, and also held concerns over its practical implementation¹¹.
14. The Court went on to discuss the covenant and its views of it from para [124] and noted various matters in respect of an *Augier* condition on a resource consent – consent notices under section 221 RMA (if selected as a mechanism) – and an example of a district plan requirement for a "restrictive non-complaint covenant" in relation to Ports of Auckland under the Auckland Unitary Plan – and what that covenant required covenantors not to complain in respect of¹².
15. Significantly – from para [134] onwards the Court noted that during the course of the hearing it become apparent that some of the experts (and the Council) considered that residents should not be prevented from making complaints, particularly where the reason for the complaint warranted investigation and (possibly) follow up action¹³.
16. The Court concurred that the ability to make complaints and for those to be investigated and acted upon when a response is justified ought not to be curtailed – and observed that the focus of consideration of the potential emergence of reverse sensitivity is generally on the incidence of complaints – and accordingly, the covenant mechanism is almost always referred to as a 'no-complaints' covenant (as it was in that case). However, the Court also considered that the focus of the incidence of complaints was

⁸ At para [71]

⁹ See para [97] and following

¹⁰ See para [117]

¹¹ See para [121] and following

¹² See paras [124]-[133]

¹³ See para [134]

misplaced – despite the fact that it accepted that there can be a connection¹⁴.

17. At paragraph [138] the Court expanded on its rationale and how that issue could become apparent by reason of long standing definitions of the concept of reverse sensitivity – and noted that the NZDF was primarily concerned to be able to continue activities within the scope of the designation without restriction (albeit it might have preferred the complaints about its activities were stifled). The Court also observed that the Council had implicitly accepted that new residents who chose to live in the area surrounding the WMRR should *not* expect to be able to attempt to curtail military training activities because they were disturbed by range noise and/or vibration¹⁵.
18. Further, the Court observed that it was apparent that the Council considered that rights of participation in the RMA processes – including in opposition to WMRR activities – should be preserved along with the ability to make complaints about such activities – and noted that the Council was strongly opposed to any ‘signal’ in the plan that rights to participate in RMA proceedings may be curtailed in such a manner. It also noted that the Council’s closing submissions also queried how a covenant could be enforced in an RMA proceeding¹⁶.
19. The Court also observed in paragraph [145] that a resource consent condition offered on an *Augier* basis has long been recognised as a valid resource consent condition – however no equivalent empowering provision existed in relation to the content (particularly methods) of a district plan¹⁷.
20. The majority of the grounds of the Council’s opposition to the covenant in that context was set out in its closing submissions – and the Court noted would equally apply to, and militate against, the existing Proposed Plan covenant requirements if the Court was to accept the Council’s submissions – which it declined to do (and gave its reasoning from paragraph [147] onwards)¹⁸.
21. The Court was mindful that it had been told that there was “strong community opposition” to inclusion of the – misnamed – no-complaints covenant mechanism in the Proposed Plan – but also considered likely that community discussions were misinformed as to the nature and purposes of such a covenant – particularly regarding perceptions that the covenants were being imposed and assumptions that same would prevent complaints about unreasonable noise events under section 16 RMA. Even if there was strong community opposition to such a requirement, however, the Court found no sound reason why persons who “*come to the*

¹⁴ See paras [136]-[137]

¹⁵ See paras [138]-[140]

¹⁶ See paras [139]-[142]

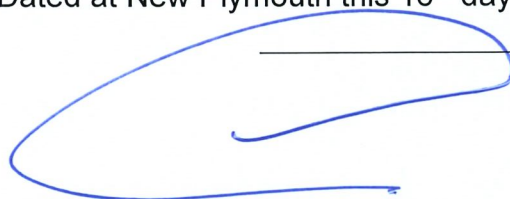
¹⁷ See para [145]

¹⁸ See paras [146]-[164]

nuisance” – should retain a right to seek restrictions on the “*nuisance*” causing activity¹⁹.

22. Ultimately the Court held that the requirement for the **reverse sensitivity covenant** (my emphasis) should be included in the Proposed Plan as requested by the NZDF – but with minor modifications involving deletion of provisions preventing the making of complaints – and the bringing of any civil proceedings for nuisance or damage. The Court considered that the covenants should be limited to involvement in RMA proceedings and indicated what it thought the covenant should not include in that regard²⁰.
23. At paragraph [159] the Court noted the reasons that informed its conclusion and summarised the relevant findings in respect of same – and endorsed a version of the modified *reverse sensitivity covenant* which had been provided in closing submissions from the NZDF. That template for the *reverse sensitivity covenant* was included as Appendix 2 – and was to be included in the Proposed Plan in the interests of certainty for persons who may come to live in proximity to the WMRR.
24. In my submission, therefore, this most recent case is helpful in that it does note the limits in respect of such covenants as canvassed above – and also corrects historical terminology in respect of “no-complaints covenants” – which should clearly be referred to as “reverse sensitivity covenants”.
25. I also note that the form of covenant instrument provided by the Court in its Decision at Appendix 2 – sets out the terms of the covenant for future certainty – and is helpful in this case, in my submission because if the Commissioner was of a mind to grant consent for the application in this case – then the relevant draft condition of consent – condition 15 – as provided in the JWS dated 14 November 2025 (filed on 17 November 2025) - would potentially require modification to bring it in line with the Court’s decision in New Zealand Defence Force.
26. Particularly subclause a. of proposed consent condition 15 of the JWS, in the context of this discussion, would need modification – for example, in terms of nuisance²¹.
27. If the Commissioner has any queries arising from the above discussion then Counsel would be more than happy to endeavour to answer those and looks forward to the hearing tomorrow.

Dated at New Plymouth this 16th day of November 2025



S W A Grieve
Counsel for Aaron Stephens

¹⁹ See paras [155]-[156]

²⁰ See paras [157]-[158]

²¹ See para [158], New Zealand Defence Force