

BEFORE THE ENVIRONMENT COURT

Decision No [2016] NZEnvC 78
ENV-2015-WLG-000016

IN THE MATTER of an appeal under s120 of the
Resource Management Act 1991

BETWEEN AVATAR GLEN LIMITED
Appellant

AND NEW PLYMOUTH DISTRICT
COUNCIL
Respondent

AND KAREN ANDERSON,
DEBORAH BLOOR &
FRAYNE BLOOR,
STEPHEN BROWN, OWEN CARTER,
MARY CARTER, JENNIFER JOHNSTONE,
BARNABY PERKINS, BRIAN WESTON
& SANDRA WESTON
Section 274 Parties

Court: Environment Judge C J Thompson
Environment Commissioner J A Hodges
Environment Commissioner C J Wilkinson

Hearing and site visit at New Plymouth 19 – 23 October 2015

Submissions on reports: 15 April 2016

Counsel and parties:

S W A Grieve and I D Matheson for Avatar Glen Limited

L P Wallace for B W and S Weston – s274 parties

K Anderson, D and F Bloor, S B Brown, O & M Carter, J A Johnstone
and B Perkins: - s274 parties

A G W Webb for the New Plymouth District Council

INTERIM DECISION ON APPEAL

Decision issued: 05 MAY 2016



Introduction

[1] In a decision dated 28 January 2015, a Commissioner appointed by the New Plymouth District Council declined the necessary resource consents for Avatar Glen Limited (Avatar) to establish and operate a Specialist Dementia Care Home at 450 Mountain Road (SH 3A), Lepperton, east of New Plymouth. This is an appeal by Avatar against that decision.

The proposal

[2] In brief, the proposal is to establish and operate a 60 bed Specialist Dementia Care Home comprised of three groups of buildings:

- i) The main building in the northwest of the site consisting of five *Pods* and an administration block arranged in a circular pattern around a central garden. Each pod is to consist of twelve bedrooms, each with a separate bathroom, configured around a central dining lounge and kitchen area. Each pod will have its own fenced courtyard with doors leading back into the building. The pods will open to a large garden with a connected walking corridor. This part of the facility is designed to allow patients some independence by configuring the corridors and garden areas to minimise the possibility of becoming disoriented and lost.
- ii) The administrative block is to have a staffroom, meeting room, office reception area and a waiting area.
- iii) An existing house at the southeast of the property is to be retained as a Manager's dwelling.
- iv) Existing utility sheds and possible future staff facilities' building, including a laundry, kitchen and storage.

[3] The proposal is intended to be staged, with the three southernmost pods being constructed first and the two remaining northernmost pods being constructed later, at a time determined by demand. We note this means that, initially, the central garden will not have the benefit of the northern pods to provide an increased degree of shelter between the garden and the neighbouring orchard, perhaps particularly relevant to noise mitigation.

[4] There are to be 40 parking spaces, with 30 of those being visitor spaces. The care home will be serviced in part by the facilities at the Maida Vale Rest Home, which is a quite short distance away at Bell Block, and which operates under the



same ownership as the proposed facility. Meals will be brought from the Maida Vale Rest Home, with laundry needs also being attended to there.

The surrounding area

[5] The property was formerly used as a plant nursery, which was run in conjunction with a cafe known as the *Tawa Glen Café*, which continues to operate under the ownership of Mr and Mrs Bloor. The cafe has consent to operate between 9.00 am and 12 midnight daily (although it operates as a daytime café only, closing c3.00 pm each day) and may exceed the *permitted* traffic generation standard of 50 Vehicle Equivalent Movements per day. The driveway to the proposed facility is shared, for its first 90m or so from the road, with the café.

[6] Apart from the café site, the balance of the surrounding land is now in relatively small rural lots ranging between c2.4ha and c10ha. These are self-contained lifestyle, poultry farming and horticulture blocks.

[7] Of those properties, the one having prominence in the evidence is immediately to the north of the subject site and is a lot of 5.19 ha, owned by Mr and Mrs Weston, on which they have established a tamarillo orchard, of which more shortly.

Zoning and activity status

[8] The site is c4.24ha in area and is zoned *Rural Environment Area* in the District Plan. It is accepted that on a *bundled* basis the proposal requires resource consents as a *discretionary* activity. The National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (2011) was also considered in formulating the proposal, because of the reported use of pesticides on the property as part of its former use as a nursery. However a preliminary investigation indicates that the presence of chemical residues in the soil is unlikely, and no consent is required in terms of the NES.

[9] The subdivision provisions of the *Rural Environment Area* in the District Plan (Rule Rural 78) allow for subdivision that can retain a 4ha balance Lot as a *discretionary* activity, so it is possible that the site Lot, and some of the surrounding Lots, could be further subdivided. We do not see that as a presently significant issue.



[10] As a *discretionary* activity, the proposal will fall to be examined under s104, s104B and Part 2 of the Act.

The parties' general positions

[11] Avatar, as one would expect, argues that the Commissioner's decision should not be upheld. It discounts the possibility of *reverse sensitivity* being a serious issue and is prepared, as a reassurance to Mr and Mrs Weston, to accept conditions such as requiring the facility to not allow residents outdoors during notified periods when spraying is under way. Further, it is prepared to offer a *no-complaints* covenant as a condition of a resource consent. That is, Avatar would agree that it would not complain about spray drift, even if, contrary to expectations, there were occasions when it became objectionable. We shall return to that possibility later.

[12] The current owner/operators of the Tawa Glen Café, Mr Frayne Bloor and Ms Deborah Bloor, also live on that property with their children. Ms Bloor made it clear that they do not oppose the care home on its site, and they do not have any problems with the Westons' operations in terms of spraying or noise. But they do have concerns about noise and safety from traffic generated on the common driveway and its junction with the road. There is a concern too about possibly confusing proposed signage at the driveway entrance. At a minimum, if the proposal does proceed, they wish to see the driveway sealed and have speed bumps installed to minimise traffic noise, and for the intersection with Mountain Road to be reconfigured for safety.

[13] Mr and Ms Bloor are also concerned about the effects increased traffic may have on rural character and privacy, both as it may affect, in particular, the *al fresco* part of the café, and the outdoor use of the property in their personal and family time. We shall return to traffic issues a little later in this decision.

[14] Mr Owen Carter and Ms Mary Carter are retired farmers who live immediately to the west of the site. They are particularly concerned about the wastewater infrastructure such a development would require, and the impacts that might have on their property; and they too have concerns about its sensitivity to the noise and spray effects of the rural activities on their property – ie they raise the issue of *reverse sensitivity*, which we will return too in more detail shortly.



[15] Mr Stephen Brown and Ms Marteen Hinton live immediately to the south of the site. They too have concerns about the infrastructure impact of such a large development; the reverse sensitivity issues, and traffic generation. They too consider that such a development is simply not in keeping with the low-density rural lifestyle amenity of the area. Mr Brown was clear that the Westons' current operations are not a concern. The frost fan is audible from his property, but he does not regard it as unacceptable in a country setting. Similarly with the gas gun, which he likens to his own pest control shooting on his property. In regard to spraying, he says that it occasionally can be smelt, and the sprayer can be heard, but it is not disturbing. Mr Brown is involved with traffic control as part of his occupation and is concerned that the intersection of the two adjacent existing driveways with Mountain Road (see below) is already confused and dangerous, with the present signage proposals being inadequate to deal with the increased traffic the proposal would generate.

[16] Ms Jennifer Johnstone lives to the east of the site on a Lot of 4.0ha. The land outside her curtilage is leased by a neighbouring farmer for grazing. Her primary concern is about traffic generation and control at the driveway intersection. The driveway to her property is shared for some 90m from Mountain Road with the Westons, and shares its intersection with Mountain Road. That intersection is immediately beside the café/subject site access, separated only by the width of a hedge. She too has concerns about its present safety, and foresees that risk becoming more acute with an increase in vehicle traffic to and from the care facility. She also mentions the possible impact on rural activities and lifestyle amenity, and effects on water supply, and waste and stormwater infrastructure. On the latter issues, she defers to expert opinion, but does have concerns about it.

[17] Mr and Mrs Weston are the owners of the orchard mentioned at paragraphs [7] and [11]. They have been there for some 33 years. Their primary concern is with the potential adverse effects of *reverse sensitivity* on the operation of their business, which produces around 43 tonnes of tamarillos each year. That is a significant part of the nationwide production of c250 tonnes. Over the course of a year, the orchard requires spraying with insecticides and, to a much lesser extent, fungicides, to keep pests under control. Of particular concern since its arrival in the country c2009 is the insect pest Tomato Potato Psyllid (TPP) which vectors the disease bacterium *Liberibacter*. This has proved to have a very significant effect on



tamarillo orchards, reducing the total New Zealand crop from c900 tonnes a year to c250 tonnes.

[18] Some of the pesticides used at the orchard are organophosphates, which are acknowledged to have a high level of toxicity. The Environmental Protection Agency has required that the use of organophosphates should be phased out, but the lack of an effective substitute has dictated that use of the organophosphate used by Mr Weston, Diazinon, can continue until 2028.

[19] The Westons' orchard is the only known commercial tamarillo orchard in the region, and Mr Weston believes that it is the intensive and adaptive spraying programme they apply which has saved it from the TPP. The spraying inevitably produces some spray drift onto neighbouring properties and, although acknowledged as being presently compliant with all relevant standards and requirements, will equally inevitably, they fear, give rise to complaints from the greatly intensified neighbouring population the proposed care home would bring. Whether or not justified in terms of actual health risks, the fear is that the level of complaints may become such that the orchard operations would have to be modified to an unrealistic degree, or even stopped altogether.

[20] Mr and Mrs Weston were very open about the precautions they take against possible harm from spray. Mr Weston of course uses appropriate protective clothing etc when operating the machinery. When Mrs Weston knows spraying is to take place, she closes all the house doors and windows, does not venture outside, and takes visitors into the house. After spraying, she does not take vegetables or fruit from the domestic garden until the relevant lapse period has expired, and carefully washes them after harvest. Against that background, it can be accepted that, quite apart from the possible impacts on their business, and the knowledge that they are compliant with all regulations, they have humanitarian concerns that others may be exposed to risk if the proposal goes ahead.

[21] As well as spraying, the other issue giving rise to fears of reverse sensitivity is that of noise. The Westons operate, and have done for 10 years, a frost fan to protect their trees over the sensitive winter period. This is a diesel powered, four bladed fan on a tower some 10.5m high which operates on a temperature sensitive control. On average, it is running for some 17 hours per month, generally over the night and early morning hours, between May and October. In very cold conditions it



may run for 15 hours continuously, but typically its operating time is one to five hours. Its noise output has been measured at 70 dBA L₁₀ at a distance of 65 metres, which is the approximate distance between the frost fan and the proposed care facility.

[22] Only since the arrival of Rosellas in Taranaki – in the last 2 – 3 years - has bird damage to the tamarillo crop become an issue. The crop matures, and is picked, over the period July to October and has not previously been subjected to significant damage from birds, apart from occasional poaching by Kereru, which, Mr Weston told us, mostly are interested in foliage rather than fruit. Given their protected status, whatever they do has had to be tolerated, or at least minimised by non-lethal means, in any event. The Rosellas have changed that and, for the first time, the Westons have felt the need for a bird scaring device. To test its efficacy they hired a gas-operated bird scaring gun which has been operating since June. It produces, on a pre-set programme of discharges, an explosive gun-shot noise of c110dB (according to the manufacturer's material) with its direction changing after each discharge.

[23] It is the frost fan and the gas gun which give rise to the Westons' concerns about noise-related *reverse sensitivity* but for the reasons to be discussed, we do not see either as decisive issues.

[24] Also, and not to be lost sight of, is the Westons' concern that the rural character and amenity of their property, and lifestyle, will be seriously affected by the construction and operation of such an intensive residential activity just across their working and residential boundary.

[25] The Council accepts the views of the Commissioner it appointed to decide the application and, while accepting the community benefits such a facility would offer, is opposed to it operating on this site. In its s42A report to the Commissioner, it did support the proposal, but after considering the evidence given at that hearing, particularly about spray drift and the possible reverse sensitivity issues that may raise, it changed its stance. It foresees the possibility of that sensitivity having a significant effect on the Westons' business, and points to provisions in the District Plan which are designed to prevent exactly that situation coming to pass. Again, we shall return to those issues.



Permitted baseline

[26] We should mention this issue first, although no weight was put on it by Avatar. Section 104(2) provides that:

When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

[27] This is known as the *permitted baseline*. In terms of noise, the District Plan does contain a qualified exemption for seasonally used farm equipment from the otherwise applicable noise standards. In respect of amenity effects, such as the intrusion of buildings into a vista, the Plan does permit houses and ancillary buildings within stated dimensions. So there are permitted activities which could produce relevant comparable effects in those respects, and we discuss the issue of noise later.

Section 104(1)(a) – effects

[28] Expert witnesses engaged by some of the parties conferred and produced joint witness statements about the potential effects of the proposal. They noted the matters on which they agree, and on which they disagree, and they have each given their reasons for that disagreement. We have, as always, found those statements very useful in analysing what issues are actually in dispute.

Positive effects

[29] There is agreement that a positive effect of the proposal would be the provision of a purpose-built specialist Dementia Care Home for the community, with the underlying acknowledgement that the number of persons requiring dementia care will almost certainly increase as time goes by. In our view, this is an important positive effect, recognising the contribution it will make to a challenging and increasing community need.

[30] There is also acknowledgement that enhanced riparian planting of the wetland/watercourse on the property will improve the quality of its natural water; and agreement on the positive effects of contracting and employment, both during the construction phase of the proposal, and in its day-to-day operations in the future.



Adverse effects

[31] The experts have agreed that effects that are no more than minor (subject to the implementation of appropriate conditions) are those arising from:

- i) Landscape and visual amenity, including privacy;
- ii) Contamination from the previous land use of the site;
- iii) Construction and earthworks;
- iv) Infrastructure/services relating to stormwater, wastewater, water supply and electricity required to service the proposal;
- v) Lighting/light overspill;
- vi) Traffic, including vehicle access, parking, onsite manoeuvring, loading and queueing, traffic generation (including during construction) and effects on the surrounding road network;
- vii) Noise emanating from the site itself.

[32] We note of course that the agreement of the expert witnesses is not binding on the parties who did not engage them, and that the parties who would be neighbours of the proposal continue to have concerns about a number of those issues. For the avoidance of doubt, we record that we agree that, based on the evidence presented to us, the effects listed in paragraph [31] will be no more than minor, but include some general commentary in relation to items iv - infrastructure) and vi - traffic) later in our decision, as these remained of concern to some of the parties. We also address in some detail aspects of the proposal that we identified as requiring particular consideration, relating to reverse sensitivity effects arising from chemical spray drift and rural noise.

Infrastructure services

[33] We note from the evidence of Mr Frank Kerlake, a professional engineer engaged by Avatar, that the proposed stormwater management system has been designed to match existing run-off conditions in a 10-year return period storm event. This means that the development of the site will not impact on catchments above or below the site; will not impede stormwater flows through the site, and will not increase stormwater flow onto the neighbouring Johnstone property, in particular. In addition, the proposed systems will improve the existing run-off parameters for high intensity short duration storm events. Overall, we are satisfied that the effects of the proposed development on stormwater will be no more than minor.



[34] We have reviewed the proposed water supply system as described in Mr Kerlake's evidence. We have also reviewed Dr Graham's findings on the acceptability of using roof water for drinking and other uses that require potable water quality, such as bathing and clothes washing. While we accept Dr Graham's advice that such use is acceptable with a suitable carbon filter system added, our preference would be for potable water to be sourced from the existing Council reticulation system or, preferably, the new potable water bore. Our reasons for this are to further reduce any concerns arising from spray drift, and to further reduce any potential for *reverse sensitivity* issues to arise. Avatar may wish to regard this as an *Augier* issue and accept a condition to that effect.

[35] We note that the wastewater treatment system and all other infrastructure will be designed in accordance with the relevant District Council standards and associated codes of practice, and will have to meet any relevant Regional Council rules, or a resource consent would have to be sought. We are satisfied this will ensure the effective management of any effects of wastewater management on and around the site.

Adverse effects - Traffic

[36] We have relied primarily on the evidence of Mr Andrew Skerret, a traffic engineer engaged by Avatar, in our consideration of traffic effects. We paid particular attention to the issues raised by submitters relating to vehicle numbers; safety associated with the joint access to the state highway; signage and other matters relating to the shared driveway with the café.

[37] The development meets or exceeds the requirements of the District Plan in terms of parking, loading and standing space, driveways, manoeuvring space and on-site queuing. It exceeds the District Plan *permitted* activity criterion for the daily number of vehicle movements, which means it requires a *discretionary* resource consent in that respect. Mr Skerret considers the peak hour traffic movements will have a less than minor impact on safety in terms of both the driveway and the access.

[38] The NZ Transport Agency has given its consent for the proposed development, subject to the upgrading of the access to comply with Diagram E in the Agency's Planning Policy Manual. Mr Skerret has proposed a series of other measures to address the concerns raised by submitters, and these were agreed as



appropriate during traffic expert conferencing. The driveway would be sealed and provided with passing lanes. A traffic management plan would be prepared and we see that as the mechanism for addressing such matters as whether speed bumps need to be provided. Monitoring of traffic numbers will be undertaken. We are satisfied this combination of measures would appropriately address traffic management and safety issues, but would still depend for success on a responsible approach by all users of the access and driveway.

Adverse effects - Noise

[39] There are four aspects of noise we need to consider: - construction noise; noise resulting from the on-going use of the facility on the local environment; noise standards that should apply to the proposed development if consent is granted, and reverse sensitivity associated with rural activities in the locality.

[40] In considering noise, we have referred to the joint witness statement of acoustic issues (JWS acoustics) resulting from conferencing by Messrs Nevil Hegley (called by Avatar), Nigel Lloyd (called by the Council) and Damian Ellerton (called by Mr and Mrs Weston) dated 13 July 2015 and to the evidence of those three witnesses in particular. We received evidence that the existing noise environment is that of a typical rural area, which is generally quiet but varies over time, due to seasonal activities. We referred earlier to the Westons' frost fan and gas gun, which give rise to the Westons' concerns about noise-related *reverse sensitivity* and which are particularly relevant to our decision.

[41] We note from the evidence of Mr Frank Versteeg, planning witness for the Council, that there are no recorded complaints relating to the operation of the frost fan, but there have been complaints about the bird scarer, which started operating relatively recently.

[42] As regards to the gas gun (ie, the bird scarer), Mr Hegley refers to a noise level of 103 dBA L_{max} at a distance of 65m based on information provided by Mr Ellerton, although we have not seen that information. Mr Hegley goes on to refer to work that concluded that 85 dBA L_{max} is an acceptable level at the notional boundary, and Mr Ellerton agreed that was appropriate, and also that the number of events per hour should be limited to 12. We record here that the notional boundary that applies at the nearest dwelling in existence today is a much greater distance



away from the gas gun than the nearest part of the proposed care facility, and we have taken this into account in our decision-making.

[43] In considering methods to avoid noise *reverse sensitivity* arising, Mr Hegley refers to the requirements of various district plans in other parts of New Zealand. He also refers to alternatives to bird scarers that can be used. He states that the noise from the frost fan and the bird scarer could be reduced if the requirement to adopt the best practicable option (BPO) was imposed on the Westons, as required by s16 of the Act.

[44] Those matters are not before the Court as part of the current applications, so are not within our jurisdiction to consider. In particular, we have no jurisdiction to impose conditions on a third party, being the Westons in this case.

[45] However, in view of the noise complaints relating to the operation of the gas gun, we anticipate the District Council would address these in an appropriate way. We would expect this to include consideration of the provisions of s16 of the Act relating to the management of noise within reasonable levels. We also consider the comments of the Planning Tribunal about noise associated in the *New Zealand Synthetic Fuels* case¹ (cited in rebuttal evidence by Mr Hegley) to be relevant in terms of effects - with or without the care home. We note too that Avatar is prepared to pay for the upgrading of the Westons' frost fan to reduce its noise levels, and that could be provided for as an *Augier* condition, if consent is granted.

[46] The JWS acoustics records that the acoustic experts agree that construction noise should comply with NZS6803:1999 Acoustics – Construction noise. We agree this is appropriate, and should adequately deal with any issues.

[47] The experts also agree that noise resulting from the on-going use of the facility, including site-generated traffic, will comply with the relevant District Plan rules, and we do not consider these aspects further.

[48] With regard to noise standards that should apply to the proposed development itself, the acoustic experts agreed during conferencing that conditions setting internal noise limits would be most appropriate. However, Mr Lloyd's evidence was that he considered the imposition of a noise insulation condition would be more



appropriate, a change in position which we found unhelpful. Mr Ellerton indicated his main reason for supporting an internal noise limit is that it puts the onus on the developer to be cognisant of the existing noise environment and to allow for that. We agree.

[49] Different internal noise standards were considered appropriate by different experts - within the ranges of 25 to 40 dB for bedrooms and 35 and 45 dB for other habitable spaces. We come back later in our decision to appropriate noise measurement units.

[50] Maximum acceptable night time noise levels considered appropriate by the three experts were within the range of 45 to 60 dB for both bedrooms and other habitable spaces.

[51] In considering the noise limits that should apply to this development if consent is granted, we took into account the following technical considerations:

- i) Noise at the facade of the care home resulting from the frost fan is predicted to be 70 dB $L_{Aeq(15\text{ min})}$, and could occur for an average of 17 hours a month and for more than 10 hours on occasions, generally at night and in the early morning.
- ii) Noise at the facade of the care home resulting from a gas gun, if a similar one currently being trialled by the Westons is used, would be likely to exceed 85 dB L_{max} , and could occur up to 12 times an hour. It would generally be used when the crop matures and is picked over the period July to October, mainly between dawn and dusk, with only limited use during night time hours.
- iii) Buildings can be constructed to provide acoustic installation of 20 to 30 dB at reasonable cost, and perhaps 40 dB at substantially increased cost. Very preliminary indications provided to us by Mr Eldon Peters, the architect engaged by Avatar, at the hearing suggested any such requirement could add \$250,000 to \$500,000 to the cost of the care facility.

[52] We received conflicting evidence on the effects of noise on dementia patients, particularly in terms of sleep disturbance and responses to sudden noises. Some of the evidence was based on interpretations of documents such as the World Health Organisation (WHO) noise guidelines by noise experts with no personal experience



in dementia care. Our own review of the documents did not support the claims made, meaning we found the evidence to be at best unhelpful and at worst potentially misleading.

[53] We paid particular attention to and gave considerable weight to the evidence of Ms Ruth Thomas on this matter, as a specialist in dementia care and a qualified mental health nurse. She has 20-plus years of clinical experience in the field, and has specialised in the care of people with dementia since she qualified as a nurse. She has a very recent masters degree in dementia studies. Under cross examination, and in response to questions from the Court, Ms Thomas advised that, based on her personal experience:

- People with dementia ... *actually have less sensitivity to noises that perhaps you and I would consider annoying or startling.*
- *Dementia patients are more sensitive to noise in the immediate environment;*
- *I am referring to the noises that are being suggested might startle people with dementia. So the frost fan and the gas gun. And like I said in my clinical experience that simply is not the case. In fact, the opposite seems to be the case. They are not startled by these noises but the noises that they are sensitive to are the noises that staff unintentionally make and just need to be mindful of.*
- *Noises associated with the frost fan and bird scarer ... will be ignored by the residents with dementia. The building site is large enough to enable residents to actively move themselves away from a noise source if it does distress them.*
- *... the gas gun I have little concern about ... or the bird scarer.*
- *As far as I'm aware there is no actual research or evidence that says those with dementia do and will ignore those startling noises but certainly my clinical experience is very, very clear.*
- *If I considered that the care home was going to place residents with dementia in harm then I wouldn't be supporting the proposal.*

[54] We acknowledge that many people like to sleep with their bedroom windows open at night, which the evidence indicates could increase noise levels in the bedrooms by 15 dB, compared to a *windows closed* situation. However, experts for Avatar indicated that air conditioning will be provided, and would be required as a condition of consent, and that the building will be designed for windows being closed



100% of the time (although provision to open windows will still be made). Accordingly, we have presumed a *windows closed* situation, recognising that some residents may choose to accept a higher noise level as a trade off for sleeping with a window open.

[55] There is a range of noise standards that need to be considered when setting the appropriate standards for particular circumstances, and comparing them is not always straightforward as units are often expressed differently. To illustrate this, the evidence, the District Plan and different guideline documents and noise standards variously referred to in evidence use L_{10} , $L_{Aeq(15\text{ min})}$ and $L_{Aeq(8\text{ hour})}$ and sound exposure level. A range of standards was also referred to in the evidence, some of which clearly had no application to the case before us.

[56] Mr Hegley records in his evidence that 40 dB L_{eq} (equivalent continuous sound level) is equivalent to 42 to 43 dBA L_{10} , and that in terms of NZS 6802:2008 Acoustics – Environmental Noise, the 30 dB L_{Aeq} night time level is more stringent than the WHO Guidelines, as NZS 6802 adopts a 15 to 60 minute L_{Aeq} level, not the eight hour value adopted by the WHO. In response to a question from the Court Mr Hegley confirmed that when he was referring to L_{eq} he was meaning the 15 minute average value. Mr Hegley also agreed in response to questioning by the Court that the New Zealand Standard values should be used as the basic starting point, and *If you meet that you should be okay, absolutely agree.*

[57] These explanations were helpful to the Court but the lack of clarity we had to work our way through in the noise evidence generally was not. We consider that where different noise measurement criteria are used by experts, they should ensure they provide clear evidence of which is applicable to noise limits proposed in a particular case such as this and why, and the differences between them, to the extent appropriate.

[58] New Zealand Standard NZS 6802:2008 (C8.6.2) is helpful in providing guidance as it identifies the desirable indoor design level to protect against sleep disturbance as 30 to 35 dB $L_{Aeq(15\text{ min})}$. It notes this is consistent with World Health Organisation guideline values for community noise in specific environments, although that appears to differ from Mr Hegley's evidence.



[59] The WHO internal guideline values for noise are 30 and 35 dB $L_{Aeq(8hour)}$ for bedrooms and indoor areas of dwellings respectively. Australia New Zealand Standard 2107:2000 – Acoustics – Recommended design sound levels and reverberation times for building interiors - recommends noise levels of a continuous steady sound of 30 dB equivalent A weighted sound pressure level for both bedrooms and indoor areas in houses near minor roads. We note these values apply to the unoccupied space in a state ready for occupancy. In other words, they are not intended to include noises generated within the rooms themselves.

[60] At the time of expert conferencing, Mr Hegley recommended 40 dBA L_{eq} when the frost fan is operating, as that is a temporary activity. In his evidence he referred to the applicable WHO guideline value as being 30 dBA $L_{Aeq(8\ hour)}$. Mr Lloyd for the District Council recommended 30 dBA L_{eq} , and Mr Ellerton for the Westons recommended 25 to 30 dBA L_{eq} , where 30 L_{eq} is as defined in NZS 2107:2000 and/or the WHO guidelines.

Conclusions on noise

[61] Having considered all the evidence and reviewed the relevant guidelines and standards referred to in the evidence, and recognising that:

- i) The external noise levels in the locality, including at night, will generally be those associated with a relatively quiet rural environment;
- ii) noise effects of the frost fan would be temporary and occur during cold weather when windows would generally be expected to be kept closed;
- iii) noise effects of the gas gun will generally occur outside night time hours;
- iv) in order to ensure the internal environment is maintained to a high standard at all times with windows closed, dedicated ventilation would be provided throughout the proposed building; and
- v) the consent holder would have the choice to design to lower limits if their experience of caring for dementia patients showed that to be necessary.

we consider the design internal noise limits should be set at 30 dBA $L_{Aeq(15\ min)}$ for bedrooms and 40 dBA $L_{Aeq(15\ min)}$ for living areas, being the satisfactory maximums recommended in Australia New Zealand Standard 2107:2000 respectively for those parts of the building.



[62] We do not accept Mr Hegley's evidence regarding periodic exceedances of the night time limit when the frost fan is operating. The Bay of Plenty case cited by Mr Hegley applied to the operator of the frost fan, who was in a position to control its use. The consent holder in this case would have no ability to control the frost fan operation, so setting a maximum number of exceedances a year would in reality be meaningless, even if we had been presented with evidence to allow us to set numbers of exceedances and limits applicable to the case before us, which we were not.

[63] In regard to maximum internal noise levels at night, Mr Lloyd's view as set out in the JWS acoustics was that the limit should be the District Plan L_{max} limit of 70 dBA minus 15 dBA to allow for windows to be opened, or an L_{max} of 55 dBA. Mr Hegley considered the level should be 60 dBA L_{max} when the gas gun is operating, but stated in his evidence that the WHO guidelines recommend that 45 dB L_{Amax} should not be exceeded *more than 10 – 15 times per night*. Mr Ellerton considered that the WHO guideline value of 45 dBA L_{max} should apply.

[64] We are satisfied that an L_{max} of 45 dB will be achieved in bedrooms at all times the gas gun is not operating, which is by far the majority of time that residents would normally be expected to be sleeping. In other words, we are satisfied that gas gun use during the night time period ending at 7 a.m. will be limited. Accordingly, we agree with Mr Lloyd that an L_{max} of 55dB is appropriate, recognising there would be very few occasions when this limit would be reached and that for most of the time noise levels would be below the WHO recommended L_{max} of 45dB.

[65] We note that we were presented with no evidence by Avatar to enable us to form an opinion on the likely effectiveness of the proposed acoustic barrier to be provided by way of a fence around the facility, but note the concerns raised by Messrs Ellerton and Lloyd. In our view, this is a design issue for Avatar, taking into account the internal noise limits that must be met, and if a higher, more substantive, barrier is required to achieve the internal noise levels, and that would require a separate consent, that is also a matter for Avatar.

[66] Mr Hamish Anderson, a consultant planner called by Avatar, considered that the proposal would not lead to reverse sensitivity effects from noise that would be more than minor, based on the mitigation measures proposed, and particularly the



acoustic fence and insulation of the building. He also relied on the evidence of Ms Thomas and Mrs Patricia Wynd that dementia care patients are unlikely to be affected by noise generated within the surrounding rural area.

[67] Mr Cameron Twigley, a consultant planner called by the Westons, noted that the noise experts were still in disagreement as to whether noise will result in reverse sensitivity effects. He considers it imperative that the internal noise level achieved in bedrooms of the care home must be sufficiently quiet to avoid any sleep disturbance. He also considers that the establishment of a care facility would change any determination of the BPO for noise in accordance with s16 of the Act, by placing a residential facility four times closer to the frost fan than the nearest legally authorised dwelling that currently exists, 280 metres away. He remained concerned that noise from the frost fan and gas gun would result in conflict between the Westons' orchard and the care home.

[68] Mr Versteeg, planning witness for the Council, drew on the relevant plan provisions when considering reverse sensitivity effects. He noted where potential reverse sensitivity effects arise, the onus is on the new sensitive activity to provide the environment it requires through mitigation measures and records his view that complete mitigation by Avatar will be difficult to achieve.

[69] With regard to noise, Mr Versteeg considered that conditions of consent could substantially address potential *reverse sensitivity* effects. However, he considered the proposal could well increase the potential for noise complaints and that a no-complaints covenant was not appropriate or likely to be effective at preventing noise complaints.

[70] We accept that no complaints covenants are not a universal panacea, but they do provide a level of reassurance to a person or organisation who or which may be at risk of complaint about some relatively low-level adverse effect. We certainly see no harm in them.

Adverse effects - Spray drift

[71] The key consideration for the Court is the level of risk that could result from the drift of agrichemical sprays from the orchard onto the proposed site of the care home, and whether or not its presence could result in reverse sensitivity issues that might restrict, or even prevent, currently acceptable and legally compliant spray



practices in the orchard. We addressed this in some detail in our Minute of 13 November 2015.

[72] As noted in the Minute, our initial review of the evidence about risk assessment identified a number of matters that required clarification, even after cross-examination by counsel and questioning of the three relevant expert witnesses by the Court at the hearing. In view of the critical importance of the effects of spray drift to our decision, we determined that an independent Court-appointed expert should be asked to report on, and peer review, the Applicant's risk assessment, and to provide an independent assessment of risks based on Ministry of Health (MOH) Guidelines.

[73] We provided the opportunity for all parties to comment on our proposed questions and instructions for the Court-appointed expert; to comment on two possible experts that we considered were appropriately qualified and experienced, and to suggest alternative experts if they wished.

[74] We prepared a brief for the Court-appointed expert which took into account feedback received from the parties, to the extent we considered appropriate, and appointed Dr Bruce Graham of Graham Environmental Limited to undertake the work.

[75] Dr Graham produced two reports in accordance with the brief. The first report dated 4 February 2016 included a commentary on the appropriateness of using the MOH Guidelines to assess the health risks associated with this proposal and a review of Dr Murray Wallis's previous assessment. The second report dated 25 February 2016 was an independent risk assessment undertaken by him. Both reports were provided to the parties as attachments to our Minute of 2 March 2016.

[76] We do not see the need to reproduce detailed information from the two reports in our decision, which essentially confirmed the evidence of Dr Wallis, called by Avatar. We do record the recommendations from Dr Graham's second report, which we consider to be particularly material to our decision, as follows:

- i. the potential risks to human health for residents, visitors and staff of the dementia care facility can be regarded as within the acceptable limits for pesticide exposures.



- ii. in addition, the risks can be further minimised by prohibiting entry to the gardens both during, and for up to 24 hours after, spraying.
- iii. any workers involved in the construction of the facility should be formally advised of the potential spray risks and the need to take appropriate precautions.
- iv. visitor movements both during, and for up to 48 hours after spraying, should be closely controlled to minimise the risk of anybody inadvertently wandering into the grounds of the orchard (especially children and pets).
- v. The proposed planting of an additional row of shelter on the northern boundary should not be undertaken, but additional shelter at or near the southern fringe of the northern gardens would be beneficial. In addition, individual tree plantings along the boundary could be used to cover some of the existing gaps.
- vi. The use of roof-collected drinking water would be acceptable provided the system is fitted with a first-flush bypass and activated carbon treatment filters.

Conclusions on direct adverse effects of spray drift

[77] We are satisfied, based on the evidence of Dr Wallis, and in particular based on the independent reports of Dr Graham, that the potential risks to human health for residents, visitors and staff of the dementia care facility can be regarded as within the acceptable limits for pesticide exposures. However, we consider that Dr Graham's recommendations reproduced in paragraph [76] (ii) to (vi), must be a prerequisite by way of enforceable conditions if consent is to be granted. We return to this later in our decision.

Adverse effects - reverse sensitivity effects of spray drift

[78] The significant issue remaining in contention is that relating to the *reverse sensitivity* effect from spray drift and noise produced by Mr and Mrs Weston's orchard operation, across the northern boundary of the site. This was largely the issue which led the Commissioner to decide against granting the resource consents, and it will be fundamental to our findings on this appeal.

[79] The term *reverse sensitivity* (sometimes described as a *secondary* adverse effect) describes the outcome of introducing a new activity to an area already affected by an existing and lawfully operating activity, so that the existing activity



becomes vulnerable to complaint and objection from the incoming activity. Relevant to this appeal, Mr and Mrs Weston fear that spray applied to their orchard for pest control purposes will drift across the boundary into the proposed care home's grounds, giving rise to complaints from its staff and residents or their visitors, and that the complaints likely to arise from that may inhibit, or even force the closure of, their orchard business.

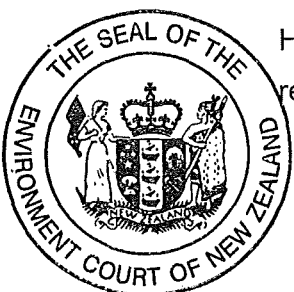
[80] We received evidence that the orchard activity is *permitted* under the Regional Air Quality Plan (RAQP), and complies with other relevant regulations and guidelines.

[81] Based on the assumption that spraying activity on the Weston property is capable of compliance with the *permitted* activity rules of the RAQP Mr Anderson, planning witness for Avatar, stated that no reverse sensitivity issue arises.

[82] In the opinion of Mr Twigley, planning witness for Mr and Mrs Weston, the best method to avoid the potential for conflict is to avoid locating activities with the potential for conflict in close proximity to each other in the first place. He agreed with the Commissioner that a rural location in this particular locality is not a necessity and that the proposal could be appropriately located elsewhere.

[83] He was also of the opinion that the introduction of the care home would make it more difficult for Mr Weston to ensure that the spray drift that occurs does not result in adverse effects, and that there would inevitably be conflict between the orchard and the care home, whether real or perceived. He records that under certain conditions residents, workers and visitors to the care home will be exposed to highly toxic chemicals from the Westons' spray operations, and that the proposal will adversely affect the Westons' production oriented activities and the working environment that presently exists.

[84] He concluded that the establishment of the care facility could potentially lead to significant restraints on the operation of productive rural activities, in particular the adjacent tamarillo orchard. He considered the reverse sensitivity effects to be more than minor; contrary to key objectives and policies in the applicable planning documents, and inconsistent with the purpose and principles of Part 2 of the Act. He did not consider that the positive benefits of the proposal outweigh the adverse reverse sensitivity effects.



Section 104(1)(a) – any actual and potential effects on the environment

[85] We include our findings on reverse sensitivity effects later in our decision. In all other respects, for the reasons traversed, we are satisfied that any actual or potential effects of the proposal will be no more than minor.

Section 104(1)(b) – planning documents

[86] We have already mentioned the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health 2011. That does not require elaboration, and no other National Policy Statement or Environmental Standard was drawn to our attention as being relevant.

Taranaki Regional Policy Statement

[87] There are three provisions of the RPS which are of particular significance, these are:

Firstly, AQU Issue 2 is:

Managing reverse sensitivity issues in relation to air emissions and which are created by incompatible land uses establishing next to industries or rural production operations.

Secondly, AQU Policy 3 states:

Land use and subdivision should be managed to avoid, remedy or mitigate adverse effects on people and the environment from reverse sensitivity effects arising from the inappropriate location of sensitive activities in proximity to legitimate activities discharging contaminants to air.

And thirdly, the RPS goes on to state:

Policy 3 recognises that even if activities discharging to air give effect to Policies 1 and 2 relating to the discharge itself, adverse effects may still arise if controls on subdivision or land use activities do not take sufficient account of the discharge activity. The intent of this policy is not to manage the discharge itself, but rather to control the siting and establishment of sensitive or incompatible land uses in the vicinity of the discharging activity

...

[88] Also of relevance to the issue of *reverse sensitivity* are some provisions of the RAQP. The plan defines sensitive areas and sensitive activities as:

Sensitive areas are areas that have within them uses or values or activities that are more susceptible to adverse effects than other [uses] or values or activities and include occupied dwelling houses, public amenity areas, places of public assembly, waterbodies used for public water supply, any waterbody, wetlands, sensitive crops



or farming systems, public roads and any place, area or feature of special significance to tangata whenua.

For the Purpose of this Plan '**sensitive activities**' means the activities that occur within sensitive areas as listed above.

[89] Policy 2.5 of the RAQP is also relevant:

Land use and subdivision should be managed to avoid, remedy or mitigate adverse effects on people and the environment from reverse sensitivity effects arising from the inappropriate location of sensitive activities in proximity to legitimate activities discharging contaminants to air.

Problems arising from reverse sensitivity effects shall be avoided, remedied or mitigated primarily through district plans and territorial authority consent decision, which:

- (a) prevent the future establishment of potentially incompatible land use activities near each other or;
- (b) allow the establishment of potentially incompatible land use activities near each other provided no existing lawful activity, operating in a lawful manner is restricted or compromised.

[90] Rule 56 of the RAQP: Discharge of contaminants to air from the spraying of agrichemicals on production land provides:

- a) The discharge shall be undertaken in a manner which does not exceed any rate, or contravene any other requirement, specified in the agrichemical manufacturer's instructions.
- b) There shall be no adverse effects from the discharge or drift of any agrichemical beyond the boundary of the subject property.
- c) The discharge shall be undertaken in accordance with all mandatory requirements set out in Sections 2, 5 and 6 and relevant appendices of the New Zealand Standard for Management of Agrichemicals (NZS 8409:2004).

[91] Section 2 of the standard relates to the management of agrichemicals, Section 5 to the use of agrichemicals and Section 6 to the disposal of agrichemicals and containers.

[92] We note that the Explanation for this Rule misinterprets the plain language of what it actually says. It presents the Rule as saying that no spray drift is permitted to cross a property boundary. Patently, that is not so. The Rule speaks of the avoidance of the adverse effects of spray drift on neighbouring properties, assuming therefore that there might be occasions when it will cross a boundary.



Relevant District Plan Provisions

[93] The District Plan Rules immediately involved in the proposal are, first, Rules 12, 12A and 12B – dealing with the maximum number of habitable dwellings on a site. These Rules will be infringed. There are currently two existing dwellings on the site and the five proposed will, as already noted, require consent as a *discretionary* activity.

[94] Rule 60 governs earthworks within six metres of a watercourse. Earthworks will be carried out to upgrade and raise the existing driveway where it crosses a watercourse. This will be a *restricted discretionary* activity. Rule 62 governs the maximum quantity of non-compacted fill per site in any 12 month period. Infringement of this is a *discretionary* activity.

[95] Rule 96 deals with the dimensions of driveways. While the proposed driveway will be longer than 60 metres with the provision of passing bays this is considered to be a *controlled* activity.

[96] Rule 98 deals with on-site queueing. Although there are more than 30 parking spaces on the proposed development, no queueing on Mountain Road is foreseen. The access has been designed to allow vehicles to pull off the State Highway before turning into the site and, with that provision, this will be a *controlled* activity.

[97] Rules 101 and 102 deal with Vehicle Equivalent Movements (VEM) per day, restricting them to 50 VEM per day over 24 hours and to 30 VEM per day averaged over a seven day period. The proposed level of traffic generation exceeds that permitted level and this is a *restricted discretionary* activity.

[98] In respect to reverse sensitivity issues, Policy 1.3 of the District Plan states:

New activities that are sensitive to the elements that define the character of the area in which they intend to locate should be designed and/or located to avoid conflict.

[99] We are satisfied, based on the whole of the evidence, that the proposal is broadly consistent with the provisions of the relevant planning documents to be considered under s 104(1)(b), except perhaps for reverse sensitivity. We gave



particularly careful consideration to provisions relating to that, as it was the principal issue in dispute.

Our findings on reverse sensitivity

[100] In terms of actual effects on the environment we are satisfied that:

- i) Spray drift from the Westons' orchard will be managed in accordance with the relevant planning and regulatory controls, with overview from the relevant consent authorities;
- ii) Based on the findings of Dr Bruce Graham, supporting those of Dr Wallis, the potential risks to human health from any spray drift for residents, visitors and staff of the dementia care facility can be managed and kept within the acceptable limits for pesticide exposures; and
- iii) We have set internal noise limits by way of consent conditions which will ensure undisturbed sleep is possible, and an appropriate level of amenity is provided in other living areas of the care home.

[101] There appears to be no practical way of avoiding residents, staff and visitors at the care home being exposed to periodic loud noises when in outside areas, if gas guns are used in the locality. It is relevant here that the Westons' gas gun will operate generally within the period July to October, when outside use would be expected to be less than in warmer periods of the year between November and May. Even so, exposure to loud noises outside could potentially give rise to complaints. We set out what we see as a reasonable way of managing that residual risk at para [103] iv.

[102] We understand the valid concerns held by some local residents and activities, that if enough complaints were received, they could adversely affect their ability to operate their existing or possible future businesses in the locality.

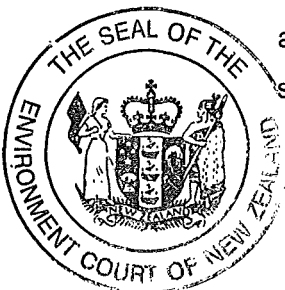
[103] In balancing the positive effect of the care home for the community, which we have earlier identified as being an important positive benefit, and the potential for reverse sensitivity complaints, we consider the following to be relevant:

- i) As noted in para [77] enforceable conditions to manage risks from spray drift along the lines recommended by Dr Graham must be a pre-requisite to consent being granted.



- ii) At times when spraying is occurring and for a period of 24 to 48 hours afterwards, there are practical and reliable options to avoid residents, staff and visitors being in areas where there would be a higher risk of exposure to spray drift, by using only outside areas on the opposite side of the building or otherwise remote or protected from orchard activities. This will, of course, require a reliable mechanism to be in place to ensure management is aware of each occasion when spraying will occur and when it stops, which we discuss in more detail shortly. This could require some interim protection measures until the northernmost pods are constructed, but we would not envisage these being onerous, particularly if the second shelter belt proposed by Dr Graham is provided. With such a management approach in place, we find it difficult to see a complaint being likely in the first place, and if it were, there would be no realistic probability of it being upheld, based on the scientific evidence now in front of us.
- iii) Provided internal noise limits comply with the limits set out in para [61] there would be no valid basis for upholding noise complaints relating to indoor use of the care home.
- iv) The risk of noise complaints by residents, staff and visitors in outside areas, resulting from the use of gas guns, could in our view be reduced for sensitive individuals by also using only outside areas remote from or protected from the orchard when such devices are in use. The consent holder will also have the option to keep residents and visitors who are sensitive to the noise inside, and to ensure they have bedrooms located remote from the orchard. A condition must be included requiring procedures to be put in place to minimise or avoid the exposure to noise from gas guns by residents and visitors who are sensitive to such noise. Provided such procedures are effectively implemented, we find it difficult to see a complaint being likely in the first place, and if it were, there would appear to be little realistic probability of it being upheld.

[104] As noted at paras [77] and [103] there is a requirement for a reliable mechanism to be in place to ensure management is aware of each occasion when spraying will occur, and when it stops. This is fundamental to the grant of a consent, and we regret having to again defer a final decision until it is resolved. As we now see it, it can be summarised in this way. If there can be assurance that the



residents of the care home will not be outdoors while spraying takes place on the Westons' orchard, the evidence satisfies us that the health risk for the residents is within recognised and acceptable limits – ie it is very low. That being so, and with a no-complaints covenant in place, the Westons could be reasonably assured that reverse sensitivity will not be a realistic issue for their continuing operations.

[105] That state of affairs – that residents will not be outdoors while spraying is being done – would rely upon the Westons giving notice to the management of the care facility that they intend to spray at or between given times. We would imagine that giving, say, 24 hours notice would suit both.

[106] In her closing submissions for them, Ms Wallace highlights the statutory notice requirements already imposed on Mr and Mrs Weston in these paras:

1.11 The level of communication that will be required in this scenario will exceed the Westons' current notification obligations, as are set out in the Taranaki Regional Air Quality Plan ("TRAQP"), the Standard 6 and the Safety Data Sheets for individual chemicals. For ease of reference, the TRAQP requires:

Landowner or occupier must give verbal or written notice to all occupied dwellinghouses, owners or occupiers of properties, sensitive crops and farming systems and places of public assembly located within 30 metres of the area to be sprayed (if spraying is by ground application) or within 100 metres of the area to be sprayed (if spraying is by aerial application).

Notification is to take place EITHER as a general notice before the beginning of a particular spray season **OR not less than 2 hours and not more than 4 weeks prior to spraying.**

1.12 The Standard (NZS8409:2004 Management of Agrichemicals) requires:

5.3.1 – The owner or occupier of the property on which the spraying is to take place shall inform, at intervals of no more than once a year, any person who is likely to be directly affected by the application, that a spray plan has been prepared and is available on request.

M2.2 Application on private property

Any person who is likely to be directly affected by the application of agrichemicals has a right to information about the operation. **The owner or occupier of the property on which the spraying is to take place shall inform, at intervals of no more than once a year, any person who is likely to be directly affected by the application,** that a spray plan (see M4) has been prepared and is available on request. More or less frequent information may be provided where mutually acceptable arrangements have been agreed to, and recorded on the spray plan.



Notification shall also be in accordance with any regulatory requirements of the local authority.

[107] Ms Wallace goes on to say:

It is not clear therefore how Dr. Graham's recommendations will be given effect to. The Court cannot impose conditions on the Westons, but the Westons' acceptance of and adherence to achieving the recommendations is essential in order for the risks to be minimised.

[108] As a matter of law, we agree that we cannot require the Westons to agree to an arrangement as a condition of consent that goes beyond the obligations already cast upon them by other instruments. Their agreement to anything more onerous than that would have to be voluntary and based on acceptance by them that, with co-operation, the two operations could reasonably co-exist. While that may be seen at first glance as a major concession on their position of outright opposition to the care home proposal, we point out that the *giving of notice* arrangement is intended to be a way of meeting their concerns. There are no direct effects on Mr and Mrs Weston, and their orchard, arising from the proposal. The basis of their opposition is the understandable fear of reverse sensitivity effects. For the reasons we have attempted to set out, we see no justifiable health concerns for care home residents, staff and visitors so long as they are not directly exposed to any spray drift in the open air. The arrangement we are suggesting, of the giving of notice by the Westons, will eliminate that possibility. There could therefore be no reasonable basis for complaint, and Mr and Mrs Weston's concerns would be met.

[109] We particularly note our understanding from the evidence that Mr Weston is currently notifying the owners of surrounding properties before each spraying event begins, so to that extent such an arrangement would not impose any further or onerous obligation upon him.

[110] If this can be agreed for future spraying events, we are satisfied that consent can be granted. We see the way forward as giving the applicant an opportunity to propose a workable and effective regime to ensure that the requirements for resident, staff and visitor safety can be put in place, either in terms of the existing legal requirements for advance notice of spraying on neighbouring properties, or with some augmented arrangement for notice.



[111] Our overall view is that, while recognising the genuine concerns of local residents about reverse sensitivity, there will be limited justification for complaints to be made if the management controls we have outlined are implemented, and a very low likelihood of any such complaints, if made, being upheld in a formal sense.

No complaints covenant

[112] Avatar has offered a no complaints covenant, as noted earlier in our decision, with the intention of providing some certainty to the Westons that Avatar would not complain about effects arising from orchard activities. We note that did not allay concerns that residents of the care home, the persons holding enduring powers of attorney for the residents, or visitors, would not complain to the relevant authorities, even though Avatar would have a formal care home specific complaints procedure in place that people could use.

[113] Mr Anderson did not consider that a no complaints covenant was necessary, but noted that one was still being offered by Avatar. He also noted that such covenants had been entered into elsewhere, including at a non-complying aged care facility in a rural area in Kumeu, Auckland.

[114] However, as further safeguards for the local community, we consider the conditions offered by Avatar in terms of a no-complaints covenant and requiring acknowledgement of the terms of residence by representatives of the residents should be retained, with modifications to reflect the various matters discussed in this decision.

[115] If that issue can be resolved, we consider the relevant plan provisions relating to reverse sensitivity are met, including the provisions of Policy 2.5 (b) of the RAQP are met, which:

Allow the establishment of potentially incompatible land use activities near each other provided no existing lawful activity, operating in a lawful manner is restricted or compromised.

Part 2

[116] There are no issues arising under s8 – the taking into account of the principles of the Treaty, nor are there issues of national importance under s6. Section 7 contains issues to which decision-makers are to have *particular regard*. Relevant to the issues in this appeal, they are:

- (a) kaitiakitanga:



- (aa) the ethic of stewardship:
- (b) the efficient use and development of natural and physical resources: ...
- (c) the maintenance and enhancement of amenity values: ...
- (f) maintenance and enhancement of the quality of the environment:
- (g) any finite characteristics of natural and physical resources: ...

[117] In this context, kaitiakitanga and the ethic of stewardship are largely synonymous. They embody the concept of the wise use of, and the caring for, resources with the needs of future generations in mind.

[118] With regard to efficient use and development, the natural resource in question here is the land, both of the site itself, and the area surrounding it and likely to be affected by the proposed use of it.

[119] Amenity values are defined in the RMA as:

... those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[120] That issue – amenity, with an overlap to the quality of the environment, are at the heart of this issue, and we believe that we have sufficiently addressed the possible effects, and a way to avoid or mitigate them, to the point where those effects would not be an impediment to the granting of resource consent.

[121] If that avoidance or mitigation can be achieved, as suggested, we consider that the proposal either contributes positively or is not contrary to these matters in terms of achieving the purpose of the Act.

Section 290A – the first instance decision

[122] Section 290A requires the Court to have regard to the decision under appeal. That does not create a presumption that the decision is correct, but does require a genuine consideration of it and, implicitly at least, would call for an explanation if the material we heard on appeal brought us to a different conclusion.

[123] We have the benefit of a new, independent, expert opinion on the main concern of the Commissioner – reverse sensitivity resulting from the potential effects of agricultural spray drift. That opinion satisfied us that the potential risks to human health from any spray drift for residents, visitors and staff of the dementia



care facility can be regarded as within the acceptable limits for pesticide exposures. Accordingly, subject to a practical and lasting arrangement to give notice to the care home management of intended spraying on the Weston property, we see no reason to decline consent.

[124] We are also satisfied, after a very careful and thorough review of noise considerations, and the imposition of internal noise limits, there is no valid basis for declining the consent on the basis of reverse sensitivity arising from noise.

Interim Result

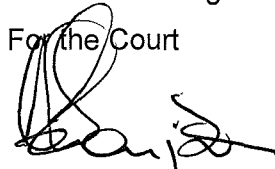
[125] We are strongly conscious of the time this matter has taken to get to this point, but the issues of possible impact on health were obviously important and we felt the need for more information.

[126] For the reasons we have attempted to set out, we believe that there is a realistic and safe way of establishing a care home that will be of considerable benefit to the community, while allowing the Westons to continue with their long established business. If Mr and Mrs Weston can see their way clear to participate in a clear and mutually binding arrangement to give notice of intended spraying, and for residents to be kept indoors for the duration of that, the way is open for the resource consents to be granted, subject of course to appropriate conditions.

[127] If some workable arrangement can be worked through, conditions addressing the source of potable water (para [34]); and no complaint covenants in respect of noise (paras [70] and [103]) and in respect of spraying (para [112]) could also be usefully addressed. Additionally attention could be given to the balance of Dr Graham's recommendations, and to possible interim arrangements regarding noise and spray drift pending the completion of all of the proposed pods. We ask that the parties confer to see if such arrangements are possible. We ask that they report on the outcome of those discussions by Friday, 27 May 2016.

Dated at Wellington this 5th day of May 2016.

For the Court



C J Thompson
Environment Judge

