BEFORE COMMISSIONERS ON BEHALF OF THE CENTRAL OTAGO DISTRICT COUNCIL

IN THE MATTER	of an Proposed Private Plan Change 13 to the Central Otago District Plan
BY	**RIVER TERRACES DEVELOPMENTS LIMITED**
	Proponent

SUBMISSIONS OF COUNSEL ON BEHALF OF HIGHLANDS MOTORSPORT PARK (SUBMITTER 144) AND CENTRAL SPEEDWAY CLUB CROMWELL INC (SUBMITTER 45)

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INTRODUCTION

1. Highlands Motorsport Park Limited operates Highlands Motorsport Park ('Highlands') located on the corner of Sandflat Road and State Highway 6. As set out in the evidence of Josie Spillane, Highlands commenced operating in 2012, having obtained consent following an environment court appeal against the proposal in 2009. Highlands has established itself as one of the premier tourist destinations within Central Otago and as a fantastic venue for national and international motorsport events.

2. Highland's resource consent allows it to operate commercial activities all year round (excluding Christmas Day and before 1pm on Anzac Day) within its 'Tier 1' noise limits. The noise limit for Tier 1 days is consistent with Rural noise standards (55dB), although Motorsport activities are clearly audible at various times on surrounding sites. Highlands have on occasion had people complain about being able to hear vehicles as far away as Bannockburn. Obviously the actual noise level in these locations is not an issue, but the character of motorsport noise is such that it is noticeable and often annoying to people. As described in Ms Spillane's evidence, issues surrounding noise generation from Highland's were significant during the early operational years and require constant attention and diligence by the Highlands Team in order for them to maintain their hard earned social licence.

3. Highland's consent also authorises 16 Tier 2 days per year. These days are not subject to a noise limit per se, but noise generation is controlled by a 95dB noise limit for vehicles. The majority of these days are used for motor racing events. But they can occasionally also include other activities such as super car vehicle launches or testing. As demonstrated by the evidence of Mr Staples, noise generated on Tier 2 days is significant. Noise levels across the Proposed Plan Change site will typically be between 60-70dB[1], but may be up to 10dB higher than this[2] (it was the number of Tier 2

[1] Statement of Evidence of Aaron Staples at Figure 2.
[2] Joint Witness Statement – Acoustics at paragraph [2.8].

days that was central to the appeal against the original grant of consent[3]).

4. The establishment of Highlands has occurred following approximately $32 Million investment. The investment was made following a comprehensive assessment through both Central Otago District Council and the Environment Court.

Environment Court Decision

5. The Environment Court decision, which granted consent for the construction of Highlands Motorsport Park, provides discussion on the receiving environment and why it was acceptable in terms of what effects the District Plan anticipated in the area. [4] In particular, the Court identified the following features of the site:

    1. Predominantly grassland, though a pine plantation extends 600m into the site from the southern boundary;

    2. The nature of proximate activities such as a cemetery, orchard, vineyard, houses, cafes, bottling plant and a consented speedway. This includes an area of rural-residential housing across Bannockburn road;

    3. The eastern boundary adjoins the Chafer Beetle reserve, an area of open grassland between the site and Bannockburn road. This is identified as an area of significant natural value; and

    4. The closest settlement is some 2 kilometres south of the site. The nearest residentially zoned site is to the north, in Cromwell, approximately 1.2 kilometres distant.

6. The existence of these activities was integrated into the effects assessment when the Court considered whether the proposal should be granted consent. Significantly, the noise emission rule

[3] The original application by Cromwell Motorsport Park Trust sought consent for up to 28 race days. The Environment Court ultimately granted consent to allow up to 16 days.
[4] *Armstrong v CODC* C131/08 at [40] – [46]

4.7.6E imposed noise restrictions at the 'notional boundary' of any dwelling (55 DbA $L1_{0 \text{ between } 7.00am \text{ and } 10.00pm}$).[5] The Application was determined to be in breach of this rule, therefore it was necessary for the Court to have regard to the extent of non-compliance.[6] Even though the noise effects would be produced in the rural zone, they would spread to residential areas in the township of Cromwell, so the Residential provisions of the District Plan became relevant as well.

7. The Court held that there would be adverse effects as a result of the noise created, however these could be managed (through conditions of consent) to be consistent with the Objectives and Policies of the District Plan. Much of this turned on the provisions for temporary activities. This was a 'finely balanced' assessment.[7] In summary, even though the residential activity in the area was not particularly dense at the time, the Court had to place significant focus on the adverse effects on existing residential activity. It is submitted that the Court's assessment would have been fundamentally different if high density residential activity had been anticipated in the vicinity of the site, or existed at the time the application was made.

8. Today, the Motorsport park forms part of the existing environment and the onus has shifted to the Proponent to demonstrate that it's proposal fits within the environment. Given the 'finely balanced' nature of the original assessment, it is submitted that the introduction of high density residential activity to the area to be highly inappropriate and inconsistent with the nature of the existing environment.

Central Speedway Club Cromwell

9. Central Speedway Club Cromwell Inc ('Speedway') operates the Cromwell Speedway. The Speedway is located on Sandflat Road surrounded by Highlands. It obtained a specified departure in 1980

[5] Ibid at [80]
[6] Ibid at [84]
[7] Ibid at [110]

and has been operating since then.[8] The specified departure places no controls on noise emissions or the number of race events. Noise emissions are controlled to a degree by the rules governing Speedway racing (similar to Highland's Tier 2 Days).

10. Historically, Speedway have operated around 12 events per year – with a degree of variability from year to year. The nature of these events is described in Mr Erskine's evidence.[9]

11. Events are generally held in the evening with activities commencing around 4-5pm and finishing between 10-11pm. Noise levels generated during these events are high and results in noise levels over the proposed plan change site that are slightly higher than Highland's Tier 2 days.[10]

12. The Speedway Club have an ongoing investment programme and have clear aspirations to continue cultivating a thriving club.

13. It is submitted that Highlands and Speedway are both significant enterprises within the Cromwell Community. They contribute to the social and economic wellbeing of the community. This is perhaps best evidenced by the number of submissions in opposition to this Plan Change proposal that raise concerns about the ongoing viability of these Motorsport assets. I can refer to several submissions which identify the important economic relationship between Highlands, Speedway and the operation of various other businesses. For example:

    1. Racer Products (OS 288) identify that several years ago they made a commercial decision to purchase a unit, #19 Pit Lane for which to run their business.

    2. Owen Shearer (OS 326) attributes direct benefits received by his orchard business and commercial complex in Alexandra to the operation and Highlands and Speedway.

[8] Evidence of Andrew Russel Erskine at [4].
[9] Ibid at [10]-[11].
[10] Statement of Evidence of Aaron Staples at Figure 3.

3. Breen Construction (OS 366) outline that they have expanded their Cromwell businesses to keep up with the growth of Highlands.

4. Andrew Waite (OS 377) is a contracted driver at Highlands and property investor in the Cromwell Township. Andrew identifies Highlands as a central reason for his decision to not only move to but invest in Cromwell.

5. Mt Difficulty Wines (OS 249) identify that motorsport and speedway activities are valuable additions to both community recreational values and significant income generators for the community.

14. Overall, it is submitted that the Proposed PC13 site is simply an inappropriate site for establishing high density residential activity due to it being wholly incompatible with the surrounding land uses.

STATUTORY ASSESSMENT

15. Counsel for various parties have provided a joint memorandum setting out the relevant statutory tests that apply. From this it is clear that the matters that require consideration are relatively non-contentious. What is clearly contentious is how PC13 stacks up against those matters. The key matters of concern for the Motorsport interests are:

1. Noise effects, including:

i. Consequent reverse sensitivity effects; and

ii. The efficacy of no-complaints covenants or conditions as a tool to avoid reverse sensitivity effects.

2. In light of the above whether PC13 can give effect to the ORPS;

3. Whether PC13 is in accordance with CODC's functions under section 31; and

4. Whether PC13 achieves the purpose of the Act.

16. Secondary to these matters are whether the National Policy Statement – Urban Development Capacity is relevant to this proposal, and if so what consequence does that have.

17. At the end of these submissions I will also address some of the matters raised in submissions by Mr Goldsmith for River Terraces.

REVERSE SENSITIVITY

18. Reverse sensitivity is generally understood to refer to how sensitive activities constrain other activities within the vicinity. Mr Goldsmith referred to the concept as discussed by the Court in *Ngatarawa Development Trust Limited.*[11] In my submission that definition fails to articulate some of the key aspects of reverse sensitivity (particularly then tendency for it to constrain and curtail). It also ignores the practical realities of reverse sensitivity. By this I mean the view expressed by Mr Goldsmith that issue is only about 'legal vulnerability'. As set out by the Court in *Independent News Auckland Limited v. Manukau City Council.*[12]

> *"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.*
>
> *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 reverse sensitivity effect."*

19. In that case the Court considered reverse sensitivity effects, firstly in relation to the impact of the noise (aircraft noise in that case) on

[11] Decision No. W017/2008, it is noted that this 'definition' came from an academic article.
[12] Decision No. A103/2003

residents, and then considering the likely cumulative responses to it.[13] In my submission you should take the same approach in this case.

20. Mr Goldsmith did not refer you the definition within the Operative Otago Regional Policy Statement (ORPS) which is as follows:

> *"Reverse Sensitivity: The potential for the operation of an existing lawfully established activity to be constrained or curtailed by the more recent establishment or intensification of other activities which are sensitive to the established activity."*[14]

21. The characteristics in the ORPS definition are all present in this instance and the history of the Highland's operation set out by Ms Spillane provides a clear window into how these effects are likely to accrue to constrain and curtail existing Motorsport activities.

22. Case law has identified reverse sensitivity is a relevant effect when assessing the appropriateness of a site for rezoning.[15] Very early cases under the Resource Management Act identified the relevance of reverse sensitivity effects. For example *McQueen v. Waikato District Council*[16] the Planning Tribunal stated:

> *"we do not accept that this question [reverse sensitivity] can be disposed of by the applicant's acceptance of the risk for its own members".*

23. The Tribunal in that case also referred to the other statutory regimes and legal obligations that would impose greater restrictions regardless of a disclaimer from the applicant[17]. The current situation is analogous as set out in evidence from the Horticulture and Motorsport Interests. In the *McQueen Case* the Tribunal ultimately concluded:

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[13] Ibid at [66]
[14] It is noted for completeness that a very similar definition has been adopted in QLDC and appeals against the 2GP Decisions in Dunedin seek inclusion of the definition.
[15] *Auckland Regional Council v. Auckland City Council* (1997) NZRMA 205
[16] EnvC Decision A45/94 at Page 9 final paragraph
[17] Ibid at page 10 paragraph 2 - 3

> *"To the extent that establishment of the proposed facilities would cause restraints on use of chemical sprays in managing those orchards, it would impair the management and protection of natural and physical resources represented by the orchards in a way that enables people to provide for their economic wellbeing…it would fail to avoid, remedy or mitigate an adverse effect of the activity [nudist colony] on the environment being the restraint that it would create on the freedom of orchardists in the vicinity to use chemical sprays to manage their orchards.*
>
> *If it were not for that factor, the proposal might have been judged as serving the statutory purpose. The site is in many respects suitable, being well-screened and handy to Hamilton. Only a small area of high quality productive land would be removed from production, and most of that could be restored to production in the long term. However the activity is not compatible with the management of orchards in the vicinity, and in that respect we consider that the site chosen is unsuitable."*[18]

24. Addressing reverse sensitivity effects also goes to the exercise of District Council functions under section 31.[19] In *Auckland RC v. Auckland CC*[20] the Court did not accept submissions that people are best to judge their own needs. The Court stated:

> *"We do not accept the submission based on leaving promotors of enterprises to judge their own locational needs, not protecting them from their own folly, or failing to consider the position of those who come to a nuisance. We consider that those submissions do not respond to the functions of territorial authorities under the Resource Management Act…It would also fail to consider the effects on the safety and amenities of people who come to premises as employees, customers and other visitors".*

25. It is submitted that these themes are applicable to PC13 and its relationship to Motorsport activities on the basis of the acoustic evidence. The key aspects of the acoustic evidence are:

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[18] Ibid at page 14 paragraph 1 - 2.
[19] *CJ McMillan Ltd v. Waimakariri DC* EnvC C087/98 at [6].
[20] NZRMA 205 (EnvC) at page 12 – 13 paragraph 2.

1. All acoustic experts agree that Motorsport noise is subjectively annoying to most people when compared to other environmental noise sources. They reach the same conclusion with respect to Horticultural noise sources.[21]

2. Noise levels from Highlands Tier 1 days will result in high levels of annoyance. Similar noise levels at other motorsport sites have resulted in significant pressure from residents to close or curtail the activities. [22]

3. Noise levels from Highlands Tier 2 and Speedway events will be high and cause serious annoyance for residents outside of their homes, such that complaints will arise despite a no-complaints covenant.[23] The proposed acoustic insulation inside the properties is also considered to be inadequate by Mr Staples and Dr Chiles. They both consider an internal noise standard of 30dB L_{Aeq} should be achieved given the more annoying nature of motorsport noise.[24] Those witnesses and Mr Reeve consider that same internal noise standard is necessary in relation to Horticulture noise.[25] Achieving this level of acoustic insulation will necessitate windows and doors to be closed which will have adverse effects on the residents style of living during the summer months (which coincides with the motorsport season).[26]

4. All acoustic experts agree that the site is exposed to noise levels of that will have a significant adverse effect.[27]

5. Mr Staples, Mr Chiles and Mr Reeve are all of the view that the proposed zoning is incompatible with the existing

[21] Joint Witness Statement – Acoustics at [7.1] and [7.2], see also Statement of Evidence of Aaron Staples at [8.7]
[22] Statement of Evidence of Aaron Staples at [4.6]. This evidence is confirmed in evidence from Mr McKay, a nearby resident.
[23] Statement of Evidence of Aaron Staples at [4.3]
[24] Joint Witness Statement – Acoustics at [8.6]
[25] Ibid at [8.8].
[26] Ibid at [8.2], Mr McKay in his evidence discusses his resentment about having to close his doors and windows to try and minimise noise.
[27] Ibid at [9.2].

environment.[28]. The only reason Mr Styles does not hold this view appears to be due to the no-complaints covenant to set expectations for residents. It is noted that he accepted in questions from the commissioners that the no complaints covenant does not address noise effects.

26. It is also submitted that the scale of the proposed development is relevant when considering the noise effects and potential reverse sensitivity effects.[29] The reality is that PC13 will significantly increase the number of sensitive receivers within the immediate environment surrounding the Motorsport Interests. Even if this is compared against a 'future environment' where the Rural Residential development of 18 Lots takes place. Under that scenario approximately 40-60 more people (depending on household size) would reside in the area. Under PC13 we are talking 2500-3000 residents. Whichever way you cut that the difference is clearly significant which has a significant bearing on the nature and scale of the effects that arise – both in terms of the noise effects that would arise and the potential for reverse sensitivity effects to accrue.

27. It is submitted that the acoustic evidence is clear. Adverse effects on residents will be significant and adverse. It is my submission those significant adverse effects are exacerbated by the significant scale of re PC13 development.

28. As highlighted by the Court in *Ngatarawa Development Trust Limited v. Hastings District Council*[30] residential occupiers have the greatest potential to generate reverse sensitivity effects. In the *Ngatarawa case* the applicant volunteered a non-complaints covenant, in relation to it the Court stated:

> *"Such covenants do not avoid, remedy or mitigate the primary effects – nothing becomes quieter, less smelly or otherwise less unpleasant simply because a covenant exists. On their face they*

[28] Ibid at [10.2]
[29] *Independent News Auckland Limited v. Manakau City Council* Decision No A103/2003 at [123]-[124]
[30] EnvC Decision W017/08

> *might avoid or mitigate the secondary effects of the ensuing complaints upon the emitting activity. But all they really mean is: If you complain, we don't have to listen, and there are issues about such covenants which have not to our knowledge, been tested under battle conditions. We are not to be understood as agreeing that they are a panacea for reverse sensitivity issues".*[31]

29. The Court went on to conclude:

> *"We find that it is not appropriate to permit the number of notional noise boundaries surrounding working rural land to proliferate beyond the number permitted by the District Plan. To do so would unreasonably and unfairly constrain the activities properly located in the Plains Zone. The adverse effects of the proposed development on the use of the rural land surrounding the golf club would individually, and more so cumulatively, be more than minor. As discussed in paras [20] and [21] there would, we consider, be direct adverse noise effects on the proposed housing within the golf course site. The conclusions expressed about reverse sensitivity upon aerodrome users and other surrounding owner/occupiers, while not decisive standing alone, reinforce our view that on any reasonable assessment the adverse effects of the proposal will be significantly more than minor"*

30. The current case possesses many characteristics that are similar to the *Ngatarawa Case*. Ultimately, it was the cumulative nature of the effects on the aerodrome, the surrounding rural land uses and the loss of rural productivity as a result that led the Court to refuse the appeal.

31. In a similar vein it is submitted that PC13 must be refused:

    1. Noise effects from motorsport will be significantly adverse;

    2. Noise from Horticulture activities will be significantly adverse;

[31] Ibid at [27]. It should be noted that the Court concluded that reverse sensitivity effects on the aerodrome in the Ngatarawa case would have been unlikely to have been a sufficient basis to refuse the appeal on their own. In that case noise levels that residents were exposed could not be definitively determined. There also appeared to be remaining measures that the aerodrome could deploy to reduce its impact.

3. The encroachment of residential activity will constrain rural activities around the Zone having consequential adverse effects on the productive capacity of the neighbouring land;

4. The encroachment of residential activity will constrain the future evolution of Highlands and Speedway;

5. It is highly likely that high density residential activity will have the effect of curtailing existing activities through the application of political pressure and via section 16.

6. Given the scale of adverse effects it is not an appropriate case for deploying mitigation methods, such as no-complaints covenants. Avoidance is the only option.

NO COMPLAINTS COVENANTS

32. It is clear that the primary tool being promoted by RTDL to mitigate reverse sensitivity effects is a no-complaints covenant for the benefit of Highlands, CODC (as owner of the Speedway site) and directly adjacent orchardists.

33. In the most recent version of the provisions RTDL have made some further suggestions:

    1. Where a no-complaints covenant is not offered consent for a non-complying activity would be required; and

    2. If the 3rd parties do not accept a no-complaints covenant then alternative methods of consent notice (for subdivision consents) or covenant under section 108 (for land use consents) be offered.

34. During oral submissions Mr Goldsmith went further suggesting that all 3 tools could be deployed if necessary.

35. These submissions will deal with no-complaints covenants in general first then discuss whether the consent notice/section 108 covenants offer the same outcome.

Covenants Generally

36. It is trite to say that no-complaints covenants have been deployed as a mitigation tool fairly widely. They are often adopted as a 'commercial solution' between applicant's and neighbours or in relation to large infrastructure (airports, ports etc) where location is fixed and any bit of protection is worthwhile. However, that cannot be interpreted to mean that they will be appropriate in all circumstances.[32] It is submitted that they are simply not adequate in this case.

37. As pointed out in *Ngatarawa* no-complaints covenants do not reduce or ameliorate actual adverse environmental effects and as such their genuine efficacy is tenuous. The Court in *Avatar Glen Ltd v New Plymouth District*[33] commented that:

> *[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.*

(emphasis added)

38. It is submitted that *Avatar Glen* is an indication that they may be accepted as a 'belt and braces' solution. That is to say, the effects that may give rise to reverse sensitivity need to be sufficiently low-level. Where this can be achieved, a no-complaints covenant simply provides extra reinforcement.

39. However, where the effects are significantly adverse it is submitted that a no-complaints covenant should not be deployed as a work around. Because, those significant adverse effects will continue to accrue, and the covenants are unlikely to withstand increasing pressure from sensitive receivers (or their proxies).

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[32] The outcome in *Independent News Auckland Limited v. Manukau City Council* being an example where avoidance took place.
[33] *Avatar Glen Ltd v New Plymouth District* [2016] NZEnvC 78.

40. The Environment Court accepted the utilisation of no-complaints covenant in the context of a Plan Change in *Colonial Vineyard Limited v. Marlborough District Council.*[34] It is submitted that the noise effects in that case were at a lower level than the acoustic evidence in this case indicates – being more akin to the noise effects of the Cromwell Aerodrome or Highlands Tier 1 alone, as opposed to the combined effect of Highlands (tier 1 and tier 2), Speedway and Horticulture which are demonstrated to have significantly higher noise levels.[35]

41. The other key deficiency of no-complaints covenants is their actual effectiveness under 'battle conditions'. I have been unable to find any examples where a dominant tenement has taken enforcement action (which must be pursued through the Court's), although there are numerous examples where no-complaints covenants are in place, but complaints still occur. Mr Staples identifies Ports of Auckland as an example.[36]

42. Mr Goldsmith referred you to *South Pacific Tyres N.Z. Limited v. Powerland (NZ) Limited.*[37] It is a decision about covenants, but in my view it is not directly relevant in terms of their efficacy under battle conditions. In that case the covenant in question had never actually been registered and the servient tenement essentially sought to unilaterally cancel the agreement that required registration of the covenant. The dominant tenement registered caveats to protect their position and litigation ensued. It is essentially a case about enforcement of contract. The Court was required to determine the legality of no-complaints covenants and found that they were lawful, although the Court noted at [63]:[38]

> *"The Covenant does not allow the plaintiff to contravene the RMA or remove the possibility of RMA duties being enforced. It only precludes the defendant – and its successors in title – from so complaining. If the plaintiff*

[34] [2014] NZEvnvC 55
[35] Statement of Evidence Aaron Staples at [7.1]-[7.8]
[36] Ibid at [8.10]
[37] *CIV-2008-485-427*
[38] Ibid at [63]

> *contravenes the RMA, any other person can still apply for an enforcement order and/or the local authority's enforcement officer can issue an abatement notice."*

43. The Court also points out that:

> *"I note also that there is no duty on land-owners like the defendant here to complain under the RMA. As such, it is understandable that the promotion of the RMA's objectives does not depend on landowners doing so – there are alternative ways, such as abatement notices being issued, that can be utilised."*

44. In my submission *Powerland* does not illuminate us about how the High Court might treat a case of a person who is a servient tenement under a no-complaints covenant constantly complaining about what they consider to be unlawful or unreasonable activities, or in the event that another person (such as the Council or an unrelated resident) sought to pursue enforcement action (particularly pursuant to section 16).

45. Another point I would make is that the covenants are inefficient in a section 32 sense. They transfer the compliance cost from RTDL to Highlands, because it is Highlands who will have the job of enforcing them against complainers. There is a lack of reciprocity between cause (i.e. the introduction of sensitive activities) and effect (the enforcement obligation). Highlands does not want that obligation. It is submitted that it is RTDL's job to keep their customers from impeding Highlands.

46. To use an analogy, if RTDL were to establish a zoo on the PC13 site with dangerous animals such as Lions and Crocodile's should it be the zoo's job to keep the animals in, or Highlands' job keep them out? Mr Goldsmith has essentially told you that it is up to Highlands' to protect themselves from being eaten. That can't be right.

47. When dealing with practical matters of enforcement it is also worth considering the nature of the effects that we are dealing with in this

case. Noise is a rather nebulous issue, particularly for lay people. The acoustic evidence demonstrates:

1. Noise generated by Highland's Tier 1 activities will be clearly audible, without being in breach of consent conditions;[39] and

2. Motorsport noise has a character that is more subjectively 'annoying' than other sources of environmental noise which tends to result in residents becoming more sensitised to it. [40]

48. Therefore increasingly irritated and sensitised residents will notice motorsport noise and interpret it as being loud because they can hear it.[41] As the no-complaints covenant only applies to existing lawful activities residents are likely to claim that activities are either in excess of the noise limits or do not fall within existing activities – particularly as Highland's offering evolves over time within the terms of the consent. It will then be incumbent on the Council to investigate and/or Highlands to incur cost to demonstrate the complaint is not valid.

49. The reality is that residents will continue to complain claiming that activities they are hearing are not covered by the covenant. Even if that is not the case they can basically complain with impunity as the enforcement tools available to Highland and Speedway are effectively impotent. Even 'low level' enforcement, such as writing to the residents reminding them of their obligations under the covenant is unlikely to be helpful, and have the effect of eroding the motorsport facilities' social licence.[42]

50. Further to this, noise generating activities have an ongoing obligation under section 16 to avoid unreasonable noise. What level of noise is 'unreasonable' is a somewhat moveable feast and

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[39] Ibid at [4.5]
[40] Ibid at [8.7]
[41] The Evidence of Mr McKay is an example of this. He comments about how Highlands Tier 1 noise is surprisingly loud and annoying at [6] of his evidence, whilst at [18] he comments that the State Highway noise is insignificant by comparison. This is despite the fact that the SH6 noise will be objectively louder than Highland's Tier 1 noise. This evidence supports the Expert Acoustic Evidence that Motorsport noise is subjectively more annoying than other environmental noise sources.
[42] Evidence of Josie Spillane at [57] and 1st and 3rd articles at footnote 7.

is inevitably influenced by the nature of the environment that is being affected by the noise.[43]

51. Therefore, it is submitted that if the site is rezoned it will have the effect of changing the character of the surrounding environment from rural to residential. This will result in the expectations and perceptions about what is 'reasonable' shifting. This phenomenon was acknowledged in *Colonial Vineyard* where the Court noted:

> *"Overriding those concerns is that airports – even those with very small numbers of aircraft using them – are potentially subject to 'noise' complaints. Such complaints may have a critical mass beyond which the legality (or existing use rights) can potentially become irrelevant in the face of political pressure"*[44]

52. This phenomenon essentially places a sinking lid on noise generating activities if land use character changes around them. The ultimate consequence being that they can no longer remain viable. The following cases provide some examples of changing environments and the impacts they can have on existing activities

    1. In *Hawke's Bay Regional Council v Te Mata Mushroom Company Ltd* the Court noted that while it was sympathetic to the situation and the issue must be recognised in terms of culpability:[45]

    > *"In terms of the defendant company's position, one has to have some sympathy for it in general terms, in the sense that the company has been operating on the site for something of the order of 50 years and Havelock North - being a desirable place to live - has expanded with of course councils' involvement - to come within 200 or 300 metres, and even closer for some properties, of the company's operation. As the situation is referred to in resource management law we have a classic situation of reverse sensitivity, where a sensitive land use (ie residential) has come within range*

[43] *Speedy v. Rodney DC* A134/93 (PT), See also *Ngataringa Bay 2000 Inc v. A-G* A016/94 for jurisprudence that compliance with District Plan noise limits may be insufficient to absolve a noise generator from obligations to avoid unreasonable noise.
[44] *Colonial Vineyard* [2014] NZEvnvC 55 at [148].
[45] *Hawke's Bay Regional Council v Te Mata Mushroom Company Ltd* [2018] NZDC 16898 at [7]-[12]

of something that produces an effect which the residents, understandably, find very unpleasant indeed.

That situation, I think, does need to be recognised in terms of culpability. It does not alter the requirement that we have to do something to try and remedy things and make it better for the future. But I do particularly record the quotation from the report that was done at the time, referred to as the Jacob report, that is set out at para 29 of Ms Blomfield's submissions. The quotation concludes, "We, [that is the consultant] consider the reverse sensitivity effect would be significant given there is evidence that the current separation distance to sensitive development is already less than necessary." So, it was a situation that was no doubt contributed to by that situation."

2. In *North Canterbury Clay Target Association Inc v Waimakariri District Council* the Court of Appeal had to consider the interpretation of noise rules in conjunction with the legal effects of a certificate of compliance. When Certificate of Compliance was issued, the nearest house was 1.2km away, however since then land near the shooting range were subdivided and residents in the new subdivision complained to WDC about gunfire noise. This was despite residents being aware of the ongoing activities at the club. Ultimately, the Court held that the Certificate of Compliance did not protect the holder from changes in the receiving environment.[46] While Highlands and the Speedway can be distinguished to an extent on the basis that they are operating under either resource consent or specific departure, the case emphasises to fragility of the public tolerance with adverse noise effects.

53. Mr McKay's evidence is a clear example of how this is likely to occur. Mr McKay and a number of the existing neighbours will not be constrained by any no-complaints covenant. They can easily provide a vehicle for disgruntled PC13 residents to constrain the Motorsport activities. Mr McKay basically volunteered to do that in his oral evidence yesterday.

54. Another example of how this can occur is Northlake, in Wanaka. In that development residents are subject to a no-complaints covenant

[46] *North Canterbury Clay Target Association Inc v Waimakariri District Council* [2016] NZCA 305 at [48]

preventing them from having formal input into consenting processes undertaken within the development by the developer (which is another subsidiary of Winton Partners). Those covenants have effectively been circumvented by a group of supportive neighbours who have taken up the cause on the Northlake Resident's behalf – Their Society is the Wanaka Community Supporting Our Northlake Neighbours Incorporated.

55. These examples serve to demonstrate how fallible a no-complaints covenant is. They are no substitute for genuine resource management planning that avoids placing blatantly incompatible activities next to one another.

Consent Notice Conditions or Section 108 Covenants

56. RTDL has added to the suite of potential no-complaints tools in the latest version of the PC13 Zone provisions to include the option of a subdivision condition secured by consent notice or a covenant under section 108. Given the significance that is placed on the need for a no-complaints covenant to mitigate noise and reverse sensitivity effects I can only assume these steps have been taken to avoid the Motorsport interests from refusing to accept such a covenant and therefore removing it from the tool box.

57. However, the proposed alternatives are no better, and in fact are a less effective tool for the following reasons:

    1. They are subject to amendment without recourse to the parties they are designed to protect. An application to amend or remove a consent notice is a discretionary activity and could be processed without notification.

    2. They transfer primary enforcement obligations to the Council.

    3. The enforcement options available to the Motorsport interests would be via enforcement order, which is no better than a direct covenant. Once again there is no jurisprudence that can provide comfort to the Commission

about how this would play out under ‘battle conditions’, Particularly in light of the Act’s section 16 obligations. The reality being that if Highlands or Speedway sought to enforce the covenant they would likely face a counter claim pursuant to section 16.

4. The no-complaints obligation is likely to be obscured amongst the array of other design controls placed on the Lots, reducing its efficacy.

58. It is submitted that these proposed changes simply serve to demonstrate how critical the no-complaints tool is for this proposal to get over the line. In this case it is not simply providing ‘belt and braces’, it is the lynch-pin of the Plan Change.

NATIONAL POLICY STATEMENT – URBAN DEVELOPMENT CAPACITY

59. I agree with Mr Goldsmith that the definition of ‘urban environment’ is rather imprecise and requires some interpretation. Unfortunately (or fortunately) we do not have input from any Court on this topic yet. In relation to the definition I make the following comment. *“Intending to contain”*

60. There is no specified timeframe within the document with respect to the population thresholds. To determine what the timeframe is I think it is necessary to consider what statutory process is being engaged with.

61. The NPS is clearly intended to operate over 3 ‘horizons’. Short Term (1-3 years), Medium Term (3-10 years) and Long Term (10-30 years). The development capacity to be provided over these timeframes anticipates not just an RMA response, but also steps under the Local Government Act, such as funding in the Annual Plan, funding in the Long Term Plan, infrastructure planning via a infrastructure strategy and so on. It is my view that ‘intending to contain’ must therefore be read in light of the regulatory process that you are engaging with. This is supported by Policy PA1 – which identifies the features of development capacity over short, medium

and long term. It includes not just zoning, but also provision of infrastructure, provision of funding for infrastructure development, or infrastructure planning.

62. In this instance we are dealing with a district plan change which has a statutory horizon of 10 years. Therefore, that is the horizon you should consider when interpreting 'intending to contain'.

63. As one last thought 'intending to contain' also implies a level of deliberateness. That an urban environment is not simply a function of behaviour, but of planning. In my view that dovetails with the functions that territorial authorities have to achieve integrated management under section 31. I think it is important to ensure that integrated management does not become subservient to providing development capacity.

"Concentrated settlement"

64. In my view this element of the definition is a factual question. It will differ depending on the nature of the environment or community you are considering.

65. The preamble may provide some guidance. It states:

> *"Urban environments are characterised by the closeness of people and places, and the connections between them. They enable us to live, work and play in close proximity, giving us access to amenity, services and activities that people value."*

66. In my view there are likely to be at least two ways of looking at this:

    1. Considering where residents of Bannockburn, Lowburn and Pisa Moorings are likely to gain access to the amenity, services and activities they need; or

    2. The other possibility is to look at it from an urban design perspective where connection and closeness is likely to hinge on accessibility – such as being in close proximity for walking and so on.

67. Which of those options (or any other) is to be preferred is a question for urban design experts and planners, so I suggest that it be raised with Mr Mead and Ms Scott.

RELATIONSHIP OF NPS AND ORPS

68. The NPS-UDC was publically notified on 3 June 2016 and became operative from 1 December 2016 the NPS-UDC 2016 came into legal effect (the Gazettal occurred in November 2016).

69. The proposed Regional Policy Statement ("PRPS") was publicly notified on 23 May 2015. The Council released its decisions on 1 October 2016. The appeal period closed on 9 December 2016. Appeals are now resolved on most of the proposed Otago Regional Policy Statement. On 12 December 2018, Council approved these provisions to become partially operative from 14 January 2019.

70. Appeals in relation to the PRPS raised the NPS as an issue, including the need for the RPS to give effect to it. Changes were made to give effect to the NPSUDC through the appeals process.

GIVING EFFECT TO THE ORPS

71. The ORPS became partially operative in January 2019. Whilst some components are yet to be made operative it is submitted that none of those elements are directly relevant to consideration of PC13.[47]

72. ORPS Chapter 4: Communities in Otago are resilient, safe and healthy is fully operative and therefore must be given effect to by PC13. It is submitted that the Objective and Policy suite at 4.5 (amongst others) of the ORPS should be given significant weight in this decision. It represents the particularisation of the NPS within Otago.

[47] The outstanding matters relate to ports, and mining and indigenous biodiversity offsetting. See explanation at page 3 of ORPS. It is important to note that this explanation does not form part of the ORPS. For further clarification see https://www.orc.govt.nz/plans-policies-reports/regional-plans-and-polices/regional-policy-statement/regional-policy-statement-review

73. As identified at 4.5 unanticipated growth places pressure on adjoining productive land and risks losing connectivity with adjoining urban areas. These are issues that are clearly engaged by PC13. In this sense the proposed development does not have regard for the local environment within which it is to take place.

74. Policy 4.5.1 requires urban growth and development to occur in a strategic and co-ordinated way.

    1. Evidence filed on behalf of CODC and Mr Mead for the Motorsport Interests demonstrates how PC13 is not consistent with the Master Plan (now Spatial Plan) for Cromwell and is not necessary to ensure that there is sufficient housing land development capacity available.[48]

    2. Evidence filed on behalf of Horticultural Interests indicates that the proposed site contains significant soils. Enabling high density residential development on the site will prevent those soils from being available for use and will have effects on the surrounding sites that are already sustaining food production.[49]

    3. The evidence of Mr Staples, Ms Spillane and Mr Erskine demonstrates that there are potentially significant adverse reverse sensitivity effects that will arise from the development of the PC13 site and it is submitted that those effects cannot be adequately mitigated.[50]

75. I also note Policy 5.3.1 that requires provisions for other activities that have a functional need to locate in rural areas. As will have been apparent from the Environment Court's decision on the Motorsport Park, the Court was clearly of the view that the Rural zone was the most appropriate location for an activity such as the Motorsport Park. Policy 5.3.1 also seeks to restrict the establishment of incompatible activities within rural areas where they are likely to lead to reverse sensitivity effects.

[48] Refer ORPS Policy 4.5.1 (a) and (c)
[49] Refer ORPS Policy 4.5.1 (f)(i)
[50] Refer ORPS Policy 4.5.1 (h)

76. PC13 is clearly at odds with the ORPS in these respects.

RELEVANT OBJECTIVES UNDER ODP

77. I think it is important to draw your attention to Section 32(3). There appears to be a suggestion in the evidence presented on behalf of RTDL that because River Terraces is its own zone, the wider objectives within the ODP are of limited relevance. I urge caution in relation to that.

78. It is my submission that the existing Objectives for the Rural and Urban areas under the ODP continue to be applicable. Those objectives set the expectations for use of land in the District. The Rural zone provisions provide insight into the management of incompatible activities and the policies indicate how this is intended to occur. With respect to the urban provisions they too provide insight for you on what is expected from these environments within Central Otago. As such they provide a useful yardstick against which PC13 should be measured.

RESPONSE TO RTDL SUBMISSIONS

A 'housing crisis'

79. Opening submissions on behalf of RTDL made repeated references to a 'housing crisis'. The basis of this appears to be the apparently 'unchallenged evidence' of Mr Meehan which makes 'crystal clear' the urgency and seriousness of the so called crisis. In my submission Mr Meehan's evidence in this regard needs to be weighed with some considerable caution.

    1. He is clearly not an independent expert and as such his opinions should be viewed with care, if not set aside entirely.

    2. The claim of a housing crisis is backed by little empirical evidence and nor is there evidence that this development is the solution. No evidence has been presented that explains what is contributing to affordability issues other than the

general principle of demand and supply. I would suggest that the answer is never that simple.

80. I think it is important to make the point that providing 'affordable housing' is not given trump card status under the RMA. So even if you were to be convinced by the partisan evidence of Mr Meehan with respect to a housing crisis, it is only one factor that is to be weighed in your decision. Everything else still needs to be weighed and considered. Particularly those matters relating to the Council's functions associated with integrated management and the effects such as noise, reverse sensitivity and so on that will impact on the quality of the development that is being proposed.

Alternatives

81. I agree that there is no mandatory requirement for consideration of alternatives. However, as discussed with Mr Goldsmith during questions from the Commissioners the statutory analysis process inevitably calls for a level of comparison with other options that may achieve the relevant objectives. In my view this is not necessarily just about an alternative site for the same development, but other methods that may be available. In this case that includes consideration of other land capacity that provide supply and alternative uses that the land in question may be put to.

82. I also agree with the proposition put to Mr Goldsmith that this process assists in informing an assessment of the risks of acting or not acting as required under section 32(2)(c).

Residential development adjacent to orchards

83. Mr Goldsmith made much of the Top 10 subdivision adjacent to the Freeway Orchard. I was Counsel for the Applicant in that case. As always context is important. In that case, the Applicant sought and obtained affected party approval from Freeway Orchard (both the occupier and the owner). This was obtained following discussions regarding connectivity through Top 10 for future residential development of Freeway Orchard. A covenant was agreed between the parties which was essentially a quid pro quo.

Residents of Top 10 are unable to complain about spray drift nor the development of Freeway for residential activity. The covenant included a sunset clause of 15 years. Top 10 also provided Freeway with road connectivity due to the restrictions that Freeway would face in gaining access to the SH8 directly. It is a classic example of the sort of 'commercial arrangement' that is often achieved between landowners. It was considered to be an acceptable use of a no-complaints covenant due to the fact that the 'incompatibility' would not endure long term.

Soils

84. In my view the question of significant soils is important and cannot be dispatched with as Mr Goldsmith might suggest. The objectives in the ORPS and ODP demonstrate that it is also about the effect that incompatible activities will have on activities that are producing food[51]. The provisions of the ORPS are clear in this regard and reinforce the same themes present in the ODP. Such as recognising the effects of rural activities on other sensitive activities and managing the effects of urban expansion[52].

85. I expect that Mr Logan and Horticulture NZ will address you on these matters in greater detail.

Reverse Sensitivity

86. Mr Goldsmith would have you believe that reverse sensitivity covenants are the complete solution to reverse sensitivity effects. As I have set out earlier in these submissions that is simply not the case and any submission to that effect ignores the raft of case law that states the exact opposite. Mr Goldsmith's submissions have some obvious weaknesses in this regard:

    1. He claims there is no evidence that restrictive covenants do not fully and completely protect existing activities. That submission ignores:

[51] See ORPS Policy 4.5.1(f)(i)(ii) and (h), Objective 5.3 and Policy 5.3.1
[52] See by way of example ODP Objective 6.3.3, Policy 4.4.9 and Policy 6.4.1.

i. The evidence from Mr Staples which discusses examples such as Ports of Auckland;

ii. Evidence of Josie Spillane which sets out the difficulties that Highland's had in operating under their existing consent.

2. Mr Goldsmith claims that the proposed covenants simply allow the existing activities to 'do nothing'. This is either naïve or deliberately obtuse. As the Courts have often discussed reverse sensitivity arises via a number of avenues through, valid, validated and invalid complaints. The covenant only relates to 'lawful activities' and as I have already set out, noise is inherently difficult for lay people to discern. Particularly as they become increasingly sensitised to the noise source. There is also the time cost associated with the noise generating activity and/or Council responding to such complaints to either validate or invalidate them. Finally Ms Spillane sets out how important Highland's social licence to operate is – it will simply not be a viable option for it to ignore complaints that come in, nor will enforcement of the covenant be desirable except in the most extreme of circumstances.

3. Highlands and Speedway will be constrained to a greater degree by the development of the RTDL Land because they do not have same degree of flexibility in the future evolution as infrastructure developments relied on by Mr Goldsmith. Ms Spillane explains in her evidence how important it is for Highlands to have scope to evolve its activities in order to remain relevant in the Tourism sector. Whilst a good chunk of this can be done within the terms of the consent, there will inevitably be things that are not. Having 900 sensitised residential landowners next door will inevitably make any such evolution hugely fraught or impossible even if the changes are within the 'noise bucket' referred to by Mr Goldsmith. RTDL are not offering a covenant that

addresses this issue. The effect of this is to freeze Highland's operations in time.

Reliance on example of no-complaints covenant elsewhere

87. During submissions from Counsel for RTDL you were referred to fairly extensive list of examples where no-complaints covenants have been deployed. It is submitted that there are some quite significant distinctions between this case and those cases:

    i. In most of those circumstances the noise levels that residents are being exposed to are less than what exists in the current case. Mr Staples will be able to discuss that particular issue with you further.

    ii. Further to that, all of the examples referred to in Mr Goldsmiths attachment relate to large and significant infrastructure. It is submitted that those facilities are in a different category to Highlands, Speedway and the Horticulture activities.

88. Attached to these submissions is a table which outlines the other planning frameworks that apply to those facilities. They all enjoy the benefit of their own zone, overlay or designation. That significantly alters the potential for their activities to be constrained because objectives, policies and rules are in place that support their operation.

89. Highlands and Speedway are in a starkly different position. They are both currently in the rural zone and their activities all require consent of some form. They do not benefit from the designation regime or recognition as national or regionally significant infrastructure. Therefore the 'tolerance' for them to cause effects is much reduced.

Criticism of the section 42A report

90. I am quite sure that Mr Whitney will be able to respond to the many matters raised by Mr Goldsmith. However, there is one point that I

wish to address from paragraph 102. In that paragraph Mr Goldsmith suggested that it was improper of for the section 42A report to consider effects on the Cromwell Aerodrome. In my submission that is wrong. The section 42A report needs to assess all relevant matters. Whether they have been raised in a submission or not. The Aerodrome is a physical resource that forms part of the existing environment within which PC13 will establish and it clearly serves to support the other activities (such as horticulture) that are impacted by the proposed development.

CONCLUSION

91. In summary Highland's and Speedway consider that PC13 is simply incompatible with the nature of the existing environment around the site. The noise levels that residents will be exposed to are significant and they will have significant effects on the residential amenity of residents and ultimately on their health and wellbeing. Little consideration has been given to the cumulative nature of these effects by RTDL and the extent that they will coincide with the weather conditions and times of year that residents will want to enjoy their homes. Highland's and Speedway are essentially spring, summer and autumn operations. This also coincides with the horticulture's most intensive activities. The reality is that residents will be exposed to high noise levels at just about any time of the day.

92. You also have evidence of how Highland's day to day activities will affect residents. Whilst these noise levels are lower the Acoustic witnesses agree that this noise is subjectively annoying. That expert view was supported by Mr McKay yesterday.

93. It is my submission that the cumulative effects of the Motorsport and Horticulture are such that PC13 should be refused.

94. The magnitude of these effects and scale of the proposed development are so incompatible that a no-complaints covenant is an inadequate response in this case. This obvious incompatibility is demonstrated when you consider this scenario in reverse. If you

imagine that River Terraces was established and Highlands proposed to move in next door. It is preposterous, and in my view this case is as simple as that.

Dated this 12 day of June 2019

B Irving

Legal Counsel for Highlands Motorsport Park Ltd and Central Speedway Club Cromwell Inc