BEFORE COMMISSIONERS ON BEHALF OF THE CENTRAL OTAGO DISTRICT COUNCIL

IN THE MATTER	of an Proposed Private Plan Change 14 to the Central Otago District Plan
BY	**NEW ZEALAND CHERRY CORP (LEYSER) LP LIMITED**
	Proponent

SUBMISSIONS OF COUNSEL ON BEHALF OF ROCKBURN WINES LIMITED

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INTRODUCTION

1. Rockburn Wines Limited (**Rockburn**) own and operate a winery at 156 Ripponvale Road, Cromwell, legal description Lot 1 DP 362547. The Rockburn site is contiguous to the proposed PC14 site.

2. Rockburn is principally concerned to ensure that PC14 does not give rise to reverse sensitivity effects as a result of introducing residential activity into an otherwise rural environment, there is inherent incompatibility between residential development and rural activities, particularly an adjoining winery which is required to operate at all hours of the night during vintage.

3. While PC14 introduces acoustic insulation requirements and a setback along the boundary of Ripponvale Road. These measures do not provide comfort against complaints and potential restrictions being introduced over time. Rockburn's Ripponvale site was established in 2015 as a result of growth and demand. The investment was made on the basis that it was a rural area, compatible with noisy activities associated with viticulture.

4. PC14 now brings residential amenity expectations to their doorstep. As currently designed, PC14 fails to protect Rockburn from reverse sensitivity effects.

Relief Sought

5. Rockburn seeks additional setbacks along the boundary of Ripponvale Road. The relief sought is consistent with what was identified within the original submission which is to remove any new housing development north and west of the Ripponvale Road corner within the areas shown as RLA4 and RLA2[1] and to replace with Horticulture (H) notation.

[1] Updated to RLA2, RLA3 and RLA4 on updated Structure Plan dated 25 May 2020.

6. The basis for Rockburn's relief has been identified within in the Acoustic Report itself:[2]

> *"The most effective means of avoiding reverse sensitivity effects is to ensure that there is adequate separation between the source of the noise and the receiving location such that the resulting noise does not give rise to adverse effects such as annoyance and sleep disturbance."*
>
> [Emphasis added]

7. The setback and acoustic insulation requirements do not form a complete mechanism to prevent reverse sensitivity effects on existing activities. It is no comfort to say that just because residences comply with World Health Organisation standards that reverse sensitivity effects have been addressed. Conversely, it has the potential to instil a sense of entitlement that residents should be immune from adverse effects.

8. For PC14 to resolve reverse sensitivity effects, greater separation between existing and new residential dwellings is required. This is the only measure that can provide certainty that reverse sensitivity effects will not arise.

REVERSE SENSITIVITY

Noise Provisions

9. Rockburn's activities are controlled by the noise emission rule 4.7.6E(a) which imposes noise restrictions at the 'notional boundary' of any dwelling: [3]

On any day 7:00am to 10:00pm	*55 dBA L_{10}*
10:00pm to 7:00am the following day	*40 dBA L_{10}*
	70 dBA L_{max}

10. Rockburn's activities do not fit within the exemption provided within 4.7.6E(a)(2):

[2] Tonkin & Taylor, entitled, PC14 Noise Assessment dated April 2020 at 5.2.
[3] Central Otago District Plan, Rule 4.7.6E(a)

Provided that the above noise limits shall not apply to: …

2. devices used to protect crops from birds or frost (see (b)-(c) below

11. During vintage, when trucks and heavy machinery are operating 24/7, Rockburn must comply with the 40dBA L_{10} requirement at all notional boundaries of residential dwellings, regardless of whether they existed at the time the activity was establishment or not.

12. Notional boundary is defined as:[4]

> *"Notional boundary" is defined as a line 20 metres from part of any living accommodation or the legal boundary where this is closer to the living accommodation."*

13. PC14 introduces additional notional boundaries, and therefore additional compliance points. Given the drafting of Rule 4.7.6E, PC14 does not alleviate Rockburn's compliance obligations. The Applicant has not provided an assessment of whether Rockburn will comply with this standard when new dwellings are introduced, nor how many additional compliance points there will be.

14. Currently, the closest dwelling is 150 metres from the Rockburn's operational facility. PC14 introduces approximately 20-30 additional dwellings to the immediate vicinity of the operation (with Reference to Indicative Master Plan)[5].

15. We note that at paragraph 67 of Mr Humpheson's Evidence he states that assessment of Rockburn's activities has been undertaken as part of his assessment of orchards and viticulture activities.[6] We can find no reference to the effect assessment of Rockburn's activities during vintage, nor its applicability to PC14. We are concerned that the Applicant relies on their representation at section 3.3 that all other sources of noise (other than frost fans, helicopter movements, bird scaring devices and spraying) are either localised within the orchards or at such a low level that noise

[4] Ibid
[5] Rough and Milne, Indicative Master Concept Plan dated 25 May 2020.
[6] Evidence of Mr Humpheson, dated 13 May at [67]

experienced off site would be negligible.[7] In our submission, the Commission simply does not have the information available to assess the level of risk in relation to Rockburn's activities.

16. Additionally, even if there is compliance with these standards, we agree with Mr Whitney's findings within the 42A report that compliance with Rule 4.7.6E does not provide a fair indicator of the acceptability of noise.[8] Mr Whitney applies this in the context of frost fans and bird scarers, but we submit it that applies to all measures of noise under Rule 4.7.6E. The creation of additional notional boundaries and compliance points is a clear indicator that the activities are incompatible.

What is reverse sensitivity?

17. Reverse sensitivity is generally understood to refer to how sensitive activities constrain other activities within the vicinity. The Tonkin and Taylor Report identify this as 'legal vulnerability' of an established activity to complain from a new land use.[9]

18. This is a somewhat overly simplistic view of 'reverse sensitivity' and how it has been applied by the Courts. In my submission, it is the 'potential' for reverse sensitivity to arise that must be assessed.

19. As set out by the Court in *Independent News Auckland Limited v. Manukau City Council.*[10]

> *"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.*

[7] Tonkin & Taylor, entitled, PC14 Noise Assessment dated April 2020 at 5.2.
[8] 42A report, at pages 39 and 40.
[9] Tonkin & Taylor, entitled, PC14 Noise Assessment dated April 2020 at section 5.1 applying NZ Journal of Environmental Law (1999) Volume 3, Pardy, B. and Kerr, J. Reverse sensitivity – the common law giveth, and the RMA taketh away.
[10] Decision No. A103/2003

> *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."*
>
> [Emphasis added]

20. In that case the Court considered reverse sensitivity effects, firstly in relation to the impact of the noise (aircraft noise in that case) on residents, and then considering the likely cumulative responses to it.[11] The Court's consideration extended to both justified and unjustified complaints. It avoids the issue to say that unjustified complaints do not form part of reverse sensitivity effects. The risk lies in the creation of a population of residents who have the ability to file complaints with Council and an expectation of amenity.

21. We submit that *Independent News* provides a fair warning that if incompatible activities are forced to exist, then complaints will arise. PC14 creates the perfect breeding ground for such complaints. To assess reverse sensitivity you must assess the activities prospectively, and consider whether the relationships between the activities are likely to result in tensions in the future.

22. Guidance can also be taken from the Otago Regional Policy Statement which defines reverse sensitivity as:

> *"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."*
>
> *[Emphasis added]*

23. Again, the focus of the Otago Regional Policy Statement is on the 'potential' for reverse sensitivity effects to arise.

[11] Ibid at [66]

24. Case law has identified that reverse sensitivity is a relevant effect when assessing the appropriateness of a site for rezoning.[12] Very early cases under the Resource Management Act identified the relevance of reverse sensitivity effects. For example *McQueen v. Waikato District Council*[13] 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".*

25. In the *McQueen Case* the Tribunal considers reverse sensitivity and compatibility with horticultural uses, which concluded:

> *"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."*[14]

26. Addressing reverse sensitivity effects also goes to the exercise of District Council functions under section 31.[15] In *Auckland RC v. Auckland CC*[16] the Court did not accept submissions that people are best to judge their own needs. The Court stated:

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[12] *Auckland Regional Council v. Auckland City Council* (1997) NZRMA 205
[13] EnvC Decision A45/94 at Page 9 final paragraph
[14] Ibid at page 14 paragraph 1 - 2.
[15] *CJ McMillan Ltd v. Waimakariri DC* EnvC C087/98 at [6].
[16] NZRMA 205 (EnvC) at page 12 – 13 paragraph 2.

> *"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".*

27. The Court in *Ngatarawa Development Trust Limited v. Hastings District Council* [17] discusses residential activity (in particular, notional boundaries) as a type of activity that has the potential to generate reverse sensitivity effects. The Court found:[18]

> *"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"*
>
> *[Emphasis added]*

28. In *Ngatarawa*, the Court was concerned with 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. We also note that the proliferation of notional boundaries was also important aspect of this consideration.

[17] EnvC Decision W017/08
[18] Ibit at [27]

29. *Ngatarawa* also touches on reverse sensitivity in relation to the efficacy of reverse sensitivity covenant. 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 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".*[19]

30. While the efficacy of covenants are not a fundamental part of the PC14 proposal, it does highlight that even though residents may be on fair notice of existing activities, it does not mean those adverse effects have been addressed. If, as in the case of *Ngatarawa*, a no-complaints covenant does not reduce or ameliorate actual adverse environmental effects (and as such their genuine efficacy is tenuous) then simply relying on awareness of existing agricultural activity will provide even less protection.

31. We submit that these themes as applied in *Ngatarawa* are similarly applicable to PC14 and its relationship to existing agriculture and viticulture uses.

Expectations of Amenity

32. PC14 assumes that provided residents are aware of existing activities that residents will be satisfied with the proposed level of amenity.

33. In some environments acoustic insulation may be a satisfactory solution (i.e beside an airport or within a vibrant town centre when expectations of compromised amenity are expected), however we

[19] 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.

submit it is not appropriate in a development that for all intents and purposes creates an expectation of residential amenity.

34. Mr Whitney outlines the categorisation of various rural-residential developments within the Cromwell Basin.[20] We agree with his assessment that the character of PC14 will be of Large Lot residential nature, not rural residential, nor consistent with existing residential development in proximity to the application site.

35. We largely agree with the statements made within the Tonkin and Taylor Report:[21]

> *"The perception of unreasonable noise in the context of horticultural activities and the effects on residents living in the area is likely to vary based on their expectation of the noise levels in the area. For example, residents who have connections to horticulture or viticulture may be less sensitive to noise in a rural environment compared to 'new' residents who may be sensitive to certain activities, such as the use of frost fans….*
>
> *When considering unreasonable noise, a judgement has to be made whether the noise in question is of a level and character which is to be expected in the local area and whether at an overall level of activity/occurrence likely to result in annoyance to the 'average' person."*

36. PC14 will introduce residential scale living, into an environment compromised by noise. This will result in the expectations and perceptions about what are 'reasonable' shifting. We risk moving the goalposts on existing activities. This issue 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"*[22]

[20] 42A Report at page 8.
[21] Tonkin & Taylor, entitled, PC14 Noise Assessment dated April 2020 at section 5, page 17
[22] *Colonial Vineyard* [2014] NZEvnvC 55 at [148].

37. This phenomenon essentially places a sinking lid on noise generating activities if lands 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

(a) 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:[23]

> *"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 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."*

(b) 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

[23] *Hawke's Bay Regional Council v Te Mata Mushroom Company Ltd* [2018] NZDC 16898 at [7]-[12]

> 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.[24]

38. *Waimakariri* is a stark reminder that notional boundary rules need to be treated with caution as compliance remains a dynamic exercise. The closer residential dwellings are located, the tighter the restrictions on existing activity. As noted previously, Rule 4.7.6E(a) relies on notional boundaries. It cannot be presumed that simply because an activity exists today, that future residents will accept their continuance.

Unreasonable Noise

39. 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 is inevitably influenced by the nature of the environment that is being affected by the noise.[25]

SUMMARY

40. Without a detailed assessment of Rockburn's activities, we submit that the panel do not have sufficient information available to determine the potential for reverse sensitivity effects on Rockburn's activities.

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

[25] *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.

41. Fundamentally, we see the introduction of Large Lot Residential development within the immediate environment of noisy rural activities to be inappropriate while this risk exists. The introduction of additional residents only places risk that those activities will eventually be confined and curtailed.

42. Rockburn maintains that adequate separation is the only mechanism that can conclusively address reverse sensitivity effects.

Dated this 27 day of May 2020

D McLachlan

Legal Counsel for Rockburn Wines Limited