BEFORE HEARING COMMISSIONERS AT HAMILTON CITY COUNCIL

IN THE MATTER OF the Resource Management Act 1991 ("RMA")

AND

IN THE MATTER OF a private plan change request by Waikato Racing Club Incorporated to the Hamilton District Plan ("PC13")

LEGAL SUBMISSIONS ON BEHALF OF CHARTWELL INVESTMENTS LIMITED

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INTRODUCTION AND BACKGROUND

1. These submissions are made on behalf of Chartwell Investments Limited ("Chartwell") in respect of the private plan request by Waikato Racing Club Incorporated (the "Applicant") to the Hamilton District Plan ("PC13"). PC13 seeks to rezone an area of 6.5ha of the Te Rapa Racecourse from Major Facilities to Medium Density Residential Zone and a small area to Industrial.

2. Chartwell made a submission opposing PC13.[1] It raised significant concerns regarding the real prospect for reverse sensitivity effects in respect of Chartwell's property at 11 Ken Browne Drive (the "Chartwell Site") which shares its northern boundary with the PC13 site.

3. Chartwell's submission seeks that PC13 be declined unless the PC13 provisions are amended to adequately address reverse sensitivity effects on the current and future activities on the Chartwell Site by the proposed new medium density residential development. Chartwell and (other submitters) has through its planning witness, Mr Houlbrooke, engaged in constructive discussions with the Applicant's planner, Mr Olliver. As a result, changes to some of the PC13 provisions have been proffered by the Applicant. Those changes are welcomed but do highlight the deficiencies with PC13 as notified in addressing reverse sensitivity effects. The agreed changes, however, do not fully address Chartwell's concerns regarding conflicting land uses and the inevitable serious consequential reverse sensitivity effects that will still arise. Chartwell's unresolved issues are clearly set out in Mr Houlbrooke's evidence.

4. PC13 enables approximately **200** (but ultimately uncapped) residential dwellings in close proximity to existing industrial activities.[2] It is submitted that PC13 represents the antithesis of sound resource management practice despite the belated and, frankly, 'hodgepodge' of amended planning provisions now proposed by the Applicants to be spread across various parts of the Hamilton District Plan.

[1] Submission #6.
[2] See Balachandran EIC at 14.

SCOPE OF SUBMISSIONS

5. These submissions:

   (a) Introduce the evidence on behalf of Chartwell;

   (b) Briefly set out the background to Chartwell;

   (c) Address the existing environment;

   (d) Outline Chartwell's key concerns with PC13;

   (e) Summarise the overarching legal context/requirements;

   (f) Address the statutory and planning context for PC13;

   (g) Discuss the issue of reverse sensitivity and measures to address reverse sensitivity effects; and

   (h) Set out my principal submission.

CHARTWELL EVIDENCE

6. Chartwell will call the following evidence:

   (a) **Mr David Heald:** Mr Heald is a director of Chartwell and will provide background to Chartwell and the Chartwell Site, and outline the reasons for Chartwell's opposition to PC13.

   (b) **Mr Alex Jacob:** Mr Jacob is an Engineering Director at Earcon Acoustics who has assessed the acoustic considerations of PC13 and the remaining issues with PC13 in protecting the existing industrial activities from reverse sensitivity effects.

   (c) **Mr Michael Hall:** Transportation Engineering Manager with CKL, addresses the transportation effects arising from PC13. He makes a number of recommendations aimed at improving the efficiency of the local roading network.

   (d) **Mr Bevan Houlbrooke:** Director and Planner with CKL, identifies the various shortcomings with PC13 as notified, outlines the agreed changes to the PC13 provisions, and sets out the remaining unresolved issues.

7. All three experts are critical of the PC13 provisions and Messrs Jacob and Houlbrooke in particular identify serious shortcomings.

8. The expert evidence of Messrs Jacob, Hall, and Houlbrooke is presented jointly on behalf of Chartwell and fellow submitters Takanini Rentors Limited[3] and Ecostream Irrigation Limited.[4] Although the submitters have adopted a joint approach to expert evidence, each submitter will present its own 'company' evidence and Mr Lang will present legal submissions on behalf of Takanini Rentors and Ecostream Irrigation. The expert evidence for Chartwell (and others) has been pre-circulated.

BACKGROUND TO CHARTWELL

9. Chartwell is part of the Chartwell Group founded in Hamilton in the early 1970's. The Chartwell Group includes the Chartwell Trust – a private charity which owns the Chartwell Collection and supports the visual arts in New Zealand, together with other environmental and educational initiatives through the Chartwell Project. The Chartwell Collection is a collection of contemporary art from New Zealand and Australia that has been held on long-term loan at the Auckland Art Gallery, Toi o Tamaki, since 1997. The Chartwell Trust is a significant philanthropic contributor to New Zealand's visual arts sector.

10. Chartwell is an active investor with a portfolio of commercial property in the Waikato Region and elsewhere. Related entities within the Chartwell Group are active developers within the Waikato Region, and Mr Heald details those activities in his statement of evidence. For the avoidance of doubt, while related entities in the Chartwell Group undertake property development, Chartwell is not a trade competitor and could not gain an advantage in trade competition through its submission. In any event, Chartwell is directly affected by an effect of PC13 that affect the environment and does not relate to trade competition or the effects of trade competition. There is rightly no suggestion that Chartwell's submission does not comply with clause 6 of the First Schedule to the RMA.[5]

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[3] Submission #7.
[4] Submission #8.
[5] Or that it is acting as a surrogate even though ss308E and F do not apply

EXISTING ENVIRONMENT

11. Mr Houlbrooke has described the Chartwell Site,[6] as does Mr Heald. Briefly, the Chartwell Site is zoned Industrial in the Hamilton District Plan. It is a relatively large flat site of over 6,500m^2 in area. The Chartwell Site is currently leased to Tuatahi First Fibre Limited and Fire Security Service. It contains a large office building and large associated carparking areas. The Chartwell Site is a scarce and finite physical resource. These characteristics mean the Chartwell Site represents a significant development opportunity.

12. The Environment Court in *Contact Energy v Waikato Regional Council* stated its understanding of the term "environment" as follows:[7]

> *We hold that consideration is to be given to the effects on the environment as it actually exists now…*

13. The existing environment concept was extended by the Court of Appeal decision *Hawthorn*, which held:[8]

> *In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activit[ies] under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. […] We think the legitimate considerations should be limited to those that we have just expressed.*

14. To understand the future state of the environment, reference to the District Plan is required. Rule 9.3 – Activity Status Table sets out a wide variety of activities that are permitted within the Industrial Zone, including but not limited to Industrial Activity (which is defined to include <u>all</u> types of processing, manufacturing, service and repair activities) and light industrial activity. The Panel's evaluation of the existing environment is therefore not limited to the existing activities undertaken on the adjacent industrial sites but extends to the activities that may be established and operate in the future, including

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6 Houlbrooke EIC at paras 9-10.
7 *Contact Energy v Waikato Regional Council* (2000) 1 ELRNZ 1 (EnvC) at paragraph 38.
8 *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424, paragraph 84.

permitted bulk and location rules. That is particularly important when considering reverse sensitivity effects.

15. Mr Jacob addresses the permissive noise controls in the Industrial Zone and Mr Houlbrooke elaborates on the activities that are permitted.

CHARTWELL'S CONCERNS WITH PC13

16. Chartwell's submission focussed principally on:

    (a) Reverse sensitivity effects that will occur by permitting 200 residential units adjacent to an Industrial Zone.

    (b) Inadequacies with the PC13 request, the proposed provisions, and s32 analysis.

    (c) Traffic and carparking.

17. Underlying Chartwell's concerns is the fact that the Chartwell Site is a scarce physical resource, which needs to be sustainably managed. This is recognised by the District Plan. The Purpose of the Industrial Zone at 9.1(a) notes that the "*industrial land base in the City is a key economic driver for the regional economy. Industrial land in the City represents* ***a finite and valuable resource that needs to be recognised and <u>protected</u>***."[9]

18. "Protect" is very directive and has been judicially defined to mean to keep safe from harm, injury, or damage and requires using such means as are adequate to achieve protection, including "a palette of measures" identified in the preparation of the district plan.[10] PC13 currently does not sufficiently 'protect' the adjacent industrial land, including the Chartwell Site.

19. In addition to the imposition of all of the agreed amended set of provisions outlined by Mr Houlbrooke[11], Chartwell seeks the following amendment to:

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9 My emphasis.

10 *Royal Forest and Bird Protection Soc of NZ Inc v New Plymouth District Council* [2015] NZEnvC 219.

11 Houlbrooke EIC at 19-29

- Rule 4.5.4 to provide for a non-complying activity status for noise sensitive activities in the setback (which on further consideration Mr Olliver agrees should apply).[12]
- Rule 4.8.2g.e to provide for a 60m setback.
- Rule 4.8.2g.f and Assessment Criteria 1.3.1P to provide for no-complaints covenants.
- Rule 4.8.12f to require an acoustically suitable solid fence that is at least 4m above the ground level of the adjoining industrial site.
- Rule 25.8.3.7 (e) to include a noise level of 65dB LAeq (15min) which Mr Bell-Booth now acknowledges is appropriate.[13]

20. Messrs Jacob and Hall also identify additional changes to the PC13 provisions.

OVERARCHING LEGAL CONTEXT / REQUIREMENTS

21. Distilling the key matters, the Panel must be satisfied that PC13:

    (a) is in accordance with:[14]

        (i) the Council's functions set out in s31 of the RMA;

        (ii) the purpose and principles in Part 2 of the RMA; and

        (iii) the Council's obligations under s32 of the RMA.[15]

    (b) gives effect to:[16]

        (a) all relevant national policy statements, namely the NPS on Urban Development ("NPS-UD);

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12 Olliver Rebuttal at 30
13 Bell-Booth Rebuttal at 5
14 S74(1).
15 S32 of the RMA requires an evaluation of the extent to which the proposed PC13 objectives are the most "most appropriate" way to achieve the purpose of the RMA, and whether the PC13 provisions are the "most appropriate" way to achieve the objectives (see in particular s32(1)-(2)).
16 S75(3).

(b) the National Planning Standards (to the extent required); and

(c) the Waikato Regional Policy Statement ("RPS").

(c) is not inconsistent with any Waikato Regional Plan with respect to the functions of regional councils.[17]

22. The approach to the assessment of proposed plan provisions has been laid out in a series of courts decisions, notably *Long Bay,*[18] followed by *Colonial Vineyards*.[19] I set out at **Annexure A** the accepted summary from *Colonial Vineyards.*

23. These submissions focus on the principal matters relevant to PC13 that the Panel will need to satisfy itself with – including s32, whether PC13 gives effect to the RPS, and the effects of PC13 that have been raised in the Chartwell submission.

Scope of PC13

24. It is submitted that PC13 as notified was deficient in respect of responding to the issue of reverse sensitivity. The post-notification changes to the provisions represent a belated effort by the Applicant and its team to rectify that situation, however it should not have been left to the submitters to raise and engage on these important issues.

25. Mr Houlbrooke in particular has engaged constructively to remedy the PC13 deficiencies. Some of the provision changes advanced by the Applicant and Mr Olliver in that process have been rather novel, in particular changes to provisions in the Industrial Zone rules (for example building setbacks in the Industrial Zone under Rule 9.4.1 and height in relation to boundary in the Industrial Zone). Mr Houlbrooke has agreed to those changes and Chartwell accepts that position (without prejudice to its over-arching submission that PC13 should be declined).

REVERSE SENSITIVITY

What is reverse sensitivity?

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17 S75(4). S75 cross-refers to the functions of regional councils in s30(1) of the RMA.

18 *Long Bay-Okura Great Park Soc Inc v North Shore City Council* EnvC A078/08.

19 *Colonial Vineyards Ltd v Marlborough District Council* [2014] NZEnvC 55 (see in particular paragraph 17). See also the recent decision of *Middle Hill Limited v Auckland Council* [2022]. NZEnvC 162 at [27]-[31]

26. The High Court in *Tasti Products Ltd v Auckland Council*[20] adopted the description of reverse sensitivity as described by the Environment Court in *AFFCO New Zealand Ltd v Napier City Council* NZ[21] as follows:

> *"the legal vulnerability of an established activity to complaint from a new land use. It arises when an established land use is causing adverse environmental impact on nearby land, and the new, benign activity is proposed for the land. The sensitivity is this: if the new use is permitted the established use may be required to restrict its operation or mitigate its effects so as not to adversely affect the new activity."*

27. In *Auckland Regional Council v Auckland City Council*[22](which was applied in *Strata Title Admin Body Corporate 176156 v Auckland Council)*[23] the Court described reserve sensitivity effects as:

> *"…the effects of the existence of sensitive activities on other activities in the vicinity, particularly by leading to restraints on the carrying-on of those other activities."*

28. In *Alpha Dairy NZ Ltd v Auckland Council*[24] the High Court noted that reverse sensitivity refers to "*the effects of the existence of* ***sensitive*** *activities on other activities in their vicinity, particularly by leading to restraints in the carrying on of those other activities.*"

29. Reverse sensitivity is also usefully defined in the RPS as

> *"the vulnerability of a lawfully established activity to a new activity or land use. It arises when a lawfully established activity causes potential, actual or perceived adverse environmental effects on the new activity, to a point where the new activity may seek to restrict the operation or require mitigation of the effects of the established activity".*

30. There is alignment with all of the above definitions. Fundamentally, reverse sensitivity effects arise through poor planning practice by allowing for the conflict of land uses through inappropriate provision of new sensitive activities.

31. In *Strata Title Admin Body Corporate 176156 v Auckland Council*[25]the issue was whether the residential use of the proposed residential units would result in conflict with industrial

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20 [2016] NZHC 1673.
21 NZEnvC W82/2004, at [29].
22 [1997] NZRMA 205.
23 [2015] NZEnvC 125.
24 [2020] NZHC 1517.
25 [2015] NZEnvC 125.

or commercial activities lawfully existing or able to establish and operate in the Business 5 zone.

Reverse sensitivity effects arising from PC13

32. Given the development opportunity at the Chartwell Site, the fact that reverse sensitivity is not limited to the activities present on the site but extend to the future state of the environment is a matter the Panel will need to be particularly cognisant of. It is an issue which the Applicant's experts have not sufficiently assessed. For example, Mr Olliver[26] in acknowledging that the Takanini Rentors site (which is smaller than the Chartwell Site) has the potential to be developed comprehensively into larger scale industrial use noted "*but there is no reason to expect the effects to be significant as I expect any redevelopment would be in the form of a modern industrial activity built to latest standards*". The basis for that 'expectation' is not provided but does not appear grounded in any policy analysis and with respect misses the mark in terms of assessing the future environment. Mr Olliver's expectation also seems grounded in what the High Court in *Tasti Products* noted was a reverse sensitivity effect, namely activities being "*required to restrict its operation or mitigate its effects so as not to adversely affect the new activity".*

33. The Court in *Strata Title* noted that it was satisfied, based on the evidence, that the existing operations currently operate within the permitted activity rules of the Business 5 zone and expect to be able to continue to do so in the future.[27] It noted that the activities currently operated on the business zoned land did not necessarily indicate the kinds or scale of activity that would operate there in the future. Importantly the Court concluded that:[28]

> *"whilst compliance with the District Plan provisions would be required, the concern is that if the appeal is granted the residential units will form part of the legitimate existing environment and the effects on that environment can be taken into account in resource consent decision-making".*

34. The Court found that the:[29]

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26 Olliver EIC at 108.
27 Ibid, at 116.
28 Ibid, at 117.
29 Ibid at 118.

"presence of legally authorised residential activities would affect the way in which a consent authority would assess any future applications from local businesses for discretionary consent applications, and we are satisfied there is real potential for such applications to be made to allow future development of some businesses. This would impose possible restrictions on the businesses, and additional costs that they would not have anticipated at the time they established in the locality that could disadvantage them compared to competitors in other Business 5 zones not constrained by residential development in the same way".

35. The introduction of 200 noise sensitive dwellings adjacent to the Te Rapa industrial activities will result in exactly the same effects identified in *Strata Title*.

36. The Court did not place much weight on the fact that there had been no prior complaints made by the residents about the operation of neighbouring businesses.[30] The Court noted it:

"is true that the absence of complaints can mean that there has been no reason for the residents to complain, but it also might mean that the residents have been reticent to complain given that the residential use of the units is unlawful. We do not think this means that there is not the potential for complaints to arise in the future. In fact, we think this is a possible outcome. While there is very little, if any, likelihood of any such complaints being upheld if the operations continue to comply with the District Plan rules, responding to them will be a distraction for the businesses and could result in them incurring unnecessary costs".

37. In *Kombi Properties Limited v Auckland Council*[31] the Court dealt with an appeal involving an application to establish 17 two storey units to be used for a mix of industrial, residential and ancillary office activities on land zoned for light industrial use (self-evidently a considerably lesser number than the 200 dwellings anticipated under PC13). Consent was declined by the first instance decision-maker and at the heart of the appeal was a dispute as to the potential for reverse sensitivity effects to occur due to the introduction of residential activity into a zone intended (primarily) for light industrial activity.

38. The Court found that the presence of residential activities may constrain the establishment of new industrial activities elsewhere within the zone, and this could result in the imposition of constraining conditions if a consent for an industrial activity is required

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30 Ibid at 120.
31 [2021] NZEnC 62.

– which the Court noted were not likely to be justified *but for* the residential activities within the zone.

39. Importantly the Court noted that:[32]

> *"[r]egardless of the potential for constraints, the presence of residential activities… may also lead to complaints. Although a business within the LIZ cannot expect to be protected from all complaints, a consequence of having to respond to the same is that additional time and compliance costs are incurred".*

40. The Court concluded that complaints would be an impediment to the efficient functioning of industrial activities even if that does not result in the imposition of constraints on those activities. The Court further identified that these are additional costs that businesses would not have anticipated at the time they established and that the occurrence of complaints could disadvantage businesses compared to other businesses.

41. Mr Olliver's opinion[33] is that:

> *"the reverse sensitivity concerns are not borne out by the evidence of Mr Bell-Booth, who concludes that the current industries are operating well within current noise standards with minimal effects beyond their boundaries. In my opinion, any concerns need to be based on the facts of the site and nearby existing and likely land uses, because there would have to be some basis for neighbours to raise concerns. Anything else is somewhat speculative."*

42. Mr Olliver reaffirms this approach in his rebuttal statement.[34] With respect, Mr Olliver's opinion is entirely misplaced and contrary to the clear Environment Court authorities.

Reverse sensitivity summary

43. The relevance of reverse sensitivity appears to not be in contention, however it appears that the likelihood of such effects rising – and the level of such effects – is.

44. In my submission, the evidence demonstrates that the introduction of an anticipated (but ultimately uncapped) **200** residential dwellings in close proximity to an established

32 Ibid at 165.
33 Olliver at 105.
34 Olliver Rebuttal at 20

industrial zone will inevitably lead to serious reverse sensitivity effects associated with noise in particular but also possibly odour, particulate discharge and the like.

45. As Mr Houlbrooke explains, the policy and rule framework under the District Plan applying to the industrial activities will be the most immediate consequence for Chartwell and others, with additional consenting limits applying.[35] The policy and rules consequence of PC13 squarely falls on the industrial activities.

Unresolved issues

46. Without prejudice to Chartwell's principal relief of rejecting PC13, Messrs Houlbrooke, Jacob and Hall set out the resolved issues from Chartwell and the other submitters' perspectives. Mr Houlbrooke also comprehensively sets out the unresolved issues in his evidence at paragraphs 30-67. Given that comprehensive analysis, these submissions do not canvass all the unresolved issues in detail other than the following matters:

    (a) No-complaints covenants.

    (b) Activity status of noise sensitive activities in the setback.

    (c) Setback for noise sensitive activities.

No-complaints covenants

47. A principal matter outstanding is the provision of no-complaints covenants to be registered on records of title for new residential lots should PC13 be confirmed. The Applicant has through evidence of Messrs Bell-Booth and Olliver recommended against that as a way to avoid or mitigate reverse sensitivity effects. Mr Bell-Booth acknowledges that no-complaints covenants are an additional "layer" of regulation to address potential noise effects but he considers that from an acoustic perspective the rules framework is suitable, and that such covenants are not *"100% effective as people may still complain irrespective of the covenant"*, and finally that they are difficult to enforce.[36] Mr Jacob disagrees. Mr Jacob notes[37] that:

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35 See for example 9.1(g).
36 Bell-Booth EIC at 95.
37 Jacob EIC at 50.

(a) While covenants may not always be 100% effective, that does not necessarily mean they are ineffective;

(b) It is not reasonable to expect that most potential residents will have realistic expectations of racecourse or industrial noise and an unambiguous legal instrument, such as a no-complaints covenant, is required to more formally establish realistic expectations rather than assume them.

(c) WRCI, as the operator of the Te Rapa Racecourse, included an agreement/no-complaints covenant as part of the sale and purchase agreement of the Minogue Drive sites referenced in Hamilton City District Plan rule 25.8.3.9.(d).(ii).[38]

48. Mr Olliver addresses no-complaints covenants and opines that such covenants are not enforceable by the Council (which is axiomatic) such that they are difficult to administer, and that they are unnecessary.[39] Mr Olliver does not explain why the Applicant elected to use such a mechanism to its benefit/protection for residential dwellings at Minogue Drive and why the mechanism is appropriate for the Applicant and not its industrial neighbours.

49. Mr Houlbrooke notes that in his experience such covenants can be successfully exercised, that they do not require administration by Councils for them to be enforceable and effective and that the Applicant itself enjoys the benefit of such covenants.[40] Mr Houlbrooke provides suggested provision wording based on the Christchurch District Plan.

50. For Chartwell, the registration of no-complaints covenants is a useful, and common, tool in addressing reverse sensitivity issues. Chartwell acknowledges that they are not a panacea and that complaints may still eventuate in breach of the terms of the covenant. That is not a reason to reject their use. Councils do not administer such covenants so the criticism of administration by Messrs Olliver and Bell-Booth in that regard is irrelevant.

51. The Environment Court has found that the use of no-complaints covenants can further mitigate potential reverse sensitivity effects even where the distance between the

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[38] We note that while this is recorded in section 4.3 of the Marshall Day Acoustic Report, both Mr Bell-Booth and Mr Olliver omit that fact from their statements of evidence when addressing the reasons for not requiring a no-complaints covenant. That is unfortunate.

[39] Olliver EIC at page 41.

[40] Houlbrook EIC at 41.

conflicting land uses is considered to be sufficient to address reverse sensitivity.[41] Some Environment Court decisions have declined to uphold no-complaints covenants, including *Craddock Farms Ltd v Auckland Council*[42] and *Ngatarawa Development Trust Ltd v Hastings District Council*.[43] However the Court in *Kombi Properties* considered the earlier decisions of *Craddock* and *Ngatarawa* and found that both decisions were distinguishable on the facts and did not support the Council's opposition to a no-complaints covenant as a tool to manage reverse sensitivity effects, as a matter of general principle.[44]

52. The Court in *Kombi Properties* noted that an "*appropriately drafted covenant is a private means of reconciling conflicting public interests. They do not contravene the principles of the RMA and are enforceable, albeit in a civil jurisdiction and not by the relevant council.*"[45] The Court continued:[46]

> *"The court is not prepared to speculate that future residents would necessarily be accepting of a lower level of residential amenity experienced within the site. Without the condition proposed by Kombi in closing* [which limited the range of industrial activities able to be conducted within the multi-use units]*, which we find is not an appropriate condition, the reverse sensitivity effects within the site remain an extant issue".*

53. The use of no-complaints covenants is an appropriate method to assist to protect against reverse sensitivity effects. In particular, no-complaints covenants are useful for managing expectations for residents at the outset by putting them on notice of the potential for reduced levels of amenity. The Applicant's reasons for rejecting their use are simply specious. Mr Olliver's opinion in his Rebuttal Statement that the Te Rapa Medium Density Residential precinct does not contain more sensitive activities than the Major Facilities Zone is emblematic of that submission.[47] As in *Kombi*, without a no-complaints covenant, the issue of reverse sensitivity remains extant. Chartwell invites the Applicant to reconsider its opposition to the use of no-complaints covenants.

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41 See *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 and *New Zealand Aviation Museum Trust v Marlborough District Council* [2014] NZHC 3350 at [55].

42 [2016] NZEnvC 51.

43 W017/08.

44 *Craddoch* involved a poultry farm and *Ngatarawa Development Trust* a residential development in proximity to horticultural activities. In both instances consent was declined and a no-complaints covenant did not 'save' the applications.

45 At 101. See also *South Pacific Tyres NZ Ltd v Powerland (NZ) Ltd* [2009] NZRMA 58.

46 Ibid at 163.

47 Olliver Rebuttal at 22

Activity status of noise sensitive activities in the setback

54. Mr Olliver notes[48] that the Precinct Plan includes an indicative open space area which will act as a buffer to the adjacent industrial activities but will be zoned Medium Density Residential. It is not to be vested with Hamilton City. This is entirely unacceptable to Chartwell as it is inherently uncertain, especially if PC12 is confirmed and there is a consequential variation after PC13 is adopted (as Mr Olliver anticipates). Such a setback would not be a Qualifying Matter.

55. Chartwell's concerns are compounded by the proposed provisions set out in Attachment 1 to Mr Olliver's Rebuttal Statement. Under Rule 23.3e ix, a discretionary activity status would apply for any subdivision not in *general* accordance with the Precinct Plan, although under xvii a restricted discretionary status would apply to that exact same activity. Beyond the obvious drafting issues, Chartwell says the flexibility afforded by the requirement for subdivision to only be "*general* accordance" with the Precinct Plan as opposed to "in accordance" with the Precinct Plan is too permissive and that Rule 23.3e ix should be amended by removing the word "*general*" and Rule 23.3e xvii is deleted.

56. As Mr Houlbrooke opines[49] a non-complying activity status and associated policy framework is necessary for any noise sensitive activity located within the stipulated setback from the industrial zone boundary. This, he rightly noted, is necessary to give certainty to industrial neighbours, and to send a clear directive to plan users that the establishment of noise-sensitive activities within the setback is not anticipated. Chartwell is pleased that Mr Olliver in his Rebuttal Statement has agreed with Mr Houlbrooke's recommendation.

Setback for noise sensitive activities

57. The expert evidence of Messrs Jacob and Houlbrooke supports an increase in the proposed setback width from 30m to 60m. This is resisted by Mr Bell-Booth on the basis that "*it would sterilize a significant area of the proposed plan change area and have and adverse (sic) impact on the developable area within*".[50] There is no quantification this impact, and economic viability is not a matter Mr Bell-Booth is qualified to comment upon.

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48 Olliver EIC at 22.
49 Houlbrooke 31-38.
50 Bell-Booth at 88.

58. Mr Castles in his rebuttal statement addresses the provision of a 60m setback as sought by Chartwell and other submitters. He notes his "serious misgivings about the feasibility of developing the PC13 site if a 60m buffer/setback were to be required" and that it "wouldn't align with the vision that WRCI has for future development of the site". In response I note that:

- The _*additional*_ buffer/setback Chartwell seeks is 30m.

- WRCI's 'vision' is irrelevant to the issue of addressing a conflict of land use.

- Financial viability is also an irrelevant consideration. In the seminal High Court decision of Justice Grieg in *NZ Rail Ltd v Marlborough DC*[51] it was noted that:

  "*Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in section 5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in section 7(b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under section 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.*"

- Mr Castles has provided no economic analysis to support his financial viability 'misgivings'.

59. Mr Bell-Booth does acknowledge however is that "*an increase in setback would potentially reduce the level of noise received at the residential lots within the new zone*".[52]

60. Mr Houlbrooke notes a 60m setback is appropriate given this is the area identified as being affected by noise from industrial activities.[53] Mr Jacob addresses nighttime noise effects and the potential for sleep disturbance and makes a number of recommendations

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51 [1994] NZRMA at 88
52 Ibid.
53 Houlbrooke EIC 32.

in that regard, including increasing the setback to circa 60m or alternatively acoustic fencing in the order of 4m or more at the industrial zone boundary.[54]

61. In Mr Jacob's opinion, the Applicant's approach of a 30m setback together with a further 30m noise sensitive area has merit but *only* during daytime hours. He concludes that the measures are insufficient to provide for amenity of the residents and therefore address reverse sensitivity in proximity to night-time industrial operations.[55] He also concludes the proposed solid 1.8m fence will be ineffective and should be in the order of 4m and specified as acoustic fencing. Without incorporating his recommendations, he concludes PC13 "*does not appropriately protect dwellings and facilities from sensitivity and reverse sensitivity effects respectively*".[56]

62. Mr Houlbrooke supports both options and provides wording for the 60m setback.[57] Chartwell's preference is for a 60m setback.

63. For the avoidance of any doubt, without the resolution of the unresolved issues set out by Mr Houlbrooke, Chartwell's opposition to PC13 remains.

STATUTORY AND PLANNING CONTEXT

64. The RPS provides an overview of the resource management issues in the Waikato region, and the ways in which integrated management of the region's natural and physical resources will be achieved. As noted earlier, s75(3)(c) of the RMA requires a district plan to give effect to any regional policy statement, and when changing its plan, a territorial authority must have regard to any proposed regional policy statement,[58] which in the context of PC13 includes Proposed Change 1. The RPS provides strong direction as to how to approach the issues of recognising industrial activities, avoiding land use conflicts and reverse sensitivity. That direction includes:

    - Significant Resource Management Issue SRMR-I4 – Managing the Built Environment which provides that development of the built environment has the potential to positively or negatively impact the ability to sustainably manage natural and physical resources. Specific focus is directed at *inter alia:*

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54 Jacob EIC at 43.
55 Jacob EIC 25-28, 33-43.
56 Jacob EIC at 65.
57 Houlbrooke at 35.
58 S74(2)(a)(i).

- SRMR-I4 (7): "*increasing impact on and conflicts with existing resource users*"
- SRMR-I4 (13): "*the need to strategically manage urban growth to ensure there is sufficient development capacity for residential and business land whilst contributing to well-functioning urban environments*".

- SRMR-PR4 recognises that development can lead to a range of undesirable and unsustainable outcomes if not appropriately managed, for example *"reverse sensitivity issues".*

- IM-03(13) – resource management decision making is holistic and consistent and results in solutions which include processes to minimise conflicts.

- Policy IM-P4 – the management of natural and physical resources provides for the continued operation and development of regionally significant industry and primary production activities by at (6) "*avoiding or minimising the potential for reverse sensitivity*".

- IM-AER2 – Anticipated environmental results: "*land use activities are appropriately managed to avoid, remedy or mitigate future adverse effects, including the effects of climate change and reverse sensitivity effects*".

- Objective UFD-O1(7) – minimising land use conflicts, including minimising the potential for reverse sensitivity.

- Implementation Method UFD-M2 – Reverse Sensitivity – "*Local authorities should have particular regard to the potential for reverse sensitivity when assessing resource consent applications, preparing, reviewing or changing district or regional plans and development planning mechanisms such as structure plans and growth strategies. In particular, consideration should be given to discouraging new sensitive activities, locating near existing and planned land uses or activities that could be subject to effects including the discharge of substances, odour, smoke, noise, light spill, or dust which could affect the health of people and / or lower the amenity values of the surrounding area".*

- UFD-PR12 – Density targets for Future Proof area – "*UFD-P12 seeks to ensure that over time, urban development will become more compact through the promotion of development density targets"* but notes the benefits of that process includes "*reducing other adverse effects of urban development, such as reverse sensitivity impacts on existing land uses*".

- APP11(h) and (o) (Development principles) - That new development should be directed away from identified regionally significant industry and not result in incompatible adjacent land uses (including those that may result in reverse sensitivity effects).

65. Read together, the RPS is clear and unambiguous – new sensitive activities are discouraged in close proximity to existing effects-intensive activities, and incompatible land uses should be discouraged. Mr Houlbrooke opines, and I submit, that PC13 does not give effect to the RPS and should be declined unless further modifications are made to respond to the evidence of Messrs Houlbrooke, Hall and Jacob.

Section 32

66. Section 32 requires an evaluation of the extent to which the relevant objectives are the **most appropriate** way to achieve the RMA's purpose; and whether the PC13 provisions are the most appropriate way to achieve the objectives. The latter inquiry requires the identification of other reasonably practicable options for achieving the objectives, and assessment of efficiency and effectiveness of the provisions in achieving the objectives. Assessment of efficiency and effectiveness in turn requires assessment of the benefits and costs of anticipated effects, including the opportunities for economic growth and employment, and assessment of the risk of acting or not acting.

67. While the Applicant has prepared a s32 report and a s32AA report (which addresses some but not all of the post notification changes), it has elected to do so without the benefit of any expert economic analysis, or (as Mr Houlbrooke identifies) any land supply analysis to assess PC13 through the necessary s32 filters. Mr Houlbrooke rightly identifies shortcomings with both the s32 evaluation report and the s32AA further evaluation report. It is submitted that the s32 evaluation report does not assess PC13 in the required manner and in instead simply focusses on a 'cost/benefit' analysis of the

"*main land use options for the site*"[59] and the "*four principal RMA process alternative[s] for achieving the preferred residential land use*".[60] That is insufficient.

68. Mr Olliver at paragraph 122 argues that land supply analysis is not necessary due to the NPS-UD and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021. That is patently incorrect - the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 does not apply to PC13 (I address that in further detail shortly), nor does the NPS-UD 'short circuit' a s32 report or exempt in any way residential development from adhering to the requirements of s32 or s32AA.

69. Without such analysis, the s32 and s32AA analyses are fundamentally deficient. How is the Panel to be satisfied based on expert evidence that the proposal is the most *appropriate* way to achieve the purpose of the Act; what are other reasonably practicable options; what is the *efficiency* of the provisions; what are the *costs* that are anticipated?

Relevance of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021

70. Mr Olliver addresses the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (the "RM Amendment Act") in considerable detail in his Evidence in Chief.[61] Mr Olliver notes among other things that PC13 is in his opinion well aligned with the RM Amendment Act by incorporating the Medium Density Residential Standards ("MRDR") "*as required by section 77G(1) of the RMA*" and that under clause 25(4A) to of the First Schedule "*HCC must not accept or adopt a private plan change request if it does not incorporate MDRS. This means that PPC13 must include the MDRS*".[62]

71. As Mr Olliver notes, Hamilton City Council has advanced PC12 which represents Hamilton's Intensification Planning Instrument ("IPI"). PC12 is on hold and hearings are understood to be likely in 2024. PC13 has therefore got well ahead of PC12. Mr Olliver notes that he anticipates a further variation to PC13 to address that fact.

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59 S32 Evaluation Report, Table 1 pg1.
60 Ibid, Table 2.
61 See Olliver EIC 29-41.
62 Olliver at 35.

72. Whilst the foregoing may have informed Mr Olliver's approach to PC13, Mr Olliver fails to acknowledge that the RM Amendment Act has no bearing on PC13 at this stage. The RM Amendment Act amended the RMA such that under s77G(1) every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone. The PC13 Subject site is not a relevant residential zone. While under s77G(4) a territorial authority may create new residential zones or amend existing residential zones, that does not extend to private plan change requests, and PC13 is not the IPI. Incorporating MDRS into PC13 is also not required under clause 25(4A) of the First Schedule as Mr Olliver suggests, as that requirement only applies under s77G(1) which again is limited to a relevant residential zone. It is submitted that no weight should be placed upon the RM Amendment Act and its MDRS. A fundamental premise for PC13 is founded on an incorrect understanding of the law.

73. In line with a misapprehension of the law, Mr Olliver rejects a number of submitter relief on the basis that the MDRS enables certain bulk and location rules and "*that PPC13 cannot depart from that unless a qualifying matter*".[63] This is simply incorrect as the MDRS do not apply to PC13. Again it highlights the fundamental error that has informed PC13's provision architecture.

PRINCIPAL SUBMISSION

74. Chartwell remains opposed to PC13 and seeks it be rejected unless the modifications proposed by Messrs Houlbrooke, Hall and Jacob are adopted. Chartwell's strong preference is to provide mechanisms to manage reverse sensitivity effects before they arise by proactively avoiding and appropriately managing the conflict of land use.

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63 See Olliver EIC Table 3.

CHARTWELL INVESTMENTS LIMITED

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JR Welsh

ANNEXURE A: SUMMARY FROM *COLONIAL VINEYARDS LTD V MARLBOROUGH DISTRICT COUNCIL* [2014] NZENVC 55 AT [17]

"A. General requirements

1. *A district plan (change) should be designed to* ***accord with***[64] *— and assist the territorial authority to* ***carry out*** *— its functions*[65] *so as to achieve the purpose of the Act*[66].

2. *The district plan (change) must also be prepared* ***in accordance with*** *any regulation*[67] *(there are none at present) and any direction given by the Minister for the Environment*[68].

3. *When preparing its district plan (change) the territorial authority* ***must give effect*** *to*[69] *any national policy statement or New Zealand Coastal Policy Statement*[70].

4. *When preparing its district plan (change) the territorial authority shall:*

   (a) have regard to any proposed regional policy statement[71];

   (b) give effect to any operative regional policy statement[72].

5. *In relation to regional plans:*

   (a) the district plan (change) must ***not be inconsistent*** *with an operative regional plan for any matter specified in section 30(1) or a water conservation order*[73]; *and*

   (b) ***must have regard to*** *any proposed regional plan on any matter of regional significance etc*[74].

6. *When preparing its district plan (change) the territorial authority must also:*

   - ***have regard to*** *any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations*[75] *to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities*[76];
   - ***take into account*** *any relevant planning document recognised by an iwi authority*[77]; *and*

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64 Section 74(1) of the Ac
65 As described in section 31 of the Act.
66 Sections 72 and 74(1) of the Act.
67 Section 74(1) of the Act.
68 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.
69 Section 75(3) RMA.
70 The reference to 'any regional policy statement' in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.
71 Section 74(2)(a)(i) of the RMA.
72 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
73 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
74 Section 74(2)(a)(ii) of the Act.
75 Section 74(2)(b) of the Act.
76 Section 74(2)(c) of the Act.
77 Section 74(2A) of the Act.

- *not have regard to trade competition[78]or the effects of trade competition;*

7. *The formal requirement that a district plan (change) must[79] also state its objectives, policies and the rules (if any) and may[80] state other matters.*

- *B. Objectives [the section 32 test for objectives]*

8. *Each proposed objective in a district plan (change)* ***is to be evaluated*** *by the extent to which it is the most appropriate way to achieve the purpose of the Act[81].*

- *C. Policies and methods (including rules) [the section 32 test for policies and rules]*

9. *The policies are to* ***implement*** *the objectives, and the rules (if any) are to* ***implement*** *the policies[82];*

10. *Each proposed policy or method (including each rule) is to be examined, having* ***regard to its efficiency and effectiveness,*** *as to whether it is the most appropriate method for achieving the objectives[83] of the district plan* ***taking into account****:*

    (i) the benefits and costs of the proposed policies and methods (including rules); and

    (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[84]; and

    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[85].

- *D. Rules*

11. *In making a rule the territorial authority must* ***have regard to*** *the actual or potential effect of activities on the environment[86].*

…

- *E. Other statues:*

16. *Finally territorial authorities may be required to comply with other statutes.*

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78 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.

79 Section 75(1) of the Act.

80 Section 75(2) of the Act.

81 Section 74(1) and section 32(3)(a) of the Act.

82 Section 75(1)(b) and (c) of the Act (also section 76(1)).

83 Section 32(3)(b) of the Act.

84 Section 32(4) of the RMA.

85 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.

86 Section 76(3) of the Act.