BEFORE THE CHRISTCHURCH DISTRICT PLAN
INDEPENDENT HEARINGS PANEL

UNDER

The Resource Management Act 1991

AND

IN THE MATTER

The Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014

AND

IN THE MATTER

The Proposed Christchurch Replacement District Plan – Chapter 8 – Subdivision- Appendix 8.6.5 South Masham Outline Development Plan

SUBMISSIONS ON BEHALF OF LUNEYS BUCHANANS LIMITED

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1 INTRODUCTION – POSITION OF THE PARTIES

1.1 These submissions are filed on behalf of Luneys Buchanans Limited (Luneys), a landowner within the northernmost portion of the South Masham ODP Area. This Greenfield Priority Area is contained with Appendix 8.6.5 to Chapter 8: Subdivision.

1.2 As the Panel will be aware from the January 2016 hearing, an issue to be determined is whether or not Plan provisions are required to address the potential for reverse sensitivity effects associated with an existing Tegal poultry farm operation at 241 Buchanans Road. The location of the poultry farm operation relative to the Luneys land is shown on Exhibit D - *Setbacks from poultry buildings*.

1.3 This issue has not been resolved between the parties.

1.4 Subsequent to the hearing, the Council has sought to introduce a number of provisions with Chapter 8 to address this potential issue. These are set out in Attachment A to the Council’s memorandum of 17 March 2016, and include:

(a) Amendments to Policy 8.1.2.6 – *Integration and Connectivity*

8.1.2.6 **Policy – Integration and connectivity**

a. Ensure effective integration within and between developments and existing areas, including in relation to public open space networks, infrastructure, and movement networks.

b. Ensure that the boundaries between new and existing developments are, where appropriate, managed to avoid or mitigate adverse effects.

c. Avoid significant adverse effects and remedy or mitigate other adverse effects on existing businesses, rural activities or infrastructure.

(b) The identification of a "200m Odour Buffer area around poultry farm buildings" on Appendix 8.6.5;

(c) The inclusion of a new Restricted Discretionary Activity consent category for subdivision within this Odour Buffer Area (RD7);

(d) An amendment to 8.4.4 (g) within the "Matters for Discretion for imposing conditions" so that it reads:

\[ g. \text{ The extent to which the subdivision design mitigates any adverse effects, including potential reverse sensitivity effects in relation to nearby existing land uses and on strategic infrastructure, including for the National Grid, electricity distribution lines as shown on the Planning Maps, or Radio New Zealand facilities on Gebbies Pass Road.} \]

(e) The inclusion of a new Matter of discretion for the purpose of declining consent and imposing conditions:

\[ \text{The extent to which the subdivision design mitigates any adverse effects, including potential reverse sensitivity effects in relation to odour from nearby existing land uses.} \]

1.5 Luneys oppose the above amendments for the following reasons:

(a) There is no evidential basis to support the necessity or appropriateness of RD7.
(b) There is no policy mandate for Rule RD7. The attempt to create such a mandate by amending the now operative Policy 8.1.2.6 is not within the scope of any submissions on the Residential New Neighbourhood Zone. Further, the amendments to Policy 8.1.2.6 are potentially of such broad ranging effect that it is outside the Panel’s discretion under the Order in Council to approve them.

(c) The Council has not provided any evidence to support the new matter of discretion in proposed Rule RD7. Specifically, there is no Council evidence as to how subdivision design could mitigate potential reverse sensitivity odour effects.

(d) Issues of odour associated with the poultry operation are more appropriately managed under Regional Plan rules.

2 ABSENCE OF EVIDENCE TO SUPPORT THE PROPOSED RULE

2.1 As noted above, the new RD7 has been included by the Council to address what is perceived to be a potential reverse sensitivity issue.

2.2 Reverse sensitivity is a well-established concept in RMA law. Reverse sensitivity has been defined as follows¹:

Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a 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 operations or mitigate its effects so as not to adversely affect the new activity

2.3 Whether reverse sensitivity is a relevant effect to address is therefore dependent on the following factors:

(a) There must be an existing established use which is causing an adverse environmental impact on adjoining land;

(b) There is an intended, benign use for this adjoining land; and

(c) This benign use may result in restrictions on the existing established use.

2.4 Examining the first factor above, the question arises as to whether the poultry farm is causing an adverse impact on adjoining land?

2.5 Ms Harte’s evidence is that the poultry farm has been in operation since the 1960s, with the current layout established by the late 1970’s. It is Ms. Harte’s understanding that the type of operation (breeder farm) has significantly less

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potential for creating odour problems than broiler farms, which involve rearing of chickens within a "pressure cooker" environment. This was undisputed.

2.6 The evidence of Ms Stewart on behalf of Tegel confirms that the: "existing poultry sheds are well established and operate in accordance with best practises and operational design features."  

2.7 In cross-examination, Ms Stewart confirmed her understanding that Tegel insists on a management regime to minimise odours. In questioning from Mr. Willis, Ms Stewart confirmed that the key source of potential odour for...intensive farming poultry operation is at the end of the cycle and when the buildings are cleared out, yes. Ms. Stewart went on to advise that the cleaning cycle for the type of poultry operation at 241 Buchanans Road was once every 64 weeks. By any measure therefore, it is submitted that this key source of potential odour occurs on an extremely infrequent basis.

2.8 In response to questions from His Honour Judge Hassan, Ms Stewart agreed that there was no evidence of odour effects:

JUDGE HASSAN: We will come to the road in a minute. But given that context, that is the evidence before us, is it not, on effects. In other words the present receiving environment, the limited evidence we have is that there is no evidence of odour effects occurring for neighbours. That is the evidence before us. What other evidence do we have?
MS STEWART: The neighbours at present, yes.
JUDGE HASSAN: So that is the evidence, limited though it is, that is the evidence, do you agree with that?
MS STEWART: Yes.

2.9 Ms Stewart agreed that a complaint is evidence of an effect. All witnesses confirmed that there have been no complaints in respect of the poultry farm operation.

2.10 Ms. Harte has investigated this matter with both the Regional Council and the City Council. In the 50 plus years since the operation has been in place, no complaints whatsoever have been received. This is despite the receiving environment having changed significantly by the establishment of the Delamain residential development immediately opposite the Poultry farm on the northern side of Buchanans Road.

2.11 Accordingly, in Ms Harte's opinion, the concerns about odour and attendant reverse sensitivity effects are essentially theoretical and the potential for such effects very limited. This opinion was effectively unchallenged in cross-examination.

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2 Evidence of Angela Madeline Stewart at para 5.1
3 Transcript at page 450
4 Transcript at page 457
5 Transcript at page 469
2.12 The sole justification for imposing a rule controlling development within a 200m odour setback appears to be that this was proposed as part of the Rural Urban Fringe proposal. In cross-examination, Ms Oliver confirmed her analysis to support the identification of a 200m odour buffer on Appendix 8.6.5 was limited to what she understood to be best practice for setbacks from poultry farms. She agreed that this was a generic setback.\(^6\)

2.13 Ms. Stewart's opinion relied on the accepted use of separation distances and her experience. However, her opinion is necessarily weakened by her acknowledgement that she had not visited the site and qualifications about her lack of knowledge of the site.\(^7\)

2.14 The inherent problem with simply adopting a generic setback as the basis for regulation is that it may be completely inappropriate in a particular context. This could not be truer in circumstances such as the present where there is a clear absence of odour effects to justify adopting a default 200m setback as a trigger for regulatory intervention. Respectfully, the Council should have considered whether any setback at all is required in the present circumstances, or alternatively whether a setback less than 200m was more appropriate.

2.15 Relevantly, the evidence is that the poultry farm has not caused any effect on the Delamain residential development, which at its closest point is some 94 metres from the farm.

2.16 In cross-examination, it was put to Ms Stewart that the separation distance between the poultry farm and Delamain had proven adequate\(^8\):

MR CLEARY: The sheds, okay. And you have agreed there is approximately 100-metre separation distance between the sheds and the Delamain residential development?

MS STEWART: Yes.

MR CLEARY: Yes, and that separation distance, given the fact that there has been no complaints, would you agree that that separation distance has proven adequate to address any potential reverse sensitivity effects?

MS STEWART: At this stage there have been no complaints, so it would suggest that.

MR CLEARY: So it has proven adequate. Is that your answer?

MS STEWART: It has proven adequate in that there have been no complaints from those residents to my knowledge.

2.17 In my submission, this response confirms that the adoption of a generic 200m setback as the trigger for regulatory intervention is not appropriate in the present circumstances.

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\(^6\) Transcript at page 135.
\(^7\) Transcript at page 466
\(^8\) Transcript at page 454
Conclusion on Evidence of Effects

2.18 As noted above, inherent to the concept of reverse sensitivity is a requirement that an existing established use must be causing adverse environmental impacts on adjacent land. Absent that requirement, the concept is of limited, if any, relevance.

2.19 The evidence available to the Panel is that the poultry farm at 241 Buchanans Road has a long and unblemished history of internalising any potential adverse odour effects associated with its operation. Its environmental performance appears exemplary.

2.20 If Tegel was able to provide cogent evidence that there were odour effects beyond the boundary of the poultry farm site and these effects could not reasonably be internalised, it may be legitimate to restrain development of the South Masham ODP, Luneys' land included.

2.21 The evidence however simply does not point in such a direction. Accordingly, it is submitted that there is no justification for the proposed 200m odour buffer area on Appendix 8.6.5 and the associated Rule RD7.

2.22 If however, the Panel considers some form of setback is required (other than the setback between the poultry farm sheds and the boundary of the South Masham Residential New Neighbourhood Zone), the evidence is that a setback of approximately 100 metres has proven adequate to date. Such a reduced setback would provide a balance between the ability of the majority of the ODP area to be developed without further regulation, while at the same time offering the ability to address reverse sensitivity effects, however unlikely or remote, associated with development of land closest to the poultry farm sheds.

3 LACK OF POLICY MANDATE FOR RULE RD7

3.1 The Panel does not need reminding of the various objectives and policies in Chapter 6 of the RPS relating to the importance of rezoning Greenfield Priority Areas identified in Map A and the need to provide for residential development at an intensity of 15 households per hectare. Suffice to say, these objectives and policies provide strong directions.

3.2 In the most basic of senses, one possible impact of the new Rule RD7 and its associated matter of discretion is that it could preclude any residential development within the odour buffer area unless the Council is satisfied that the design of the subdivision mitigates potential reverse sensitivity effects. Such an outcome could not be said to give effect to the RPS.

3.3 Some discussion took place during the hearing of the relevance of Policy 6.3.6 of Chapter 6, in particular clause (8) which states:

(8) Ensures reverse sensitivity effects and conflicts between incompatible activities are identified and avoided or mitigated against.
3.4 Leaving aside the fact there is no evidence of potential conflict between development of South Marsham RNNZ and South Marsham RNNZ, it is submitted that because Policy 6.3.6 relates to the provision, recovery and rebuilding of business land within Greater Christchurch, it is irrelevant to the particular issue at hand.

3.5 Strategic Objective 3.3.14 is of relevance:

**3.3.14 Objective - Incompatible activities**

(a) The location of activities is controlled, primarily by zoning, to minimise conflicts between incompatible activities; and

(b) Conflicts between incompatible activities are avoided where there may be significant adverse effects on the health, safety and amenity of people and communities.

3.6 Again the evidence does not point to any effects that would lead to conflict between incompatible activities. Certainly there is no evidence whatsoever of significant adverse effects on health, safety and amenity of people and communities.

3.7 In addition, it is submitted that the proposed Rule RD7 does not implement Objectives 3.3.1 or 3.3.2 as it creates investor uncertainty as to whether development will be approved within the identified odour buffer area, does not minimise transaction costs, and increases reliance on resource consent processes.

3.8 In an attempt to fill the obvious policy vacuum for the proposed Rule RD7, the Council has amended Policy 8.1.2.6 so that it would read:

**8.1.2.6 Policy – Integration and connectivity**

a. Ensure effective integration within and between developments and existing areas, including in relation to public open space networks, infrastructure, and movement networks.

b. Ensure that the boundaries between new and existing developments are, where appropriate, managed to avoid or mitigate adverse effects.

c. Avoid significant adverse effects and remedy or mitigate other adverse effects on existing businesses, rural activities or infrastructure.

[Amendments Underlined]

3.9 Policy 8.1.2.6 was the subject of a decision by the Panel on 12 January 2016. To the best of counsel’s knowledge, this decision has not been appealed. Accordingly, Policy 8.1.2.6 is an operative policy.

3.10 That aside, there does not appear to be any scope within submissions on the Proposed Plan to introduce these amendments. As such, there is a clear jurisdictional issue as to whether or not the Council can approve the suggested amendments.
3.11 One factor that should be borne in mind is that the amendments to the Policy have potential implications for all subdivision within the Christchurch City District, not just subdivision within odour buffer areas. However, no opportunity is available for persons who are potentially affected by these amendments, and who are not submitters on the South Masham ODP, to express their views on what is proposed. From a natural justice perspective, this is of significant concern.

3.12 Given their potential universal impact and the apparent lack of scope, it is submitted that the Panel does not have the jurisdiction to approve the amendments to Policy 8.1.2.6. The only way these amendments could lawfully be approved is if they are incorporated within a new proposal under either Clauses 13 (4) or Clause 13 (6)(2) of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014.

4 APPROPRIATENESS OF THE PROPOSED MATTER OF DISCRETION WITHIN RD7

4.1 In deciding to either decline consent or impose conditions under RD7, the Council proposes the following matter of discretion:

The extent to which the subdivision design mitigates any adverse effects, including potential reverse sensitivity effects in relation to odour from nearby existing land uses.

4.2 The design of a subdivision is of course fixed at a particular point in time. At this point in time there are no adverse odour effects that require mitigation and the possibility of such effects occurring in the future and being unmanaged appears remote.

4.3 It is not at all clear how subdivision design can mitigate reverse sensitivity effects, other than by imposing a setback or some form of a clearly articulated buffer between the South Masham Residential New Neighbourhood Zone and the poultry farm.

4.4 In questions from His Honour Judge Hassan, Ms Stewart was of the view that a buffer might achieve the required outcome:

JUDGE HASSAN: Are you describing that point of separation as being in the nature of a psychological difference or barrier or - it puzzles me why you place such emphasis on the road, is it because it provides a physical and psychological separation point?

MS STEWART: Yes.

JUDGE HASSAN: Right. So if one was to consider mitigation of the same kind, albeit not a road, it could be potentially in the form of a buffer, could it not, depending on how it was landscaped, similar width, separating the poultry farm from the neighbouring land?

MS STEWART: Yes, that would seem that that might achieve the required outcome.

4.5 Ms Stewart qualified the above answer by referring to the absence of an odour assessment, although she then accepted that in terms of prevailing wind direction
there would be marginal difference between wind direction affecting this land and land across the road i.e. the Delamain development. As noted above no issue of incompatibility has arisen between this development and the poultry farm. Logically therefore, if the wind blows equally on the South Masham RNNZ, the same result can be expected.

4.6 If the Panel is minded to incorporate the concept of a buffer it is submitted this does not need to be part of a Restricted Discretionary Activity Rule. On the contrary, it could be addressed in a controlled activity application by means of a site-specific matter of control under Rule 8.3.2.1 Controlled activities and the associated Rule 8.4.4.

5 MANAGEMENT OF ODOUR UNDER REGIONAL AIR PLAN RULES

5.1 It is common ground that the existing poultry farm operation is a permitted activity under Rule AQL 58 of Chapter 3 to the Canterbury Natural Resources Regional Plan. Permitted activity status is maintained if the existing operation continues to meet the conditions of Rule AQL 58, including:

1. There shall be in increase in the scale, intensity, frequency or duration of the effects of the discharge of contaminants into air from the activity;

2. The discharge of odour beyond the boundary of the site shall not be noxious, dangerous, offensive or objectionable to such an extent that it has an adverse effect on the environment; and

3. The dispersal and deposition of particles shall not cause a noxious, dangerous, objectionable or offensive effect beyond the boundary of the property where the discharge originates.

5.2 The evidence is that the existing operation meets AQL 58 at present i.e all odour effects are internalised by Tegel. If the existing operation fails to meet these conditions in the future, a restricted discretionary activity consent is required. Similarly, if the existing operation were to change from a breeder farm to the more intensive "pressure cooker" rearing operation a consent would be required.

5.3 It is submitted that there is no compelling reasons to impose a rule which may prevent development of a significant part of the South Masham Greenfield Priority Area if the primary effect at issue (potential odour) is already appropriately managed by the Regional Plan rules.

5.4 In other words, if the primary effect is already subject to an appropriate management regime, there is no need for additional controls in the Proposed Replacement District Plan.

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