

Tabled @ Hearings  
30/10/15  
B Williams for  
GELITA.

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*under:* the Resource Management Act 1991

*in the matter of:* the proposed Canterbury Air Regional Plan

*and:* **Gelita NZ Limited**  
*Submitter 63201*  
*Further Submitter 103493*

## Summary of submissions on reverse sensitivity issue

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Dated: 30 October 2015

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## SUMMARY OF SUBMISSIONS ON REVERSE SENSITIVITY ISSUE

- 1 This hearing is in the process of considering submissions and further submissions in relation to the proposed Canterbury Air Regional Plan (*pCARP*).
- 2 These submissions are provided on behalf of Gelita NZ Limited (*Gelita*) and relate to one single issue - the appropriateness of Policy 6.7 of the *pCARP*.
- 3 This issue forms the core basis of Gelita's wider submission and further submission. In terms of this wider context the concerns discussed in respect of policy 6.7 are, for example, especially relevant to the amendments sought by Gelita in respect of objective 5.9 and policies 6.8 and 6.19.
- 4 These submissions also, in part, provide further comment on answers 22 and 23 of the "*Responses to Questions of the Panel*" provided by the Council officers on Tuesday, 27 October 2015.

### **Policy 6.7 – Reverse sensitivity**

- 5 In simple terms Policy 6.7 provides that where a sensitive land use activity moves alongside a 'first in time' discharger, then the 'first in time discharger' (and not the new entrant) will either need to reduce its effects or relocate.
- 6 The specific wording provides:
  - 6.7 Where, as a result of authorised land use change, land use activities within the neighbourhood of a discharge into air are significantly adversely affected by that discharge, it is anticipated that within a defined time frame the activity giving rise to the discharge will reduce effects or relocate.
- 7 The policy falls within a suite of policies that (as noted by the Hearing Panel in its questions to the Council officers), more closely align with what these submissions refer to as the 'orthodox' approach to the management of reverse sensitivity effects – i.e. an approach which requires the "*environment*"<sup>1</sup> and the effects of air discharges to be considered on a case by case basis (i.e. without pre-determination or a policy of 'reverse reverse sensitivity' in terms of managing effects).
- 8 The more relevant policies in this regard are policies 6.5 and 6.6:

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<sup>1</sup> *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA)

- 6.5 Offensive and objectionable effects are unacceptable and the frequency, intensity, duration, offensiveness and location of discharges into air must be identified and managed.
- 6.6 Discharges of contaminants into air, and the effects of those discharges, occur in appropriate locations, taking into account the distribution of land use as provided for by the relevant district plan.
- 9 It is Gelita's submission that this orthodox approach is the appropriate approach for addressing "legacy effects". In addition it is submitted that:
- 9.1 policy 6.7 as set out in the notified plan (and supported by the Council Officers) is an unjustified departure from the long line of cases that deal with the consideration of the environment and the management of reverse sensitivity effects;
- 9.2 policy 6.7 fundamentally undermines the existing land use zoning (which in the case of the Gelita site is 'heavy industrial'); and
- 9.3 acceptance of the Council officer position would have potentially far reaching consequences – impacting not only existing 'legacy effects' (if in fact such effects exist), but also future 'legacy effects' in reverse sensitivity situations that are yet to arise.
- 10 This is discussed below.

#### **Reverse sensitivity**

- 11 Although the effect that policy 6.7 is that it is intended to deal with a reverse sensitivity effect, the approach is the opposite to the 'orthodox' and long recognised approach to reverse sensitivity.

- 12 In this regard:<sup>2</sup>

The term 'reverse sensitivity' is used to refer 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.

- 13 In planning effect, it has parallels with the common law principle that 'coming to a nuisance is no defence'. Unfortunately, the effect of policy 6.7 is the reverse – i.e. coming to an existing nuisance is a complete defence. With respect, that simple cannot be correct.

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<sup>2</sup> *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205.

- 14 Not surprisingly, reverse sensitivity case law deals with the situation where a later in time applicant has sought resource consents to establish an activity that is incompatible with other existing and authorised land uses.
- 15 Examples are varied and include establishing:
- 15.1 a camping ground next to an existing honey bee operation;<sup>3</sup>
- 15.2 further residential activity within airport noise contours<sup>4</sup> or near an existing pig farm;<sup>5</sup>
- 15.3 a nudist retreat next to existing orcharding activities;<sup>6</sup> and
- 15.4 a café near an existing pig farm<sup>7</sup>
- 16 Consistent with the above, cases that reference reverse sensitivity in a Schedule 1 context similarly focus on the need to create particular rules or a buffer around a relevant existing activity.<sup>8</sup>
- 17 To this extent, it appears that in all cases the existence of the relevant first-in-time activity has been assumed to form part of the existing environment<sup>9</sup> and the issue before the relevant Court or tribunal was focused on the controls that need to be placed on the new sensitive activity so that it could co-exist with that which was pre-existing.

<sup>3</sup> *Arataki Honey Limited v Rotorua District Council* (1984) 10 NZTPA 180 (PT)

<sup>4</sup> *Gargiulo v Christchurch City Council* (Unreported, Environment Court Christchurch, C137/00, 17 August 2000, Jackson J).

<sup>5</sup> *Belfast Park Limited v Canterbury Regional Council* [2010 NZEnvC 235

<sup>6</sup> *McQueen v Waikato District Council* (Unreported, Planning Tribunal Auckland, A045/94, 20 June 1994, Sheppard J).

<sup>7</sup> *Sugere v Selwyn District Council* (Unreported, Environment Court, Christchurch C043/04, 7 April 2004).

<sup>8</sup> For example:

- *National Investment Trust v Christchurch City Council* (Unreported, Environment Court Christchurch, C041/05, 30 March 2005) – plan provisions to avoid residential subdivision under noise contours;
- *Winstone Aggregates Limited v Papakura District Council* (Unreported Environment Court Auckland, A049/02, 26 February 2002, Whiting J) – plan provisions to include a buffer zone around a quarry
- *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205 – plan requirement for activities sensitive to the discharge of contaminants to air to be reclassified as controlled or discretionary (from permitted)

<sup>9</sup> Noting application of the existing 'environment' principle in the Schedule 1 context is consistent with the likes of *Shotover Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712; *Milford Centre Limited v Auckland Council* [2014] NZEnvC 23.

- 18 In this context it is submitted that recognition and protection of the 'first in time' activity is consistent with general RMA concepts around (for example) non-derogation from grant<sup>10</sup> and the certainty that the RMA more generally provides to existing consent holders, existing use rights and those undertaking permitted activities.
- 19 That is not to say the new entrant must carry the full cost of mitigating reverse sensitivity effects. The key point is that every case must be considered on its merits. In a practical sense this means that when an entity such as Gelita comes to vary or renew its existing resource consent(s), there will effectively be a three-step process:
- 19.1 first, it is necessary to determine the "environment" against which the relevant effects are going to be assessed. In the case of Gelita this will include the other industrial and non-industrial activities occurring in the wider area;
- 19.2 second, the effects must be identified. In the context of the pCARP the relevant effects are those that arise through the discharge of contaminants to air (but it is important to remember that is but one of the effects – both positive and adverse that arise from the site); and
- 19.3 third, the extent to which those effects should be avoided, remedied or mitigated needs to be determined – ultimately with reference to Part II and the concept of sustainable management.
- 20 It is submitted that this approach is consistent with, and can be fully informed by the likes of policies 6.5 and 6.6 (without any reference to policy 6.7).
- 21 It is also (unlike policy 6.7) consistent with Policy 14.3.5 of the Canterbury Regional Policy Statement (CRPS):

**Policy 14.3.5 – Relationship between discharges to air and sensitive land-uses**

In relation to the proximity of discharges to air and sensitive land-uses:

- (1) To avoid encroachment of new development on existing activities discharging to air where the new development is sensitive to those discharges, unless any reverse sensitivity effects of the new development can be avoided or mitigated.
- (2) Existing activities that require resource consents to discharge contaminants into air, particularly where reverse sensitivity is an

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<sup>10</sup> *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268

issue, are to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment.

- (3) New activities which require resource consents to discharge contaminants into air are to locate away from sensitive land uses and receiving environments unless adverse effects of the discharge can be avoided or mitigated.

- 22 Ultimately, it will not be every case where it is appropriate or possible for an existing activity to fully internalise its effects – rather it will depend upon what is reasonable in light of the relevant facts. As the Environment Court in *Winstone Aggregates*<sup>11</sup> advised (a reverse sensitivity case where the inclusion of buffer zone on surrounding land around a quarry was considered appropriate):

[43] The application of section 5(2)(c), therefore, must necessarily involve a consideration of all aspects of a proposal within the broader context of sustainable management dependent upon the factual matrix of each circumstance. This calls for an assessment to be made in terms of the scale and degree of those effects and their significance or proportion in the final outcome. It is a pragmatic approach to sustainable management, and also one that is designed to achieve an outcome that is fair and reasonable in each particular circumstance.

...

[45] ... "Internalise" is not to be interpreted as to "internalise at all costs".

- 23 Against the above, the effect of policy 6.7 is to effectively remove any discretion in terms of the extent to which effects should or should not be internalised (in circumstances where, for example, the full cost of requiring internalisation has not been assessed, the focus has been on air quality and not the wider range of effects that will ultimately inform any decision on sustainable management, and the implications for wider zoning have not been considered).
- 24 In regard to the latter it is important to also emphasise that in the case of Gelita its Woolston site is zoned Business B5 'Heavy Industry' under the operative Christchurch City Plan (and is similarly proposed to be zoned Industrial Heavy through the proposed Christchurch City District Plan review process). This zone naturally anticipates a lower level of amenity and effects.
- 25 Put simply, Gelita is located in an appropriate zone. In that context it is respectfully submitted that the Hearing Panel should be very reluctant to effectively 'gazump' certain industrial activities – especially on the basis of air quality alone.

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<sup>11</sup> Refer footnote 8.

**Specific response in relation to Gelita**

- 26 As was confirmed by the Hearings Officer in questioning, the intent of Policy 6.7 is to specifically address the legacy situation and the example cited (at least by clear implication) was Gelita.
- 27 In simple response it is noted that the Council officers appear to have made a core factual error as to the nature of Gelita existing discharge and the lawfulness of it.
- 28 This error is that until recently Gelita was actually not complying with its resource consent (i.e. this is not a situation where a *lawfully* established activity had become incompatible with more recently established landuses). It appears that this has not been appreciated by the Council officers.
- 29 Accordingly, it is submitted that bringing the Gelita site back into compliance as per its resource consent requirements (which is discussed in detail in the evidence provided by Gelita) will be sufficient - such that a much more 'blunt' instrument such as policy 6.7 is not required.
- 30 To put that another way, policy 6.7 places an additional but unnecessary burden on the likes of Gelita (contrary to CRPS, the general principles of sustainable management and the fact the RMA is not a no effects statute) - in that it would now be 'required' to fully internalise its effects or relocate. In the case of Gelita that is simply not necessary or appropriate given the underlying zoning and the steps that are being made towards reducing odour discharge from the site.
- 31 In terms of wider context, it is however accepted that rightly or wrongly, the Christchurch City Council has granted resource consent in adjoining industrial areas that are not consistent with what one might typically see as heavy industrial activities. The most obvious of these is the Tannery complex which includes 'The Brewery', a restaurant facility and various retail complexes. Apartment-style living has also been approved in the wider area.
- 32 The simple practical answer to the Gelita situation (as discussed earlier in these submissions) is that when it renews its resource consent (or undertakes a consent variation), it will need to take the existing 'environment' as it finds it. Dealing with effects on neighbouring sensitive activities and the need for further conditions then becomes a matter of weight. Policies 6.5 and 6.6 are appropriate and sufficient for addressing that. This will require a balance between the need for further conditions on the first-in-time activity versus whether the extent to which the level of amenity remains appropriate for an industrial/heavy industrial zone.

- 33 Again, Gelita is very concerned that through policy 6.7 this discretion could effectively be pre-determined which, if effects could not be internalised, would appear an almost all circumstances mandate a long-standing and potentially significant activity relocating out of the area.

**Wider application**

- 34 As noted earlier in these submissions, in answer to questions from the Hearing Panel, the Council Officers noted that policy 6.7 was (at least by clear implication) intended to address the Gelita situation.
- 35 For completeness it is noted that the existing wording of Policy 6.7 is much broader than that. It could potentially affect any activity where a later in time activity, rightly or wrongly, develops alongside it. That could have far reaching implications.
- 36 That is a further reason for deleting policy 6.7 and reverting to the orthodox approach reflected in policies 6.5 and 6.6.

**Conclusion**

- 37 It is respectfully submitted that policy 6.7 (and the other provisions of the pCARP that take a similar approach) create significant investment uncertainty for industrial activities (emphasising that that is not just Gelita) and is contrary to the long line of cases concerning reverse sensitivity.
- 38 If the Hearing Panel appropriately considers the actual context of the Gelita situation, it should become readily apparent that such an unorthodox (and unjustified) 'fix' is not required. On that basis Gelita respectfully seeks that Policy 6.7 be deleted and various other amendments to bring the pCARP in line with the 'orthodox' approach to reverse sensitivity effects.
- 39 Further background to Gelita and the amendments to other provisions of the pCARP that are being sought are discussed in the evidence of:

39.1 **Mr Gary Monk** (Gelita);

39.2 **Mr Roger Cudmore** (air discharge); and

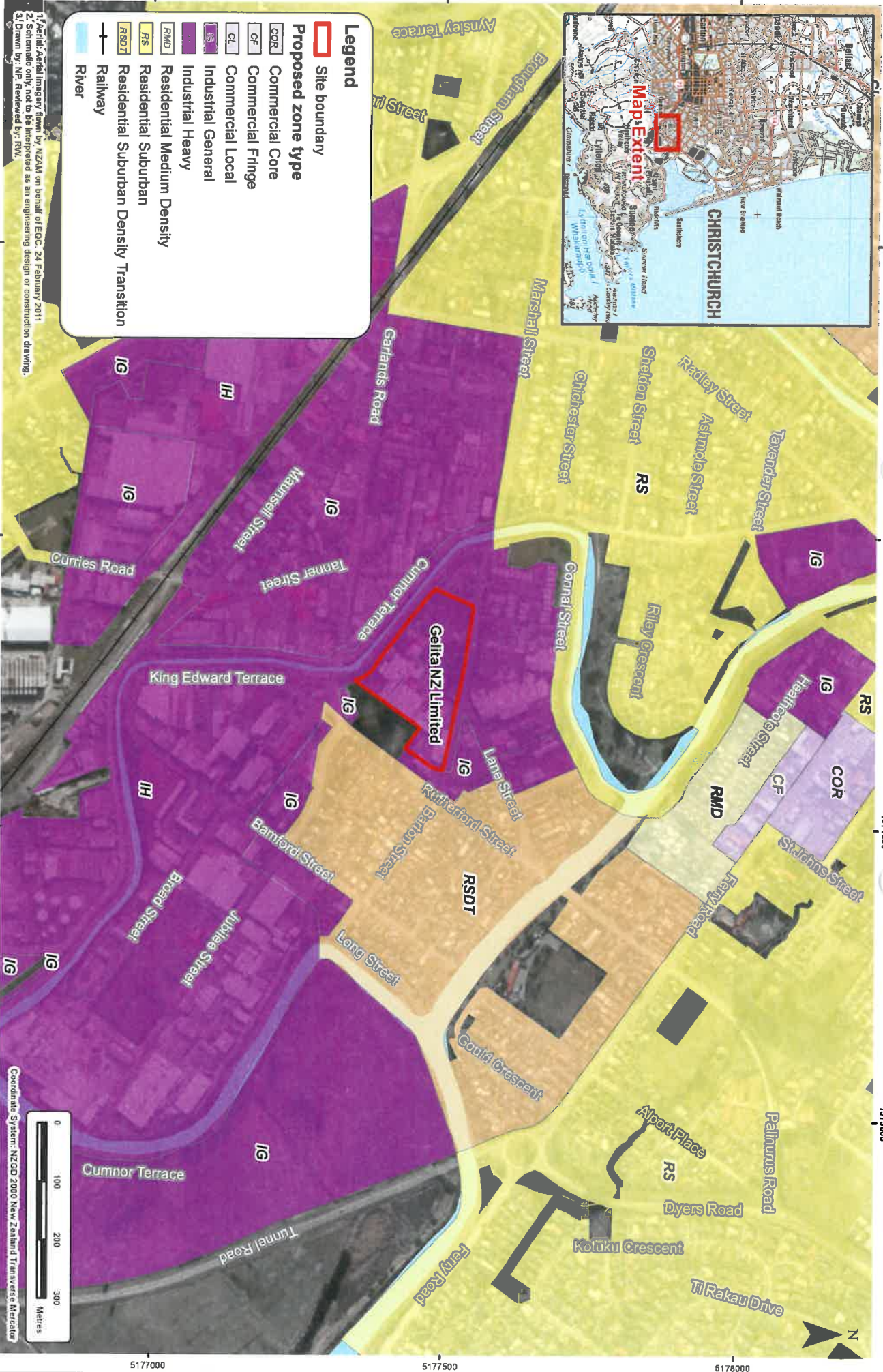
39.3 **Mr Kevin Bligh** (planning)

Dated 30 October 2015

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Ben Williams  
Counsel for Gelita NZ Limited





**Legend**

- Site boundary
- Proposed zone type**
- Commercial Core
- Commercial Fringe
- Commercial Local
- Industrial General
- Industrial Heavy
- Residential Medium Density
- Residential Suburban
- Residential Suburban Density Transition
- Railway
- River

1. Aerial imagery from NZAM on behalf of EDC 24 February 2011  
 2. Schematic only, not to be interpreted as an engineering design or construction drawing.  
 3. Drawn by: NP. Reviewed by: RW.



Coordinate System: NZGD 2000 New Zealand Transverse Mercator

