

**BEFORE AN EXPERT PANEL**

**FTA-2506-1083**

**UNDER** the Fast Track Approvals Act 2024 ("**the FTAA**")  
**IN THE MATTER** of an application by CDL Land NZ Limited for approvals under  
the FTAA for a listed project, Arataki

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**MEMORANDUM OF COUNSEL FOR THE APPLICANT**

3 DECEMBER 2025

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**MAY IT PLEASE THE EXPERT PANEL**

1. This memorandum is filed on behalf of the Applicant, CDL Land NZ Ltd (“**CDL**”), in response to Minute 3 of the Panel. Minute 3 seeks further information from CDL in relation to reverse sensitivity issues.
2. The matters at paragraphs [11](a) and (d) of Minute 3 are addressed in the planning response accompanying this memorandum (“**Planning Memo**”). The matters at paragraphs [11](b) and (c) are addressed below.

***Para [11](b) - How should the Panel assess reverse sensitivity effects if two alternative approaches to the management of those effects have been offered?***

3. In response to comments, CDL has proposed a condition which would enable an alternative scheme should agreement be reached with Shaggy Range to relocate the existing Shaggy Range driveway.
4. The revised scheme would see the Shaggy Range driveway relocated from the centre of the CDL Site to the southern boundary of the site (“**Relocated Driveway**”). The Relocated Driveway would maintain a separation buffer between the CDL Site and the adjoining Olive Grove to the south and Shaggy Range to the east, but only marginally increases the minimum distance between the houses and the Olive Grove boundary<sup>1</sup>.
5. The Relocated Driveway scheme does not represent a change in approach to the management of effects because:
  - (a) The minimum distance between the houses and the Olive Grove and boundary does not change in any material way;
  - (b) The minimum distance between the houses and the existing Shaggy Range activities remains similar; and
  - (c) The key mitigation measures (shelterbelt and acoustic fence secured by consent notices, and no-complaints covenants) remain in place under either option.

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<sup>1</sup> An overall building setback of 10m under the original scheme, and 11.5m under the Relocated Driveway Scheme.

6. CDL's evidence is that:
  - (a) Development on the CDL Land will not generate any adverse effects on the neighbouring activities (Shaggy Range and Olive Grove) that are not addressed by mitigation measures.
  - (b) Both options will result in acceptable levels of effects being experienced at the incoming houses on the CDL Land (e.g.: the district plan noise standards will be complied with under each option).
  - (c) Both options appropriately mitigate potential reverse sensitivity effects, and neither option would result in a greater potential for reverse sensitivity effects than the other.
7. For those reasons, CDL considers the Panel's query to be moot. Having said that, if the Panel were to come to a different conclusion, and CDL was still pursuing an 'either/or' approach, then it would be appropriate for the project to be assessed based on what the Panel considers to be the 'worst case' scenario.

***Para [11](c) - What is the correct legal test to be applied to the Expert Panel's assessment of the reverse sensitivity issue in the context of FTAA decision making criteria?***

8. Minute 3 requests further commentary on the following response to the comment received from C&M McKenzie, including whether it reflects the correct legal test to be applied by the Expert Panel in assessing potential reverse sensitivity effects in the context of the FTAA:

*"CDL considers that the buffer proposed is adequate to avoid unreasonable reverse sensitivity constraints while balancing the requirement for efficient land use outcomes"*

9. We understand that the Panel's enquiry relates to the words "*while balancing*". As noted in the Planning Memo, this response was intended to convey the planning judgement underpinning the reverse sensitivity assessments. Rather than undertaking a balancing exercise, the planners have concluded that the proposal *both* avoids unreasonable reverse sensitivity constraints *and* provides for efficient land use outcomes.

10. With respect to the Panel's question about the legal test to be applied to its assessment of the reverse sensitivity issue in the context of the FTAA decision making criteria, we first address the principles developed through case law for reverse sensitivity, before placing that in the context of the FTAA. For completeness, we then apply these to the Arataki proposal.

*Principles - Reverse Sensitivity*

11. There is a large body of case law concerning reverse sensitivity and how it might be defined. The oft-cited and longstanding definition of the concept given in the article *Reverse Sensitivity - The Common Law Giveth, and the RMA Taketh Away* is as follows:<sup>2</sup>

*“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 that 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.”*

12. The Environment Court has, however, recognised that an incoming activity can be expected to accept impacts on amenity that arise from the existing activity. This is relevant when the Panel is weighing up the potential for these effects to arise. For example:

- (a) In *Blueskin Bay Forest Heights Ltd v Dunedin City Council*<sup>3</sup> the Court noted with reference to a rural residential subdivision that, “We accept the possibility that the secondary effect of reverse sensitivity may arise. But we think that there does need to be a measure of robust realism about this. Those who might come to this area to live have to expect some rural noise, and just have to accept that as a fact of life, or not come at all.” The subdivision was granted consent.

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<sup>2</sup> *Pardy and Kerr: Reverse Sensitivity – the Common Law Giveth and the RMA Taketh Away* (1999) 3 NZJEL 93, 94

<sup>3</sup> *Blueskin Bay Forest Heights Ltd v Dunedin City Council* [2010] NZ EnvC 177 at paragraphs [34] and [35].

- (b) The court used almost identical language in *Ngatarawa Development Trust Ltd v Hastings District Council*<sup>4</sup> with reference to a proposal to establish a golf course and residential development adjacent to an existing aero club, stating that, “*we think that there does need to be a measure of robustness about this.*” In that case, the Court declined the application.

*FTAA Legal Test*

13. The existing case law is relevant in determining whether or not in fact a potential reverse sensitivity effect is likely to arise. If, having considered that case law, the Panel determines that a reverse sensitivity effect may arise we submit that you should:

- (a) Assess the extent of that potential reverse sensitivity effect with reference to the principles discussed above.
- (b) Consider what mitigation measures are available, keeping in mind the FTAA’s requirements that:
  - (i) Conditions must be no more onerous than necessary to address the reason for which it is set (s 83 FTAA); and
  - (ii) When setting conditions, the Panel must take into account the relevant provisions of the RMA but give greatest weight to the purpose of the FTAA to facilitate (relevantly) the delivery of development projects with significant regional benefits (cl 17, Sch 5 FTAA).

[Nb: In this case, the project’s benefits arise from the number of houses delivered, so any decision which impacts or reduces the number of dwellings possible, will reduce the extent of the benefits generated.]

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<sup>4</sup> *Ngatarawa Development Trust Ltd v Hastings District Council* EtCt Decision W17/2008 at paragraph [29].

- (c) Determine whether the extent of that adverse impact (by itself, or in combination with other adverse impacts) is sufficiently significant to be out of proportion to the project's regional benefits (s85(3) FTAA), noting:
  - (i) A Panel cannot form that view solely on the basis that the adverse impact is inconsistent with or contrary to a provision in a relevant planning document, and
  - (ii) If the adverse impacts are out of proportion with the benefits then the Panel *may* decline the proposal, but is not required to.

*Application to the Arataki Proposal*

- 14. In short, reverse sensitivity could arise in this case if the incoming “*sensitive*” activities (i.e. the new CDL residential properties) are adversely affected by effects lawfully generated by the existing neighbouring activities (e.g on the Shaggy Range or Olive Grove sites), and consequential complaints from the incoming activity lead to the existing activity's operations being compromised.
- 15. With reference to determining whether and to what extent a potential reverse sensitivity effect arises in this case (as set out at para 13 above), CDL submits:
  - (a) There is no basis for concluding that the Proposal will have any potential adverse effect on the viability and operations of existing rural activities in the area or any new industries that might wish to establish on rurally zoned land:
    - (i) The existing rural activities are already operating in the vicinity of established residential development. Further, as noted in the Planning Memo, aside from the establishment of feedpads/lots (which are already significantly constrained as a viable use), all standard rural activities permitted under the plan could continue.

- (ii) The design of the Proposal minimises the potential for adverse visual, odour or noise effects on the residential elements through a combination of visual, acoustic and spray drift screening (planting, shelterbelt and an acoustic fence) secured by consent notices, building setbacks and no complaints covenants. The expert evidence of CDL is that the treatment of these interfaces will appropriately mitigate any potential land use conflicts and in this case the risk of unreasonable adverse reverse sensitivity effects is unlikely not arise.
- (iii) In any event, as indicated in the Court decisions quoted above, incoming occupants to the Site will need to be realistic about their physical and planning context. Any assessment of reverse sensitivity should take into account the Rural zoning on the CDL Site and the neighbouring land, and the measures incorporated into the proposal to address potential effects on the residential elements. It is submitted that, given that context, the occupants of the subdivision will not realistically generate reverse sensitivity effects on a neighbouring rural activity that is operating in accordance with the zone and any consent conditions.

16. CDL considers that:

- (a) No further mitigation measures are necessary or justified in terms of the FTAA. In that regard, the acoustic memorandum compared the effects of a 10m and 30m buffer, concluding that a 30m buffer is not required to achieve compliance with the district plan provisions or to ensure an appropriate and quiet acoustic environment. This is supported by the assessment contained within the Planning Memo. Introducing a 30m buffer to address the potential for reverse sensitivity effects would therefore be more onerous than necessary to address the reason for which it is set.

- (b) Any potential adverse reverse sensitivity effects are not sufficiently significant, either by themselves, or in combination with other adverse impacts, to be out of proportion to the project's regional benefits.

**DATED** this 3<sup>rd</sup> day of December 2025

A handwritten signature in blue ink, consisting of a series of loops and flourishes, positioned above a horizontal line.

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**Douglas Allan / Alex Devine**

Counsel for CDL Land NZ Ltd