

Reverse Sensitivity — The Common Law Giveth, and the RMA Taketh Away

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Reverse sensitivity is sensitivity not to environmental impact, but to complaint about environmental impact. Reverse sensitivity exists where an established use produces adverse effects and a new use is proposed for nearby land. It is the legal vulnerability of the established activity to objection from the new use. Under the Resource Management Act 1991 (“RMA”), new uses may be prohibited or limited on the ground of reverse sensitivity in order to protect established uses from having to modify their operations. Restricting new uses on this basis has significant consequences for the law of private nuisance, private land rights, and the interpretation and application of the RMA. It defeats the purpose of the common law rule that it is no defence that the plaintiff came to the nuisance. Private land rights become dependent upon public benefit and are apt to be compromised or extinguished in the absence of open and continuous use. Owners of vacant land must object to proposed activities with adverse effects in order to preserve future rights to use their own land. The RMA is reduced to a planning statute rather than an environmental protection regime. Adverse environmental impacts are permitted to continue and the existing uses that cause those impacts are protected from legitimate legal complaint.

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I. INTRODUCTION — THE CONCEPT OF REVERSE SENSITIVITY

1. Definition

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 to not adversely affect the new activity.

Under the RMA, reverse sensitivity has been found to be a legitimate reason for restricting new land uses. It may justify declining resource consent,¹ imposing conditions on consent,² or restricting or prohibiting activities in local plans.³ Decisions based on reverse sensitivity protect established uses from having to have the method of operations changed, or otherwise have the ongoing viability of the established use preserved.

The term “reverse sensitivity” does not appear in the RMA. It is not a term of art, but has become the label for a particular kind of effect. It was defined in *Auckland Regional Council v Auckland City Council*:⁴

[The term 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 activities.

2. Application — An Example

In *McQueen v Waikato District Council*⁵ a land use consent for a nudist camp was overturned on appeal. The appeal had been brought by the owners of fruit orchards in the vicinity of the property. They objected to the camp on several grounds: increased traffic hazards, noise, devaluation of neighbouring properties, adverse social and cultural effects and effects on amenity values, and the possible restrictions on spraying of the orchards that might eventuate because of the health risks to the nudists from the spraying.

- 1 *McQueen v Waikato District Council*, Planning Tribunal, Hamilton, A 45/94, 20 June 1994, Judge Sheppard.
- 2 *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145 (HC); *Ports of Auckland v Auckland City Council* [1998] NZRMA 481 (HC).
- 3 *Winstone Aggregates Ltd v Papakura District Council Environment Court*, Auckland, A 96/98, 14 August 1998, Judge Whiting; *Wellington International Airport Ltd v Wellington City Council*, Environment Court, Wellington, W 102/97, 19 November 1997, Judge Kenderdine.
- 4 *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205, 206.
- 5 Planning Tribunal, Hamilton, A 45/94, 20 June 1994, Judge Sheppard.

The Planning Tribunal⁶ found no substance in any of the objections, save the last. There were no discernible traffic effects.⁷ There were no grounds to expect a noise problem, nor any adverse effect on the value of neighbouring properties. There were no significant adverse effects on social or cultural conditions or amenity values.⁸ The Tribunal did find that spraying of the orchards would pose a health risk to the users of the camp. It concluded, therefore, that the presence of the nudists posed a threat to the future viability of the orchards. The resource consent for the camp was refused. The Tribunal stated:⁹

We find that there would be a potential effect on the environment, including people engaged in orchards as a part of an ecosystem, of allowing the proposed activity. That effect would be that those orchardists in the vicinity would be restrained from managing their orchards with chemical sprays at the times and in the ways that they might otherwise do, because of the risk of harm to people using the applicant's property for recreation.

3. Consequences

Reverse sensitivity can be viewed as simply a factor to consider in resource management decisions. Environment Court Judge Kenderdine stated in *Wellington International Airport Limited v Wellington City Council*:¹⁰

... the use of the term “reverse sensitivity” should not obscure either of two things. First, it is not a term which is used in the Act or given any particular status. Second, it is no more than a description of a class of effect — the sensitivity of a person quite lawfully creating adverse effects to pressure from people who may be potentially affected by those adverse effects. But, like any other “effect”, reverse sensitivity needs to be considered in the context of all effects.¹¹

This simple definition belies the impact of reverse sensitivity on the law of private nuisance, private land rights, and the interpretation and application of the RMA.

6 Now the Environment Court.

7 *McQueen v Waikato District Council*, Planning Tribunal, Hamilton, A 45/94, 20 June 1994, 4 per Judge Sheppard.

8 *Ibid.*, 6.

9 *Ibid.*, 10.

10 Environment Court, Wellington, W 102/97, 19 November 1997, 44.

11 “Effect” is defined in s 3 of the Act: In this Act, unless the context otherwise requires, the term “effect” ... includes —

- (a) Any positive or adverse effect; and
- (b) Any temporary or permanent effect; and
- (c) Any past, present or future effect; and
- (d) Any cumulative effect which arises over time or in combination with other effects — regardless of the scale, intensity, duration, or frequency of the effect, and also includes —
- (e) Any potential effect of high probability; and
- (f) Any potential effect of low probability which has a high potential impact.

The practice of restricting new activities on the ground of reverse sensitivity has significant consequences:

- (a) It defeats the purpose of the common law rule that it is no defence that the plaintiff came to the nuisance;
- (b) It allows unreasonable adverse effects to continue;
- (c) It reduces the RMA to a planning statute rather than an environmental protection regime;
- (d) Private property rights become dependent upon public benefit;
- (e) Owners of vacant land must object to any proposed activity with adverse effects in order to preserve the ability to use their own land;
- (f) Consent applications are more likely to require notification.

Each of these consequences will be examined in part III below. First, however, it is necessary to briefly consider the common law of nuisance in isolation from the RMA.

II. PROPERTY RIGHTS: THE LAW OF PRIVATE NUISANCE

1. Right to Quiet Use and Enjoyment

At common law, occupation of land includes the right to quiet use and enjoyment. This right is protected by the tort action in private nuisance. The right to quiet enjoyment is not absolute but contextual. The occupier is not protected from all interference, but from interference that is unreasonable.¹² What constitutes unreasonable interference depends upon the neighbourhood within which the land is located.¹³ For example, loud noise and objectionable smell is more reasonable in industrial areas than in residential neighbourhoods.

2. That the Plaintiff Came to the Nuisance is No Defence

A basic and well-established principle of the law of nuisance is that it does not matter who arrived first, the defendant causing the nuisance or the plaintiff being

12 Reverse sensitivity cases refer to “sensitive” activities, but the term is not used in the same sense as it is in nuisance law. In nuisance, a sensitive user of land is one whose requirements are extraordinary. A sensitive use cannot complain about a reasonable degree of interference. For example, a mink farm cannot prevent reasonable noise from its neighbours simply because it interferes with whelping (*Rattray v Daniels* (1959) 17 DLR (2d) 134 (Alta CA)). The “sensitive” uses in most reverse sensitivity cases are ordinary uses, such as residential development or recreational use. They are only sensitive in the sense that they will be affected if a neighbouring activity causes a nuisance.

13 *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB); *Bone v Seale* [1975] 1 WLR 797 (CA).

affected by it. This principle was articulated in *Sturges v Bridgman*¹⁴ and has been followed and confirmed repeatedly. In *Sturges*, a physician became the occupier of a house in London. At the back of the house, he established a consulting room for his medical practice. On the property to the rear was the house and business of a confectioner. The confectioner's kitchen abutted the physician's consulting room. The confectioner's equipment included two large marble mortars and two large wooden pestles, used for breaking up and pounding sugar and other hard materials. The confectioner had used this equipment in the same spot for thirty years before the arrival of the physician. Unfortunately, the operation of the equipment caused substantial noise and vibration to the consulting room, and the physician found that it interfered with carrying out his practice. He brought an action in private nuisance.

The confectioner defended the suit with the argument that he had been carrying on in exactly the same manner for thirty years with no complaint from anyone, and that the physician had caused the problem by locating his consulting room directly next to his kitchen. The Court held for the physician. The interference amounted to an actionable nuisance, and the fact that the plaintiff had come to the nuisance was not a defence.

The rule is well established: it is no defence to an action for private nuisance that the plaintiff undertook a new activity on his own land in the vicinity of interference being caused by an established use. If it were otherwise, the court would be sanctioning a transfer of rights over the plaintiff's land without consent or compensation. If the plaintiff cannot move to the nuisance and complain, he does not have the right to quiet use and enjoyment of his land, which means that the established use has acquired rights over that land.

3. Easements by Prescription

In order to understand the rationale behind the rule, it is necessary to detour briefly into property law, and in particular the law of easements. At common law, one way to get rights over neighbouring land was to obtain an easement by prescription. A prescriptive easement is a right to use another's property in a particular way, which is acquired by open and continuous use for a long period of time, often twenty years. Prescription is based upon the consent or acquiescence of the owner of the servient tenement,¹⁵ the land over which the easement is taken. In other words, the use of the land must be one that the owner is able to detect and prohibit should he choose to do so.

It follows, therefore, that in order to obtain an easement to commit a nuisance, the nuisance must be open and continuous; and of course in order to be open and

¹⁴ (1879) 11 Ch 852 (CA).

¹⁵ *Ibid*, 863.

continuous, the nuisance must actually be committed. In *Sturges*, no nuisance was committed during the thirty years before the arrival of the physician. The confectioner may have used his mortars and pestles during that period, but prior to the building of the consulting room, no action in nuisance was possible because the shaking and the pounding was causing interference to no one. The effect had existed for thirty years, but the nuisance had not. The Court stated:¹⁶

[W]e arrive at the conclusion that the Defendant's acts [prior to the arrival of the physician] would not have given rise to any proceedings either at law or in equity. Here then arises the objection to the acquisition by the Defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventable nor actionable found an easement? We think not ... an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence.

Easements cannot be obtained by prescription over any land that has been brought under the Land Transfer Act 1952,¹⁷ which is most land in New Zealand. This does not negate the rationale for the rule that coming to the nuisance is no defence, but rather strengthens it. The prohibition on prescription reflects a legislative position against the acquisition of land rights other than by express agreement.¹⁸ If it is not possible to acquire rights over neighbouring land directly, in the face of open and continuous use over a substantial period of years, then it should not be possible to acquire such rights in the absence of such notorious use.

III. CONSEQUENCES OF RESTRICTING NEW ACTIVITIES ON THE GROUNDS OF REVERSE SENSITIVITY

1. Defeating the Purpose of the Common Law Rule that Coming to the Nuisance is No Defence

Strictly speaking, "protecting" established uses from benign new uses does not reverse the rule that it is no defence that the plaintiff came to the nuisance. Any land occupier who manages to get planning approval to move to a nuisance would certainly be able to bring a private nuisance action.¹⁹ However, reverse sensitivity can prevent the rule's application and defeat its rationale.

16 Ibid, per Thesiger LJ.

17 Land Transfer Act 1952, s 64; *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741 (CA).

18 Or by one of the exceptions provided for in legislation, such as by court order in the case of encroachment or landlocked land: Property Law Act 1952, ss 129 and 129B.

19 *Ports of Auckland v Auckland City Council* [1998] NZRMA 481, 493–498 (HC).

The RMA should have no formal effect on the law of nuisance. Section 23(1) of the RMA states that “Compliance with this Act does not remove the need to comply with all other applicable . . . rules of law”. Nevertheless, prohibiting activities on the basis of reverse sensitivity defeats the application of the common law rule, not by saying that it *is* a defence that the new use came to the nuisance, but by not allowing the new use to occur at all. It restricts a land owner’s ability to undertake a normal, non-offending activity which causes no impact upon anyone. The effect is not to bar nuisance actions, but to prevent a nuisance from occurring. If no new use is present, there is no plaintiff to be affected by the established use, and thus no interference with quiet use and enjoyment about which to complain. The external effects still occur, but those effects cause no plaintiff unreasonable interference with use and enjoyment of property. Thus the rule that it is no defence that the plaintiff came to the nuisance is rendered meaningless because the scenario to which it would apply is prohibited.

Restricting new activities on the ground of reverse sensitivity has the effect that the common law rule prevented: established uses effectively obtain the right to cause adverse effects to nearby vacant land. The rationale for the common law rule, as articulated in *Sturges* above, is that if an established use is able to unreasonably interfere with the use and enjoyment of neighbouring land with impunity, the law has effectively granted rights to the established use over that neighbouring land; the land owner’s rights in the land are diminished. Reverse sensitivity does so without the land owner’s knowledge or consent, and without compensation.

The potential for such a result can be seen in a recent reverse sensitivity case, *Winstone Aggregates Ltd v Papakura District Council*.²⁰ Winstone Aggregates Limited (“Winstone”) was a quarry company that owned a large piece of land in the Papakura District. On the land was an established quarry and a site for a future quarry. Winstone, along with the Auckland Regional Council, appealed the proposed Papakura District Plan on the grounds that it did not adequately cater for the protection of mineral resources. Winstone’s submission on the proposed plan had been that the plan should make provision for a 500 metre buffer around the quarry zone, and that within the buffer, land uses that could be affected by quarry operations should be prohibited. The difficulty, in the eyes of the Papakura District Council, was that Winstone did not own the land in the proposed buffer zone. Essentially, Winstone was proposing that land held by private third parties be used as a buffer to insulate the quarry from future restrictions or mitigation measures that new activities would seek to impose upon it. The Environment Court stated:²¹

20 *Winstone Aggregates Ltd v Papakura District Council*, Environment Court, Auckland, A 96/98, 14 August 1998, Judge Whiting.

21 *Ibid*, 22.

The purpose of the proposed buffer overlay is to protect the quarry activity from possible complaint and constraint flowing from the establishment of any sensitive activity.

The Papakura District Council, explaining its decision not to include such a buffer in the plan, said:²²

The effects of present and future quarry operations should be restricted to the site of those operations. That is, the responsibility for mitigating the effects of quarries rests with the quarry operator.

However, the Environment Court held that territorial authorities did have jurisdiction to make allowance for reverse sensitivity by the creation of a buffer zone on lands other than of the established use, in this case the quarry.²³ It adjourned the appeal to allow the parties to provide more complete evidence on the issue of vibration before it would decide whether the buffer should be created in the situation before it.²⁴

The effect of such a buffer would be to grant de facto rights to the quarry over the buffer land. It would enable the quarry to produce environmental externalities without fear of legal action. The value of the buffer land would be reduced without compensation. The result would be the same as if the quarry had successfully made a claim for adverse possession of the land, or for an easement by prescription over the land, neither of which would have been possible to do directly.

2. Allows Unreasonable Adverse Effects to Continue

The test for private nuisance is whether the plaintiff is experiencing an unreasonable interference with quiet use and enjoyment of land. If the effect complained about is actual damage that is beyond a trivial matter, then the effect is *prima facie* unreasonable and the test is satisfied.²⁵ If the effect is mere interference, then it must be unreasonable in the context of the neighbourhood in which it occurs.²⁶ The purpose of taking reverse sensitivity into account in resource planning is to protect established uses from being subject to this test. However, the test is a perfectly sensible one to impose. For example, consider the facts of *Port of Auckland*,²⁷ in which a residential development was proposed in the vicinity of a port facility that operated twenty-four hours a day. One of the

22 Ibid, 9.

23 Ibid, 49.

24 Ibid, 50–51.

25 *Hunter v Canary Wharf Ltd* [1997] AC 655, 705 (HL).

26 *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB); *Bone v Seale* [1975] 1 WLR 797 (CA).

27 *Ports of Auckland v Auckland City Council* [1998] NZRMA 481 (HC).

concerns about allowing the development was that twenty-four-hour noise was not appropriate for residential dwellings. The Environment Court thought that it was necessary to protect the facility from future complaints from the residents, and thus thought it appropriate that conditions requiring noise-proofing be attached to the development.

If the residential development was built without conditions, the residents might later bring an action in private nuisance against the port because of the noise from the operation of the facility. The port facility is located in an industrial area, on the harbour. Under the law of nuisance, if that neighbourhood was one in which twenty-four-hour noise was to be expected, given its dominant uses, characteristics, development and history, it would not be unreasonable. It would not therefore constitute a nuisance. Therefore, conditions imposed by the Environment Court would not have been required to protect the port because the nuisance action would fail. However, if twenty-four-hour noise was not reasonable even in this neighbourhood, taking into account the character and history of the area, then the port facility would be causing an unreasonable interference. If the effect is unreasonable even in the context of the neighbourhood in which the established use is located, it is difficult to understand why it should be protected, even under a statutory planning regime. Such protection comes at the expense of owners of surrounding property, who are restricted in the manner they may use their land and whose land values inevitably decrease as a result. As Kekewich J stated in *Attorney-General v Cole & Son*,²⁸ “If [a person is causing] a nuisance, then he cannot say that he is acting reasonably. The two things are self-contradictory.”

3. Reduces the RMA to a Planning Statute

The issue of reverse sensitivity is just one aspect of a larger ongoing debate about the overall intent and purpose of the RMA. Is the RMA primarily a planning statute similar to the Town and Country Planning Act 1977 (“TCPA”), or was it intended to be a different kind of decision-making process based on avoiding, remedying and mitigating adverse effects on the environment? Protecting hazardous established uses from harmless new uses is a practice that brings the purpose of the RMA into question. For such a practice to be appropriate, the RMA must primarily be a planning statute which requires councils and courts to regulate activities — to decide what should go where, and whose private interest should be sacrificed for the public interest.

Before the RMA, the TCPA allowed councils to direct and control development and make choices for the local community over whom they had jurisdiction. The TCPA required the wise use of resources amongst other matters

of national importance.²⁹ The term “reverse sensitivity” was not used, but managing land use so as to avoid reverse sensitivity situations was consistent with the direct and allocative land use control of the TCPA. For example, in *Aratiki Honey Ltd v Rotorua District Council*³⁰ a consent had been granted for a camping ground to set up on property adjacent to a large honey complex. The honey complex appealed the consent, arguing that the presence of its bees posed a threat to users of the camp site, and that future restrictions on the operation of the apiary might result. Principal Planning Judge Turner observed that the case was a rare situation “where an established use is opposing the introduction of a new use in the neighbourhood because of what the established use perceives as *its* likely effect on the proposed use”.³¹ The Tribunal found that the intended site was suitable for the proposed camping ground, and that if the existence of the honey complex was excluded from consideration, the consent should undoubtedly be confirmed. Nevertheless, the Tribunal allowed the appeal and refused consent on the basis of the potential conflict between the proposed benign camping ground and the established, hazardous apiary.

If the RMA is merely a planning statute, then restricting new uses on the grounds of reverse sensitivity could well be consistent with its purpose. The alternative is that the RMA was intended to be a different kind of regime whose primary purpose is environmental protection, and whose mandate to councils and courts is to avoid, remedy or mitigate adverse effects on the environment. For example, s 104(1)(a) states:

- (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to —
 - (a) Any actual and potential effects *on the environment* of allowing the activity [emphasis added].

Restricting harmless activities in order to protect hazardous activities is not consistent with such a purpose. It shields offending activities from environmental protection rather than protecting the environment from offending activities. In

29 Town and Country Planning Act 1977, s 3(1)(b) (repealed by the RMA).

30 (1984) 10 NZTPA 180.

31 *Ibid*, 183 (emphasis in original).

order for reverse sensitivity to be taken into account under s 104(1)(a), “environment” would have to be defined so broadly as to include rules of law.³²

4. Private Property Rights become Dependent upon Public Benefit

Whether an effect constitutes a nuisance depends upon what kind of effect it is. If it is interference, such as noise or smell, it will be a nuisance if the degree of the interference is unreasonable in the context of the neighbourhood in which it occurs.³³ If the effect is actual physical damage, something beyond a mere triviality, then a nuisance is *prima facie* established. No contextualisation is necessary.³⁴

Although the language in some nuisance cases is not altogether precise, the question is not whether the defendant is making reasonable use of its land but whether it is reasonable for the plaintiff to tolerate the effect that is being caused. Thus the question is not whether the defendant is making an ordinary and reasonable use of its land in isolation, but whether, as it stated in *Bank of New Zealand v Greenwood*,³⁵ it is a reasonable use having regard to the fact that there are neighbours.³⁶ Thus the nuisance inquiry is not primarily about the activity of the defendant, but about the effect upon the plaintiff. Therefore, the question of nuisance does not depend on whether there is some public benefit in the defendant’s activity.

There have been decisions in nuisance cases that have attempted to incorporate public benefit into the nuisance equation, but they generally have not been followed. *Miller v Jackson*,³⁷ the infamous cricket case, is one such example. The plaintiffs purchased a house adjacent to a cricket pitch. Cricket had been played there for seventy years before the plaintiffs arrived. Occasionally when there was a hit for six, the ball went over the fence and into the plaintiffs’ property, smashing

- 32 In RMA, s 3, “environment” is defined as including —
- (a) Ecosystems and their constituent parts, including people and communities; and
 - (b) All natural and physical resources; and
 - (c) Amenity values; and
 - (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.
- The Ministry for the Environment, in its Proposals for Amendment to the Resource Management Act November 1998, has suggested amending the definition of “environment” to include:
- (a) Ecosystems and their constituent parts; and
 - (b) All natural and physical resources; and
 - (c) The health, safety, amenity values, and cultural values of people and communities.
- 33 *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB); *Bone v Seale* [1975] 1 WLR 797 (CA).
- 34 *Hunter v Canary Wharf Ltd* [1997] AC 655, 705 (HL).
- 35 *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 (HC).
- 36 *Ibid*, 534.
- 37 [1977] 3 All ER 338 (CA).

tiles and posing a danger to the plaintiffs sitting in the garden. The English Court of Appeal declined to grant the plaintiffs an injunction. Lord Denning reasoned that not only had the plaintiffs moved to the nuisance, the cricket pitch was a valuable village facility and its public benefit outweighed any infringement to the plaintiffs' rights.

Miller v Jackson not only failed to apply the *Sturges v Bridgman* rule that coming to the nuisance is no defence, but cast the net too widely by taking public benefit into account. The law of private nuisance is the law of property rights: as between two land occupiers, who can do what to whom? Mr Justice Hardie-Boys, as he then was, well stated the law in New Zealand in *Bank of New Zealand v Greenwood* when he observed:³⁸

To the extent that this is an appeal to set the public interest ahead of the private interests of the plaintiffs, then I regret that authority requires me to close my ears to it. Despite the valiant efforts of the cricket-loving members of the Court in *Miller v Jackson*, it has been made clear in *Kennaway v Thompson* [[1980] 3 WLR 361; 3 All ER 329] that a long line of authority going to back to *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 has maintained inviolate the principle that, in the words of Lindley LJ in the latter case (p 316): "... the circumstances that the wrong-doer is in some sense a public benefactor ... [has not] ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed."

One of the problems with reverse sensitivity is that it allows a wide net to be cast, and for public benefit to be taken into account. It makes the question of private land rights dependent upon public utility: what course of action creates the greatest good for the greatest number? In reverse sensitivity cases, weighing the public benefit of the established use is common.³⁹ In *Winstone* the appellants argued that constraining the potential of the quarry would jeopardise the efficient use of that resource and therefore its benefit to the community of Auckland. The Court determined that it was appropriate to take into account the cost to *Winstone* if it was required to internalise effects given the importance of the aggregate to the community of Auckland. The Court found the evidence too inconclusive⁴⁰ to

38 *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, 535.

39 For example, see *Winstone Aggregates Ltd v Papakura District Council*, Environment Court, Auckland, A 96/98, 14 August 1998, 33 per Judge Whiting; *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205. In the latter case, the regional council requested that activities listed permitted in the business zone of the Proposed Auckland City District Plan require resource consent application. This assessment would allow consideration of the effects of air discharges from activities already established in the vicinity. The regional council argued that the existing industry was a scarce resource and that it needed a place to function effectively without compromising the health and safety of people. The appeal was allowed.

40 *Winstone Aggregates Ltd v Papakura District Council*, Environment Court, Auckland, A 96/98, 14 August 1998, 50 per Judge Whiting.

allow for a determination. However, its deliberations indicate that the more economically significant an established use, the more likely that a proposed use will be prohibited if it will be adversely affected by the established use. This means, in turn, that the larger the offending activity in economic terms, the more likely it is to be permitted to cause adverse environmental effects on surrounding land.

5. Sensitivity to Reverse Sensitivity: Owners of Vacant Land Should Object to Any Proposed Activity with Adverse Effects

There are at least two ironies in the development of reverse sensitivity as a ground for objecting to proposed uses. The first is that it becomes necessary for the offending activity to emphasise how offensive it is. In nuisance actions or proceedings for an enforcement order, the offending activity seeks to show that its adverse effects are minimal. In reverse sensitivity cases, the effects are emphasised by the offending party. For example, in *Winstone*, the quarry's own witnesses described the effects of quarrying operations as including "ground vibrations from blasting, air blasts, noise from quarry operations and vehicles, dust, heavy vehicle traffic flows, visual impacts, release of sediment to water from earthquakes, [and] potential risks from storage and use of hazardous substances".⁴¹

The other irony is that reverse sensitivity may eventually hinder activities with adverse effects. Reverse sensitivity is an effective argument for maintaining the status quo, and so far its application has been to the advantage of established activities with external effects. However, if an activity with external effects can effectively "take over" neighbouring vacant land, restrict the uses of that land, and cause a reduction in its value, owners of vacant land should object to the establishment of any use that might in the future plead reverse sensitivity. If reverse sensitivity is to become a legitimate ground for objecting to a proposed activity, as it seems to have become, then it must also be legitimate for an owner of vacant land to object to the establishment of any activity in the vicinity with external effects. In other words, what is sauce for the goose is sauce for the gander: If reverse sensitivity is a legitimate ground for objecting to a proposed activity, then "sensitivity to reverse sensitivity" must also be a legitimate objection. If reverse sensitivity is an "effect" under s 3 of the RMA, because of the threat of future restrictions on the established use, then the threat of future restrictions on the vacant land because of reverse sensitivity must itself also be an "effect" in a similar, but opposite, manner.

Thus, reverse sensitivity has become the RMA version of adverse possession or prescription: if the landowner does not object before that use becomes

41 Ibid, 24.

established, it will be too late. For example, the proposed buffer zone in *Winstone* consisted of other people's property. In retrospect, it would have been reasonable for the owners of the vacant land to object to the original establishment of the quarry, even though the quarry's effects would have caused trouble for no one at the time. The objections could have been based on the valid concern that future land use might become restricted because of the nature of quarry operations.

6. Consent Applications are More Likely to Require Notification

If owners of vacant land can legitimately object in the manner described above, resource consent applications are more likely to require public notification. A survey of local authorities carried out by the Ministry for the Environment⁴² indicates that at present only 5 per cent of all resource consents are notified. Under s 94 of the RMA, provision is made for certain categories of resource consent applications to proceed without notification as provided for in s 93. For example, s 94(2) states:

- (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and —
 - (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
 - (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

Thanks to reverse sensitivity, even applications to undertake activities near vacant land will affect rights of the owners of those lands. Keeping in mind that the definition of "effect" in s 3 includes any future effect, it is difficult to characterise the adverse effect in any potential reverse sensitivity situation as minor since the future use of the vacant land may be restricted. The owners of such land therefore can legitimately complain if they do not receive notification of any such application which has the potential to affect their interests and land values.

IV. CONCLUSION

To restrain new uses because of the effects of an existing use is precisely what the law of nuisance says should not occur. In *Sturges v Bridgman*, Jessel MR offered the following example:⁴³

42 Ministry for the Environment, *Annual Survey of Local Authorities 1997–1998*, (1999).

43 (1879) 11 Ch 852, 858–859 (CA).

Take the case of putting a blacksmith's forge in the middle of a moor: you cannot enter the blacksmith's forge, inasmuch as that belongs either to him or to his landlord, and the owner of a moor which has no game upon it has nothing which can be injured by the noise. There is no remedy whatever, because it is a barren moor. Presently, this which is useless as a barren moor becomes available for building land by reason of the growth of a neighbouring town: is it to be said that the owner has lost the right to this barren moor, which has now become worth perhaps hundreds of thousands of pounds, by being unable to build upon it by reason of this noisy business? The answer would be simply, "I could not stop you: I could not interrupt. It is physically impossible, because it would be a trespass; legally impossible, because I had suffered no damage and could not maintain an action. How could you therefore acquire a right to deprive me of the fair and ordinary use of my property?"

The practice of restricting new activities on the ground of reverse sensitivity has significant consequences for the law of private nuisance and the interpretation and application of the RMA. Private land rights are apt to be compromised or extinguished in the absence of open and continuous use and without the means to seek compensation. The rule that coming to the nuisance is no defence loses its importance. Treating reverse sensitivity as an "effect" shields offending activities from environmental protection rather than protecting the environment from offending activities. It insulates land uses that cause adverse environmental impact from legitimate legal complaint.



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Environment & Resource Management Group

The Environment & Resource Management Group comprises experienced specialists with commercial and litigation backgrounds who have worked in multi-disciplinary teams on major projects and transactions. The Group has the necessary expertise and experience to handle all aspects of the specialist work relating to development and the environment, including:

- strategic, policy and project planning advice
- resource consent applications and assessments of environmental effects
- submissions on proposed resource management plans and legislation
- due diligence prior to acquisitions and divestments
- environmental compliance programmes
- risk management projects including reviews of environmental management systems

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