Reverse Sensitivity — Are No-Complaints Instruments a Solution?

Asher Davidson*

Consideration of reverse sensitivity in applications for consent under the Resource Management Act is now common place. Often it will mean that consent authorities are faced with a difficult choice between allowing an existing activity with unavoidable adverse effects to continue and refusing consent to a proposed activity; or allowing the new activity to establish to the detriment of its effects-producing neighbour. This article considers the potential win-win solution offered by "no-complaints" instruments, which prevent landowners from bringing action against any activity of the effects-producing neighbour. Factors considered are the mechanisms by which such instruments operate, their validity, enforceability, legality and general desirability.

1. INTRODUCTION

The problem of a person wanting to develop their land in a way that conflicts with their neighbour's use of their land is by no means new. The relatively ancient law of nuisance was developed to deal with just that situation.[1] Currently, in New Zealand, applications for proposed new uses of land are dealt with under the Resource Management Act 1991 (RMA) but that law continues to allow nuisance actions to be maintained.

Because of this, owners of activities that produce unavoidable adverse environmental effects fear that if incompatible activities are allowed to establish

* BA, LLB(Hons) *Auckland*. Completing LLM at the University of Auckland. Currently practising in environmental and resource management law at the Auckland offices of Chapman Tripp. My thanks to Associate Professor Ken Palmer and Vernon Rive for their helpful comments on this paper.

1 See for instance, *Aldred's Case* (1610) 9 Co. Rep. 57b.

nearby, their business may be prevented from developing or may be stopped altogether. The term "reverse sensitivity" has been coined to denote the susceptibility of an activity that has unavoidable adverse effects (known in this paper as an "effects-producing" activity) to nuisance actions from new, nearby activities. The effects-producing activity is therefore entitled to object to a proposed neighbouring activity, which in itself may be innocuous, on the basis that those neighbours might later effectively require the closure of the effects-producing activity

Consideration of the reverse sensitivity doctrine in applications for resource consent is now common place. Often it will mean that consent authorities are faced with a difficult choice between allowing an existing activity to continue and refusing consent to the proposed activity or allowing the new activity to establish to the detriment of its effects-producing neighbour.

This article looks at the possibility of a compromise — a "win-win" solution for developers and owners of effects-producing activities. That possible solution is the imposition of a condition on the resource consent preventing complaints being made by the consent holder against any activity of the effects-producing neighbour. The condition is placed in a covenant or easement and registered on the certificate of title, ensuring successors in title have specific notice of the requirement, and are bound by it.

In the last 5 years or so, a number of cases have looked at the merits of using what are called in this paper "no-complaints" instruments to allow conflicting land uses to co-exist peacefully as neighbours. This paper particularly looks at how no-complaints instruments may be used in situations of reverse sensitivity to avoid placing unnecessary restrictions on the use of neighbouring land. It looks particularly at sections 108 and 220 of the RMA and how such instruments would work in practise. It further addresses the question of whether no-complaints instruments are lawful, in terms of the *Newbury* principles, and whether they comply with the New Zealand Bill of Rights Act 1990 (NZBORA). Finally, it looks at the effectiveness of no-complaints instruments and to what extent they benefit the developing land owner, the effects-producing neighbour and the public generally.

2. NUISANCE AND REVERSE SENSITIVITY

The benefit of using no-complaints instruments arises out of the Court's acceptance of the reverse sensitivity doctrine, which in turn, was developed because of the continuing application of the law of nuisance in New Zealand. This part looks briefly at the law of nuisance and the doctrine of reverse sensitivity.

2.1 The Common Law of Nuisance

Where a person's reasonable use and enjoyment of their land is interfered with by a neighbour's use of their land, the neighbour may be liable for the tort of private nuisance.[2] A common, (though criticised[3]), maxim sometimes said to underlie the law of nuisance is *sic utere tuo ut alienum non laedas* — a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour.[4] Courts have held that water, smoke, smell, fumes, gas, noise, heat, vibrations, electricity, animals and vegetation may all give rise to a claim in nuisance.[5]

There are two main remedies available for an action in nuisance — damages for past loss, and, of most concern to effects–producing activity owners, an injunction against the continuance of the nuisance.

2.1.1 The RMA does not exclude liability in nuisance

Nuisance is part of the common law, and as such is applicable in New Zealand law. While the common law can be defeated by a contrary statutory provision, the RMA specifically provides at s 23(1) that:

> Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws and rules of law.

Two New Zealand cases have addressed this provision of the Act in relation to the law of nuisance. The first is *Ports of Auckland Ltd v Auckland City Council*.[6] In this case, Baragwanath J had to decide whether, if apartments were allowed to be built close to the Ports of Auckland, occupants of the apartments would be theoretically able to sue the Ports in nuisance. In that case the Court concluded that:[7]

> ... there can be no doubt that very many of the potential plaintiffs whom the port company has in mind will have standing to sue [in nuisance].

2 The term "neighbour" is used loosely, and it is of course unnecessary for the parties to live "next door" to each other.

3 *Bonomi v Backhouse* (1858) EB & E 622, 643; Salmond & Heuston *On the Law of Torts* (Sweet & Maxwell Limited, London 1996) 21st edition, p 54.

4 *Sedleigh–Denfield v O'Callaghan* [1940] AC 880 at 898.

5 See *Hunter v Canary Wharf Limited* [1997] AC 655 at 685.

6 [1999] 1 NZLR 601 (*Ports of Auckland*). The facts of this case are given at Part 4.2.3 and discussed in more detail in Part 4.

7 Ibid at 608.

The second case in which s 23(1) was considered is *Varnier v Vector Energy Limited*.[8] In *Varnier,* the plaintiffs argued that the electromagnetic fields emanating from the defendant's power lines caused damage actionable under the heads of nuisance, trespass, negligence and the principle enunciated in *Rylands v Fletcher*[9].[10] In that case Salmon J held that s 23(1) of the RMA clearly contemplated that the common law right to claim in nuisance or negligence would persist.[11]

2.1.2 Resource consent does not exclude liability in nuisance

Related to the question of whether the RMA of itself allows for claims in nuisance is the possible argument that if an activity has been given planning permission in the form of a resource consent, then that activity cannot be actionable in nuisance. Both *Varnier* and *Ports of Auckland* rejected that argument. In doing so, both decisions reviewed the relevant United Kingdom authorities.[12] Although *Varnier* (as the later case) did not refer to *Ports of Auckland,* both came to the same conclusion. That conclusion, in line with the English authorities, is that just because an activity has planning permission, it is not necessarily protected from a claim in nuisance.

In *Ports of Auckland,* Baragwanath J held that:[13]

> It would be simplistic to say that because the port company has its position recognised by the relevant planning documents it cannot be the subject of a successful claim for nuisance. In *Wheeler v JJ Saunders Ltd* planning permission to accommodate pigs for breeding did not insulate the defendants from an injunction and damages relating to strong smells emanating from the premises. ... It was rightly not argued in this case [*Hunter v Canary Wharf Ltd*] that emission of noise within the limits of an ordinary and reasonable user and compliance with the council's rules as to noise levels will be characterised as an unalienable right, whatever the consequences to residents of new apartments within the precinct.

In *Varnier,* Salmon J held that the submission that a planning authority may authorise a nuisance was incorrect. This was not only on the basis of section 23 of the RMA but also on the basis that in *Wheeler v JJ Saunders* the English Court of Appeal had held that the planning authority had no jurisdiction to

8 HC, Auckland, CP82/99, 16 March 2003, Salmon J; [2000] BCLD 334. (*Varnier*).
9 *Rylands v Fletcher* (1868) LR 3 HL 330.
10 Supra note 8, at para 6.
11 Supra note 8, at para 28.
12 *Hunter v Canary Wharf Limited*, supra at note 5; *Gillingham Borough Council v Medway (Chatham) Doc Co Limited* [1993] QB 343; *Wheeler v JJ Saunders Limited* [1996] Ch 19.
13 Supra note 6, at 611.

authorise the nuisance unless it had a statutory authority to permit a change in the character of a neighbourhood and the nuisance was such that it would inevitably result from the authorised use.[14]

On the evidence presented in *Varnier*, the Court was not satisfied that either criteria had been met. It noted that the evidence suggested that there were ways of establishing the power line which would not cause the nuisance complained of.

2.1.3 No defence that the plaintiff has come to the nuisance

A further relevant aspect of the common law relating to private nuisance is that it is no defence that the plaintiff came to the nuisance after the activity complained of had already been established. In *Sturges v Bridgeman*,[15] the Court held that although a confectioner had been carrying out his trade in exactly the same manner for 30 years, a physician who bought the neighbouring house and set up his consulting room on the property was entitled to succeed in his claim for private nuisance. The confectioner argued that his use of the heavy machinery for many years gave him a prescriptive right over the neighbouring property which would have prevented the doctor from complaining.

However, the Court held that because the physician's consulting room had not been built until shortly before the claim, no nuisance had arisen until that time. As prescription is based upon the consent or acquiescence of the owner of the servient tenement, the right could not be obtained unless the owner had experienced the adverse effects for a long period of time. The Court stated:[16]

> [We] 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.

The principle that the plaintiff having come to the nuisance is no defence is supported in *Ports of Auckland* where the Court stated simply:[17]

> It is no defence that the plaintiff has come to the nuisance: *Sturges v Bridgeman.*

14 Supra note 8, at 29.
15 (1879) 11 Ch 852 (CA).
16 Ibid at 863, per Thesiger LJ.; quoted in Pardy & Kerr, infra note 22, at 104.
17 Supra note 6, at 608.

The simple reason for this common law rule is that an owner should not be able to permanently diminish the value of neighbouring land, without providing compensation, simply by establishing his or her use first.[18]

2.1.4 Consent is a defence

If the plaintiff has consented to the nuisance he or she can not then claim relief for it.[19]

2.2 Reverse Sensitivity

2.2.1 Reverse sensitivity accepted by New Zealand Courts

The leading case on reverse sensitivity is *Auckland Regional Council v Auckland City Council (ARC v ACC)*.[20] In that case the term "reverse sensitivity" was defined as:[21]

> 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.

Rather more helpfully, Pardy and Kerr define the doctrine as being:[22]

> The legal vulnerability of an established activity to complaint from a new land use.

In *ARC v ACC*, Judge Sheppard had to consider two matters, the relevant one for this paper being the appropriateness of providing in the Auckland Isthmus District Plan for reverse sensitivity. The Auckland Regional Council sought to have certain activities that were classified as permitted in the District Plan changed to controlled or discretionary activities if they were likely to be adversely affected by discharges to air from other nearby activities.

The Court did not accept submissions by the Auckland City Council that people should be left to judge their own locational needs, that they should not be protected from their own folly, or that people who came to the nuisance would not have recourse against the existing use. In short the Court accepted

18 Todd, *The Law of Torts in New Zealand* (Brookers, Wellington, 2001) 3rd edition, at 523.
19 Ibid.
20 [1997] NZRMA 205 (*ARC v ACC*).
21 Ibid, at 206.
22 Pardy & Kerr, in "Reverse Sensitivity — the common law giveth, and the RMA taketh away" (1999) 3 *NZJEL* 93, at 94.

that providing for reverse sensitivity within the District Plan was within the proper function prescribed for territorial authorities under the RMA.

The doctrine of reverse sensitivity has since been widely applied. Apart from the ports, such activities as quarries[23] and airports[24] now commonly object to nearby proposed activities on reverse sensitivity grounds.

2.2.2 The dilemma of reverse sensitivity

The reverse sensitivity doctrine benefits effects-producing activities, and the public interest in allowing nationally, regionally and locally important industries to continue. However, the Court's approval of the reverse sensitivity doctrine is a concern for landowners whose land is close to an effects-creating activity.

Take a recent example in Wanaka. There, a developer wished to subdivide land between the Clutha River and Wanaka Airport.[25] Organisers of the Warbirds Over Wanaka Airshow expressed concern that allowing 17 houses to be built in the area over which the bi-annual airshow took place would mean the show would not be able to continue. Concerns included that the area would become a "congested area" over which Civil Aviation requirements prevented flying displays, and that the streets in and around the subdivision are needed for parking and other services that residents might not be willing to allow.[26]

Other submitters opposed the application on the grounds that allowing residential activity close to the Airport would prevent planned extensions to the runway at the Airport and that present activities would be hampered, because future residents would be entitled to complain about the Airport.[27] The Civil Aviation Authority group general manager was reported as saying that:[28]

> it had been found that people were now more inclined to complain about airport noise than in the past. Residents would knowingly build near airports then "complain bitterly" about noise from aircraft.

23 *Winstone Aggregates v Papakura District Council*, Environment Court, Auckland, A96/98, 14 August 1988, Judge Whiting.

24 *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145; *Gargiulo v Christchurch City Council*, High Court, Christchurch, AP32/00, 6 March 2001. See also *Wrightson Seeds Ltd v Selwyn DC*, EnvC C32/2001, 16 March 2001, Judge Jackson, where Wrightsons appealed against granting of consent for subdivision on the basis that there may be reverse sensitivity effects on research crops.

25 Staff reporter, "Housing plan puts airshow in doubt", Otago Daily Times, 14 May 2002, quoting John Lanham.

26 Ibid. However, the Civil Aviation Authority issued a statement in October 2002 to the effect that the proposed subdivision would not constitute a "congested area" — "Airport subdivision approved", The Press (Regional edition), 4 December 2002.

27 Ivor Hayman, "Officials say project would affect airshow", Southland Times, 14 May 2002.

28 Supra note 25.

If no alternative solution had been available, it seems evident from such comments that the consent authority would have had essentially to choose between allowing the subdivision to go ahead and risk the Airport's activities being impeded, or, applying the doctrine of reverse sensitivity, refusing subdivision consent altogether.

However, in this case the parties found an alternative solution. The next part of this paper discusses the possible solution offered by no-complaints instruments in situations such as these.

3. THE LAW OF NO-COMPLAINTS INSTRUMENTS

3.1 A possible solution to the reverse sensitivity dilemma?

In the Wanaka subdivision scenario described above, the parties found an apparent solution to the seemingly inevitable refusal of consent or disruption to the Airport entailed by reverse sensitivity. Wanaka Airport and other submitters sought to have conditions placed on the resource consents, and covenants placed on the titles to the subdivided sections to the effect that owners, all successors in title and their occupiers, tenants, invitees or licensees, would be prevented from complaining about airport noise.[29]

The hearing commissioner eventually granted the application, one of the conditions being that the no-complaints covenant sought must be entered into.[30] An additional condition required the entering into of a covenant which would require owners and occupiers to fully co-operate with Warbirds Over Wanaka airshow management to facilitate the show.[31,32] Agreeing in principle to such covenants prior to the decision, a representative of the developer, Poplar Beach Ltd, said the company was looking for a "win-win situation".[33]

Do such "no-complaints" instruments really offer a win-win solution to the reverse sensitivity dilemma? On the face of the situation they do — in this case

29 Ibid.

30 "Airport subdivision approved", supra at note 26. Condition 9(e) Decision of David W Collins on Poplar Beach application dated 25 November 2002.

31 Condition 9(f) Decision of David W Collins on Poplar Beach application dated 25 November 2002. There was considerable discussion about whether this requirement to co-operate would require occupants to vacate their houses during the Airshow, to ensure safety requirements are met, if requested to do so.

32 Supra note 25. Such a covenant is not a no-complaints instrument as such but would raise similar issues to those discussed in this paper in terms of reasonableness.

33 Mark Thomas, "Attempts to save Warbirds show", Otago Daily Times, 16 July 2002. No decision has yet been made on this application as parties are still negotiating the covenants (as of 24 October 2002).

the property is likely to be subdivided and the Airport will be allowed to continue its operations, and develop, without interference from its new neighbours.

3.2 What are no-complaints instruments?

No-complaints instruments prevent the covenantor (if the instrument is a covenant), or servient owner (if an easement), from complaining about the adverse effects of a nearby activity, such as a quarry, a landfill, a port, or an airport. Like those covenants proposed in the Wanaka example, such instruments will often include a prohibition on the owner or occupier:

- Suing for nuisance;
- Taking any type of enforcement action under the RMA;
- Making opposing submissions against an application by the effects-producing landowner to obtain new resource consents or renew existing ones; and
- Funding or being otherwise involved in any of the above.

In *Christchurch Airport* the covenant included the added component that if the covenantor was to complain in breach of the covenant, the resource consent would automatically end.[34] By imposing a condition that the applicant enter into a covenant or easement of this type, the effects-producing landowner can be assured[35] that their activity will not be hindered by a new nearby activity whose owners might otherwise later complain.

3.3 Conditions under the RMA

3.3.1 Section 108

Section 108(1) of the RMA relates to conditions of resource consents. It provides:

> Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

This is a broad power, limited by the common law and the New Zealand Bill of Rights Act 1990, as is discussed later in Part 4. This general power would be

34 *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145 at 153. The wording of this covenant is discussed at Part 4.

35 Although see the reservations as to this assurance in Part 5.3.

used to impose a condition on the resource consent preventing a person from complaining about the effects created by a neighbour.

3.3.2 The law relating to conditions

Land use consents, and their conditions, are said to "run with the land".[36] Therefore subsequent owners of the land will (theoretically) be bound by conditions of the resource consent relating to use of the land. There are, of course, problems with enforcing specific conditions where the purchaser may not have had notice of the requirement. The use of the covenant or easement, entered on the certificate of title of the land, is a "reinforcement" tool, to ensure the purchaser does have specific notice of the condition.[37]

The breach of the no-complaints condition, as opposed to the covenant or easement, would be remedied under Part XII of the RMA. If the consent-holder made a complaint contrary to a no-complaints condition in a resource consent, one mechanism for enforcing the consent would be an abatement notice. Section 322(1) of the RMA provides:

> An abatement notice may be served on any person by an enforcement officer —
> (a) Requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, —
> (i) Contravenes or is likely to contravene ... a resource consent

A second option for the effects-producing neighbour who is the subject of the complaint would be an application to the Environment Court for an enforcement order. An enforcement order is defined in s 314(1) of the RMA as an order made by the Environment Court that can:

> (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Environment Court, —
> (i) Contravenes or is likely to contravene...a resource consent

The onus is on the applicant to prove on the balance of probabilities, with regard to the seriousness of the matter, that the order should be granted.[38]

36 RMA, s 134. *Walker v Manukau City Council*, Environment Court, C213/99, 7 December 1999, Judge Skelton: *NZ Post Ltd v Moore* (1992) 1 NZRMA 213 (PT).

37 See for instance, *Arkinstall v Wairoa District Council*, Environment Court A88/98, 27 July 1998.

38 See further Williams D, *Environmental and Resource Management Law* (Butterworths, Wellington, 1997) 2nd edition, chapter 14.

An enforcement order could be more attractive to the effects-producing neighbour than an abatement notice because the landowner him or herself can make the application, and it is not necessary for the council to take the initiative. On the other hand, because an enforcement order is of a serious nature, a full hearing is required, which would of course be time consuming and expensive.

If an abatement notice or enforcement order is issued and the complaining landowner ignores it, they may be found to be committing an offence under s 338 of the RMA and, under s 339, may be liable for a term of imprisonment of up to 2 years and a fine of $200,000.

3.4 Covenants under the RMA

3.4.1 Sections 108(2)(d) and 109

Without limiting the generality of section 108 (1), subsection (2) gives a list of kinds of conditions that the drafters of the legislation had in mind. Of particular relevance for this paper is section 108(2)(d), which provides:

> A resource consent may include any one or more of the following conditions: ...
>
> (d) In respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates).

Section 109 of the RMA goes on to make special provision in respect of covenants. That section provides:

> (1) ...every covenant given under section 108(2)(d), —
>
> (a) Shall be deemed to be an instrument creating an interest in the land within the meaning of section 62 of the Land Transfer Act 1952, and may be registered accordingly; and
>
> (b) When registered under the Land Transfer Act 1952, shall be a covenant running with the land and shall, notwithstanding anything to the contrary in section 105 of the Land Transfer Act 1952, bind all subsequent owners of the land.

Section 109 allows registration of the covenant on the certificate of title of the applicant's land and provides that the burden of the covenant runs with the land. Without this section, a covenant in favour of the consent authority would not be registrable and would not run with the land, because the benefit of the covenant does not relate to the land of the consent authority. This is explained further below.

3.4.2 The law of covenants

Covenants are promises made in the form of a deed, enforceable primarily by parties to the covenant, that is, by those with privity of contract.[39] In relation to land, a covenant is essentially a promise by the covenantor to the covenantee either to do something (if a positive covenant) or to refrain from doing something (if a negative covenant) on the covenantor's land.

There is a long history of various rules determining by whom the covenant is enforceable, depending on whether there is privity of contract, privity of estate or neither. The common law, equity and statutory law, in the form of the Property Law Act 1952 ("PLA"), provided different means by which a covenant could be said to "run with the land" and therefore be enforced by people other than the original signatories.

Section 109 of the RMA removes the necessity to address these various rules in detail. Clearly, due to the application of s 109(1)(b), all subsequent owners of the covenantor's land are bound by the covenant. Section 109 also allows the consent authority the right to enforce the covenant. None of these means described above would have allowed this since there is no land to which the benefit of the covenant ostensibly attaches.[40] The combination of sections 108(2)(d) and 109 of the RMA provide a statutory exception to the general rules of enforceability, meaning the consent authority would have standing to seek a remedy for breach of the covenant imposed under s108.[41]

As the benefit of the covenant does not attach to any specific land, there would be no other person that would be able to enforce the covenant. To enforce the covenant, the effects-producing landowner would need to rely on the local council. The normal remedy for a breach of a negative covenant is to obtain an injunction restraining acts in breach of it.[42] Thus if a no-complaints covenant was breached, it would be possible to injunct the complaint so that it had no further effect.

39 Hinde McMorland & Sim, *Butterworths Land Law of New Zealand* (Butterworths, Wellington, 1997), para 11.001.

40 Ibid at para 11.007.

41 See discussion in Preston & Newsom, *Restrictive Covenants Affecting Freehold Land*, (Sweet & Maxwell, London, 1999) at 71–72 and 233–234. See further Grant M, *Urban Planning Law*, (Sweet & Maxwell, London, 1982) at 360–372 on the English use of planning agreements which utilise covenants.

42 Preston & Newsom, ibid at 168: *Doherty v Allman* (1878) 3 App.Cas. 709.

3.5 Easements under the RMA

3.5.1 Section 220

Section 108(2)(d) excludes consent authorities from imposing covenant conditions on subdivision consents.[43] However, s 220 has been used in the past to similar effect in terms of barring the applicant or successors from complaining about a neighbouring nuisance.[44] Section 220 provides:

> (1) Without limiting section 108 or any provision in this Part, the conditions on which a subdivision consent may be granted may include any one or more of the following: ...
> (f) A condition requiring that any easements be duly granted or reserved:

A major difference between a covenant imposed under s 108 and an easement required under s 220 is that the parties to the easement are the applicant and the effects-producing neighbour. It is therefore more straightforward for an effects-producing activity owner to enforce an easement than a covenant, which is between the council and the applicant.[45]

3.5.2 The law of easements

The land affected by the easement is known as the servient tenement.[46] The land that enjoys the benefit of the easement is the dominant tenement.[47] If there is no dominant tenement, that is, if the easement does not relate to a specific parcel of land, it is known as an easement in gross.[48]

Like covenants, easements may be either positive or negative. A positive easement gives a person the right to use the land of another in a particular way, without any right to possession.[49] Thus in *Rowell v Tasman District Council*, an easement allowed dust from a quarry to pass over the servient owner's land.[50] A negative easement is distinguishable from a restrictive covenant only in form, but has the same effect in that the landowner having granted the easement is prevented from using their land in a particular way.[51] In *Rowell* a negative

43 While there is no case law on this aspect of s 108(2)(d), presumably the specific bar on using covenants on subdivision consents would override the general power in s 220 to impose any condition pursuant to s 108.
44 See *Rowell v Tasman District Council* [1997] NZRMA 241.
45 Enforceability of the instruments is discussed further at Part 5.3 of this paper.
46 Supra note 39, at para 6.002.
47 Ibid.
48 Ibid.
49 Ibid.
50 Supra note 44. The facts of *Rowell* are discussed at Part 4.2.1.
51 Supra note 39, at para 6.002.

easement prevented the servient owner from complaining about the quarry's activities.

Easements, including easements in gross,[52] may be registered against the title of the land.[53] They are therefore enforceable against successors in title to the original servient owner. If the enjoyment of the easement is significantly and wrongly interfered with[54] the dominant owner can sue in private nuisance, and seek damages, an injunction, a declaration or a combination.[55] The result would be similar to a breach of covenant in that the servient owner would be injuncted from complaining.

Although easements and covenants are subject to different rules, in the context of this general discussion of instruments that prevent landowners from complaining about a nuisance, both easements and covenants with that effect are treated as falling under the term no-complaints instruments.

4. THE VALIDITY OF NO-COMPLAINTS INSTRUMENTS

4.1 The Test For Validity of Conditions

Although section 108 of the RMA is worded in such a way as to suggest that a consent authority may impose any condition it thinks fit, it has long been held that this general power is subject to common law principles relating to the validity and proper scope of conditions to be placed on resource consents. In the case of *Newbury District Council v Secretary of State for the Environment*,[56] the House of Lords laid down the test for validity of conditions in a resource consent, namely:

1. The condition must be for a resource management purpose not for an ulterior one.
2. The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached.
3. The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.

52 Property Law Act 1952, ss 3(2) & 122.
53 Property Law Act 1952, s 3(2).
54 The interference must be "of a substantial nature": *McKellar v Guthrie* [1920] NZLR 729, HMS 656.
55 Supra note 39, at para 6.058.
56 [1981] AC 578, [1980] 1 All ER 731 ("*Newbury*").

That this test is applicable to New Zealand resource management conditions has been confirmed by the Court of Appeal in *Housing New Zealand v Waitakere City Council.*[57] In that case the Court of Appeal held:[58]

> We take the view that the *Newbury* test remains of general application and that New Zealand Courts should continue to apply it in relation to the provisions of the Resource Management Act.

4.2 The Cases

Because the remainder of this section looks at the arguments presented in the few relevant cases, it is worthwhile starting with a brief summary of the facts of each case.

4.2.1 Rowell v Tasman District Council (Rowell)[59]

Rowell concerned a Mr Nurse who had sought a resource consent to subdivide his property. Wairoa Quarries Ltd opposed the application on the basis that more intensive residential development would give rise to potential conflict between new residents and the legitimate activities of the quarry. Mr Nurse, the quarry owner and the council eventually agreed that easements would be granted to the quarry allowing it the right to emit noise, road and rock dust from the quarry and to allow the emissions to escape, pass over or settle on Mr Nurses land. The easement contained covenants preventing Mr Nurse or his successors in title complaining about the quarry. The plaintiff, who lived between the quarry and Mr Nurse's land, appealed the condition on many bases, including that it suffered from *Wednesbury* unreasonableness and was contrary to the NZ Bill of Rights Act (NZBORA).

4.2.2 Christchurch International Airport v Christchurch City (High Court)[60] *and Re an Application by Christchurch International Airport Ltd*[61] *(Planning Tribunal)*

In the above *Christchurch Airport* cases, the Planning Tribunal, and then the High Court addressed two issues. The first, not relevant for this paper, concerned whether imposing a condition that provision be made for noise attenuation in the building contravened s 7(2) of the Building Act 1991.

The second issue was whether the consent authority could lawfully impose a no-complaints condition and require a covenant to be entered into, and whether

57 [2001] NZRMA 202.
58 Ibid, at para 18.
59 Supra note 44.
60 Supra note 34.
61 [1995] NZRMA 1.

such a condition was contrary to the NZBORA. Christchurch International Airport (CIA) had opposed a number of applications to build dwellings on rural land close to the Airport. The CIA's submissions to the Christchurch City Council sought that consents be declined, or in the alternative that if consent was granted, a condition should be imposed on the consent that it would only enure for so long as no complaint was made about airport activities, including noise. It further requested that the condition be enforced by a registered covenant between the applicant and the council.

Prior to a council hearing, the affected applicants had agreed to accept the condition, and to enter into the suggested covenant. However, wanting to make sure the council had the power to impose such conditions, CIA sought a declaration that the condition and requirement that the applicant enter into the covenant was within the lawful function of the consent authority.

The Planning Tribunal (as it then was) issued a declaration that the condition was in breach of the NZBORA, despite the fact that the applicants had agreed to accept it. CIA then appealed to the High Court and obtained a declaration that the condition was not in breach of the NZBORA. The different positions of the Planning Tribunal and the High Court are considered below.

4.2.3 Ports of Auckland Ltd v Auckland City Council (Ports of Auckland)[62]

Ports of Auckland concerned an application for judicial review by Ports of Auckland Limited who operated a busy port in central Auckland, considered to be of regional and national importance. The council had granted non-notified consents to developers to build apartment complexes close to the port. The Ports of Auckland argued that the applications should have been notified and that the conditions imposed on the consents were not sufficient to ensure adequate noise control in the apartments, meaning residents could bring nuisance claims against the port.

In the context of determining "eight basic constraints on adjudication", that is, factors that were "given" in determining the review application, the Court considered the possibility of a no-complaints covenant being imposed on the proposed apartments.[63]

4.2.4 CJ McMillan Ltd v Waimakariri District Council (Waimakariri)[64]

Finally, this case concerned a reference on a plan change to the Waimakariri Transitional District Plan (Rangiora Section). The council had declined to make the plan change, and that decision was referred to the Environment Court by a company who owned one of the three sections affected. The plan change would

62 Supra note 6.
63 Supra note 6, at 612.
64 Environment Court, C87/98, 11 August 1998, Judge Jackson.

have rezoned the land to allow rural/residential subdivision, and the referrer wanted to be able to subdivide its land.

Submitters claimed that the situation was one of reverse sensitivity and that were the plan change to go ahead, and subdivision to commence, pig farming currently carried out on the land would be subject to complaints. It was feared that new residents would complain about the odour from the pigs, and the farm would be forced to close. The possibility of some form of no-complaints covenant was considered.

4.3 For a Resource Management Purpose

Conditions imposed under section 108 must be for a resource management purpose. Whether no-complaints conditions satisfy this requirement has not been expressly considered by the Courts. There are arguments to be made both ways. One argument is that for a condition to be for a resource management purpose, it must be consistent with the RMA. A major principle behind the RMA is public participation.[65] A no-complaints instrument expressly removes the rights conferred by the RMA to participate in local resource management decision making. This appears to be one of Baragwanath J's arguments in his decision in *Ports of Auckland* where he found that:[66]

> ... neither a council nor this Court may order an unwilling party to surrender, as a condition under s 108, the right as affected party to receive notice of an application under s 93(1)(e), to make submissions under s 96, and to appeal under s 120.

He stated that the principle that the statute should be read as a whole leads to the conclusion that no condition can be imposed that would abrogate the rights conferred by the RMA.[67]

On the other hand it could be argued that given that Courts have accepted that reverse sensitivity is a valid consideration in resource management decisions, then no-complaints conditions, which seek to deal with a reverse sensitivity problem, will be for a resource management purpose.

In cases that have considered no-complaints instruments, Courts often seem implicitly to accept that such instruments are for a resource management purpose. For instance in *Waimakariri*,[68] Judge Jackson, hearing the case, invited counsel

65 *Murray v Whakatane District Council* [1997] NZRMA 433; *Re Vivid Holdings Limited* [1999] NZRMA 467.

66 Supra note 6, at 612.

67 Ibid.

68 Supra note 64.

for the parties to discuss the possibility of a reference on a District Plan change being settled by the imposition of covenants or easements preventing complaints by new residents about the pig farm. The end result of that case was that easements were concluded to be unhelpful, in the circumstances, not invalid.[69] The fact that they were considered a potential solution by the Judge suggests they would pass the first of the *Newbury* tests for validity.

Given that a no-complaints instrument is a direct answer to reverse sensitivity, which is a recognised resource management principle, the second argument seems more defensible. The argument that such covenants are inconsistent with the RMA is certainly relevant, but may be better suited to coming into the "reasonableness" question, rather than ruling such conditions out at the first hurdle.

4.4 Fairly and Reasonably Relate to the Development Authorised

In most of the cases contemplated by this paper, one or more residential buildings are proposed to be constructed close to an effects-producing activity, with the danger that new residents of the building might complain about the effects, and prevent the effect-producing activity from developing or continuing. The potential "effect" being mitigated by the condition would be the possibility of residents complaining, and restricting the activity of the often important effects-producing activity. That effect would not arise but for the development authorised by the consent. Therefore, the condition would fairly and reasonably relate to the development authorised.

4.5 Not be *Wednesbury* Unreasonable

4.5.1 The test for Wednesbury *unreasonableness*

The test for *Wednesbury* unreasonableness, as stated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[70] and applied to the resource management situation, is that a decision is unreasonable and therefore invalid if the consent authority comes to so unreasonable a conclusion on the facts that no reasonable authority could ever have come to it.[71] This was applied in a local government context in New Zealand by the Court of Appeal in *Wellington City*

69 Ibid, at para 19.
70 [1948] 1 KB 223.
71 See also *Waitakere City Council v Lovelock* [1997] 2 NZLR 385.

Council v Woolworths New Zealand Limited (No 2),[72] which held that unreasonable decisions were ones:[73]

> ... so "perverse", "absurd", or "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made by an elected Council.

This definition has been adopted in resource management law by such cases as *Wilson Parking New Zealand (1992) Ltd v Auckland City Council.*[74] (It should be noted though, that not all cases employ such a strict test, for instance in *Ports of Auckland,* Baragwanath J preferred the much broader "hard look" test.[75])

In terms of no-complaints instruments, few cases have expressly looked at the reasonableness of the condition. Below, some suggestions about the reasonableness of a no-complaints condition are made.

4.5.2 Consent of the applicant

The case in which reasonableness is given the greatest attention is *Rowell,*[76] where the reasonableness of an easement preventing complaints about a quarry was expressly considered. In *Rowell*, the applicant had freely consented to the imposition of the easement. In such circumstances, the Court had no doubt that the condition was reasonable. The applicant was perfectly entitled to give up rights of public participation given under the RMA and the council was entitled to rely on that consent in imposing the condition.[77]

4.5.3 Wording of the instrument

In most no-complaints instruments, a landowner is simply prevented from complaining about an effects-producing neighbour. If the condition, covenant or easement is breached, the council or neighbour can seek to enforce it by means of the enforcement mechanisms described above in Part 3. In the *Christchurch Airport* case, though, the condition was worded in such a way that if residents did complain about the effects-producing activity, their resource

72 [1996] NZLR 537.
73 Ibid, at 552.
74 [2001] NZRMA 364.
75 Supra note 6, at 606. For discussion of the "sliding scale" of the intensity of judicial review see Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers, Wellington, 2001) 2nd edition, para. 22.3.3.
76 Supra note 44.
77 Ibid, at 255.

consent would automatically end ("the *Christchurch Airport* condition").[78] It stated:[79]

> That the consent to use any building on the property ... for residential purposes shall enure only ... for so long as any such person [any person owning or occupying or otherwise being present on the property] does not do or permit to be done any act, matter or thing in relation to airport noise which is intended to restrict or has the effect of restricting in any way whatsoever the operations of Christchurch International Airport or any aircraft using the same.

The High Court expressly did not consider whether or not the condition was reasonable.[80] The Planning Tribunal suspected that the condition would be "repugnant to administrative justice" which, in *Rowell*, the Court took to be a reference to the condition being *Wednesbury* unreasonable.[81] However, the High Court in *Christchurch Airport* doubted the Planning Tribunal's reasoning, and there is therefore no judicial answer to the question of whether this condition would have been considered reasonable in the circumstances surrounding the *Christchurch Airport* case.

The effect of the *Christchurch Airport* condition is quite ingenious from the point of view of the effects-producing neighbour, the Airport, for a number of reasons. First, it avoids the difficulties with enforcement that are discussed at Part 5.3.3 of this paper. The covenant proposed in the *Christchurch Airport* case has an automatic result that the consent of the complainant will lapse. By application of s 9 of the RMA, it is illegal to use land in a manner that contravenes a rule in a district plan without resource consent.[82] The effects-producing neighbour could immediately apply for a declaration, enforcement order or abatement notice, requesting that the person complaining effectively cease to live in their home.

Secondly, and more simply, as soon as the resident complained, their resource consent would end, and they would no longer have any right to live in the affected building. They would therefore have no legitimate complaint that they were being adversely affected by the effects-producing activity.

The repercussions of making a complaint are therefore quite startling. The normal remedy for breach of such a covenant would be an injunction preventing the complaint being made or heard, and perhaps damages. Even the Environment Court does not have jurisdiction to cancel a resource consent, except under an

78 Resource consents are generally for an unlimited period, unless the consent states otherwise.
79 Supra note 34, at 156.
80 Ibid, at 157.
81 Supra note 44, at 252.
82 RMA, s 9. No existing use rights would apply — see RMA ss 10 and 10A. The use must be contrary to the district plan or no consent would ever have been required.

application under s 314(1)(e) of the RMA.[83] However the remedy for breach of the Christchurch Airport covenants is that the complainant would potentially be deprived of the right to live in their home. The breach and the remedy seem disproportionate in this case. The condition would very likely be found to be unreasonable.

There are a number of other reasons why it is probable that the *Christchurch Airport* condition, or one like it, would be found to be unreasonable. First, if the consent was for an apartment building, or another type of unit entitlement, rather than for individual houses, the effect of the condition would either be unenforceable, and therefore invalid or patently unreasonable. That is, if one person complained the entire building would apparently be affected. Either only that unit would be considered to have lost its resource consent, or the whole building would have. In the first situation, it would be impossible to enforce the law against only one owner. In the second situation it would be patently unfair and unreasonable for a building full of people to essentially be derived of their property rights because of the actions of one person.

Secondly, because the effect of the *Christchurch Airport* condition impacts so clearly on property rights of the owner of the building, it seems unreasonable that resource consent could be retracted because of the actions of a person other than the owner. A lessee is entitled, under the RMA, to complain about the adverse environmental effects of an activity. Such a complaint could trigger the removal of resource consent if the *Christchurch Airport* condition was allowed to go ahead. There would be a very strong argument that such a result is unreasonable and that the condition is therefore unreasonable.

4.5.4 Classification of the activity

Although the cases have not explicitly considered the point, it may be that the classification of the proposed activity within the District Plan is relevant to the reasonableness of a no-complaints activity. That is, if residential activity is a controlled activity within a certain area then an argument that a no-complaints condition is unreasonable may be more likely to succeed than if residential activity was a discretionary or non-complying activity.

In *Ports of Auckland* the proposed apartments were a controlled activity. The council therefore had no discretion to disallow consent, but could only impose conditions. On the other hand, in *Rowell,* subdivision was a discretionary activity, and the Court indicated that if the easements were not given, consent was unlikely to be granted.[84] In *Christchurch Airport*, where the consents sought

83 *Topping v C Gibbons Holdings Limited* [1992] 1 NZRMA 205.

84 Supra note 44, at 243, 255.

were to construct dwellings on rural land, the activity was also classified as discretionary.[85]

In *Rowell*, Neazor J pointed out that:[86]

> Mr Nurse wanted a concession under the Scheme in respect of which his interests conflicted with the existing interests of another land owner, and giving the easement and accepting its consequences was the price he was prepared to pay.

Arguably, the greater "concession" an applicant is seeking, the more restrictions they can reasonably be asked to subject themselves to. That is, the weight their interests should be given is determined by the District Plan, such that the interests of a permitted or controlled activity must be given more weight than those of a proposed discretionary or non-complying activity. Thus in *Christchurch Airport* it may have been unreasonable to require residents to give up their participation rights under the RMA, whereas in *Rowell* it might be perfectly reasonable.

4.5.5 Alternatives to no-complaints instruments

If there are practical alternatives to imposing a no-complaints instrument, it may be considered unreasonable to impose the condition.[87] In *Ports of Auckland* the Court clearly believed that adequate noise mitigation could be provided.[88] Although it did not say so explicitly, it is possible that the Court may have seen the possible inclusion of a no-complaints condition and covenant as an "easy way out", particularly for developers who would be able to build the apartments cheaper without insulation, and would pass on the noise problem to purchasers. If alternative means of avoiding the problem had been unavailable or impractical a no-complaints instrument might be more reasonable in the circumstances.

4.6 Fundamental Rights

4.6.1 Rights affected

In the cases in which the Courts have considered no-complaints instruments as conditions of resource consents, the infringement of key human rights has been a major factor in the decision. In the Planning Tribunal and Environment Court decisions on *Christchurch Airport*, the NZBORA was central. In *Ports of*

85 Supra note 61, at 1.
86 Supra note 44, at 255.
87 See for instance *Arkinstall v Wairoa District Council* Environment Court, A88/98, 27 July 1998.
88 Supra note 6, at 613.

Auckland the rights considered were not ones protected by the NZBORA, but by the RMA and common law. These are considered at the end of this Part.

The NZBORA applies to consent authority decisions by virtue of s 3(b), since resource management decisions are:

> acts done ... in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The main right that might be infringed by the imposition of a no-complaints condition is that protected by s 14 of the NZBORA which provides:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

A no-complaints condition prima facie offends this provision, as the consent-holder is prevented from imparting the information or opinion that they are adversely affected by the effects-creating neighbour.[89] However, none of the rights in the NZBORA are absolute, but are subject to s 5 of the Act which provides when rights can be justifiably limited:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This provision has been referred to as a "utilitarian calculation", which allows the rights of the individual to be balanced against the interests of society.[90] In *Christchurch Airport* the High Court noted that the section is necessary because, as John Donne wrote, "No man is an island entire of itself; every man is a piece of the continent".[91]

This part of the paper looks at whether no-complaints instruments are justified under section 5 of the NZBORA. First though, the position of those applicants who consent to the imposition of the condition is considered.

4.6.2 When the condition is consented to

The Planning Tribunal's consideration of *Christchurch Airport* did not consider the effect of the applicant having consented to the condition and covenant.[92] On

89 *Christchurch Airport*, supra note 34, at 155: *Rowell*, supra note 44, at 254.

90 P Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers, Wellington, 2001) 2nd edition, at 1036.

91 Supra note 34, at 157, citing John Donne, Meditation XVII (1624).

92 Ibid, at 155.

the other hand, the consideration played a great role in the High Court's consideration.

The High Court held that the condition did, prima facie, take away the consent holder's freedom of expression, guaranteed by s 14 of the NZBORA.[93] However the Court considered the fact that the applicants had consented to the condition to be highly relevant, and considered sound in principle CIA's submission that provisions in the NZBORA for the benefit of an individual may be waived by that individual provided there is no wider aspect of public policy which precludes such waiver.[94] As there were no reasons of public policy why a person should be prevented from waiving their right to freedom of expression, the condition/ covenant did not fall foul of the NZBORA.[95]

The Court went on to say:[96]

> It would seem somewhat contradictory to say that such rights and freedoms may not be given up for what the person concerned regards as valid reasons. The concept of freedom pre-supposes not only that you are free to enforce your right but that you are free not to enforce it and to waive it, if you choose to do so... There seems to me to be something inherently unsound in saying that a person's rights have been breached when that person has voluntarily indicated that he/ she does not wish pro tanto to assert them. Why should those concerned be deprived of their freedom to express themselves in that way?

The Court was unimpressed with the argument that the council could never be sure whether the consent was free and fully informed.[97] The Judge noted that resource management conditions were often imposed by consent and never in his experience had there been a suggestion that the consent authority had an obligation to second guess the consent or enquire into its nature and quality.[98] The council was entitled to take a consent condition on its face.

The Court noted that commercial documents and settlements of litigation frequently contained clauses whereby each party surrenders his or her freedom of expression. This is because it is commercially advantageous or otherwise appropriate to do so. It would be bizarre, the Court said, if an agreement of this type was found to be unenforceable because it was in breach of the NZBORA.[99] This is an odd argument given that the Court seems to be contemplating an agreement between private parties who are not bound to make decisions consistent

93 Ibid, at 154.
94 Ibid, at 155.
95 Ibid, at 156.
96 Ibid, at 155–156.
97 Supra note 34, at 156.
98 Ibid.
99 Ibid, at 157.

with the NZBORA.[100] Their confidentiality agreements could therefore never be struck down on the basis of inconsistency with that Act.

On the question of consent, the Court concluded that:[101]

> It would be unduly paternalistic and precious to say that this is a kind of right which people should not be allowed to surrender for what they see as their own advantage.

A similar sentiment was expressed by the Court in *Rowell*, where the Court emphasised that the NZBORA:[102]

> ... does not enact that such rights are inalienable by the person for whose benefit they are affirmed. There is nothing in the Act which curtails an individual's freedom to give up or limit his or her exercise of any of the affirmed rights.

So long as the landowner had freely consented on an informed basis to the imposition of the condition, Neazor J had no doubt that the NZBORA would not be breached despite the fact that the landowner's affirmed right would be given up or limited.

Successors in title were considered in both *Rowell* and *Christchurch Airport*. Neither were concerned that the successor would have his or her rights restricted by the condition and covenant because when purchasing the property, full notice of the restriction would be available, thanks to entry on the title, and that could be taken into account in the bargaining process. Justice Neazor stated:[103]

> People who may become successors in title are free to do so or not do so, knowing what limitation will attach to the acquisition. What has happened does not impose any limit on their right.

In *Christchurch Airport* the Court accepted counsel's submission that:[104]

> A prospective purchaser need not buy if unwilling to live with the covenant.

In short, a successor would be in the same position as an applicant who had consented to the condition.

100 Section 3 NZBORA — This Bill of Rights applies only to acts done —
(a) By the legislative, executive, or judicial branches of the government of New Zealand; or
(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

101 Supra note 34, at 157.

102 Supra note 44, at 254.

103 Ibid.

104 Supra note 34, at 155.

4.6.3 Where there has been no consent — section 5 of the NZBORA

When there has been no consent by the applicant, a full section 5 analysis needs to be done to establish whether the limitation on the applicant's freedom of expression is justified, and therefore not in breach of the NZBORA. If the condition is not in breach of the NZBORA because it is reasonable in terms of s 5, it will be lawful for the consent authority to require compliance with it. At that point, the applicant can still choose not to proceed with exercising the resource consent if it is felt that the right to speak that will be lost is worth more than the consent.[105]

The High Court's decision in *Christchurch Airport* expressly considered whether a consent authority would breach the NZBORA if it imposed a no-complaints condition without consent.[106] The essential argument was that, since the Court was assuming the condition was otherwise reasonable and lawful, the condition must be able to be demonstrably justified under s 5. The consent authority would have fairly addressed all matters raised and balanced individual issues and concerns and made an assessment of the correct resource management solution.[107] If that assessment was that one person's rights must yield to another's, or to the public good, then that was justified under s 5 of the NZBORA.

In support of this proposition the Court cited *R v B*,[108] in which a man accused of sexual abuse of his daughters sought an order that one of the girls undergo a medical examination that he contended would assist in his defence. The Court of Appeal observed that the man's right to a fair trial should yield to the right of his daughter to refuse to undergo medical treatment.[109] The High Court, whose decision was under appeal in *R v B* had refused to make the order because of the above reason, and because if the girl chose to exercise her rights not to undergo the examination, and the charges against the man were consequentially dropped, the public interest in having offenders brought to justice would be jeopardised.

In a comparable way, the private interests of the effects-producing neighbour, and the public interest in protecting regionally and nationally important industries, may be judged by a consent authority to be more important than the restriction on the applicant's freedom of speech.

4.6.4 An observation — is the NZBORA analysis different from reasonableness?

As mentioned above, the High Court's analysis in *Christchurch Airport* depended on the assumption that the condition was reasonable. It would seem then that in fact the NZBORA adds little to the argument of whether a condition is valid. On

105 Ibid, at 158.
106 Ibid, at 157.
107 Ibid.
108 [1995] 2 NZLR 172.
109 Ibid, at 182. Note that this was an obiter observation.

the Court's analysis, if the condition is reasonable, it will be a reasonable limitation on rights under s 5 of the NZBORA. If it is unreasonable, the condition will be invalid in any event.

From a practical point of view the analysis only needs to go so far because the condition only needs to be invalid on one ground to be ruled out. But for the sake of completeness it is worth asking whether if a condition is unreasonable it is necessarily in breach of the NZBORA. In *R v Grayson*[110] the Court of Appeal held that an unlawful search was nevertheless "reasonable" in terms of the NZBORA.[111] Yet it is somewhat difficult though to think of a situation in which a no-complaints covenant might be deemed to be so unreasonable that no consent authority could have reasonably imposed it and yet would be justifiable in a free and democratic society.

4.6.5 Other rights that may be infringed

In *Ports of Auckland*, Baragwanath J expressed the view that *Christchurch Airport* should be seen as authority only when the applicant had consented to the imposition of the no-complaints condition. As noted above, the Judge was clearly of the view that no such condition could be validly imposed without consent.

The first reason for this was that the RMA gave rights of objection, and a condition could not seek to remove those rights.[112] This is the argument of public participation discussed briefly earlier in this Part. The argument is supported by little reasoning, and seems inconsistent with other resource management decisions that focus on the reasonableness of the particular condition in the particular circumstances, rather than laying out blanket prohibitions.

His second reason is that no-complaints instruments deprive citizens of the right of access to justice. He cites the case of *R v Lord Chancellor, ex parte Witham*[113] which had emphasised the principle that a citizen is not lightly to be deprived of such right. However that case ruled that an increase in fees to such a level as to have the effect of depriving people of rights to justice was *Wednesbury* unreasonable.[114] A lesser fee may have been reasonable.

No-complaints instruments purport to restrict access to justice for a limited range of matters. Baragwanath J goes no further into an assessment of whether such instruments may be reasonable in some circumstances given the range of issues on which the citizen is deprived of the right is limited to nuisance and

110 [1997] 1 NZLR 399.

111 The provision in question was s 21, which guarantees the right to be free from "unreasonable search or seizure".

112 Supra note 6, at 612.

113 [1997] 2 All ER 779.

114 Ibid, at 788.

RMA complaints against one activity. Given comments in cases such as *Rowell* and *Christchurch Airport* though, it is probable that the "access to justice" argument should be seen as a relevant, but not determinate factor, in deciding on the validity of a condition.

It should be pointed out that, in all, the argument against no-complaints instruments in *Ports of Auckland* is one paragraph long. It was an observation by the Court and apart from raising some important issues worthy of further argument in the context of a particular fact situation, it is unlikely to provide any real precedent.

4.7 Conclusion on Validity

The validity of any condition is a fact specific question depending on the factual matrix surrounding the particular case. However, from the observations in the cases and from the discussion above, some broad conclusions can be drawn.

First, no-complaints conditions appear to satisfy the first two tests for validity, that is that they are for a resource management purpose (in that they address a situation of reverse sensitivity) and they relate to the development authorised by the consent.

The second important point is that if the applicant has given specific consent to the imposition of the condition, it will rarely be the case that the condition will be invalid. As a person is free to give up their own rights under the RMA and under the NZBORA, the consent authority is entitled to rely on that waiver to achieve the valid resource management purpose of compromising between two potentially conflicting land uses in a case of reverse sensitivity. Often the applicant will welcome the opportunity to consent to such a condition if it means the effects-producing neighbour withdraws its objection to the proposed activity. If the applicant does not consent, it will be a question of fact as to whether such a condition is reasonable in terms of s 5 of the NZBORA and in terms of *Wednesbury*. As was noted above, if a condition is *Wednesbury* reasonable, it appears likely that it will also pass the s 5 test.

A consideration of reasonableness may include:

- whether the applicant has consented to the condition and covenant;
- whether the wording of the condition means the result of a breach will be out of proportion with the breach itself;
- how great a concession the applicant is seeking in order to be able to carry out their proposed activity;
- whether there are sensible, and less intrusive, alternatives to imposing the condition;

In *Rowell*, Neazor J held:[115]

> [T]he council had to choose between one of two uses or to provide conditions under which they could co-exist. It cannot be said to be unreasonable to make a provision which sensibly balances those interests.

This decision suggests that if the consent authority is faced with a decision between disallowing resource consent to protect an existing activity and allowing the activity to the detriment of the existing activity, it would appear to be patently reasonable for the consent authority to seek a "middle ground" solution.

5. ARE NO-COMPLAINTS COVENANTS A WIN-WIN SOLUTION?

It is apparent from the discussion above that if the specific facts of the case are favourable, and the condition is worded so as to give a reasonable outcome if there is a breach, no-complaints instruments may be validly imposed as conditions of resource consents. But are they desirable or worthwhile for all the parties involved?

This Part seeks to evaluate no-complaints instruments as a "solution" to the reverse sensitivity dilemma whereby a consent authority is essentially forced to choose between allowing an important, but effects-producing activity to continue to operate and disallowing a new, innocuous activity, or allowing the new activity and risk limiting or closing down the effects-producing activity. The risks and benefits of employing the no-complaints covenant technique in a reverse sensitivity context are discussed from the point of view of the applicant, the effect-producing activity owner, and the public generally.

5.1 The Applicant — Private Property Rights Versus Public Interest

5.1.1 Reverse sensitivity and property rights

A common complaint about the application of the reverse sensitivity doctrine in resource management law is that private property rights are relegated in favour of the public interest.[116]

First, reverse sensitivity defeats the rule that it is no defence to an allegation of nuisance that the complainant came to the nuisance.[117] Pardy and Kerr argue

115 Supra note 44, at 257.
116 Pardy & Kerr, supra note 22; A Dormer, "Reverse Sensitivity" (2001) 4 *BRMB* 29.
117 Ibid.

that, although application of the reverse sensitivity doctrine does not directly negate the rule that it is no defence that the plaintiff came to the nuisance, it does prevent the rule from being applied in the first place.[118] That is, rather than allowing a land owner to develop their land as they see fit and then complaining about a neighbouring activity if it interferes with the new use, the new use is prevented from being developed at all.

Allowing reverse sensitivity to prevent development of land is said to diminish, without compensation, the property rights of the neighbouring land.[119] Effectively, the effects-producing activity is given rights over the neighbouring land. The classic example of this is *Winstone Aggregates v Papakura District Council*.[120] In that case the Court upheld an appeal by the quarry owners and created a buffer zone around the quarry in the District Plan in which any activity that might be affected by the quarry operations would be prohibited. The land forming the buffer zone was owned by third parties, whose rights to develop their land were quite substantially diminished by this ruling.

In making its decision the Court in *Winstone* took into account the fact that the quarry was an important resource for the Auckland community.[121] This is contrary to the common law rule that the public worth of an activity is irrelevant to whether the activity is or is not acceptable. Lindley LJ in *Shelfer v City of London Electric Lighting Company* stated:[122]

> ... 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.

Alan Dormer notes that the RMA reflects a Kantian view of property rights whereby such rights are conferred by society as opposed to the individual rights based Lockean principles of the common law.[123] This is supported by a recent High Court appeal where the Court stated: [124]

> It is sufficient here to state that we have no difficulty with private property rights being limited by the public benefit because that is authorised by the RMA if certain preconditions exist. But first we recognise that there are in our law no such things as absolute, divine or natural rights to property. Rather, property

118 Supra note 22, at 98.
119 Ibid, at 99.
120 Supra note 23.
121 Ibid, at 33.
122 [1895] 1 Ch 287, 316. Cited in *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, 535. See also *Munroe v Southern Dairies Ltd* [1955] VLR 332.
123 A Dormer, "Reverse Sensitivity" (2001) 4 BRMB 29, at 30.
124 *Gargiulo v Christchurch City Council*, High Court, Christchurch, AP32/00, 6 March 2001, at para 72.

rights are themselves creatures of law which create costs (taxes) and can thus be measured against the interests to be protected under the RMA.

Thus a similar exercise as is undertaken in an analysis of s 5 of the NZBORA can occur in the RMA context. If the consent authority in granting resource consents, or the district or regional council, in drafting its plan, considers it reasonable to do so, private property rights can be diminished in the public interest.

5.1.2 No-complaints instruments can "soften the blow"

By allowing no-complaints covenants to be used in a situation of reverse sensitivity, the rights of the landowners are still diminished but to a lesser extent than would be the case if reverse sensitivity was strictly applied. For instance if in *Winstone* the buffer zone had made potentially affected activities non-complying, rather than prohibited, it would still have been open for a landowner to develop such an activity on that land if he or she could satisfy the consent authority that it would not interfere with the quarry. One of the ways of achieving this would have been to impose a no-complaints condition and instrument.

Similarly, in the Wanaka subdivision example given earlier in this article, if the developer is allowed to subdivide, subject to entering into and complying with no-complaints instruments, its rights over the land would be subject to less interference than if subdivision was disallowed because of the reverse sensitivity effects of houses close to Wanaka Airport. Presuming that a consent authority can validly impose a no-complaints condition (as is argued above), the landowner at least has a choice between a total restriction on developing his or her land or accepting a limited restriction which requires giving up the right to complain about the effects of the property's neighbour.

5.2 The Public — Unreasonable Effects Allowed to Continue?

5.2.1 Reverse sensitivity and assessment of effects

In the last section it was stated that reverse sensitivity often relegates the rights of the individual in favour of the public interest in allowing significant industries, such as quarries, ports and airports, to continue. No-complaints instruments soften the blow on the individual without compromising the protection of those industries and therefore the public. However, commentators have pointed out that the application of reverse sensitivity may allow unreasonable adverse effects on the environment to continue unchecked, which is likely to be contrary to the interests of the public generally.[125]

125 Pardy & Kerr, supra note 22, at 100–101; Dormer, supra note 123, at 31.

As noted above at Part 2.1, the law relating to nuisance only protects a person's *reasonable* use and enjoyment of their land. In common law, the reasonableness of an effect is measured against the neighbourhood in which it occurs.[126] The authors considered that in most cases where reverse sensitivity is applied, it is unnecessary, or over-kill. For instance in *Ports of Auckland*, any claim for nuisance by an occupant of the proposed apartments would have been considered against the neighbourhood in which the apartment was located, that is, in the vicinity of a port facility operating 24 hours a day. Therefore, Pardy and Kerr argue, normal operation by the port would not be considered a nuisance.[127] However, they note that if the port was creating noise considered to be unreasonable even in the context of the neighbourhood, then it *should* be made to reduce its noise. The application of reverse sensitivity prevents that assessment from being undertaken.

5.2.2 No-complaints instruments do not assist

No-complaints instruments do nothing to counter the accusation that reverse sensitivity allows (and possibly encourages[128]) adverse effects to continue. The people who are in the best position to judge the level of effects being caused by the effects-producing activity are prevented from making a complaint.

5.2.3 Notification

Preventing nearby residents from complaining about or submitting on their neighbour's activities may be a particular concern in relation to the concept of limited notification introduced by way of the Resource Management Amendment Act 2003.[129] Limited notification allows only persons considered to be "adversely affected" by a proposed activity to be served with the application and to make a submission, if an applicant seeks a resource consent without full notice.[130] It is quite possible that all the people likely to be adversely affected could be prevented from making a submission opposing the application due to no-complaints instruments.

126 *Halsey v Esso Petroleum Co Limited* [1961] 1 WLR 683 (QB).

127 A difficulty with Pardy and Kerr's analysis is that it is possible for the character of the neighbourhood to change. In *Ports of Auckland* the proposal was for several apartment complexes in a relatively confined area. After construction of those buildings, there is at least the possibility that a Court could find the neighbourhood to have been changed to the extent that it was now a neighbourhood with a significant residential element in which 24 hour port noise was unacceptable.

128 Supra note 121, at 31.

129 Resource Management Amendment Act 2003 (relevant parts in force 1 August 2003).

130 Ibid, s 41, inserting RMA, ss 94–94C. It is arguable that entering a no-complaints covenant may not be strictly the same as giving written approval to the activity.

This would be a great advantage for the applicant, but may be a significant detriment to the public. The theme of public participation that currently runs through the RMA could be significantly compromised, and the consent authority may be left with insufficient information to make a reasonable assured decision. Interestingly, Pardy and Kerr consider that the acceptance of the reverse sensitivity doctrine will cause an increase in the number of applications for consent that need to be notified.[131] This is because if an effects-producing activity can effectively be given rights over neighbouring land, potentially reducing the ability of owners to deal with their land as they wish, then if there is an application to establish an effects-producing activity, neighbouring land-owners should object. Pardy and Kerr put it the following way:[132]

> ... 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 such an objection is legitimate then the neighbouring land-owners will be affected, even if the land is vacant, and the application will need to be notified.[133] Notified applications are relatively time consuming and expensive, with a great deal of that expense being borne by the consent authority, and therefore passed on to ratepayers.

No-complaints instruments are not relevant at this stage of the process, since the neighbouring land is still vacant. It is a logical progression though that the consent authority could impose a condition requiring a covenant be placed on the effects-producing applicant's title barring the applicant from complaining about the reverse sensitivity effects of the neighbouring land owner when that owner later seeks resource consent approval to develop their own land. That is, a "reverse sensitivity sensitivity" covenant could be considered an adequate answer to the neighbouring land owner's concern that his or her use of the land would be restricted by the new activity.

5.3 The Effects-Producing Activity — Problems With Certainty and Enforceability

Apart from the potential for reverse sensitivity to "back-fire" on the effects-producing activity in the way contemplated above, the doctrine provides good

131 Supra note 22, at 105.
132 Ibid.
133 RMA, s 94.

protection for such activities. However reverse sensitivity is not always decisive in the consent process and it may be in the effects-producing activity's interests to suggest, perhaps as an alternative to the primary relief sought of refusal of consent, a middle ground solution by way of a no-complaints instrument. No-complaints instruments will provide the effects-producing neighbour with a good degree of security so long as they are certain, effective and enforceable.

5.3.1 Certainty — validity of the condition

As discussed above, there have been a few judicial rulings on the validity of no-complaints instruments, and at least one has spoken relatively scathingly of their worth.[134] As was indicated in Part 4, there are at least some circumstances in which a Court would likely find a no-complaints instrument to be invalid. The effects-producing activity owner will therefore be interested in the consequence of a no-complaints instrument being found to be invalid.

If a no-complaints condition was found to be invalid, the question of its importance to the resource consent would be raised. A condition that is merely incidental to the permission may be severable from the resource consent.[135] The permission granted will be valid, and the condition simply removed from it. However, if a condition is found to be invalid that is sufficiently fundamental or important to the consent, the consent would fail without it.[136] If there was a clear case of reverse sensitivity, and without the no-complaints instrument there were no conditions to adequately protect the effects-producing activity, it is likely the condition would be seen as fundamental. The consent would therefore fail.

If the consent was refused and the application was then reconsidered, the effects-producing neighbour could continue to seek refusal of consent. If faced with the prospect of refusal of consent, the applicant may wish to consent to the condition after all. As discussed in Part 4, there is little doubt that a no-complaints condition that the applicant has consented to is valid.

If the condition requiring a covenant or easement be entered into was found to be invalid, and the instrument had already been registered on the title, the instrument would not automatically lapse. Rather, the covenantor or servient owner, as the case may be, would likely make an application to the District Court to extinguish the instrument under s 126G of the Property Law Act. An Environment Court judge, sitting in the District Court, would have jurisdiction

134 Supra note 6.

135 *Turner v Allison* [1971] NZLR 833; *Kent City Council v Kingsway Investments (Kent) Ltd* [1971] AC 72; [1970] 1 All ER 70 (HL); *Bidwell v Wellington City* (1978) 6 NZTPA 455 (TCPAB); and *Hall & Co. Ltd v Shoreham-by-Sea UDC* [1964] 1 All ER 1 (CA).

136 Ibid.

to do this,[137] and could presumably before or at the same time rule on the need for or validity of the condition.

The likely ground for extinguishment would be that there would be no substantial injury to the dominant owner.[138] Since the Court could have decided that the condition was invalid or unnecessary, the dominant owner (be it the effects-producing activity if an easement, or the consent authority if a covenant) would have no real legal right to the protection afforded by the instrument and would therefore not be substantially injured by the extinguishment.

5.3.2 Certainty — susceptibility of condition and instrument to change

A challenge to the condition may be made at any time by an application for a change or cancellation of a consent condition by the consent holder.[139] Section 127 of the RMA (as amended 2003) provides:

> (1) The holder of a resource consent may apply to a consent authority for the change or cancellation of a condition of the consent (other than any condition as to the duration of the consent).

If the neighbour applicant has given a specific undertaking to enter into the condition and covenant and the consent authority has granted consent in reliance on that undertaking, the applicant will be prevented in equity from later challenging the validity of the condition.[140] It will therefore be to the advantage of the effects-producing neighbour if the applicant can be persuaded to give such an undertaking.

If the applicant has not given a specific undertaking, the condition may still be changed later, under s 127 of the RMA, if the requirements of that section are met. Following the 2003 amendment it is no longer necessary for the consent-holder to be able to show or prove that the circumstances have changed significantly such that the condition is no longer appropriate.

If such an application is made, unless certain criteria are met, it will be publicly notified, and the effects-producing neighbour would have an opportunity

137 Under ss 126 and 126G(1)(a) of the Property Law Act 1952 the District Court has the power to amend covenants and easements on specified grounds. Under s 278 of the RMA, the Environment Court has the same procedural powers as the District Court, but not the same substantive jurisdiction.

138 Property Law Act 1952, s 126G(1)(d).

139 RMA s 127 (as amended 2003).

140 *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD) — applied in New Zealand cases *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556; *Alexander v Auckland City Council,* Environment Court, A83/99, 6 August 1999, Judge Sheppard, and *Auckland City Council v Auckland Regional Council* [1999] NZRMA 145, 199.

to be heard as to why the condition should persist.[141] If the applicant consented to the imposition of the condition (short of giving an undertaking to perform it) that consent will be relevant to the consideration of whether to grant the amendment.[142]

The covenant and easement would also need to be amended. In the same way as s 127 of the RMA would allow for a change of condition when there has been a change in circumstances since the date of the grant, it is possible to alter or extinguish an easement or covenant on the same grounds.[143]

Relevantly, s 126G(1) allows the Court to modify or extinguish instruments where:

> (a) ... by reason of any change since the creation of the easement or covenant —
>
> (i) In the nature or extent of the user of the land to which the benefit of the easement or covenant is annexed or of the user of the land subject to the easement or covenant; or
>
> (ii) In the character of the neighbourhood; or
>
> (iii) In any other circumstances of the case that the Court considers relevant, — the easement or covenant ought to be modified or wholly or partially extinguished; or
>
> (b) That the continued existence of the easement or covenant in its present form would impede the reasonable user of the land subject to the easement or covenant in a different manner or to a different extent from that which could have been reasonably foreseen by the original parties at the time of the creation of the easement or covenant ...

Any of the situations contemplated by this provision could arise in a no-complaints instrument situation, particularly if the effects-producing activity had increased its effects, for instance by expanding its operations. The effects-producing activity owner should also be aware of the risk of the character of the neighbourhood changing, which could quite easily happen if more residential activity was allowed in the vicinity of the effects-producing activity.

The owner of the benefit of the easement or covenant has the right to object to the application for modification or extinguishment.[144] It should be borne in mind though that the owner of the benefit of a covenant imposed under s 108 of

141 RMA, s 127(3).

142 *Craig Kinniburgh Ltd v Palmerston North City Council,* HC Wellington M216/84, 5 July 1984, Jefferies J.

143 For commentary on what constitutes a "change in circumstance" for the purposes of this power, see Hinde McMorland & Sim, supra note 39, at para 11.032.

144 Supra note 39, at para 11.031.

the RMA is the consent authority.[145] The effects-producing activity owner would therefore be unlikely to be able to be represented at the hearing, other than with leave of the Court.

The effects-producing activity owner should not, therefore, presume that the instrument will give perpetual protection, particularly if there are plans to expand its operations and, consequently, its effects, as the instrument is vulnerable to modification by the Court.

5.3.3 Enforceability

As foreshadowed in Part 3 of this paper, which described the mechanics of enforcing conditions, easements and covenants, enforcement of a no-complaints covenant is less than straight-forward. While the applicant still owns the land to which the resource consent granted attaches, the no-complaints condition, as opposed to the covenant or easement, will likely be used for enforcement purposes. If the council lacks the will to issue an abatement notice, the effects-producing neighbour can bring enforcement proceedings.[146]

After the land to which the resource consent relates is sold, it is more likely that the covenant or easement will be relied upon, since, as the instrument is registered against the title, it is not arguable by the subsequent owner that they did not have notice of such instrument. If the instrument is one of easement, the effects-producing neighbour can institute proceedings for breach, since it is a party to the instrument.[147]

If, however, the instrument is a covenant, the effects-producing neighbour is, in law, powerless to prevent the breach, or to obtain any remedy for it. It must rely on the council to take action against the complainant. This is fraught with potential difficulties. First, it must be remembered that the consent authority is a political body, and it will depend on the political will of the present make-up of the council as to whether it is willing to issue proceedings.

Secondly, and related to the first point, there could potentially be a great deal of bad publicity if the council was seen to be taking proceedings against an individual, who may be seen by the public as merely exercising their right to complain about the interference of the effects-producing neighbour with enjoyment of their land. Given that, by their nature, effects-producing activities do produce adverse effects on the environment, it would be quite simple for such an activity to be portrayed as the "bad" activity, and the complainant as the "good" environmentalist. The council could be susceptible to criticism for defending the effects-producing activity over the individual ratepayer. In light

145 RMA s 108(2)(d).
146 See above at Part 3.3.2 of this paper.
147 RMA, s 220(1)(f).

of this possibility, the council may choose not to take the matter on, or to drop it, if such publicity did arise.

Thirdly, and again related to the first two points, it may be seen as a bad move financially, politically, or both, for the council to invest ratepayer funds in Court proceedings where the outcome would be uncertain and the pay-off for a win small. There is always the possibility of the effects-producing activity funding the proceedings. However, again, this will depend on the current political make-up of the council and this will only be an answer if the issue is financial rather than PR related. If the effects-producing activity was to fund the challenge, there is also the possibility, if remote, of a claim for the tort of maintenance or champerty against the effects-producing activity owner.[148]

If and when enforcement action is taken for breach of a no-complaints instrument, the person being sued can simultaneously apply to have the instrument varied or extinguished.[149] If circumstances have changed significantly since the time the instrument was entered into, the Court would have the discretion to modify the instrument rather than enforcing it.[150]

6. CONCLUSION

The fact that no-complaints instruments have been used by parties as a response to a situation of reverse sensitivity on a number of occasions, without many of the issues raised in this paper having come before the Courts, is an indication that they offer practical solutions to real problems. However, this paper has highlighted some potential problems with the operation of no-complaints instruments that could be encountered if parties were uncooperative.

To recap, some of the problems uncovered in this paper include questions as to the legal validity of the condition requiring the covenant be entered into, problems of certainty and enforceability from the perspective of the activities the instruments are designed to protect, and potential concerns about the public policy of allowing such instruments to prevent what would in normal circumstances be legitimate complaints being made about adverse environmental effects. However, identifying the weaknesses in such instruments does not necessarily mean that in every case they will be unhelpful. Rather by identifying situations in which their helpfulness is questionable, it is possible to recognise where they may be useful, and how they should best be framed.

148 See further on the tort of maintenance and champerty, S Todd *The Law of Torts in New Zealand* (Brookers, Wellington, 2001) 3rd edition, paras 180–183.

149 Property Law Act 1952, s 126G(3).

150 Property Law Act 1952, s 126G(1). See the discussion of modification and extinguishment of instruments above.

From the observations made in this paper it can be concluded that no-complaints instruments are best employed in the following broad circumstances:

- A reverse sensitivity issue exists;
- The effects-producing activity has internalised its effects as much as possible;
- The effects-producing activity is important, either locally, regionally or nationally;
- If not for the no-complaints condition / instrument, the resource consent would likely be declined;
- All parties (but particularly the applicant) agree to the imposition of the condition / instrument;
- If the applicant does not consent, then the consent authority is granting the applicant a major concession by issuing the resource consent, and there are no other practical and effective alternatives to the instrument;
- The instrument bars complaints against the effects-producing neighbour, but does not contain its own remedy.

If the above circumstances exist, the no-complaints instrument is likely to allow the proposed activity to go ahead and to provide the effects-producing activity with a reasonable amount of assurance that their operations will not be unduly interrupted. While not a revolutionary and absolute answer to the reverse sensitivity dilemma, it is a practical solution that in the right circumstances can offer parties a win-win situation.