BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY THE WAIMAKARIRI DISTRICT COUNCIL

IN THE MATTER OF	The Resource Management Act 1991 (**RMA** or **the Act**)
AND	
IN THE MATTER OF	Hearing of Submissions and Further Submissions on the Proposed Waimakariri District Plan (**PWDP** or **the Proposed Plan**)
AND	
IN THE MATTER OF	Hearing of Submissions and Further Submissions on Variations 1 and 2 to the **Proposed** Waimakariri District Plan
AND	
IN THE MATTER OF	Submissions and Further Submissions on the Proposed Waimakariri District Plan by **Momentum Land Limited** and **Mike Greer Homes NZ Limited**

LEGAL SUBMISSIONS FOR MOMENTUM LAND LIMITED AND MIKE GREER HOMES NZ LIMITED REGARDING HEARING STREAM 7B: VARIATION 1 – HOUSING INTENSIFICATION

DATED: 6 September 2024

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1. These submissions are filed on behalf of Momentum Land Limited (**MLL** or **Momentum**) and Mike Greer Homes NZ Limited (**MGH** or **Mike Greer Homes**) in respect of the Stream 7B hearing of submissions on the Proposed Waimakariri District Plan (**Proposed Plan**) and Variation 1 to the Proposed Plan.

Context

2. The Submitters seek, through their submissions and further submissions on the Proposed Plan and Variation 1, to rezone land currently zoned Rural under the Operative District Plan and Rural Lifestyle Zone (**RLZ**) in the Proposed Plan to Medium Density Residential (**MRZ**).

3. Rezoning MLL's land to MRZ would enable a yield in the order of approximately 1,000 dwellings, with subdivision and development guided by an ODP. In the case of MGH's land, approximately 190 dwellings would be enabled by MRZ zoning, again, in accordance with an ODP.

Relevant Law

4. The requirement for district plans to incorporate Medium Density Residential Standards (**MDRS**) in the "relevant residential zones" was imposed by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021. District plans may be more permissive than the MDRS, but may not be less permissive in a relevant residential zone, except to the extent needed to accommodate a qualifying matter set out in s77I. The qualifying matters align with those in the National Policy Statement on Urban Development 2020. A council implementing the MDRS or intending to make an allowance for a qualifying matter must carry out an enhanced s 32 evaluation (ss77J and 77L), or follow the alternative process in s77K for existing qualifying matters.

5. The relevant provisions of the Act are as follows (our emphasis <u>underlined</u>):

77G Duty of specified territorial authorities to incorporate MDRS and give effect to policy 3 or 5 in residential zones

(1) Every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.
(2) Every residential zone in an urban environment of a specified territorial authority must give effect to policy 3 or policy 5, as the case requires, in that zone.
…

(6) A specified territorial authority may make the requirements set out in Schedule 3A or policy 3 less enabling of development than provided for in that schedule or by policy 3, if authorised to do so under section 77I.
(7) To avoid doubt, existing provisions in a district plan that allow the same or a greater level of development than the MDRS do not need to be amended or removed from the district plan.
(8) The requirement in subsection (1) to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.

77I Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones

A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:
…
(e) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:

(j) any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied.

77J Requirements in relation to evaluation report
(1) This section applies if a territorial authority is amending its district plan (as provided for in section 77G).
(2) The evaluation report from the specified territorial authority referred to in section 32 must, in addition to the matters in that section, consider the matters in subsections (3) and (4).
(3) The evaluation report must, in relation to the proposed amendment to accommodate a qualifying matter,-
(a) demonstrate why the territorial authority considers-
(i) that the area is subject to a qualifying matter; and
(ii) that the qualifying matter is incompatible with the level of development permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 for that area; and
(b) assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity; and
(c) assess the costs and broader impacts of imposing those limits.
(4) The evaluation report must include, in relation to the provisions implementing the MDRS,
(a) a description of how the provisions of the district plan allow the same or a greater level of development than the MDRS:

(b) a description of how modifications to the MDRS as applied to the relevant residential zones are limited to only those modifications necessary to accommodate qualifying matters and, in particular, how they apply to any spatial layers relating to overlays, precincts, specific controls, and development areas, including—
(i) any operative district plan spatial layers; and
(ii) any new spatial layers proposed for the district plan.
(5) The requirements set out in subsection (3)(a) apply only in the area for which the territorial authority is proposing to make an allowance for a qualifying matter.
(6) The evaluation report may for the purposes of subsection (4) describe any modifications to the requirements of section 32 necessary to achieve the development objectives of the MDRS.

77K Alternative process for existing qualifying matters
(1) A specified territorial authority may, when considering existing qualifying matters, instead of undertaking the evaluation process described in section 77J, do all the following things:
(a) identify by location (for example, by mapping) where an existing qualifying matter applies:
(b) specify the alternative density standards proposed for those areas identified under paragraph (a):
(c) identify in the report prepared under section 32 why the territorial authority considers that 1 or more existing qualifying matters apply to those areas identified under paragraph (a):
(d) describe in general terms for a typical site in those areas identified under paragraph (a) the level of development that would be prevented by accommodating the qualifying matter, in comparison with the level of development that would have been permitted by the MDRS and policy 3:
(e) notify the existing qualifying matters in the IPI.
(2) To avoid doubt, existing qualifying matters included in the IPI—
(a) do not have immediate legal effect on notification of the IPI; but
(b) continue to have effect as part of the operative plan.
(3) In this section, an existing qualifying matter is a qualifying matter referred to in section 77I(a) to (i) that is operative in the relevant district plan when the IPI is notified.

77L Further requirement about application of section 77I(j)
A matter is not a qualifying matter under section 77I(j) in relation to an area unless the evaluation report referred to in section 32 also—
(a) identifies the specific characteristic that makes the level of development provided by the MDRS (as specified in Schedule 3A or as provided for by policy 3) inappropriate in the area; and

(b) justifies why that characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD; and
(c) includes a site-specific analysis that—
(i) identifies the site to which the matter relates; and
(ii) evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and
(iii) evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 while managing the specific characteristics.

6. Under s77J, an enhanced s32 evaluation is required when a territorial authority is making a change to its plan to implement the MDRS or making an allowance for a qualifying matter under s77I of the RMA 1991, unless the territorial authority instead follows the alternative process in s77K for existing qualifying matters.

7. A territorial authority need not follow the enhanced s32 evaluation approach required by s77J if it instead follows the alternative area-specific approach set out in s77K and compares the level of development proposed with the level of development that would have been permitted if the MDRS had been applied.

8. Section 77L provides a further avenue to exclude the MDRS in relation to a particular area on the basis of any other matter that makes higher density as provided for by the MDRS inappropriate in an area, provided the territorial authority can justify why the specific characteristic makes that higher density inappropriate.

9. The Council's s32 report in relation to the ANQM relies upon s77K, being the alternative process for existing qualifying matters, rather than ss77I and 77J.[1]

10. The ANQM as notified shows the existing/operative (2008) 50 dBA L_{dn} annual average contour, as well as the remodelled (2023) 50 dBA L_{dn} annual average contour. It does not show the remodelled (2023) "3 worst months contour" which is now sought by CIAL, at all.

11. The remodelled annual average contour does not cover the MLL North Block, nor the MGH land, although it does cover most of the MLL South Block. All 3

[1] Paragraph 174 to 175 of ANQM s32 Report

blocks were covered by the operative annual average contour, and would be covered by the 2023 "3 worst months" contour.

12. In *Kāpiti Coast District Council v Waikanae Land Company Ltd,*[2] it was determined that a new QM may not make the MDRS standards less enabling than the status quo. In that case, the Court concluded that the new qualifying matter in issue there (a wāhi tapu site) did not support the MDRS because it actively precluded their operation, and nor was it consequential on the MDRS because the MDRS set out to impose more permissive standards, and the qualifying matter would make the plan provisions less permissive.

13. Applying that principle to the present case, the use of the "3 worst months" 50 contour would be less enabling than the status quo annual average contour, and make the plan provisions less permissive, so is not enabled by the QM.

14. At any rate, regardless of whether the operative airport noise contours, or the remodelled 2023 noise contours, on either the annual average or the "3 worst months" basis are used, it is our submission that on the evidence presented to this Panel, the requirements of section 77I(e) are not met. Although Christchurch Airport may be considered to be "nationally significant infrastructure", precluding the operation of MDRS between the 50 and 55 dBA L_{dn} contours is not "a matter required for the purpose of ensuring the safe or efficient operation of" the Airport.

15. NZS 6805:1992 does not even mention the 50 dBA L_{dn} contour, and certainly does not require that housing of any particular density be prevented within it. The evidence of Professor John-Paul Clark and Brian Putt is that the 55 L_{dn} contour is recognised throughout New Zealand and the rest of the world as the appropriate boundary at which to begin considering housing restrictions (not necessarily preventing housing, but including requiring acoustic insulation and ventilation), except in the USA, where the 65 L_{dn} contour is used.

16. The alternative ground set out in s 77I(j) is also not met in this case, as the factors set out in s 77L are not addressed, and would not have been made on on the evidence, even if they had been addressed.

17. Neither the Council's s32 report on ANQM, nor the material produced by CIAL provides justification for precluding the operation of MDRS between the 50 and

[2] *Kāpiti Coast District Council v Waikanae Land Company Ltd* [2024] NZHC 1654

55 L_{dn} contours. They simply assert that MDRS would enable more people to live in that area, which will lead to more people complaining about airport noise, which will eventually have some sort of adverse effects on airport operations. These are speculative assertions which are not supported by the evidence before the Panel.

18. The discussion here is not whether or not the Submitters' land should be rezoned for residential development: that was the Stream 10A and 12E question. The question to be answered in this Stream is whether, assuming that the Submitters' land is rezoned to MDZ, the evidence shows that residential development on the land should be restricted to a 200m^2 lot size, or 300m^2 or 600m^2 as asserted by CIAL, or not have a minimum lot size at all, as enabled by MDRS. There has not been any material produced to this hearing which would justify that restriction.

19. To the contrary, evidence has been produced for MLL and MGH that being able to have a good mixture of section and house sizes, including some sections even smaller than the 200m^2 minimum proposed by the Council, is necessary for the financial viability of housing developments in the current economic environment, and for the creation of well-functioning urban environments.[3] None of the evidence for CIAL, or information in the Council's reports, addresses those issues. Rather, it simply repeats the unsupported assertion that more people being housed within the 50 to 55 contours will somehow lead to restrictions on the Airport's future operations, and makes an arbitrary "stab in the dark" guess at a lower density which would somehow prevent that effect.

20. Although not binding on this Panel, in our submission the recent report of the Independent Hearings Panel for Plan Change 14 to the Christchurch City Plan is relevant and persuasive, particularly as the same Airport and its contours are involved, within the same sub-region (Greater Christchurch) and the evidence presented that Panel was the same evidence presented to this Panel (including the evidence for CIAL, and the evidence of Professor John-Paul Clarke for land owners / developers). The PC14 Panel said (our emphasis <u>underlined</u>):

> [312] …. Mr Day[4] was of the opinion that the evidence of the likelihood people would be highly annoyed by airport noise within the 50dB is stronger now than

[3] Evidence of Shane Fairmade, Richard Withy, Mark Allan and Patricia Harte

[4] Although it was Mr Day of the firm Marshall Day who gave evidence on behalf of CIAL to the PC14 Panel, that evidence was essentially the same as was given by this Panel by Ms Smith of

in the past, referring to updated international survey data in the 2018 WHO Report. The Panel note, however, that the Marshall Day Report concluded that a comparison in annoyance levels from surveys over the period 2001 Miedema et al, 2002 Taylor Bains, WHO 2018 and FAA 2021 shows there is an appreciable variation between the curves, making it difficult to predict the actual annoyance outcome with certainty. The Panel note here that even if annoyance occurred in a 'worst case', that is not of itself a reverse sensitivity effect or even an inappropriate adverse effect; in terms of health effects, using surveys of annoyance as a proxy for actual adverse health effects on individuals is in the Panel's view less than entirely reliable. In terms of reverse sensitivity there is still a need for complaints to occur in such a frequency and manner that the operator of a lawfully established activity found itself unable to persevere with its activities, and scale those back.

[313] The general conclusion made by the Marshall Day Report was that community annoyance due to aircraft noise increases with noise level exposure (as expected), and overall has increased over time. In the Marshall Day Report the analysis demonstrated that the causes for complaints are varied and often unrelated to actual noise levels, and complaints are frequently agitated through media coverage or changes to airport planning, sometimes regardless of the scale or effect of that change. The Marshall Day report cites a paper by FICON in 1992 that commented that "annoyance can exist without complaints, and conversely complaints may exist without annoyance" and it has long been thought that complaints data cannot be used to accurately predict annoyance levels. Marshall Day concluded that this continues to be the finding of the latest research in this area. However, recent studies have shown that analysis of complaints data can show other trends which may be helpful to understand.

21. At [318], the PC14 Panel referred the earlier decision of the Christchurch Replacement Plan[5] Independent Hearing Panel, which said:

[206] Mr Day concluded that it is not sensible to locate new residential development (or intensification) within the 50 contour "if it can be easily avoided". He concluded that the "land use planning provision in the [CRDP] should be maintained to ensure intensification inside the noise contours is not allowed to occur".

[207] We do not consider we can rely on that ultimate conclusion, as it lacks a sufficiently reliable foundation and is, in any case, beyond the scope of Mr Day's true expertise.

[209] A high relative proportion of people in the Christchurch community likely to be highly annoyed by airport noise is not itself conclusive as to the extent of any associated reverse sensitivity risk for the Airport. In a broad sense, we accept as logical that there will be correlation between the proportion in a community "highly annoyed" and the proportion who could take associated action, including opposing the Airport's further development. We also accept in broad terms and subject to the limitations as to reliability of the evidence that we have noted, that larger scale developments could increase the proportion of

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the same firm. See in particular paragraphs 27, 33 and 34 of her Stream 7A/B evidence, and paragraphs 55 and 63 of her Stream 10A evidence.

[5] That Panel included former High Court judge Hanson J, and current Environment Court judge John Hassan

highly annoyed people and, therefore the number who could become Airport opponents. However, that is a very limited basis for determining what, if any, related restrictions should be imposed on residential and non-residential activities in relevant zones.

[210] Mr Day's evidence also leaves for assumption what, if any, material consequence a modestly higher proportion of active complainants (for instance, opponents of the Airport in future RMA or other process) would have for the Airport's efficient and effective provision operation, maintenance or upgrade. On this the evidence of Mr Day (and the other evidence for the Airport) leaves us in the realm of speculation.

[211] In any case, it is not a foundation that necessarily supports his ultimate conclusion as to what is "sensible". For us to determine the "sensible planning outcome" (as Mr Day termed it), we must test the benefits, costs and risks of the different options available to us, in order to determine what is the most appropriate approach to the management of noise sensitive activities. Ultimately, that involves some trade-offs on a range of matters beyond Mr Day's true expertise.

22. Having reviewed the earlier Panel's conclusions regarding what was effectively the same evidence put forward by CIAL, the PC14 Panel said:

[319] The Panel find that remains the position before us today. The Panel find that the acoustic evidence from Mr Day and the operational evidence of Ms Hayman does not satisfy us that there is a sufficient nexus between the probably of 10-27% (regardless of whether the Panel accept the WHO or Professor Clarke's *Gjestland* curve of annoyance) of potential new residents as a consequence of implementing the MDRS or Policy 3 becoming highly annoyed necessarily leads to the conclusion that the airport will face restrictions on its existing lawful activities. It may be that the airport would face opposition from more residents than it would currently if it chooses to expand its operations beyond what lawfully exists, however that is not a reverse sensitivity effect as defined by the ODP.

[320] The Panel do not find the suggestion by Mr Day, that if given the choice it should adopt an avoidance approach to be the correct approach, As we have set out in other parts of our decision, a QM should not be used to advance a general planning preference. The correct application of the RMA is to proceed on the basis that the MDRS (or NPS-UD Policy 3 response) must apply to all relevant zones and then, through the use of QMs, work back from that only to the extent demonstrated as necessary. Outright avoidance of the MDRS or NPS-UD Policy 3 response, as Mr Day explained it to us, is not as we see it a valid option. The Panel need to test the appropriateness of the QM's method in the ordinary way, and consider the relative costs, benefits and risks for the Airport and other resource users, and the community as a whole supplemented by the additional requirement of the Housing Supply Amendment Act.

23. The PC14 Panel noted at [319] that the Airport possibly facing increased opposition from more residents than it would currently face if it chooses to

expand its operations beyond what lawfully exists is not a reverse sensitivity effect as defined by the Operative [Christchurch] District Plan. That concept was explained in more detail earlier in the report, at [308] to [310]. The Christchurch ODP definition of "reverse sensitivity" is: "means the effect on existing lawful activities from the introduction of new activities, or the intensification of existing activities in the same environment, that may lead to restrictions on existing lawful activities as a consequence of complaints."

24. In our submission, that definition is not materially different from that contained in the PWDP, namely: "means the potential for the operation of an existing lawfully established activity to the compromised, constrained, or curtailed by the more recent establishment or creation of another activity which may be sensitive to the actual, potential or perceived adverse environmental effects generated by an existing activity."

25. The PC14 Panel said:

> [310] In the context of the potential increase of new residential activities within the 50dB Ldn noise contour, the Panel's interpretation of that definition is that there needs to be a causal nexus between complaints arising from new or intensified residential activities and the likelihood of restrictions being imposed on the airport's existing lawful activities. The Panel find Mr Kyle's view that the concept of reverse sensitivity being 'forward looking' does not extend to members of the community exercising their statutory rights of objection to the expansion of activities that the airport may undertake in the future pursuant to the RMA, should planning approval be required, an issue both Ms Hayman and Mr Day were concerned with. Nor does it extend to the airport making an operational decision to alter its activities on a voluntary basis or in response to the duties imposed under RMA s16, the Panel do not consider those to be 'restrictions' on existing lawful activities as a consequence of complaints. They are a mandatory duty of the RMA and are an inherent part of the lawful activities.

26. This view by the PC14 Panel is consistent with that expressed by the High Court in the recent case of *Auckland International Airport Ltd v Auckland Council and Kainga Ora*.[6] This was a case concerning development between the 60 and 65 dB L_{dn} noise contours of Auckland Airport.[7] A resource consent application by Kainga Ora for an intensive housing development in this "Moderate Airport

[6] *Auckland International Airport Ltd v Auckland Council and Kainga Ora* CIV-2022-404-2365 [2024] NZHC 2058.
[7] Paragraph 24

Noise Area (MANA)", which is a discretionary activity, had proceeded on a non-notified basis, and been granted.

27. Auckland Airport brought judicial review proceedings in the High Court regarding the decision to proceed on a non-notified basis. As such, the Court did not have to deal with the substantive question of whether or not the application for resource consent should have been granted. The judgment simply examines whether or not Auckland Council had regard to all relevant matters, and followed the correct process, in deciding not to notify the application. At any rate, because it dealt with the question of development between the 60 and 65 dB L_{dn} noise contours, it is irrelevant to the proposition that residential development should be constrained between the 50 and 55 dB L_{dn} noise contours.

28. The High Court judgment refers with approval to the following definition of "reverse sensitivity": "Reverse sensitivity is sensitivity not to environmental impact, but to complaint about environmental impact. Reverse sensitivity exists where an established use produces adverse effects and a new use is proposed for nearby land. It is the legal vulnerability of the established activity to objection from the new use."[8]

29. This is the approach which was taken by the PC14 Panel: reverse sensitivity effects relate to effects on established lawful activities, not to activities which may be sought to establish in the future. The PC14 Panel did not accept that MDRS within the 50 to 55 L_{dn} contours of Christchurch Airport would have reverse sensitivity effects upon the Airport's operations which would justify departing from MDRS by imposing lesser density standards.

30. The evidence before this Panel on the PWDP and Variation 1 is the same evidence as was heard by the PC14 Panel, directing the same conclusion as was reached in that case. The evidential basis for an Airport Noise Qualifying Matter has not been established, so MDRS between the 50 and 55 L_{dn} airport noise contours in Waimakariri District must be fully enabled.

Dated: 6 September 2024

[8] Paragraph 27

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