

Before an Independent Hearings Panel
appointed by the Waimakariri District Council

under: the Resource Management Act 1991

in the matter of: Submissions and further submissions in relation to the
proposed Waimakariri District Plan, Variation 1 and
Variation 2

and: Hearing Stream 12E: Rangiora, Kaiapoi, Woodend,
Variation 1

and: **Christchurch International Airport Limited**
Submitter 254

Speaking notes – legal

Dated: 19 August 2024

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SPEAKING NOTES

INTRODUCTION

- 1 These legal submissions are presented on behalf of Christchurch International Airport Limited (*CIAL*).
- 2 These submissions will respond to the various points raised in the legal submissions of Momentum Land Limited (*Momentum*) and Mike Greer Homes NZ Limited (*Mike Greer*).
- 3 Many of the issues (particularly with respect to the proper interpretation of Policy 6.3.5(4) of the CRPS) have already been dealt with in considerable detail at Hearing Stream 10A. *CIAL* continues to rely on the evidence and legal submissions presented at that hearing.
- 4 In summary, *CIAL* maintains its opposition to the residential rezoning of land within the Remodelled 50dB Ldn Outer Envelope Air Noise Contour. Relevant to Hearing Stream 12E, this means that submissions seeking the rezoning of land in this area should be rejected.
- 5 For clarity, our submissions addressed Variation 1 to the extent that it is covered in this Hearing Stream 12E (i.e. the rezoning requests being sought under the Variation).
- 6 Our understanding is that Variation 1 will otherwise be dealt with in Hearing Stream 7 (i.e. Hearing Stream 7 will cover intensification of *existing* residential areas). *CIAL* intends to participate as necessary in Hearing Stream 7.

THE POLICY 6.3.5(4) EXEMPTION

- 7 The proper interpretation of Policy 6.3.5(4) was dealt with in considerable detail during Hearing Stream 10A. Rather than repeat the submissions we have already provided to the Panel; we will refer back to and endeavour to briefly summarise the key points raised during that hearing.
- 8 In contrast to the 12E Reporting Officer, and the position taken by counsel for Momentum and Mike Greer, in our submission the correct position is that:
 - 8.1 the Kaiapoi exemption applies to a narrowly defined area of Kaiapoi and its outer bounds have already been reached within plan changes that have occurred under the Operative Waimakariri District Plan (the *Operative Plan*) post the Christchurch Earthquake; and
 - 8.2 the Kaiapoi Future Development Area (*FDA*) is therefore to be treated no differently to other areas of land in Waimakariri

that are subject to aircraft noise levels of 50dB Ldn or greater.

- 9 We highlight the following:
- 9.1 The "avoid" direction within Policy 6.3.5(4) (and I note that I address what avoid means below) does not apply within specific listed areas, being existing residentially zoned urban areas, residential greenfield areas in Kaiapoi or residential greenfield areas identified in Map A.
 - 9.2 FDAs are not one of the listed areas and therefore cannot be exempt from the direction in Policy 6.3.5(4). FDAs were introduced by Plan Change 1 to the CRPS (*PC1*) and this was after Policy 6.3.5(4) was already in place, including the Kaiapoi exemption. This again demonstrates that the Kaiapoi exemption reflected the circumstances at the time following the Canterbury earthquakes; the list of exempted areas has not been amended since.
 - 9.3 If it was intended that the Kaiapoi exemption should apply to FDAs at Kaiapoi, one would expect an amendment to the list of exempted areas, or that the FDAs at Kaiapoi would be named to one of the already exempted areas (e.g. residential greenfield area). The fact that no such amendments were made must be taken to be deliberate drafting.
 - 9.4 The Hearings Panel recommendation for PC1 explicitly stated that "there is no exemption for noise sensitive activities in FDAs and any development would therefore need to comply with Policy 6.3.5".¹ It therefore makes sense that FDAs were deliberately not added to the list of land types that are granted an automatic exemption from the direction in Policy 6.3.5(4).
- 10 In short, if the exemption in Policy 6.3.5(4) was intended to capture to FDAs it would have said so.
- 11 The correct interpretation must be that all land which will be subject to levels of 50dB Ldn or higher is subject to the direction in Policy 6.3.5(4), except for those three categories of land listed within the policy.
- 12 Because FDAs are not listed, those that sit within the 50dB Ldn Contour (we say Remodelled Outer Envelope) should be treated no differently (from a Policy 6.3.5(4) perspective) to any other area of land that is subject to aircraft noise levels of 50dB Ldn or greater in

¹ *Report to the Minister for the Environment on Proposed Change 1 to Chapter 6 of the Canterbury Regional Policy Statement* (dated March 2021) at [152].

any other part of the region. Relevant to Hearing Stream 12E, this includes the Kaiapoi Development Area.

- 13 The evidence of **Mr Kyle** supports this conclusion from a planning perspective.
- 14 I note that the legal submissions for Momentum and Mike Greer refer to the Greater Christchurch Spatial Plan (*GCSP*) and the very recently released recommendations of the Independent Hearings Panel on Christchurch City Council's Plan Change 14 (CCC's IPI). The legal submissions suggest that this Panel should have regard to these documents because they take a "markedly" different approach to the management of residential growth beneath the air noise contour.
- 15 In our submission, referring to the approach taken in these documents as "markedly" different is misleading. A key premise of the GCSP is "growth in appropriate places". Within this concept, "areas to protect" includes strategic infrastructure, including Christchurch Airport. The Operative 50 dB Ldn Air Noise Contour is included in the GCSP, on the basis that urban development should be carefully managed around strategic infrastructure to ensure the safety and well-being of residents, and to safeguard the effective operation, maintenance and potential for upgrades of this infrastructure.² There is also an express note about the remodelling process and the need to incorporate the new contours in future. We struggle to see how this approach is "markedly" different to what exists in the current CRPS.
- 16 As to Plan Change 14, we also struggle to see how the recommendations of that Panel are relevant to this Panel's exercise. They are simply recommendations and, importantly, CCC is currently having significant deliberations as to the scope of its decision-making in light of the Government direction around the timing of implementing Policies 3 and 4 of the NPSUD (September 2024) versus the MDRS/qualifying matters generally (September 2025).
- 17 That said, the Plan Change 14 Panel's recommendations *do not* address greenfields rezoning (as is the case here) because it was not a proposed plan process and dealt only with existing residential zones (where there is an exemption in Policy 6.3.5(4)). Rather, they retain a level of protection for Christchurch Airport from reverse sensitivity effects in the context of intensification of existing areas and, importantly, they recognise and implement the Remodelled 50dB Ldn Outer Envelope Air Noise Contour in the Christchurch City planning framework.

² Page 53, Map 9.

THE MEANING OF "AVOID"

- 18 The meaning of the word "avoid" in the context of the CRPS was also dealt with in Hearing Stream 10A.
- 19 Counsel for Momentum and Mike Greer assert that Policy 6.3.5(4) should be interpreted as "avoiding material harm" to CIAL from noise sensitive activities within the 50 dB Ldn contour, rather than avoiding all noise sensitive activities.³ However, in reaching this conclusion counsel appear to have misinterpreted and misapplied the recent findings of the Supreme Court decision in *Port Otago Limited v Environmental Defence Society Incorporated (Port Otago)*.⁴
- 20 *Port Otago* does not redefine the word "avoid" in the context of planning documents.
- 21 The Supreme Court in *Port Otago* reaffirmed the well-established definition from *King Salmon*, that the term 'avoid' "has its ordinary meaning of "not allowing" or "preventing the occurrence of"⁵ but added that it is important to look at the words which follow the word "avoid" to determine what it is that is "not allowed" or "prevented" Relevantly, the Court found that:⁶

[64] The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. As this Court said in King Salmon, the various objectives and policies in the NZCPS have been expressed in different ways deliberately. Some give decision-makers more flexibility or are less prescriptive than others. Others are expressed in more specific and directive terms. These differences in expression matter."

- 22 In this sense, there are different types of 'avoid' activities. For example, some avoid policies in planning documents seek the avoidance of activities, and others seek the avoidance of certain adverse effects.
- 22.1 Where an avoid policy relates to the avoidance of a specific activity (such as here with Policy 6.3.5(4) of the CRPS), are framed in a prescriptive, specific, and unqualified way and are therefore directive.

³ Legal submissions on behalf of Momentum Land Limited dated 9 August 2024 at [75]-[75]; and Legal submissions on behalf of Mike Greer Homes NZ Limited dated 9 August 2024 at [65]-[70].

⁴ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112.

⁵ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24].

⁶ *Port Otago* at [61].

- 22.2 Where an avoid policy relates to the avoidance of certain adverse effects total prohibition would not likely be necessary in all circumstances if noise effect can be dealt with.⁷ In such cases, decision makers must either be satisfied there will be no material harm or alternatively, be satisfied that conditions can be imposed that mean:⁸
- (a) material harm will be avoided;
 - (b) any harm will be mitigated so that the harm is no longer material; and
 - (c) any harm will be remedied within a reasonable timeframe so that overall, it is not material.
- 23 Policy 6.3.5(4) of the CRPS states "*including by avoiding noise sensitive activities within...*". The Policy could not be more directive in that it is noise sensitive activities themselves which are to be avoided not the effects which arise. Noise sensitive activities are defined by the CRPS,⁹ leaving no doubt as to exactly what the policy applies to.
- 24 We observe that other provisions in the CRPS use different phrases such as "avoid adverse effects"¹⁰ and "avoid development that adversely affects..."¹¹ (among others). For those provisions, the *Port Otago* rationale in relation to avoiding material harm is relevant, as the language following the word "avoid" is of a similar nature. However, Policy 6.3.5(4) of the CRPS is worded different and the Supreme Court has told us that these differences must be regarded as deliberate and that they "matter" in an interpretation exercise.
- 25 Applying the reasoning of the Supreme Court above, the term "avoid" in Policy 6.3.5(4) is directive and requires the avoidance of noise sensitive activities. It is not possible to circumvent the application of this policy by simply mitigating adverse effects.
- 26 Even if the Panel were to consider that "avoid" in the context of Policy 6.3.5(4) of the CRPS requires a consideration material harm in light of *Port Otago*, it is submitted that the way the policy is drafted

⁷ *Port Otago* at [64].

⁸ *Port Otago* at [66].

⁹ Noise sensitive activities means "*Residential activities other than those in conjunction with rural activities that comply with the rules in the relevant district plan as at 23 August 2008; Education activities including pre-school places or premises, but not including flight training, trade training or other industry related training facilities located within the Special Purpose (Airport) Zone in the Christchurch District Plan; Travellers' accommodation except that which is designed, constructed and operated to a standard that mitigates the effects of noise on occupants; Hospitals, healthcare facilities and any elderly persons housing or complex. But does not include: Commercial film or video production activity.*"

¹⁰ Objective 5.2.1 .

¹¹ Policy 6.3.1.

implies that the decision maker has already determined that harm will occur if noise sensitive activities are not avoided. That is why the Policy is so directive.

SHOULD THE REZONINGS BE ACCEPTED ON THE BASIS THAT THEY SATISFY THE RESPONSIVE PLANNING PROVISIONS OF THE NPSUD?

- 27 The final argument out forward by counsel for Momentum and Mike Greer is that in the event that the Panel determines that the urban development is not anticipated by the CRPS in the relevant locations, the NPSUD contemplates the situation of a lower order planning document becoming outdated and acting as a closed door to development.¹² Counsel cites the recommendation of the Commissioner for plan change request for 69 under the Selwyn District Plan (PC69) in an attempt argue that Policy 8 of the NPSUD provides a way around the avoidance directions in the CRPS.
- 28 However, in our submission, NPSUD cannot be relied on to allow the rezoning proposals because what is proposed is clearly distinguishable from PC69.
- 29 The key issue arising in PC69 was whether it was appropriate to rezone land given that it was not identified on Map A of the CRPS and therefore was subject to the avoid direction at Objective 6.2.1.3. The avoid direction in Objective 6.2.1.3 restricts urban development outside of the identified areas of Map A. In the circumstances of this case, the conflict between the CRPS and Policy 8 of the NPSUD was able to be overcome simply by reading the provisions together. This approach was supported by the overarching purpose of the NPSUD.
- 30 In contrast, the relationship between Policy 6.3.5(4) and Policy 8 goes directly to the fundamental merits of making land available for urban development and managing the adverse effects of airport noise. To properly approach these provisions, consideration must be had to the purpose and the intent of the respective planning instruments.
- 31 In our submission, Policy 8 must not be read in a vacuum. The overarching purpose of the NPSUD is set out at Objective 1. The NPSUD it intended to ensure that “*New Zealand has **well-functioning urban environments** that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their **health** and safety, now and into the future.*”
- 32 The purpose of Policy 6.3.5(4) is twofold. It protects both:¹³

¹² Legal submissions on behalf of Momentum Land Limited dated 9 August 2024 at [76]-[83]; and Legal submissions on behalf of Mike Greer Homes NZ Limited dated 9 August 2024 at [71]-[78].

¹³ See *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601. at [34].

- 32.1 the safe and efficient operation, use, future growth and development of CIAL; and
- 32.2 the **health**, wellbeing and amenity of people though avoiding noise sensitive activities within the 50 dBA Ldn air noise contour.
- 33 An approach which attempts side-step the clear direction in Policy 6.3.5(4) would clearly be contrary to the very purpose of the NPSUD as it fails to provide for the well-being and health of all people and communities.
- 34 Furthermore, to say that Policy 8 can be relied on to circumvent all objectives or policies that require certain activities to be avoided is simply illogical. Such interpretation would allow for absurd outcomes by permitting development in areas clearly recognised as inappropriate for future development for legitimate planning reasons. For example, strict reliance on Policy 8 would potentially enable development in areas adjacent to the coastal marine area that would compromise areas of high natural character¹⁴, in areas subject to natural hazard risk¹⁵ and could permit development that would impact constrain existing infrastructure.¹⁶ It is difficult to see how this would lead to 'well-functioning' urban environment and cannot be the intent of the NPSUD.
- 35 Therefore, in our submission, Policy 8 of the NPSUD can be read together with Policy 6.3.5(4) of the CRPS in this context, and Policy 8 cannot be relied on to overcome the clear avoidance directions in the CRPS.
- 36 It is noted that counsel has not referred to the far more relevant PC71 land and planning processes in the Selwyn context. The subject land is in East Rolleston and falls partly within the operative 50 dB Ldn contour (at the relevant time of PC71 the remodelling had not occurred). Rezoning of the land was pursued under both the Operative Selwyn District Plan (including a MDRS variation) and the Proposed Selwyn District Plan (and Variation 1).
- 37 In both the operative and proposed plan processes, the decision-makers refused to rezone the part of the land within the operative 50 dB Ldn contour due to the policy direction of Policy 6.3.5 of the CRPS, despite the NPS-UD. Specifically, the Selwyn Proposed District Plan Panel concluded that it "*would be inappropriate to rezone land within the 50 dB Noise Control Overlay*" for residential

¹⁴ Policy 8.3.4.4.

¹⁵ Policy 11.3.1.1

¹⁶ See for example Policy 5.3.6.1, Policy.3.7.2, 5.3.9.1 and Policy 5.3.10.1.

activities because it would be not give effect to and would be inconsistent with objectives and policies of the CRPS.¹⁷

- 38 We note that decision-making on the PC71 land did not incorporate the remodelled contours, but this was due to timing, with the remodelled contours only being available just before the Variation 1 hearing, with no time available for a suitable section 32 assessment. This contrasts with the current situation where this Panel has a full suite of evidence before it on the Remodelled 50 dB Ldn Outer Envelope Contour.

MOMENTUM /MIKE GREER RESPONSE TO MR KYLE

New Zealand Standard for Airport Noise Management and Land Use Planning (NZS6805)

- 39 There has been some discussion about the requirement of NZS6805 and the approach that is adopted in Canterbury. NZS6805 was addressed in considerable detail at Hearing Stream 10A from a planning, legal and technical perspective.
- 40 As explained by **Ms Smith** in her Hearing Stream 10A acoustics evidence, it is important to view how NZS6805 as a whole has been implemented.¹⁸ Yes, the 50dB Ldn contour as the OCB for Christchurch Airport is more conservative than NZS6805's minimum recommendation, but territorial authorities have the discretion to go further than the minimum and so the 50dB is entirely consistent with NZS6805. There is also a specific reference in NZS6805 to it not being used to downgrade existing land use controls, as explained by **Mr Chris Day** in his Hearing Stream 10A evidence.
- 41 Moreover, as has been noted a number of times at various hearings that the current land use controls within the 50dB Ldn contour are in fact more liberal than NZS6805 recommends. In *Robinson's Bay Trust* it was noted that:¹⁹

... (1) The parties agree that the Noise Standard is generally appropriate for use at the Christchurch Airport. This includes an acceptance that it is appropriate to address controls over the airport and over land development by means of an air noise boundary and an outer control boundary. The major distinction between the parties is whether the outer control boundary should be at the 55 dBA Ldn specified in the Noise Standard (clause

¹⁷ Recommendation Report Selwyn PDP Hearing 30.1: Rezoning Requests – Rolleston at [23]-[34].

¹⁸ Statement of evidence of **Ms Laurel Smith** for Hearing Stream 10A (dated 2 February 2024).

¹⁹ *Robinsons Bay Trust & Ors v Christchurch City Council*, C60/2004, 13 May 2004, Smith J (EnvC) (*Interim decision*) at [20].

1.4.2.2) or should be at the 50 dBA Ldn contour line shown in the Proposed Plan.

(2) Having assessed the evidence of all the witnesses, we conclude it is common ground of the parties that the standard is a guide rather than a mandatory requirement and that it has been utilised in various ways throughout New Zealand. The Noise Standard does not recommend using the 50 dBA Ldn contour line, nor has it been used elsewhere in New Zealand.

(3) The purpose of the outer control boundary is set out in Noise Standard at clause 1.1.5:

"(b) The Standard establishes a second, and outer, control boundary for the protection of amenity values, and prescribes the maximum sound exposure from aircraft noise at this boundary."

The level of disagreement therefore relates not to the applicability of the standard but whether, in fact, a lower level than 55 dBA Ldn is appropriate to the circumstances of this case.

42 In that case the Court held:

[46] ... We have concluded that the Proposed Plan is relatively liberal in presently allowing a level of development down to four hectares within the Rural 5 zone, even within the 50 and 55 dBA Ldn contours. Thus, not all residential development within the area is discouraged, only certain urban peripheral growth. Furthermore, during the course of the hearing it became clear that Policy 6.3.7 sought to deal only with certain types of noise sensitive activities or residential activities but was not intended to include non-sensitive activities, for example industrial or commercial activities.

...

[57] We are unable to see that there is any particular cost imposed upon landowners from the adoption of the 50 dBA Ldn contour as opposed to the 55 dBA Ldn contour. The land is still available for a range of permitted uses, including, as we have already discussed, limited residential subdivision and development of one dwelling to four hectares in the Rural 5 zone and one to 20 hectares in the Rural 2 zone. The land is still available for a wide range of rural uses. Policy 6.3.7 itself it would not, on its face, affect applications for non-noise sensitive activities or subdivisions for commercial or industrial use.

...

[64] ... (5) the 50dBA line does not foreclose future options. It enables the parties in the sense of conserving options for the future (and future generations). These options apply to both the landowner and the airport. If the 50 dBA Ldn noise contour restrains the landowner at all it does so only in a temporary sense. The policy could be changes in the future to realise the potential for any appropriate development. We conclude that the 50dBA line preserves the potential of land for future generations"

...

We conclude that the 50dBA noise contour better reflects the purpose of the Act to achieve the sustainable management of these physical resources.

- 43 **Mr Kyle** will also briefly address this issue in his summary statement.

Auckland Airport decision

- 44 In our submission, Policy 6.3.5 of the CRPS requires reverse sensitivity effects to be considered beyond ensuring compliance with internal acoustic standards for development . This is supported by the evidence of **Ms Smith** (Hearing Stream 10A) and the recent *Auckland International Airport Limited (AIAL)* decision, which we addressed in our legal submissions for this hearing stream.²⁰
- 45 We disagree with counsel’s (for Momentum and Mike Greer) comments about the relevance of the AIAL decision. Our legal submissions expressly acknowledged that the AIAL decision was made in a different context against a different factual background. We also acknowledge that, being a judicial review, the decision was not a review of the merits of the decision. However, the High Court’s findings are highly relevant and applicable to the extent that they highlight that reverse sensitivity effects must be considered beyond ensuring compliance with applicable acoustic standards for development and, in particular, that adverse effects on the outdoor environment must also be considered.
- 46 The AIAL decision involved a judicial review of Auckland City Council’s decision not to notify a resource consent application for an intensive development located within the Airport Noise Overlay (which restricts development within the overlay to manage the adverse effects of aircraft noise).
- 47 Auckland City Council had concluded that the potential for reverse sensitivity effects were less than minor because the applicant had sought to comply with all standards for acoustic insulation and the proposal comprised of extensive acoustic design (including cladding and window designs specifications and heating and ventilation requirements) such that windows and doors can be closed if

²⁰ *Auckland International Airport Limited v Auckland Council* [2024] NZHC 2058 .

required. On this basis, Auckland City Council determined that the application could proceed on a non-notified basis. On the same day it made the notification decision, Auckland City Council also decided to grant the consent sought. Auckland International Airport Limited challenged both the notification decision and consent decision by way of judicial review.

- 48 The core issue in the AIAL decision essentially came down to whether or not compliance with acoustic standards was intended to be the sole mechanism by which reverse sensitivity effects were to be managed within the overlay.
- 49 In reaching its decision, the High Court *cited Independent News Auckland Ltd v Manukau City Council* where the Environment Court had previously recognised the importance of protecting Auckland Airport through limiting the amount of residential development in areas affected or potentially affected by high aircraft noise.²¹ In that case, it was held that that mitigation measures by way of acoustic and ventilation standards were not sufficient to address reverse sensitivity effects.²²
- 50 The High Court also took into account evidence presented by Auckland Airport's expert witnesses about the potential for adverse noise effects in outdoor areas of the proposed development. Based on this evidence, the High Court had "little difficulty" in finding that compliance with acoustic standards was not the only matter to be considered to address adverse effects and Auckland City Council had therefore failed to carry out the mandatory assessment of all relevant adverse effects.²³ Therefore, the notification and consent decision were held to be invalid.
- 51 We remain firmly of the view the AIAL decision is relevant that to the extent that it highlights that the Panel's decision must consider all relevant effects, including outdoor noise effects which cannot be mitigated through adherence to internal acoustic standards for development.

CONCLUSION

- 52 CIAL maintains its opposition, as per its submission and further submission, to the residential rezoning of land within the Remodelled 50dB Ldn Outer Envelope Air Noise Contour. CIAL's case was made in detail, with supporting evidence and legal submissions, at Hearing Stream 10A.
- 53 Relevant to Hearing Stream 12E, submissions seeking the rezoning of land, and the intensification of development rights, within the

²¹ *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16.

²² At [117].

²³ *Auckland International Airport Limited v Auckland Council* [2024] NZHC 2058 at [87].

Remodelled 50dB Ldn Outer Envelope Air Noise Contour should be rejected.

Dated: 19 August 2024

A handwritten signature in blue ink, appearing to read 'Jo Appleyard'.

Jo Appleyard / Meg Davidson
Counsel for Christchurch International Airport Limited