

Before an Independent Hearings Panel
appointed by 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 10A: Future Development Areas,
Airport Noise Contour, Bird Strike and Growth policies

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

Speaking notes - legal

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SPEAKING NOTES

The meaning of "avoid"

- 1 The legal submissions filed on behalf of CIAL briefly address the meaning of "avoid".¹ These supplementary submissions provide additional analysis as we appreciate that is important in the context of the Panel's interpretation of the relevant Canterbury Regional Policy Statement provisions.
- 2 Firstly, the recent *Port Otago* decision does not redefine the word "avoid" in the context of planning documents. The Court reaffirmed the definition from *King Salmon*:

[64] It is clear from this Court's decision in King Salmon that the NZCPS avoidance policies have a directive character. This Court said that the term "avoid", as used in the NZCPS, has its ordinary meaning of "not allow" or "prevent the occurrence of", meaning that the policies at issue in that appeal provided "something in the nature of a bottom line". The Court noted, however, that what was to be avoided with regard to those policies was, in that case, the adverse effects on natural character and that prohibition of minor or transitory effects would not likely be necessary to preserve the natural character of coastal environments.

- 3 Rather, the Court says that in interpreting an avoidance policy it is important to look at the words which follow the word "avoid" to determine what it is that is to be "not allowed" or "prevented". As the Court said:

[61] 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.

[62] A policy might be expressed in such directive terms, for example, that a decision-maker has no choice but to follow it, assuming no other conflicting directive policy. As this Court said in King Salmon:

... although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule.

[63] Conflicts between policies are likely to be rare if those policies are properly construed, even where they appear to be pulling in different

¹ Paragraphs 45 to 48.

directions. Any apparent conflict between policies may dissolve if "close attention is paid to the way in which the policies are expressed". Those policies expressed in more directive terms will have greater weight than those allowing more flexibility. Where conflict between policies does exist the area of conflict should be kept as narrow as possible.

- 4 Policy 6.3.5(4) of the CRPS states "*including by avoiding noise sensitive activities within...*". The Policy couldn't be more directive in that it is noise sensitive activities themselves which are to be avoided. Noise sensitive activities are defined by the CRPS², leaving no doubt as to exactly what the policy applies to.
- 5 We observe that other provisions in the CRPS use different phrases such as "*avoid adverse effects*"³ and "*avoid development that adversely affects...*"⁴ (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;
- 6 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 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.
- 7 That brings me to the history of the 50dB Ldn as the trigger for land use controls in Canterbury.

History of 50 Ldn

Gargulio

- 8 This case is addressed at paragraphs 21 to 23 of our legal submissions. This was in the context of a resource consent but also in a context where neither the District Plan nor the RPS contained a specific reference to avoiding noise sensitive activities within the

² 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.*"

³ Objective 5.2.1

⁴ Policy 6.3.1.

50Ldn. (Since 1958 the Rural zoning had aligned with exposure to noise levels of 50 dB Ldn or greater)

- 9 During that hearing Judge Jackson was critical of the fact that evidence would have to be adduced at every future hearing to show the chance of a person being highly annoyed and airport operations therefore put a risk and encouraged both the CCC and ECan to make their policies more directive about where adverse effects on people and the airport would arise rather than leaving it to implication that rural zoning/50dB Ldn implied the existence of adverse amenity and reverse sensitivity effects.

Robinsons Bay Trust 2004

- 10 That then lead to Variation 52 to the CCC's Proposed Plan which sought to make what the Court said was implied in the District Plan (and RPS) explicit. This is the Robinsons Bay case which had the single question to decide. The Court said in paragraph 19 that in simple terms, the question is whether the 50 or 55 dBA contour line better provides for the purpose of the Act, the RPS and the provisions of the Proposed Plan.
- 11 Although in the context of Christchurch the evidence the Court considered, and issues that were raised are exactly the same as those that and are now raised here.
- 12 The Court said:

[20] There are many points of agreement between the parties including:

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

Both the Council and the Regional Council advocated the adoption of the 50 dBA contour line as the contour which better supported the purpose of the Act.

...

- 13 Importantly the Court analysed the evidence of effects primarily in terms of effects of the airport on people i.e. annoyance (an amenity effect). The Court said:

[49] The major argument for adopting the 50 dBA Ldn noise contour in Policy 6.3.7 relates to providing an additional control to reduce the potential for residents to become highly annoyed with aircraft traffic. We accept the clear evidence given to us that noise can create impacts on amenity and some people will become highly annoyed. We also accept that there would be some benefit to the airport in future-proofing its operation. That benefit is one that has local, regional and national significance", It was not clear to us what alternative means would produce this outcome. We conclude that in these circumstances alternative means are not appropriate.

...

[59] We have concluded as a fact that a greater number of dwellings between the 50 and 55 dBA Ldn contour will lead to an increased number of persons being highly annoyed by aircraft traffic. That effect is one on the amenity of the persons who may reside under the flight path and accordingly is an effect which we should properly take into account, particularly under section 5 of the Act. However, it is also an effect which has a cost (in the wider meaning of that term) in terms of its effect on the local amenity. It is an effect which is not internalised to the airport and its land and is therefore shifted to the owners of land under the flight path. Thus, although there is no prospect of curfew on the airport at this time, there is likely to be an adverse effect on amenity of persons living within the 50 dBA Ldn contour line and thus an environmental cost imposed.

PC1 2007 and CERA NOTICES

- 14 The High Court in *Independent Fisheries* describes PC1 (2007) as:

[9] Amongst other things PC 1 identified urban limits through to 2041. It specified the sequencing of new greenfield land for residential development and directed that urban development was not to occur outside the specified urban limits applying from time to time. A long standing policy of precluding noise sensitive uses within a 50 dBA Ldn contour around the Christchurch international airport was also supported. The relevant territorial authorities were required to amend their district plans to reflect these matters.

[10] By the time submissions for PC1 closed in March 2008, around 700 submissions (the PC1 submissions) had been lodged. These included submissions from landowners (including the applicants) who sought to either have their land included within the urban limits or to amend provisions relating to the sequencing of greenfield land for development. Although Christchurch International Airport Limited generally supported PC1, it lodged a submission seeking the inclusion of updated air noise contours.

- 15 At the time of the earthquakes PC1 hearings had concluded before ECan's independent Panel chaired by Judge Shepherd and was subject to 50 appeals including against the inclusion of the 50 Ldn rather than 55 dB Ldn.

- 16 As the High Court in Independent Fisheries sets out:

[34] On 8 October 2011 the Minister gave public notice that, pursuant to s 27(1)(a) of the CER Act, he was amending the RPS by inserting chapter 22. The stated objective was to provide for and manage urban growth within greater Christchurch while protecting:

(a) the safe and efficient operation, use, future growth and development of Christchurch international airport; and

(b) the health, wellbeing and amenity of the people through avoiding noise sensitive activities within the 50 dBA Ldn air noise contour.

That objective was supported by two policies: the first provided for residential development at Kaiapoi inside the 50 dBA Ldn noise corridor to offset the displacement of residential activities at Kaiapoi (from the earthquakes); the second was to avoid noise sensitive activities within the air noise corridor except as provided for in the first policy.

[35] On 17 October 2011 the Minister gave public notice that the RPS was further amended by inserting chapter 12A. In broad terms this chapter gave effect to the relief sought by the UDS partners in their appeals to the Environment Court. It also reversed the changes arising from the Regional Council's decision, including changes supported by the applicants.

[36] By public notices on 1 November 2011 the Minister directed changes to the Christchurch and Waimakariri district plans.

- 17 It was the Minister's inclusion of the 50 dbA Ldn contour in the RPS instead of the 55 dBA Ldn contour that set off the court proceedings in *Independent Fisheries*. An unusual aspect of the Court proceedings was that the Court was informed by an affidavit from the Minister explaining his reasons for inserting Policy 6.3.5. Both Courts state that where a decision maker explains their reasons they should be given "real weight". We do not need to guess what the Minister's purpose was.
- 18 We now have the benefit of those reasons in considering what the Minister's purpose was in making the changes he did including inclusion of Policy 6.3.5. This includes the following paragraph:⁵

31. I considered it necessary to use my section 27 powers to add a new Chapter 22 to the RPS because it would settle throughout greater Christchurch where the contour line was and its effect. Following the earthquakes it was essential that people knew clearly what activities, and so what development, were allowed to take place near the airport. Given the importance of the airport to Canterbury I considered its continuing operations had to be protected from "reverse sensitivity" claims, and that a 50 dBA Ldn noise contour was appropriate since that noise level had been used for decades. However, approximately 25% of Kaiapoi had been significantly affected by the earthquake. Much of the township was already within the noise contour and I thought it was necessary to free up land in the immediate vicinity to enable residential development to occur to accommodate those displaced in the township and also from the Residential Red Zones further afield.

- 19 There are many other references to the Minister's purpose which was to protect the airport. See for example paragraph 100 of the Court of Appeal judgement which refers to "strengthening the protection" for Christchurch Airport:

[100] Second, there is little doubt that the continued safe and efficient operation and further development of Christchurch International Airport is essential for the full social, economic, cultural and environmental recovery of greater Christchurch in the widest sense...

- 20 We also wish to highlight the following comment from the Court of Appeal:

[102] Fourth, the fact that chapter 22 had the effect of restricting urban development in the area within the noise level contour does not mean that it had "nothing to do with earthquake recovery" as submitted by Mr Cooke. Settling the location of the contour provided planning certainty, a potentially essential prerequisite for recovery in the widest sense.

⁵ Paragraph 97 of *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601.

- 21 The references to the reasons for the Kaiapoi exemption are set out in our legal submissions and contained within the Principal Reasons and Explanation of the RPS itself as being “to offset the displacement of residences as a result of the 2011/2012 earthquakes” As the Court of Appeal told us these reasons are to be given “real weight” and it would be wrong to imply some wider purpose to the short term exemption such as now being relied on to support a medium to long term demand for housing. That would be contrary to the legislative history and the express purpose of the amendment as set out in the Minister’s affidavit and the RPS itself.
- 22 The position of CIAL on the correct interpretation of the RPS including the highly directive Policy 6.3.5 is the same as advanced by the Regional Council’s counsel. In particular as will be covered by Mr Kyle shortly there is a distinction made between Greenfield Priority areas and FDA’s. Mr Kyle will take you to those specific distinctions. On standard principles of statutory interpretation those distinctions must be assumed to be deliberate.
- 23 On the issue of intensification within “existing residential areas” we direct the Panel to paragraph 123 of our legal submissions regarding the Replacement Christchurch District Plan decisions.

Qualifying matters

- 24 CIAL’s relief in relation to Variation 1 is from paragraph 117 of our legal submissions.
- 25 As explained in CIAL’s submission on the Variation, where a matter is already provided for in an operative district plan, it is defined as an “existing qualifying matter”. Variation 1 as notified correctly identified the land within the operative 50dB Ldn Air Noise Contour as subject to an “existing qualifying matter”.
- 26 As Mr Wilson explained the notification of Variation 1 also included land within the updated (then draft) annual average 50 db Ldn contour as a qualifying matter area which was larger than the operative contour in one place. There is no problem with this. Whether you describe the remodelled contours as updating the spatial extent of an existing qualifying matter or describe it as a new qualifying matter the Council was entitled to include them in its notification.
- 27 By way of explanation the Christchurch City Council had included the (draft) remodelled contours in its notification. There a problem had been immediately apparent as the updated contours are significantly larger than the operative contour over relevant residential zones. In particular the annual average covered much of the relevant residential zones to a larger extent than the operative

contour The CCC notified PC14 as subject to the updated contour. (Check version of s77 report provided to WDC). CIAL disagrees with Mr Wilson's categorisation of the drafting error.

- 28 CIAL's submission to CCC (the same as WDC) then asks for the qualifying matter area to include the updated outer envelope. It considers that the location of the Airport QM should be based on the most up to date evidence that indicates the areas where people will experience levels of noise of 50dB Ldn or greater and where noise sensitive uses would be inappropriate. (Reference to Appendix A PC31 submissions).
- 29 In response to CIAL's submission and evidence planning officers for Christchurch City Council in relation to Plan Change 14, where the Airport QM is described as "an existing qualifying matter but new spatial extent, and retention of existing plan densities" ie the remodelled outer envelope.
- 30 We have provided the Panel with copies of Ms Sarah Oliver's Section 42A report and rebuttal evidence. Importantly, Ms Oliver states:

"12.17 I consider the new evidence base on the Airport Noise Contours to be robust and comprehensive and should be appropriately considered through this plan change. Importantly, to ensure the planning response to the requirement for greater intensification achieves the higher order policy direction and purpose of the Act (sustainable management principles). This includes "...a land use and infrastructure framework that:...achieves development that does not adversely affect the efficient operation, use and development, appropriate upgrade, and future planning of strategic infrastructure and freight hubs" (CRPS, Chapter 6, Objective 6.2.1), and District Plan Objective 14.2.3 and Policy 14.2.4.1 Avoidance of adverse effects on strategic infrastructure.

12.18 My second reason is that even if the reference in CRPS Policy 6.3.5 to the 50dBA Noise Contour can only be the contour as depicted on Map A, I consider there is still scope through this IPI process to consider whether MDRS and Policy 3 NPS-UD application is most appropriate outside of the Map A 50dBA Noise Contour. Map A of the CRPS does not in my opinion provide a barrier to the consideration of limiting the greater enablement through a qualifying matter. A qualifying matter can include both the CRPS Map A 50dBA Noise Contour spatial extent, as well as a wider 50dBA Noise Contour."

- 31 Ms Oliver has recently updated her recommendation to ask for the Updated contours (outer envelope) to be used as the basis for a "Provisional Airport Noise Qualifying Matter" within which the Operative District Plan zoning should be retained in the meantime. The Provisional Airport Noise Qualifying Matter could then be revisited via a plan change after the RPS review. Mr Kyle will refer to this.

Selwyn

32 Some of the issues that the Panel faces have also arisen in Selwyn.

33 Refer to the Commissioners decision in PC71, the decision on the Proposed Plan and Variation.

The Kaiapoi “natural experiment”

34 In response to Mr Colegrave’s evidence in relation to the Kaiapoi natural experiment, we emphasise that the noise contours are a measure of future noise levels.

35 As explained by Ms Smith, the noise levels that are currently experienced at Kaiapoi are 43 – 48dB Ldn. But Kaiapoi will experience 50dB Ldn in the future as the airport continues to grow.

36 The purpose of the 50dB Ldn Contour is to guide land use planning now and to avoid the very type of experiment that Mr Colegrave refers to when the evidence we have tells us the percentage of the population that will be highly annoyed by exposure to specific noise levels in the future.

37 For the record CIAL/CCC/CRC have previously commissioned an actual report (Taylor Baines) into annoyance levels in response to actual noise (including airport noise) at Christchurch. It is intended to update that study for the RPS hearings but to date that has been delayed by atypical aircraft patterns due to Covid19.

The appropriateness of the 50dB Ldn Contour for the Proposed Plan

38 There have been a number of questions in relation to the appropriateness of the 50dB Ldn Contour in planning documents for Canterbury. Submitters have referred to a lack of evidence that there are any reverse sensitivity effects on Christchurch Airport operations, and therefore question why land use controls associated with the 50dB Contour are necessary.

39 We firstly take this opportunity to respond to the assertion that there is no evidence of residential activity impacting the safe and efficient functioning of CIA. Ms Hayman, Mr Hawken and Ms Smith address this in evidence and explain why:

39.1 The lack of complaints should not be given significant weight; and

39.2 That there are ample examples of where levels of annoyance have resulted in restrictions on airport operations.

39.3 There is evidence/studies of high levels of annoyance at exposure to levels of 50 Ldn) including in Canterbury (Taylor Baines)

NZS6805

- 40 There has also been discussion about the requirements of NZS6805 and the approach that is adopted in Canterbury. As explained by Ms Smith, it is important to view how NZS6805 as a whole has been implemented. Yes the 50dB contour as the OCB is more conservative than NZS6805's minimum recommendation (emphasising that territorial authorities have the discretion to go further than the minimum and so the 50dB is entirely consistent with NZS6805) (There is a specific reference in NZS6805 to it not being used to downgrade existing land use controls – refer Chris Day).
- 41 Moreover as has been noted a number of times at various hearings the land use controls within the 50 Ldn are more liberal NZS6805 recommends. As the Court said in *Robinson's Bay Trust*:

[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