

**BEFORE THE HEARINGS PANEL
FOR THE PROPOSED WAIMAKARIRI DISTRICT PLAN**

UNDER the Resource Management Act 1991 (RMA)

IN THE MATTER of the Proposed Waimakariri District Plan

AND

IN THE MATTER of Hearing Stream 10A: New Development Areas, Airport
Noise and Bird Strike

**LEGAL SUBMISSIONS ON BEHALF OF THE CANTERBURY REGIONAL
COUNCIL – HEARING STREAM 10A**

9 February 2023

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MAY IT PLEASE THE PANEL

- 1 The Canterbury Regional Council (**Regional Council**) made a submission (and further submission) on Waimakariri District Council's (**WDC**) proposed Waimakariri District Plan (**pWDP**) primarily in order to ensure that the pWDP gives effect to the Canterbury Regional Policy Statement (**CRPS**).
- 2 In general, the Regional Council is supportive of the amendments suggested by the section 42A officers to address the Regional Council's submission points on the topics relevant to this hearing. The Regional Council appears before the Panel in this hearing seeking to provide assistance to the Panel primarily in giving effect to the CRPS.
- 3 The Regional Council does hold some specific concerns, particularly in relation to the future "release" of New Development Areas, to ensure that relevant factors are able to be taken into account in determining whether particular land is suitable for development. This is particularly so in relation to the Kaiapoi New Development Area, where there are particular development constraints through the location of the Airport Noise Contour and also concerns as to natural hazards.
- 4 The Regional Council's submission on the provisions subject to Hearing Stream 10A is summarised further in Ms Mitten's evidence, along with Ms Mitten's recommended amendments to the pWDP.¹
- 5 These legal submissions:
 - (a) Provide an overview of the Regional Council's interest in the relevant provisions heard as part of Hearing Stream 10A and relevant statutory provisions;
 - (b) Address the key issues from the Regional Council's perspective, being:
 - (i) The appropriate Airport Noise Contour to include as part of the pWDP (including through the Qualifying Matters in Variation 1);
 - (ii) The criteria for certification of New Development Areas; and

¹ Statement of Evidence of Joanne Mitten dated 1 February 2024.

- (iii) How the New Development Area identified in Kaiapoi should be approached.
 - (c) The Regional Council also wishes to address potential legal issues for the Panel in designing the pWDP provisions (and particularly the “certification” approach of the pWDP to releasing the New Development Areas for development), to ensure that the provisions are certain and enforceable.
- 6 The Regional Council’s interest in Hearing Stream 10A is aligned with its participation in the pWDP to date, in that it is appearing to provide assistance to the Panel in giving effect to the CRPS and other relevant planning instruments.

Relevant statutory provisions

- 7 As will be very familiar to the Hearing Panel, the Regional Council has a number of functions relating to the integrated management of natural resources² and is required to prepare and administer the CRPS,³ to which a district plan (including the pWDP) is required to give effect.⁴
- 8 The Resource Management Act 1991 (**RMA**) requires that a district plan must give effect to (relevantly) any national policy statement and any regional policy statement.⁵
- 9 Relevant national and regional planning documents that the provisions relevant to Hearing Stream 10A of the pWDP must give effect to include the National Policy Statement on Urban Development 2020 (**NPS-UD**), the National Policy Statement for Indigenous Biodiversity 2023 (**NPSIB**) and the CRPS.
- 10 Particularly relevant to the provisions the subject of this hearing stream are the provisions of Chapter 6 of the CRPS, particularly Policy 6.3.5 regarding the protection of strategic infrastructure.⁶ The importance and

² RMA, s 30(1)(a).

³ RMA, s 60(1).

⁴ RMA, s 75(3).

⁵ RMA, s 75(3).

⁶ This policy includes the direction that the recovery of Greater Christchurch is to be assisted by the integration of land use development with infrastructure by “only providing for new development that does not affect the efficient operation, use, development, appropriate upgrading and safety of existing strategic infrastructure, including by avoiding noise sensitive activities within the 50dBA Ldn airport noise contour for Christchurch International Airport, unless the activity is within an existing residentially

relevance of the Chapter 6 provisions is evidenced by the extent of evidence that you have received from the various parties with an interest on this topic.

- 11 The application of the Chapter 6 policies, and specifically Policies 6.3.1 and 6.3.5 and the interaction of the airport noise contour with the Kaiapoi New Development Area, is addressed more specifically below. However, it is helpful to remind ourselves of the role that regional policy statements play in integrated planning, including in relation to urbanisation of the region. As Principal Planning Tribunal Judge Sheppard noted in *North Shore City Council v Auckland Regional Council* the regional policy statement “is to be the heart of resource management in that region”.⁷
- 12 Although the NPS-UD has introduced additional considerations in respect of planning for urbanisation, this has not lessened the role of a regional policy statement – indeed, objective 3 of the NPS-UD recognises the role of regional policy statements in planning for urban environments.
- 13 It is trite that the direction that regional policy statements provide is not inconsequential. Policies may be either flexible or inflexible, or either broad or narrow, and applying a policy strictly does not mean it ceases to be a policy.⁸
- 14 This approach is consistent with the Supreme Court’s discussion in *King Salmon*, where the emphasis on particular words and directions in the RMA was carefully examined. As will be well known by the Panel, this decision confirmed that the direction to “give effect” to is a strong one, creating a firm obligation on the part of those subject to it.⁹
- 15 This decision also discussed the meaning of “avoid”, which is relevant to policies discussed further below. In that case, the Supreme Court determined that “avoid” meant “not allow” or “prevent the occurrence

zoned urban area, residential greenfield area identified for Kaiapoi, or residential greenfield priority area identified in Map A...”.

⁷ *North Shore City Council v Auckland Regional Council* [1994] NZRMA 521 (PT) at 7.

⁸ *Auckland Regional Council v North Shore City Council* [1995] 3 NZRMA 424 (CA) at 10.

⁹ *Environmental Defence Society Inc v New Zealand King Salmon Co* [2014] 1 NZLR 593 (SC) at [77].

of”.¹⁰ However, the most recent discussion of the term “avoid” is in the Supreme Court decision of *Port Otago*, in the context of specific policies of the New Zealand Coastal Policy Statement (**NZCPS**).

- 16 In this case, the Supreme Court noted that “avoidance” in that context meant the avoidance of material harm.¹¹ However, that direction should be interpreted in its context relevant to the particular policies of the NZCPS that seek to avoid adverse effects.¹² When read in context, it is submitted it is of limited application to the interpretation of “avoid” in other situations, for example, where the policy is specific that a particular activity is to be avoided, rather than effects of that activity.

Airport Noise Contour

- 17 One of the relevant issues to be considered as part of this Hearing Stream, both in relation to the noise provisions and to the extent that it relates to Variation 1 and the Airport Noise Qualifying Matter, is the relevant airport noise contour to be applied.
- 18 In this case, the Regional Council agrees with the section 42A report author in that the relevant contour is the 50dB Ldn contour shown on Map A of the CRPS. Including this contour in the pWDP ensures that the pWDP gives effect to the CRPS, as is required by the RMA.
- 19 While it is noted that the airport noise contours have been remodelled and have been through an independent peer review process (as provided for by Policy 6.3.11(3) and Method 4 of the CRPS),¹³ the statutory obligation is to give effect to the regional policy statement.
- 20 The airport noise contours have been going through a remodelling exercise prior to initiating a review of Chapter 6 of the CRPS. The Christchurch International Airport has remodelled the contours, and an independent expert panel has undertaken a peer review of the inputs, assumptions and outcomes of the remodelling. The expert panel has produced a report that is publicly available.

¹⁰ *Environmental Defence Society Inc v New Zealand King Salmon Co* [2014] 1 NZLR 593 (SC) at [93].

¹¹ *Port Otago Ltd v Environmental Defence Society Inc* [2023] 1 NZLR 205 (SC) at [65].

¹² See for example NZCPS Policy 11.

¹³ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [52] – [53].

- 21 The remodelled contours will inform the upcoming review of the CRPS (scheduled to be notified at the end of 2024).¹⁴ The relevant contour (and the associated policy direction) will need to be considered as part of the public process for that new policy statement.
- 22 The pWDP cannot seek to predetermine the outcome of this future planning process regarding the CRPS by including the remodelled contours at this point in time. While the contours have been remodelled as anticipated by the process in Policy 6.3.11, the remodelled contours carry no statutory weight. Notably, the independent expert panel that considered the remodelled contours did not make any conclusions on the appropriate use of the contours in land use planning.
- 23 Further, the translation of the remodelled contours into the CRPS will necessarily be the subject of the future statutory process – of which parties with an interest in the application of the contours over Kaiapoi can participate.
- 24 If the contours do change in time (as part of the CRPS review process), then this can be addressed by a subsequent plan change to the pWDP if desirable.
- 25 It is noted also that the Regional Council submitted in relation to Variation 1 in support of the operative airport noise contour as a qualifying matter, in particular reliance on Policy 6.3.5 of the CRPS. For the reasons discussed below in terms of the interpretation of this policy, the Regional Council supports the continued inclusion of the 50dB Ldn contour as shown in the CRPS as a qualifying matter for the purpose of limiting housing intensification under the contour.

Certification process generally

- 26 While the Regional Council's concerns are more focused on the criteria that are used to assess the readiness of the new development areas for development, rather than the particular mechanism used to release them, in order to provide assistance to the Panel these submissions also address potential issues with the legality of these approaches.

¹⁴ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [53].

Notified approach – certification by the Chief Executive

- 27 The notified approach of the pWDP provided for certain areas of land identified as New Development Areas to be enabled for development once “certified” for that purpose by the Chief Executive of WDC, once certain criteria have been met.
- 28 Certification as a concept has often been considered as part of resource consent conditions. In that context, case law has established that there are limitations to what can be considered for “certification” in order to ensure legality, and that there is not an unlawful reservation of discretion in decision-making.
- 29 In the context of resource consent conditions, case law has established that certification may be done by a person using that person’s skill and experience, but a certification condition cannot delegate the making of a substantive decision.¹⁵
- 30 Although qualitative criteria can appear evaluative on its face, this can be certified by delegates using their qualifications and experience, provided that the certification requirements are appropriately framed to include measurable certification criteria.¹⁶
- 31 In my submission, any certification approach that is intended to be adopted through a planning process should also apply these criteria to ensure that the substantive decision-making is not reserved for a later date, through:
- (a) ensuring that any criteria for certification are specifically framed so as to include measurable outcomes and objectives; and
 - (b) ensuring that the delegate holding the power of certification is appropriately qualified to assess the relevant matters and determine whether they have been satisfied.

Section 42A proposed approach – consenting framework

- 32 In response to concerns from submitters regarding the uncertainty and inflexibility of the certification framework proposed in the notified pWDP,

¹⁵ *Royal Forest and Bird Protection Society Inc v Gisborne District Council* ENC Wellington W026/09, 7 April 2009 at [88]; and *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [126].

¹⁶ *Northcote Point Heritage Preservation Society Inc v Auckland Council* [2016] NZEnvC 248, [2017] NZRMA 405 at [50] – [51].

the section 42A officer has recommended an approach for which resource consent is sought for certification as a restricted discretionary activity.

33 This approach raises some legal issues, as case law generally states that a resource consent cannot be granted for an activity that is not a use of land, and that the activity status of an activity cannot be dependent on whether previous resource consent has been granted or not.

34 In *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*, the Environment Court considered provisions that operate similarly to those proposed in the section 42A report, in that case requiring activities to be accordance with “any approved Outline Development Plan”.¹⁷

35 The Environment Court determined that these rules were *ultra vires*, on the basis that:¹⁸

... the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. In summary we find rules 12.19.1.1 and 12.20.3.2-4 are ultra vires s 77B of the Act insofar as the rules require compliance with a resource consent which is not a standard, term or condition that is specified in the plan change.

36 The rules were also considered to be ultra vires on the basis that they did not identify activities for which resource consent was required.¹⁹

37 Similar issues appear to arise with the rule framework proposed by the section 42A officer in this case. While the rule framework does not require development to proceed in accordance with the certification resource consent like an outline development plan, it does differ (including in activity status for certain activities) depending on whether the certification resource consent has been granted or not.

¹⁷ *Queenstown Airport Corp Ltd v Queenstown Lakes DC* [2014] NZEnvC 93 at [128]-[136].

¹⁸ *Queenstown Airport Corp Ltd v Queenstown Lakes DC* [2014] NZEnvC 93 at [179]. The relevant provision is now s 87A following the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The Environment Court has considered the effect of this change and noted that there had been no significant change to the wording of the provisions - *Re Auckland Council* [2016] NZEnvC 56 at [99].

¹⁹ *Queenstown Airport Corp Ltd v Queenstown Lakes DC* [2014] NZEnvC 93 at [167] – [168].

- 38 Like an outline development plan, it is also not clear what the land use is that is requiring resource consent in this case, as the activity is described only as the “certification” of the relevant land.
- 39 Both of these aspects appear to be contrary to the direction provided in *Queenstown Airport Corporation Ltd*, and, therefore, may be considered ultra vires.

Regional Council’s position

- 40 The Regional Council supports the need to be able to respond in a timely manner and flexibly to changing demand for development, and appreciates the certification process (or equivalent’s) ability to release land for development (noting that these areas have been identified for future development through the higher order provisions) without having to proceed through a plan change process. However, this does need to be reconciled with the legal requirements for plan rules, with this being something for the Panel to consider as it is contemplating these provisions.
- 41 The Regional Council considers that there are two options available to release land for development without a further plan change process (but subject to its position specifically on Kaiapoi which it considers should be considered through a plan change process).
- 42 First, it may be possible to design a rule framework that does still allow for the release of land for development in a more flexible way than through a plan change, provided that a resource consent approach is not used to determine activity status. In *Appealing Wanaka Inc v Queenstown Lakes District Council*, the Environment Court recognised the “considerable merit” of Outline Development Plans subject to that proviso.²⁰
- 43 In this regard, a potential option would be to modify the rules proposed by the section 42A author so that the matter being consented was an activity regulated by section 9 or section 11 of the RMA. The most obvious way to do this would be for DEV-R1 (along with the associated matters of discretion) to be repurposed as a subdivision rule, with comprehensive matters of discretion addressing the various matters relevant to whether that land should be subdivided. The subsequent

²⁰ *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 196 at [22].

development on that subdivided land could then be controlled by land use rules. It is acknowledged that the Regional Council has not sought to consider the matter of detailed drafting at this stage.

- 44 The alternative approach would be for a certification approach to be used, similar to what was proposed in the notified provisions. If WDC was minded to adopt this approach, then it may be necessary to ensure that any of the evaluative matters relevant to the release of the land are substantively considered through rezoning requests on the pWDP such that the certification is limited to actual connection to infrastructure, and potentially the capacity related issues, i.e. in terms of there being a need to provide residential capacity to help achieve or exceed the projected total residential demand as identified in UFD-O1 (for the medium term) as indicated by the most recent analysis undertaken by WDC in accordance with the NPSUD.
- 45 A certification approach has been used in some instances in other district plans that Counsel is aware of. For example, the Invercargill City Plan contains a deferred zone that is only available for development after certain roading and sewerage infrastructure is in place.²¹ There are also provisions within the Tasman Resource Management Plan where land subject to a deferred zone is able to be released upon council resolution confirming certain servicing requirements have been met.²²
- 46 Representatives of the Regional Council are willing to further discuss these matters and work with WDC in order to design a solution that is valid and lawful.

Ability of certification to allow consideration of particular issues

- 47 Irrespective of the exact mechanism for release of land, as part of its submission on the pWDP, the Regional Council indicated that while it was not opposed to the certification process, it did have some additional matters that it considered would be required to be addressed as part of the process for releasing further land for development.
- 48 In particular, these issues relate to the ability to properly consider natural hazards and the potential offsite effects of further development, as well

²¹ See RES4Z-R1 of Invercargill City Plan.

²² See 17.14.2 of the Tasman Resource Management Plan for procedure for removal of deferral.

as any issues regarding indigenous biodiversity and wetlands on the particular land in question.

- 49 It is noted that the proposed approach in the section 42A report does provide additional criteria to that which was notified. However, as noted in Ms Mitten's evidence, the Regional Council's concern as to offsite effects from flooding generally can be addressed provided that its relief sought through Hearing Stream 3 in relation to an additional rule is granted,²³ and Ms Mitten has provided suggested drafting to address the omission of consideration of indigenous biodiversity issues in these areas generally.²⁴
- 50 It is also noted that integrated transport has been added as a relevant matter for consideration through the section 42A report.²⁵ The Regional Council supports the retention of this criterion regardless of which specific process is used for the release of land, for consistency with the provisions of Chapters 5 and 6 of the CRPS and the NPSUD.

Certification for Kaiapoi

- 51 Aside from the appropriateness of the particular process for certification, the area identified as a New Development Area in Kaiapoi under the pWDP has some additional constraints which the Regional Council considers should be taken into account when determining whether it is appropriate for this land to be released through a certification process (in place of a plan change to rezone the land).
- 52 One particular constraint is the location of the airport noise contour on Map A of the CRPS over this particular area of land. As is set out in Ms Mitten's evidence, her view is that Policy 6.3.5(4) of the CRPS does not provide an exception from the requirement to avoid noise sensitive activities within this contour for the Kaiapoi Future Development Area, as the Future Development Areas are not specified within this policy as being excluded.²⁶ This approach is consistent with the Regional Council's Officer's Report on Change 1 to the CRPS.²⁷

²³ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [27] – [29].

²⁴ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [37].

²⁵ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [38].

²⁶ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [43].

²⁷ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [43].

- 53 It is acknowledged that there is potential ambiguity in the wording of this policy, particularly in its reference to “residential greenfield area identified for Kaiapoi” separately from greenfield priority areas. However, based on Ms Mitten’s opinion and consideration of the relevant documents, it is apparent that the direction of the CRPS as it currently stands does not provide an exception from avoidance of noise-sensitive activities under this contour within Future Development Areas (FDAs).
- 54 This is consistent with the definition of “greenfield development” within the definitions for Greater Christchurch of the CRPS, which provides that greenfield development means “subdivision, use and/or development of land identified on Map A as a Greenfield Priority Area”.²⁸ While Policy 6.3.5 refers to “greenfield areas” rather than “greenfield development”, it is submitted that these two phrases should be read in the same way.
- 55 Further, the explanation and reasons to Policy 6.3.5 state that:
- The only exception to the restriction against residential development within the 50dBA Ldn airport noise contour is provided for at Kaiapoi.
- Within Kaiapoi land within the 50dBA Ldn airport noise contour has been provided to offset the displacement of residences as a result of the 2010/2011 earthquakes. This exception is unique to Kaiapoi and also allows for a contiguous and consolidated development of Kaiapoi.
- 56 This demonstrates that the exception for development was provided in order to allow for development in order to meet a short term shortfall, post the 2010/2011 earthquakes, rather than any medium term development such as in the FDAs.
- 57 This is also supported by other policies in the CRPS:
- (a) Policy 6.3.12 of the CRPS references the Future Development Areas being enabled for development where required to meet the medium term housing demand requirements,²⁹ as opposed to Greenfield Priority Areas for which development is to be enabled without reference to additional criteria (other than being in accordance with an outline development plan).³⁰

²⁸ Canterbury Regional Policy Statement, “Definitions for Greater Christchurch”, at p 249.

²⁹ Statement of Evidence of Joanne Mitten dated 1 May 2023 (HS1), at [71]; Canterbury Regional Policy Statement, Policy 6.3.12.

³⁰ Canterbury Regional Policy Statement, Policy 6.3.1(3).

(b) Policy 6.3.1(4) which states:

Ensure new urban activities only occur within existing urban areas or identified greenfield priority areas as shown on Map A, unless they are otherwise expressly provided for in the CRPS.

58 The Council's position is also supported when considering the history and development of the RPS.

(a) Policy 6.3.5(4) as it relates to the airport noise contour and the above text in the explanation and reasons to Policy 6.3.5 was inserted into Chapter 6 as part of the Land Use Recovery Plan. This was prior to the inclusion of FDAs as part of Change 1 to the CRPS.

(b) While FDAs were introduced through Change 1, Change 1 only amended clause (1) of Policy 6.3.5 to refer to FDAs. No additional change was made to Policy 6.3.5(4) to account for their inclusion. For this reason, if it was intended that Policy 6.3.5(4) exempt FDAs from the restriction on development under the contour, such an exemption would have needed to have been specifically provided for (given that clause (4) of that policy was worded in the same way before the concept of FDAs was introduced to the CRPS).

59 For these reasons, the Council considers that the exception in Policy 6.3.5 was not intended to apply to the Kaiapoi Future Development Area.

60 Given this particular constraint, as well as the uncertainty as to the effects from coastal flood hazards as set out in Ms Mitten's evidence,³¹ it is the Regional Council's position that this particular area of land would be better suited to a plan change process, rather than certification, in order to enable detailed consideration of these issues (and certainty that the potential adverse effects can be mitigated).

61 This is consistent also with Ms Mitten's evidence on Hearing Stream 1 of the pWDP that "simply because an area may be identified as an FDA under the CRPS provisions, this does not mean that it can automatically be developed. There are still other criteria that are required to be met (see Policy 6.3.12 of the CRPS)".³²

³¹ Statement of Evidence of Joanne Mitten dated 1 February 2024, at [46].

³² Statement of Evidence of Joanne Mitten dated 1 May 2023 (HS1), at [73].

62 It is acknowledged that the Regional Council is not a submitter on the rezoning proposals part of the pWDP, including in relation to areas identified as Future Development Areas in the CRPS. I acknowledge that in referring to a plan change being the appropriate mechanism for considering development of these areas that this could also be considered through these rezoning proposals, as rezoning under the pWDP process would be through largely the same mechanism as a plan change, and require the same considerations.

63 However, I note that to rezone land the Hearing Panel would still need to be satisfied that it has the relevant information to assess the potential rezoning, and to consider the particular technical issues that the rezoning of those areas would present. To the extent that rezoning is proposed under the Airport Noise Contour in particular, the Regional Council's position would remain consistent as expressed in Ms Mitten's evidence and these legal submissions, that the CRPS provides for avoidance of noise-sensitive development in those areas. Further this is an obligation that is required to be given effect to (i.e. preventing the occurrence of noise-sensitive development in those areas is a firm obligation).

Conclusion

64 The relief sought by the Regional Council in its submission is intended to ensure that the pWDP gives effect to the CRPS. The Regional Council appears at this hearing largely to assist the Panel in its interpretation and consideration of the issues, particularly in relation to the CRPS.

65 As signalled earlier in these submissions, the Regional Council and its representatives are willing to work with WDC to ensure that the provisions of the pWDP are certain, lawful and give effect to the relevant planning instruments.

Dated this 9th day of February 2024



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K T Dickson

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