

14 February 2024

To

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Dear Neil

Consideration of airport noise contours

1. You have prepared a section 42A Report dated 9 January 2024 entitled "*Proposed Waimakariri District Plan: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*" (**s42A Report**).
2. The Hearings Panel considering submissions on the Waimakariri Proposed District Plan (**Proposed Plan**) has asked the following questions arising from the s42A Report:

- (a) Regarding paragraphs 125, 129, 130 and 137 of the s42A Report:

To what extent can and should we consider a media article, Joint Witness Statement submitted to a hearings panel or the decision of another council in respect of the consideration of submissions on the PDP, particularly in respect to the Airport Noise Contours? You may wish to seek legal advice and append that to your response.

- (b) Regarding paragraph 128 of the s42A Report:

Notwithstanding your opinion that "it will be more efficient to wait until after the RPS review is complete and make any necessary amendments to the District Plan at that stage", what obligation does the Panel have to make recommendations now, based on the matters and evidence in front of us now?

Is it a valid reason to reject a submission which now includes revised noise contours as a relevant matter for the Panel's consideration, on the grounds that a review of a Statutory document has not yet taken place?

Notwithstanding the above, will there be any issues of natural justice, fair process and certainty likely to arise if we were to accept CIAL's submission, which did not include the revised noise contours at the time of public notification and as such were not available to review and make submissions on?

3. You have asked us to provide legal advice on the above issues.

Considering a media article

4. We understand the Hearings Panel's query relates to the extent it can consider the media release referred to at paragraph 125 footnote 5 of the s42A Report, which is entitled "Council reviews airport noise contours" dated 5 July 2023 and is downloadable from Canterbury Regional Council's (**ECan**) website (**ECan Media Release**).¹
5. The Hearings Panel, like the Environment Court², is not bound by the usual rules of law about evidence. Section 41(1)(b) of the RMA provides that section 4B of the Commissions of Inquiry Act 1908 applies to every hearing conducted by a local authority or a person given delegated authority to conduct hearings, such as the Hearings Panel. Section 4B of the Commissions of Inquiry Act 1908 confirms that the Hearings Panel:

"...may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law".

[our underlining for emphasis]
6. Accordingly, there is no legal barrier preventing the Hearings Panel from admitting a media release for consideration, provided the Hearings Panel forms the opinion that it may provide some assistance to deal with the subject matter(s) it is considering. However, it remains important for the Hearings Panel to determine what weighting is appropriate to apply to any evidence (including a media release) admitted for consideration.
7. The appropriate weighting to be given to a media release, or any other evidence before the Hearings Panel, is ultimately a matter for the Hearings Panel to consider in the exercise of its substantive evaluation. Factors that can be considered in weighting include whether and to what extent evidence is relevant, reliable, focused, probative, and provides substantial assistance to the decision-maker.
8. While it is not a matter of legal opinion what weighting should be given to the ECan Media Release, we make the following observations:
 - (a) While the ECan Media Release is hearsay, that is not a barrier against consideration by the Hearings Panel.
 - (b) The ECan Media Release is largely informative regarding what has been happening with the updating of airport noise contours, what the airport noise contours are, and ECan's intentions as at 5 July 2023 regarding the future use of those contours. Such information has the potential to be corroborated during the hearing, for example, by ECan's witnesses.
9. We apprehend from the Hearings Panel's queries outlined in paragraph 2(b) above that the Hearings Panel might be querying whether and to what extent the specific information the s42A Report refers to within the ECan Media Release, the joint witness statement submitted to a different hearings panel and the decision of another council, is relevant to the s42A Report recommendation

¹ <https://www.ecan.govt.nz/get-involved/news-and-events/2021/council-reviews-airport-noise-contours/>

² Section 276(2) of the RMA.

that the Hearings Panel rejects submissions regarding airport noise contours on the grounds that a review of the Canterbury Regional Policy Statement (**CRPS**) has not yet taken place.

10. We provide our opinion regarding the Hearings Panel's ability to reject submissions regarding airport noise contours on the grounds that a review of the CRPS has not yet taken place at paragraphs 17 to 23 below. For present purposes, we simply observe that while the ECan Media Release mentions that the noise contours will provide material to inform a review of the CRPS and then the Christchurch, Selwyn and Waimakariri District Plans, it does not state that submissions lodged on existing district plan reviews are unable to be considered and are to be rejected on the basis that the contours will inform a review of the CRPS.

Considering a joint witness statement submitted to a different hearings panel

11. We understand the Hearings Panel's query relates to the extent it can consider a joint witness statement (**JWS**) referred to at paragraphs 129 and 137 and footnotes 5 and 8 of the s42A Report which is downloadable from the Council's website.³ The JWS was between planners and submitted to a different hearings panel that was appointed to consider proposed Private Plan Change 31 to the Operative Waimakariri District Plan.
12. Our comments at paragraphs 5 to 7 and 9 above also apply to the JWS.
13. While it is not a matter of legal opinion what weighting should be given to the JWS, we observe that:
 - (a) Any substantive content in the joint witness statement that might be of assistance to the Hearings Panel in dealing with any subject matter(s) it is considering will be unable to be tested in the absence of the authors appearing before the Hearings Panel, and that could be a factor in reducing what weighting might be given to the content.
 - (b) Neither of the passages of the JWS as referred to in paragraphs 129 and 137 of the s42A Report states that submissions lodged on existing district plan reviews are unable to be considered and/or must be rejected on the basis that the contours will inform a review of the CRPS. The quotation from the JWS in paragraphs 129 of the s42A Report does not mention that a CRPS change is required first (i.e. before considering existing submissions on the Proposed Plan). The word "first" does not appear. The relevant quotation states (with its preceding context):

Mr Willis and Ms Mitten also consider that the 2023 Christchurch Airport Noise Contour is not operative until the CRPS has undergone a Schedule 1 process, and therefore is currently not relevant to Plan Change 31. The process for review of Map A is set out in CRPS Policy 6.3.11 and includes references to airport noise contours. Neither Policy 6.3.11 nor its methods state that the contour can be changed without a formal process. Furthermore, if the contour changed but not the contour location on Map A this would cause confusion as there would be two inconsistent contours which both need to be given effect to. Finally, requiring a CRPS change is appropriate as if the contours were to change markedly, such that large swathes of Greater Christchurch were no longer able to be developed or intensified, this change should go through a notified plan

³ https://www.waimakariri.govt.nz/_data/assets/pdf_file/0017/141641/RCP031-JOINT-WITNESS-STATEMENT-OF-PLANNING-EXPERTS-ON-PLANNING-CONSTRAINTS-230817-Joint-Witness-Statement-of-Planning-Experts-RCP031-signed.pdf

change as the Greater Christchurch Council's [sic] and community may wish to modify Policy 6.3.5 and apply a different approach for airport noise.

[Our underlining for emphasis]

Considering the recommendation report of a different independent hearings panel

14. We understand the Hearings Panel's query relates to the extent it can consider a recommendation report prepared by the Independent Hearings Panel on Variation 1 to the Selwyn Proposed District Plan, which is referred to at paragraph 130 and footnote 7 of the s42A Report and is downloadable from Selwyn District Council's website (**Recommendation Report**).⁴
15. Our comments at paragraphs 5 to 7 and 9 above also apply to the Recommendation Report.
16. While it is not a matter of legal opinion what weighting should be given to the Recommendation Report, we observe from paragraph 23 of the Recommendation Report that the reason given for declining to amend qualifying matters to refer to remodelled 'Outer Envelope' 50dBA noise contours was due to the absence of an assessment under sections 32 and 77L of the RMA. Although paragraph 25 of the Recommendation Report mentions that the incorporation of revised airport noise contours in the CRPS will occur through a RMA schedule 1 process, that was not stated as a reason for declining to amend qualifying matters to refer to the remodelled contours.

Can the Hearings Panel reject a submission on the grounds that a review of a statutory document has not yet taken place?

17. While planning efficiencies can be expected if airport noise contour issues are first addressed at the regional level through the CRPS review and then necessary amendments made to district plans to give effect to the reviewed CRPS, we have found nothing in the RMA expressly authorising a rejection of submissions on the grounds that a review of the CRPS has not yet taken place. Nor have we found any caselaw addressing the issue of whether a submission can be rejected on the grounds that a review of a statutory document has not yet taken place.
18. Based on a first principles approach that accounts for the wider scheme of the RMA, we would caution against a local authority rejecting (or declining to consider) relief in a submission that raises issues that is within the scope of what the local authority can consider in the planning document on the grounds that the same or similar issue could be addressed (whether more efficiently or otherwise) as part of a future review of a different planning document.
19. As a starting point, a local authority cannot outrightly decline to consider a submission and make a decision on it. Clause 10(1) of the First Schedule of the RMA provides that a local authority "must" give a decision on the provisions and "matters raised in submission".
20. Section 40(1) of the RMA provides that any submitter at a hearing may speak and call evidence. Given the public participatory theme of the RMA, the right to speak and call evidence imports an expectation that a local authority would hear and consider argument and evidence presented, and weigh them accordingly. Outright rejection on the basis that the same issues could be raised and

⁴ <https://extranet.selwyn.govt.nz/sites/consultation/DPR/Shared%20Documents/PI%20Decision%20Reports/V1%20PI%20Hearing%2005%20-%20District%20Wide%20Area%20Specific%20and%20Qualifying%20Matters.pdf>

considered later as part of a future planning process does not sit well with that expectation, and is akin to a strike out of that submission from substantive consideration. The strike-out powers of an authority conducting a hearing in section 41D of the RMA do not include an ability to strike out a submission that raises issues that can be addressed in a future planning process, even if that might be more efficient. Rather, the strike-out powers relate to circumstances where a submission is frivolous or vexatious, discloses no reasonable or relevant case, would be an abuse of process, is supported only by evidence purporting to be independent expert evidence but is not, or contains offensive language.

21. While a local authority is empowered to reject a submission, clause 10(2)(a) of the First Schedule of the RMA requires the decision to include reasons for rejecting the submission. Assuming the submission seeks relief that is not rejected due to being outside the scope of the RMA or the relevant planning document, or struck out under section 41D, then clauses 10(2)(ab) and 10(4)(aaa) of the First Schedule to the RMA anticipate that the reasoning for rejecting a submission would entail undertaking a further evaluation under section 32AA to which the local authority must "have particular regard". Section 32AA anticipates a substantive evaluation of relief sought, including a consideration of benefits and costs, and whether the relief is the most appropriate way to achieve the purpose of the RMA and objectives of a plan. There is no clause in the First Schedule of the RMA specifically empowering a local authority to reject a submission on the basis the same subject matter could be dealt with as part of a future review of another planning document. Accordingly, the scheme of the First Schedule anticipates a merits assessment of relief sought in a submission that lies within the scope of matters the local authority can consider.
22. We also observe that the scheme of the RMA provides for a hierarchy of planning documents, which can address similar issues, yet subject to separate public participatory processes. Relevantly to the present case, airport noise contour issues could be addressed in both a regional policy statement and a district plan. The RMA anticipates an ability for the public to lodge submissions to either of these processes. There is no statutory restriction preventing submissions from being lodged on a subject matter that can be addressed as part of one planning document if the same subject matter could also be considered in relation to another planning document.
23. In our view, the above factors suggest that a high degree of caution should be exercised in rejecting a submission outright on the grounds that a review of a statutory document has not yet taken place. At the very least, we suggest it should not be a determinative or sole reason for rejecting a submission such that it is not considered on its merits. Rather, we would recommend that the merits of the submission is still considered as part of a substantive assessment, including in terms of section 32.

Natural justice, fair process and certainty

24. We have assumed the Hearings Panel's query is whether issues of natural justice, fair process and certainty arise if it were to accept the submission of Christchurch International Airport Limited (**CIAL**) to include the latest revised contours in the Proposed Plan in the following circumstances:
 - (a) On 26 November 2021 CIAL lodged a submission that includes (in appendix C) two remodelled contours, one being the "Outer Envelope" contour, the other being an "Annual

Average" contour ("**Appendix C contours**"). Amongst other things, the submission states (at paragraph 31):

...the updated contours provide relevant and important up to date information about aircraft noise in the district. It would be inappropriate to alter the proposed rural zoning of the land which may fall within updated Air Noise Contours. Similarly, existing residential or semi-urban zoning (such as Large Lot Residential or Settlement zoning) in areas that are likely to fall within the updated Air Noise Contours should not be expanded nor intensified.

- (b) On 21 November 2022, CIAL lodged a further submission that (amongst other things):
- (i) Opposes and requests the rejection of various submissions seeking urban rezoning of land within the Appendix C contours.
 - (ii) Opposes and requests the rejection of Kāinga Ora's submission which seeks to remove all airport noise provisions and contours. CIAL's reasons in support of that opposition state:

The Proposed Plan must contain an overlay for the 50dB Ldn Air Noise Contour (which, at present, must consist of the operative and draft remodelled updated 50dB Ldn contours) with provisions relating to avoiding noise sensitive activities in order to give effect to the CRPS.

- (c) The Appendix C contours have been superseded by updated contours, with the latest contained in an addendum report by Tonkin+Taylor dated 24 August 2023 which is downloadable from ECan's website ("**Updated Contours**").⁵
- (d) The area covered by the Updated Contours differs from the area identified by the Appendix C contours. However, due to the underlying map used for the Appendix C contours being at a different scale to the underlying map used for the Updated Contours, it is not clear to us whether and to what extent the Updated Contours cover areas of the district that extend beyond those areas covered by the Appendix C contours. For the purposes of our opinion, we have assumed that the Updated Contours includes areas extending beyond areas covered by the Appendix C contours.
- (e) You have advised that CIAL now seeks to utilise the Updated Contours to identify the areas in the district where noise sensitive activities are to be avoided.

25. There are several legal principles governing decisions on submissions on a proposed district plan that are relevant to the consideration of natural justice, fair process and certainty issues in the present case, as follows:

- (a) One of the underlying purposes of the submission process is to ensure that the relevant local authority and all other potentially interested parties are sufficiently informed about the relief sought by the submitter.⁶ The submission and further submission procedure is designed to ensure there is full and widespread public knowledge of any proposal to amend a publicly

⁵ <https://www.ecan.govt.nz/document/download?uri=4980664>

⁶ *Shaw v Selwyn District Council* [2001] 2 NZLR 277, at [30].

notified plan so that further submissions can be lodged either in support of or in opposition to such a proposal.⁷

- (b) A local authority should not amend a proposed plan beyond what has been raised in submissions that have been publicly notified. A local authority needs to consider whether any amendment to a notified proposed plan goes beyond what is reasonably and fairly raised in submissions, being a question of degree to be judged by the terms of the Proposed Plan and the content of the submission. The question of whether an amendment to a plan is fairly and reasonably raised in the course of submissions should be approached in a realistic, workable fashion.⁸
- (c) The principles are underpinned by a concern to ensure effective public consultation and to enable public participation in the RMA process by giving interested persons the opportunity to oppose or otherwise comment on the changes sought by the submitter.⁹
- (d) It is an essential aspect of fairness that persons who wish to be heard by a local authority on an issue should be heard. To be heard, they need to file a further submission, and to do that, they need to be put on notice.¹⁰ A reasonably informed person must be able to ascertain from the documentation (the summary and the submission itself) what is intended by a submitter, and it cannot be for the reasonable reader to uncover the true intentions of a submitter.¹¹
- (e) Further submissions can only be made in support of, or opposition to, an original submission. A further submission cannot extend the scope of the original submission, and can only seek allowance or rejection of the original submission in whole or in part.¹²
- (f) Ultimately, it is a question of procedural fairness, which extends to the public as well as to the submitter and the territorial authority.¹³

26. Applying the above principles to the present situation, we consider there is potential for natural justice, fair process and certainty issues to arise in the present case, insofar that CIAL seeks to utilise Updated Contours to identify the areas in the district where noise sensitive activities should be avoided that lie beyond the areas identified in its original submission at Appendix C. In particular:

- (a) A reasonably informed person may well have understood from CIAL's original submission that CIAL was concerned to ensure that rural zonings are retained and existing residential or semi-urban zonings are not expanded or intensified within the areas that are identified in

⁷ *Hilder v Otago Regional Council* C122/97.

⁸ *Countdown Properties (Northlands) v Dunedin City Council* [1994] NZRMA 145; *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408.

⁹ *Gertrude's Saddlery Limited v Queenstown Lakes District Council* [2020] NZHC 3887, at [63]; *Royal Forest and Bird Protection Society Inc v Dunedin City Council* [2023] NZEnvC 79, at [44].

¹⁰ *Gertrude's Saddlery Limited v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZHC 147, at [62]-[67].

¹¹ *Healthlink South Ltd v Christchurch International Airport Limited & Canterbury Regional Council* HC Christchurch AP 14/99, 14 December 1999, at [29] and [36].

¹² *Offenberger v Masterton District Council* W053/96; *Telecom New Zealand Limited v Waikato District Council* A074/97;

¹³ *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556, at [74].

appendix C. A reasonable reader may not uncover an intention that land use limitations might apply outside the identified Appendix C contours.

- (b) Even if a reasonable reader might have uncovered that CIAL's intent in its submission was that land use restrictions be applied outside the identified Appendix C contours, a reasonable reader could not, with any certainty, ascertain whether and to what extent land extending beyond the Appendix C contours might fall within that future identified area and be subject of land use restrictions.
- (c) In such circumstances, there is potential for the public to have been disenfranchised from the opportunity to make a further submission on CIAL's submission.
- (d) To the extent that CIAL's further submission contains reasoning that might be read as requesting the use of future remodelled contours extending beyond the Appendix C contours as a basis for land use controls (see paragraph 24(b)(ii) above), that reasoning cannot extend the scope of Kāinga Ora's original submission which sought to remove all airport noise provisions and contours. At most, CIAL's further submission on Kāinga Ora's original submission referred to above provides scope to retain all airport noise provisions and contours in the notified plan.

27. We note that the Hearings Panel's query was in only respect of CIAL's submission on the Proposed Plan. We have not considered whether other submissions before the Hearings Panel might fairly and reasonably raise land use controls applying to areas outside the Appendix C contours.

28. Please do not hesitate to telephone if you wish to discuss.

Yours faithfully
Buddle Findlay



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