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

Legal Submissions on behalf of Christchurch International Airport Limited

Dated: 11 February 2024

Counsel: JM Appleyard (jo.appleyard@chapmantripp.com)
AM Lee (annabelle.lee@chapmantripp.com

chapmantripp.com
T +64 3 353 4130
F +64 4 472 7111

PO Box 2510
Christchurch 8140
New Zealand

Auckland
Wellington
Christchurch

chapman tripp

MAY IT PLEASE THE INDEPENDENT HEARINGS PANEL

Introduction and summary

1 These legal submissions are presented on behalf of Christchurch International Airport Limited (*CIAL*). CIAL is a submitter and further submitter on the proposed Waimakariri District Plan (*Proposed Plan*) and Variation 1 to the Proposed Plan (*Variation*).

2 The Proposed Plan and Variation are two distinct processes. These legal submissions are structured in two parts accordingly.

3 Part one addresses the Proposed Plan and outlines:

3.1 Christchurch International Airport's (*Christchurch Airport*) importance to the Canterbury region and Waimakariri District;

3.2 The evidence supporting why residential intensification and new residential rezonings should be avoided in areas that will be exposed to future levels of aircraft noise of 50dB Ldn or greater;

3.3 The higher-level Canterbury Regional Policy Statement (*CRPS*) policy support for avoiding such intensification and new residential rezonings and specifically refuting the "urban myth" that there is a general exemption for Kaiapoi in terms of Policy 6.3.5(4) of the CRPS; and

3.4 The appropriateness and importance of using the recently remodelled Air Noise Contours for Christchurch Airport as the best available evidence to determine the areas of land that will be exposed to levels of 50dB Ldn or greater and therefore where intensification or residential rezoning needs to be avoided.

4 Part two addresses the Variation and explains the qualifying matter that ought to be applied to prevent intensification or the creation of new residential land in areas that be subject to future aircraft noise levels of 50dB Ldn or greater. The qualifying matter relates to residential density controls and is required for the purpose of ensuring the safe and efficient operation nationally important infrastructure, namely Christchurch Airport.

5 CIAL's overall position is that Council's section 42A officers for the Proposed Plan and the Variation have not adequately identified or assessed the plethora of evidence and case law made available through many hearings over the past two decades that confirms the importance of Christchurch Airport and the need for provisions in the Proposed Plan that protect it from reverse sensitivity effects. Nor have they protected the amenity of residents within the Waimakariri District by drafting provisions that allow people to live

in areas where they will be exposed to the adverse effects of aircraft noise.

6 In addition, Council officers have incorrectly interpreted Policy 6.3.5(4) of the CRPS. On the basis of the proper interpretation of that policy, combined with the best available and most up to date evidence, intensification or new residential rezonings in areas subject to future aircraft noise of 50dB Ldn or greater must be avoided under both the Proposed Plan and Variation processes.

7 CIAL seeks that the Hearings Panel accept the relief contained in Annexure B of **Mr Kyle's** evidence.

PART ONE: PROPOSED WAIMAKARIRI DISTRICT PLAN

8 Part one of these legal submissions relates to CIAL's submissions and further submissions on the Proposed Plan.

9 CIAL's involvement in the Proposed Plan hearings to date is as follows:

9.1 CIAL filed evidence and legal submissions and appeared at Hearing Stream 1[1] to address CIAL's key submission points and requested relief with regards to plan structure and the Strategic Directions chapter. The evidence and legal submissions also provided an overview of CIAL's interests in the Proposed Plan as a whole.

9.2 CIAL filed planning evidence from **Mr Darryl Millar** for Hearing Stream 5[2] which addressed CIAL's submission points and requested relief with regards to the Noise, Energy and Infrastructure and Transport chapters. Council's section 42A officers for those chapters deferred a significant number of CIAL's submission points to Hearing Stream 10A. Accordingly, Mr Millar's evidence only addressed CIAL's submission points relating to high level strategic provisions within the Hearing Stream 5 chapters.

9.3 CIAL filed a memorandum on 14 August 2023 and this included a table of CIAL's submission points and the hearing stream that they were proposed to be addressed at. Council's section 42A officer for Hearing Stream 10A generally agree with CIAL's proposal.[3] CIAL's evidence for this hearing

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1 Part 1 General Matters, Definitions, Strategic Directions and Urban Form and Development.

2 Noise, Notable Trees, Historic Heritage, Signs, Light, Energy and Infrastructure, Transport, Earthworks.

3 *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraphs 5 and 44.

stream and these legal submissions have been prepared on that basis.

10 Part one of these legal submissions addresses CIAL's submission points and requested relief relating to Future Development Areas, the Air Noise Contours, Bird Strike and Growth policies. CIAL is calling evidence from:

10.1 **Mr Sebastian Hawken** – in relation to airport safeguarding; and

10.2 **Ms Laurel Smith** – in relation to acoustics;

10.3 **Dr Leigh Bull** – in relation to ornithology;

10.4 **Mr Gary Sellars** – in relation to housing capacity;

10.5 **Ms Natalie Hampson** – in relation to economics; and

10.6 **Mr John Kyle** – in relation to planning.

11 CIAL will also be filing company evidence from **Ms Felicity Hayman** in advance of CIAL's presentation at Hearing Stream 10A. Ms Hayman will provide further detail relating to noise contours and CIAL's management approach to the issue of bird strike.

WHAT IS THE STATUS OF CHRISTCHURCH INTERNATIONAL AIRPORT?

12 It is important to reiterate the critical and strategic importance of Christchurch International Airport (*Christchurch Airport*) at the outset; a fact that is supported by evidence,[4] the existing planning framework and in previous caselaw. Christchurch Airport has also been explicitly recognised by the Courts as being of national importance.[5]

13 While Christchurch Airport is not physically located in the Waimakariri District, land use activities in the District affect, and are affected by, Christchurch Airport's operations. Furthermore, the Waimakariri District is the beneficiary of the significant economic benefits that arise from operations at Christchurch Airport. **Ms Hampson** estimates that, in the year ending February 2020[6], Christchurch Airport accounted for a combined economic

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4 See in particular Statements of evidence of **Mr Sebastian Hawken** and **Ms Natalie Hampson** for Hearing Stream 10A, dated 2 February 2024.

5 *Robinsons Bay Trust & Ors v Christchurch CC,* C 60/2004, 13 May 2004, Smith J (EnvC) (*Interim decision*) at [49].

6 2020 is the base year used in **Ms Natalie Hampson's** Economic Impact Assessment.

contribution of $262 million and just under 2,890 jobs in the Waimakariri District.[7] This is significant and reinforces that Christchurch Airport is one of, if not the most, important infrastructure assets to the Canterbury Region and specifically the Waimakariri District.

14 CIAL's sustainability programme and its current, planned and future directives to support decarbonisation of the aviation industry is and will be a key element of Christchurch Airport's future growth. CIAL plans to deliver infrastructure that supports the national and global transition to a net zero carbon environment in aviation, but also in other disciplines. Recognising that climate change is a global issue, it is important for the planning framework to anticipate and provide for the future benefits of sustainable technology, including the infrastructure that will be provided at Christchurch Airport.

15 As outlined by **Mr Kyle**, Christchurch Airport's importance as a regionally and nationally significant infrastructure asset is also recognised plainly in the national and regional planning framework.[8] The evidential and higher order policy support for Christchurch Airport as an important infrastructure asset justifies a complimentary planning framework that:

15.1 enables the safe and efficient operations of Christchurch Airport; and

15.2 protects against inappropriate development, including noise sensitive activities and activities that may increase the risk of bird strike.

16 Counsel is conscious of repeating material about Christchurch Airport that has been provided to the Hearings Panel at a previous hearing (i.e. Hearing Stream 1) and that is widely known.

17 However, a key theme of the section 42A report on the topics of Airport Noise Contours and Bird Strike, in rejecting a number of CIAL's submission points, is an alleged lack of justification for changes to the Proposed Plan provisions to appropriately protect and enable Christchurch Airport operations. It is submitted that justification is clearly established in both the evidence for CIAL, the higher-order planning framework and in case law. On this basis, **Mr Kyle's** version of the provisions, which we discuss later, ought to be preferred.

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7 Statement of evidence of **Ms Natalie Hampson** for Hearing Stream 10A, dated 2 February 2024 at paragraph 21.

8 Statement of evidence of **Mr John Kyle** for Hearing Stream 10A dated 2 February 2024 at paragraph 11.

WHAT IS THE CORRECT INTERPRETATION OF THE CRPS?

11 An overview of the Canterbury regional planning framework is contained in **Mr Kyle's** evidence.[9] The efficient use and development of Christchurch Airport as a significant physical regional infrastructure resource is provided for in both Chapter 5 (Land use and Infrastructure) and Chapter 6 (Recovery and Rebuilding of Greater Christchurch).

12 Provisions in the CRPS support CIAL's requested relief relating to the Christchurch Airport Noise Contours (*Noise Contours*) and bird strike and will be referred to where relevant in these legal submissions.

13 Policy 6.3.5 is particularly relevant to Hearing Stream 10A. Council's section 42A officer refers to Policy 6.3.5(4) providing a specific exemption in Kaiapoi from land use controls relating to the Noise Contours in "*an existing residentially zoned urban area, residential greenfield area identified for Kaiapoi, or residential greenfield priority area identified in Map A*".[10]

14 Below we explain why the officer's interpretation of Policy 6 3.5(4) is incorrect. This is the "urban myth" that has been perpetuated without any consideration of the legislative history and context of the policy (Christchurch earthquakes) and with limited reference to the full wording of the explanation given for the policy.

15 In simple terms, Policy 6.3.5(4) does not provide a broad exemption for Kaiapoi as suggested by the Council officer. To the contrary, the exemption applies only in limited circumstances which have already been provided for through changes that were directed to the Operative Waimakariri District Plan (*Operative Plan*) by the Minister for Earthquake Recovery (*Minister*).

16 CIAL's relief on the Proposed Plan, including in relation to proposed new residential areas in Kaiapoi, is therefore the only correct approach in order to be consistent with the CRPS.

What does Policy 6.3.5(4) apply to?

17 The avoidance direction in Policy 6.3.5(4):

17.1 Applies to land across the Canterbury region (in all three Districts) that is subject to projected aircraft noise levels of 50dB Ldn or greater; and

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9 Ibid, from paragraph 17.

10 *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraph 136.

17.2 Includes an exemption limited to a specific subset of land categories and that exemption does not include any Future Development Areas (*FDAs*), at Kaiapoi.

Why 50dB Ldn?

18 Land in the Waimakariri District that is subject to projected noise levels of 50dB Ldn or greater is depicted by a 50dB Ldn Noise Contour for Christchurch Airport (*50dB Ldn Noise Contour*) in the Proposed Plan. As explained by **Ms Smith**:

18.1 The New Zealand Standard NZS 6805 (*the Standard*) was introduced to promote a consistent approach to noise planning around New Zealand airports.

18.2 The Standard recommends minimum standards to manage land use planning and airport noise. A local authority may determine that a higher level of protection is appropriate in a particular locality.[11]

18.3 It also introduced the 'Noise Boundary' concept which utilises noise contours to project future aircraft movements and determine where noise effects from aircraft operations will be felt. The noise contours are then used to inform decisions on land use planning and airport noise compliance.

18.4 Canterbury Regional Council (*ECan*) and Christchurch, Waimakariri and Selwyn District Councils have always used four contours for Christchurch Airport. This approach pre-dated implementation of the Standard and has been maintained ever since. As a result, the Councils and CIAL have effectively maintained a green-belt of low density or non-sensitive land use around Christchurch Airport.[12] Other airports in New Zealand have not been as fortunate.

18.5 The 50dB Ldn and 55dB Ldn Noise Contours are relevant to the Waimakariri District planning framework.

18.6 The 50dB Ldn Noise Contour, or the Outer Control Boundary (*OCB*) for land use controls across Canterbury, is relevant when assessing Policy 6.3.5(4) of the CRPS.

19 There are two key types of airport-related effects that land use controls within the 50dB Ldn Noise Contour are designed to address:

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[11] Statement of evidence of **Ms Laurel Smith** for Hearing Stream 10A, dated 2 February 2024 at paragraph 30.

[12] Ibid, at paragraphs 30 – 36.

19.1 *Amenity* – the effect of noise from aircraft operations on the community. **Ms Smith** has advised that we can expect 18 - 27% of people to be highly annoyed by aircraft noise exposure of between 50dB and 55dB Ldn.[13]

19.2 *Reverse sensitivity* – adverse effects on the community may lead to an increase in the incidence of complaints about noise and/or indirect pressure for CIAL to take steps to curb, curtail or amend its operations. This is a very real concern which has and is being experienced at various airports internationally, as demonstrated in the case studies appended to **Mr Hawken's** evidence.

20 The Environment Court has recognised both types of adverse effects in a number of decisions relating specifically to Christchurch Airport and land which will be exposed to levels of noise of 50dB Ldn or greater.[14]

21 As long ago as 2000 in *BD Gargulio v Christchurch CC*[15] (at a time where the Christchurch District Plan and CRPS contained no explicit policy support for avoidance within the 50 dB Ldn Noise Contour so the findings of the Court, in the context of an application for a resource consent, were in large evidential) the Environment Court said:

> *[31] … We draw two conclusions from this uncontroverted evidence:*
>
> > *(a) There is a 10% chance that whoever lives on Lot 1 of Mr Gargiulo's subdivision will be highly annoyed by noise of aircraft movements (quite apart from other noise from the airport); and*
> >
> > *(b) Moving the house on Lot 1 to the back will not change (a); nor will it mitigate the annoyance outside the house.*
>
> *…*
>
> *[51] … All we can say here is that different objectives and policies in a district plan should be given different weights. Some should, under some plans, be given so much weight that they come close to prohibited activities (while always leaving it open for exceptional cases). We find that is the position here: the cumulative effect of the objectives and policies we have quoted show that the density provisions of the proposed plan should be given considerable weight.*

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[13] Statement of evidence of **Ms Laurel Smith** for Hearing Stream 10A, dated 2 February 2024 at paragraph 58.

[14] Included at Appendix B to these legal submissions is a table of extracts from relevant Court decisions in recent years.

[15] *BD Gargiulo v Christchurch CC,* C 137/2000, 17 August 2000, Jackson J (EnvC).

…

[63]… In any event on the facts of this case we find that the density of dwellings (which is controlled by subdivision size) is so important around the Christchurch International Airport that it is a dominating factor in terms of weight.

22 The Environment Court also stated:

[39] However, these issues do not have to be resolved just on their own facts on a case-by-case basis without further help: there is guidance in the RPS and in the district planes). The CCC (and on appeal this Court) does not have to guess whether the effects of subdivision and a new house will be adverse, the RPS and the proposed district plan both imply (as we shall see when we consider them shortly) that subdivision within the 50 Ldn contour at a density greater than one lot per 4 hectares does have adverse effects….

23 The High Court agreed, stating "*Frankly, having read the documents, that is an inevitable and necessary implication*."[16]

24 There were then proposed changes to the Christchurch District Plan policies to add in a specific reference to the 50dB Ldn Noise Contour as the point at which land use controls commence, and this came before the Environment Court in *Robinsons Bay Trust v Christchurch City Council*.[17] The Court was faced with the key decision of whether the 50dB or 55dB Ldn Noise Contour should be used for deciding where the density of new noise sensitive activities should be controlled, and found:

[49] … 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.

[58] … We do accept that there are likely to be a percentage of persons highly annoyed even below the 50dBA Ldn noise contour. Although that percentage is significantly less than at the 55dBA Ldn contour, we accept this may lead to an increased level of complaints.

25 The evidence filed on behalf of CIAL for the Proposed Plan demonstrates that the Environment Court's commentary is still applicable today. In fact, **Ms Smith's** recent literature review indicates that annoyance effects have increased over the past 20 years and that now the percentage of people who can expect to be highly annoyed by exposure to levels of aircraft noise of 50dB Ldn is

[16] *Gargiulo v Christchurch City Council* HC Christchurch AP32/00, 6 March 2001.

[17] *Robinsons Bay Trust v Christchurch City Council* C 60/2004, 13 May 2004.

between 18 and 27%. **Mr Hawken's** evidence demonstrates the ongoing and increasing pressure that airports around the world continue to face.

26 Council's section 42A officer refers to a lack of complaints data from within the Waimakariri District when assessing the necessity of CIAL's relief.[18] However, as explained by **Ms Smith**, complaints are not a measure of community annoyance. Furthermore, CIAL does already receive complaints from within the Waimakariri District notwithstanding that the current levels of noise are less than what the District will receive in future. **Ms Hayman** will provide more detail on this in her evidence and at the hearing.

27 The avoidance direction in Policy 6.3.5(4), which relates to the integration of land use and infrastructure, applies to land within the 50dB Ldn Noise Contour. There has been no change to the higher-order policy direction and there is no evidence to suggest that the current policy approach is no longer appropriate. It would be a significant departure from decisions made in many forums to date for this Hearings Panel to depart from the evidence presented by CIAL. It would also represent a significant risk to the efficient operation of Christchurch Airport now and into the future.

There no exemption for Kaiapoi generally

28 Policy 6.3.5(4) requires avoidance of noise sensitive uses. It only exempts land within the 50dB Ldn Noise Contour where it is "*within an existing residentially zoned urban area, residential greenfield area identified for Kaiapoi, or residential greenfield priority area identified in Map A…*" (the so called "*Kaiapoi exemption"*).

29 It is submitted:

29.1 the Kaiapoi exemption applies to narrowly defined area of Kaiapoi and its outer bounds have already been reached within the Operative Plan; and

29.2 on a correct interpretation of Policy 6.4.5(4), FDAs are to be treated no differently to other areas of land in Waimakariri that are subject to noise levels of 50dB Ldn.

30 We explain the background to the Kaiapoi exemption in more detail in the following sections.

History of the Kaiapoi exemption

31 Appendix A of these legal submissions provides a timeline of relevant planning instruments and their purpose. This is a more comprehensive version of the timeline that was filed with CIAL's

[18] *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraph 139.

memorandum dated 14 August 2023 in order to assist the Panel with Hearing Stream 10A matters.

32 To summarise the most relevant aspects:

32.1 The CRPS became operative in 1998. In 2003 ECan initiated a process to develop a growth strategy for Greater Christchurch. In 2007 they publicly notified what was then known as Plan Change 1 (*PC1*).

32.2 PC1 was determined and at the time of the 2011 earthquakes was on appeal to the Environment Court. There were a number of appeals opposing the adoption of the 50dB Ldn Noise Contour. The Court of Appeal later described PC1 as including *"a long standing policy of precluding noise sensitive uses within a 50 dBA Ldn contour around Christchurch International Airport*".[19]

32.3 The Minister utilised powers under the Canterbury Earthquake Recovery Act 2011 (*CERA*) to revoke PC1 and to stop the Environment Court appeals process.

32.4 On 8 October 2011 the Minister gave public notice that, pursuant to s 27(1)(a) of CERA, he was amending the CRPS by inserting chapter 22. The notice is clear that it exempted a limited number of households within the 50dB Ldn Noise Contour at Kaiapoi from the avoidance policy but only to the extent "*as an offset for the displacement of existing noise sensitive residential activities in the Kaiapoi Residential Red Zone*".

32.5 The Minister then issued two separate notices under the CERA amending the Operative Plan to enable two specifically identified areas of residential development in Kaiapoi that would address that offset. As the High Court said in Independent Fisheries:

> *[37] The changes to the city plan created residential zones at Prestons Road and Halswell West. The change to the Waimakariri plan zoned specified land within the 50 dBA Ldn contour at Kaiapoi for residential purposes pursuant to an exemption contained in chapter 22 of the RPS. It was stated that this exemption was specifically provided to reflect the displacement of existing dwellings at Kaiapoi within the 50 dBA Ldn noise contour.*
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> *[38] Early in November 2011 lawyers for the first applicant wrote to the Minister seeking reconsideration of his decisions adding the*

[19] *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601 at [74].

> *two new chapters to the RPS. The letter sought redress in the form of revocation of the 50 dBA Ldn noise corridor and the substitution of a 55 dBA Ldn contour. It also sought reinstatement of a greenfield area that had been included in PC1 before it was deleted by variation 4. After receiving a briefing paper the Minister declined the request.*
>
> *…*
>
> *[142] One of the explanations for inserting chapter 22 into the RPS is that unless the location and effect of the 50 dB A Ldn contour was made clear, developers would attempt to pursue developments at other locations within the contour on the coat tails of the Kaiapoi incursion. In other words, the territorial authorities would be flooded with requests for private plan changes. However, any possibility of that happening needs to be weighed against the detailed provisions in the Waimakariri district plan which make it clear that the circumstances giving rise to the incursion in Kaiapoi were unique.*

32.6 The first iteration of "Map A" was introduced in the Land Use Recovery Plan in December 2013 and included greenfield priority areas.

32.7 Eight years later in July 2021 another Plan Change to the CRPS (also called *PC1*) then amended Map A to include FDAs (which were initially proposed in Our Space to give effect to the National Policy Statement for Urban Development Capacity). The approved PC1 recommendation explicitly states that any development in the new FDAs would still need to comply with CRPS Policy 6.3.5.[20]

33 The intent of the Kaiapoi exemption was set out by the Canterbury Earthquake Authority when advising the Minister:[21]

> "*… Our assessment is that exempting either the north-eastern Kaiapoi or all of the Kaiapoi township can be justified on the basis of displacement of residential properties from the Red Zone. However, the larger the area exempted the greater the risk that the air noise contour will be undermined and others will also seek to be exempted from the restriction of noise sensitive activities under the contour".*

34 This was subsequently considered by the Court of Appeal:[22]

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

[21] *Cited in Canterbury Regional Council v Independent Fisheries* [2012] NZCA 601, [2013] NZLR 57 at [96].

[22] Ibid, at [99].

> *"… the exception to the restrictions imposed by the noise level contour for residential development in Kaiapoi was clearly designed to assist the recovery of Kaiapoi…"*

35 What is clear is that the Kaiapoi exemption was limited in its extent to provide for displacement for the number of people living in the Kaiapoi Red Zone only. The Operative Plan was amended to reflect this by allowing new residential zoning in two limited geographical areas specified by the Minister. This is logical, as aircraft noise effects within 50dB Ldn are not experienced differently at Kaiapoi compared to elsewhere in the region. The Kaiapoi exemption simply reflects that a trade-off was required in the circumstances following the Canterbury Earthquakes to move people within locations inside the 50dB Ldn Noise Contour at Kaiapoi. By doing this it did not create an increase in the overall number of people exposed to the effects of aircraft noise.

36 Based on the suite of evidence in front of the Panel today, there is no evidence of a need for any further trade-off in the Proposed Plan to deal with displacement from the Kaiapoi Red Zone.[23]

37 It is submitted that the Kaiapoi exemption was introduced under urgency and reactively following the Canterbury earthquake sequence, and its sole purpose was to offset displaced residents in Kaiapoi. Two areas in particular were identified, and changes made to the Operative Plan, by the Minister.[24] Those changes have been carried through into the Proposed Plan and CIAL is not seeking to unwind the residential development enabled under those Operative Plan provisions. It does however seek to maintain the status quo.

38 That is where the Kaiapoi exemption ends. It does not allow for a geographical expansion of residential development in Kaiapoi, beyond the areas that the Minister provided for, onto land that is subject to noise levels of 50dB Ldn or greater. Nor does it provide for further intensification of land exposed to 50dB Ldn or greater.

39 Further, it could only be at the point where land was not available for housing in the District outside the 50dB Ldn Noise Contour that decision makers would need to start making the compromises that other airports have had to make and weigh the competing demands of housing provision (or affordability) and infrastructure protection.

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[23] **Ms Natalie Hampson** concludes that CIAL's relief for existing residential areas is likely to only have a minor opportunity cost which is able to be mitigated. Furthermore, that CIAL's relief will not adversely affect urban growth in Waimakariri District as FDAs are not zoned and additional FDAs can be identified as required. **Mr Gary Sellars** concludes that there are other areas in Waimakariri District to offset housing capacity lost as a result of CIAL's relief.

[24] See Policy 12.1.1.12 of the Operative Plan which explains the Kaiapoi exemption. The residential zones and associated densities are already provided for in areas contemplated by the Kaiapoi exemption.

That decision would need to be made during the CRPS hearing process when Policy 6.3.5 is reconsidered.

How do we interpret the exemption as written in Policy 6.3.5(4)?

40 The proper interpretation of Policy 6.4.5(4) also does not lend itself to the position put forward by Council's section 42A officers. **Mr Kyle's** evidence steps through an interpretation exercise of the policy as a whole.[25] We do not repeat that here but highlight the following:

40.1 The avoidance direction within Policy 6.3.5(4) 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*.

40.2 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 PC1 well 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.

40.3 If it was intended that the Kaiapoi exemption would deal with more than displacement from the Kaiapoi Red Zone and would apply to FDAs at Kaiapoi, one would expect an amendment to the list of exempted areas, or that the FDAs at Kaiapoi would have been named in a manner consistent with 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.

40.4 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*".[26] 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).

41 The correct interpretation must be that all land within the 50dB Ldn Noise Contour is subject to the direction in Policy 6.3.5(4), except for those three categories of land listed within the policy. Because

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[25] Statement of evidence of **Ms Laurel Smith** for Hearing Stream 10A, dated 2 February 2024 from paragraph 60.

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

FDAs are not listed, those that sit within the 50dB Ldn Noise Contour should be treated no differently (from a Policy 6.3.5(4) perspective) to any other area of land that is subject to 50dB Ldn in any other part of the region including in the other two Districts.

What does Policy 6.3.5(4) provide for?

42 The crux of Policy 6.3.5 is to assist the recovery of Greater Christchurch through the integration of land use development and infrastructure. Subparagraph 4 seeks to ensure that new development does not affect the efficient operation, use development, appropriate upgrading and safety of existing infrastructure. One of the ways to achieve this is by "*avoiding noise sensitive activities within the 50dBA Ldn airport noise contour for Christchurch International Airport.*" As will be addressed later in these legal submissions, bird strike risk management is another matter to deliver on the direction in Policy 6.3.5(4).

43 Council's section 42A officer considers that terms such as 'require' and 'avoid' that are contained in CIAL's submission "…*have the effect of not allowing any adverse effect, no matter how minor it might be, also it does not allow for management of degrees of adverse effects. In essence, avoidance is the only outcome contemplated, which I do not consider realistic or reasonable. I also do not consider it appropriate given the outcome of the RPS review and related policy settings and land use controls is unknown*."[27]

44 With respect, the 'avoid' language contained in CIAL's submission directly reflects the current wording in the CRPS. The CRPS provisions are unambiguous and highly directive; new noise sensitive activities must be avoided within the 50dB Ldn Air Noise Contour.

45 As the Panel will be cognisant of, the meaning of the word "avoid" has been the subject of Supreme Court commentary in the context of the New Zealand Coastal Policy Statement:[28]

> *[96] In that context, we consider "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence, "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c) for example, it is difficult to see that "avoid" could sensibly bear any other meaning.*

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[27] *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraph 133.

[28] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

46 The Supreme Court in the recent Port Otago decision examined the case law on the meaning of "avoid" and concluded:[29]

> *[68] All of the above means that the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.*

47 In this case, the amenity of residents and the safe and efficient operation of Christchurch Airport is what is sought to be protected. The measures that can be put in place to avoid causing material harm in relation to those values are those put forward in CIAL's relief on the Proposed Plan, including density controls.

48 These measures are necessary to avoid material harm in light of CIAL's expert evidence. CIAL's experts consider that such strong direction is entirely appropriate and necessary to protect the amenity of the community and to protect Christchurch Airport from reverse sensitivity effects. Density controls and avoiding noise sensitive activities on land subject to 50dB Ldn in the first place are the core land use planning tools supported by the experts. It has also been recognised by the Courts, on numerous occasions, that the appropriate planning response is to keep the numbers of people affected by airport noise to a minimum and hence limiting the number of people highly annoyed by airport noise. For example, in *Gargiulo v Christchurch CC*:[30]

> *[63] … in any event on the facts of this case we find that the density of dwellings (which is controlled by subdivision size) is so important around the Christchurch International Airport that it is a dominating factor in terms of weight.*

49 Importantly in *Robinsons Bay Trust* the Environment Court stated in relation to density controls as the method by which effects would be dealt with:[31]

> *[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*

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29 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 at [68].

30 *BD Gargiulo v Christchurch CC,* C 137/2000, 17 August 2000, Jackson J (EnvC).

31 *Robinsons Bay Trust & Ors v Christchurch CC,* C 60/2004, 13 May 2004, Smith J (EnvC) (*Interim decision*).

this outcome. We conclude that in these circumstances alternative means are not appropriate.

50 To be clear, CIAL is not seeking to unwind the clock on residential development or other noise sensitive activities already provided for under the Operative Plan, including the two plan changes promulgated by the Earthquake Recovery Minister. As explained by **Mr Kyle**, CIAL's relief on the Proposed Plan is qualified (e.g. by seeking minimum density requirements) so to not prohibit certain land uses entirely. However, in order to give effect to the strong direction contained in the CRPS provisions, it is critical that the Proposed Plan does not enable any additional or intensified noise sensitive development beyond what the Operative Plan provides for.

51 As outlined above, FDAs are not exempt from the direction contained in Policy 6.3.5(4). That is, new noise sensitive activities are to be avoided in all locations that are subject to aircraft noise levels of 50dB Ldn or greater.

RELEVANCE OF THE REMODELLED CONTOUR

52 As explained in Hearing Stream 1, Policy 6.3.11(3) in the CRPS requires certain processes with respect to remodelling the Noise Contours. The evidence of **Mr Hawken** and **Ms Smith** outlines the process that has been undertaken.

53 CIAL's submissions and further submissions on the Proposed Plan included the then draft updated contours that were prepared by CIAL's expert team and submitted to ECan for peer review (*Draft Updated Contours*).

54 At the time of preparing evidence and legal submissions for Hearing Stream 1, the Draft Updated Contours had not been confirmed by ECan's independent peer review panel. However, we signalled to the Panel at the hearing on 18 May 2023 that, through the detailed peer review process, there had been some adjustments to the modelling methodology and assumptions and that the shape of the final updated contours were likely to be different from the Draft Updated Contours.

55 The final updated contours were subsequently agreed between CIAL and ECan's experts in June 2023 (*Updated Contours*). CIAL's relief is therefore based on the outer geographical extent of the contour as shown in the CRPS (*Operative Contours*) and the evidence produced to the Panel which shows where future noise levels of 50dB Ldn or greater will be experienced i.e. Updated Contours (Outer Envelope methodology). In practical terms the Operative Contours sits geographically inside the Updated Contours.

Why should the Proposed Plan provisions be based on the Updated Contours?

56 The Updated Contours are the "best available evidence" for inclusion in the Proposed Plan and to inform where intensification and new residential rezonings should be avoided because they show where the effects of 50 dB Ldn or greater will be experienced and therefore where 18-27% of the population will be highly annoyed.

57 The advice from CIAL's experts (**Mr Hawken, Ms Smith** and **Mr Kyle**) is that the Updated Contours are the best up-to-date technical information to identify where aircraft noise effects are likely to be felt. The Updated Contours are therefore the best information to base land use planning provisions off.

58 Furthermore, it is clear from **Ms Hampson** and **Mr Sellars** that the negative effects, from an economics and housing capacity perspective, associated with applying CIAL's relief to land within the Updated Contours are minimal.

Why is the 'sequencing issue' irrelevant to decisions on the Proposed Plan?

59 Council's section 42A officer comments that the relevant CRPS provisions do not state that the Noise Contours can be changed without a formal Resource Management Act (*RMA*) review process.[32] They consider that the relief sought by CIAL in relation to the Updated Contours is premature and should instead be considered via another process following completion of the CRPS review.[33]

60 The Council officer cites a number of documents to support this view however none of these authorise the Panel to ignore relevant, and the best available, evidence as to where adverse effects of aircraft noise will be experienced. The officer refers to:

60.1 ECan's public commentary ahead of the formal CRPS review process where it states "*At this stage, the new contours are considered to be technical information only*."

60.2 That statement may be correct as far as the CRPS goes but it is unclear what "only" means for this Panel which actually has the evidence from relevant experts in front of it; the Panel is obliged to consider that evidence it in its decision making. The Panel is not entitled to ignore the evidence of where effects will be experienced simply because of some future review process. The CRPS is not an expert witness as to the

[32] *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraph 124.

[33] Ibid at paragraph 127.

extent of effects and it does not depict up to date information.

60.3 The officer also refers to a Joint Witness Statement by Waimakariri District Council and ECan on Private Plan Change 31. The reference is incomplete as the Joint Witness Statement also included the Applicant's expert witness. ECan is also giving evidence for this hearing and Ms Mitten can answer the Panel's questions directly.

60.4 The officer also refers to the Selwyn District Hearing Panel recommendation in relation to the Selwyn District's Variation. The Officer refers to the Qualifying Matter recommendation report. We firstly note that the Qualifying Matter recommendation report simply states that inclusion of Updated Contours in the CRPS would have to follow an RMA Schedule 1 process. It does not state that a Schedule 1 process must take place before they are considered as evidence in other processes e.g. district plan reviews.

60.5 We also highlight the Rezone Rolleston recommendation report which states:[34]

- *Variation 1 did not include the CIAL noise contour as a qualifying matter in HPW30 because at the time of notification, the operative 50dBA Noise Control Overlay only covered land zoned GRUZ.*

- *We accept that if the 50dBA CIAL Noise Control Overlay did impinge on MRZ zoned land then it would clearly be an appropriate qualifying matter under RMA s 77I(e). However, we decline to recommend amending HPW30 to refer to either of CIAL's recently remodelled 50dBA noise contours in the absence of an SDC assessment under ss32 and 77L of the RMA.*

61 To explain, the timing of the Rezone Rolleston process was well ahead of the Noise Contour remodelling process, and the scope of CIAL's submissions and the evidence that CIAL produced did not introduce or include a proper assessment so as to justify the Updated Contour as a new qualifying matter over a particular piece of land where a landowner sought rezoning. The Operative Contour was however adopted as an existing Qualifying Matter and impacts the same piece of land (although to a slightly different extent).

62 This confirms that, unlike here, it was only the lack of evidence and associated statutory analysis which prevented the Hearings Panel making decisions based on the Updated Contours. It is worth highlighting that, in the Selwyn context, almost the entire district

[34] *PDP Hearing 30.1: Rezoning Requests – Rolleston* at paragraph 70.

plan review process, including the Variation, had taken place before the Updated Contours were confirmed. That is not the case here.

63 It would obviously be preferable for the CRPS review to take place first and the updated policy direction to be clear before decisions are made on areas that are appropriate for intensification or residential rezoning. But the issue of the timing of the Proposed Plan and Variation process are out of CIAL's control; CIAL has to present the most up to date evidence as it comes to hand about where the impacts of Christchurch Airport's operations will be felt. That is, of course, the duty of CIAL's expert witnesses.

64 In our submission the sequencing issue should not be determinative when considering the evidential merits of including the Updated Contours in the Proposed Plan and when making decisions about the appropriate locations for intensification and rezonings after considering and assessing that evidence as well as the supporting policy direction.

65 Council's section 42A officer also alludes to inefficiencies if the Proposed Plan incorporates the Updated Contours, and then the CRPS planning framework that supports them changes through the CRPS review.[35]

66 In our submission, the risk of adverse outcomes if the Proposed Plan does not incorporate the Updated Contours at this time far outweighs any associated potential planning inefficiencies. Failure to consider the Updated Contours in the context of rezoning or intensification proposals will create landowner expectations and may allow the horse to bolt on inappropriate intensification or rezoning until before the CRPS review process is complete. A cautious approach is warranted given that any inappropriate development in the meantime would be very difficult, if not impossible, to undo.

67 In our submission, it would be a perverse outcome for the Panel to base its decisions on the Proposed Plan on outdated theory about where effects will be felt. It is the evidence before the Panel which represents the best available information of where the adverse effects of aircraft noise are going to be experienced.

68 When viewed in the round, there is little to lose by including the Updated Contours in the Proposed Plan now. At worst, if the policy were to change during the upcoming CRPS review and, for example, the 55 dB Ldn Noise Contour were to be adopted as the point of avoidance, then land would be able to be released for residential development and there would simply have been a delay in the rezoning of the FDA land or intensification. It should be noted that

[35] *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraph 128.

the FDA land is included in the Council's information as being capacity for the long term so there is ample time available to free up land in the event the CRPS review moves from the current policy position.

69 On the other hand, there is the potential for significant consequences if the evidence of the Updated Contours is ignored through the Proposed Plan review and decisions are made on what is known to be out of date information from a modelling process which occurred in 2008. This would enable the horse to bolt on intensification and residential rezoning in areas that, if it sticks to its current policy position of using the 50dB Ldn contour, the CRPS process might later determine to be inappropriate.

Why <u>can</u> the Proposed Plan provisions be based on the Updated Contours?

70 There are two relevant matters to consider when answering this question.

Would the Proposed Plan be inconsistent with the CRPS if it utilised the Updated Contours?

71 Council's section 42A officer also points to the fact that Policy 6.3.5(4) and Policy 6.3.11 of the CRPS refer to Map A and the Noise Contours, observing that Map A currently depicts the Operative Contour.[36]

72 However, **Mr Kyle** (similarly to **Mr Millar** in Hearing Stream 1) explains that relevant provisions of the CRPS do not refer to "the 50dB Ldn Noise Contour on Map A". Council's reporting officer is correct that "50dB Ldn Noise Contour" and "Map A" are both used within the same CRPS policies, but they are not qualified by each other. Importantly, the direction to avoid noise sensitive activities, relates to the "50dB Ldn Noise Contour" only.

73 Accordingly, it is submitted that the Updated Contours can appropriately be included in the Proposed Plan without frustrating the CRPS and would be consistent with the policy when based on up to date evidence about where noise levels of 50dB Ldn or greater will be experienced.

74 This is also in the context of a practical situation where the Operative Contour falls within the Updated Contour so, even on the Officer's interpretation, adopting the Updated Contour also gives effect to Policy 6.3.5 (4). In other words the Panel cannot do less than the Policy requires but, after hearing up to date evidence, it can do more.

[36] Ibid, at paragraph 124 to 128.

CIAL'S RELIEF IN RELATION TO NOISE CONTOURS

75 Council's section 42A officer is concerned that accepting CIAL's submission would involve amending large parts of the Proposed Plan and would provide a prominence to Christchurch Airport to an extent that is not justified.[37]

76 It is accepted that the relief contained in CIAL's submission touches a large number of chapters and provisions in the Proposed Plan. Through the preparation of evidence for Hearing Stream 10A counsel and CIAL's expert team have revisited CIAL's submission and, without diluting the need for the Proposed Plan to appropriately recognise and provide for the safe and efficient operation of Christchurch Airport, concur that some rationalisation and consolidation of CIAL's relief is appropriate.

77 **Mr Kyle** has proposed a refined approach, with amendments in full contained in Annexure B of his evidence.[38] For completeness, we note that CIAL's submission was intended to apply across the district to all land that is subject to noise levels of 50dB Ldn or greater. While not expressly stated that this was for all (relevant) zones in the Proposed Plan, that was clearly the intent of CIAL's submission and Mr Kyle's proposed approach was prepared accordingly.

78 It is submitted that the relief now sought by CIAL avoids unnecessary repetition in the Proposed Plan, but achieves the outcomes sought in CIAL's submission; being to avoid new noise sensitive activities beyond that already provided for in the Operative Plan.

Is the FUDA certification process lawful?

79 CIAL is aware of the submissions given on behalf of Carter Group Limited and Rolleston Industrial Developments Limited and adopts them.

WHY IS BIRD STRIKE RISK MANAGEMENT IMPORTANT?

80 As outlined by **Mr Hawken**, management of bird strike risk is a core airport safeguarding matter, and it is a matter that CIAL takes very seriously. CIAL has a responsibility to provide a safe operating airport environment and therefore actively works to minimise the threat and incidence of bird strike around Christchurch Airport.

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[37] *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraphs 132 to 135 and 138.

[38] Summarised at paragraph 88 in the statement of evidence of **Mr John Kyle** for Hearing Stream 10A, dated 2 February 2024.

81 Off-airport activities can increase bird strike risk if not appropriately managed, and they can affect the ability of CIAL to provide a safe environment. **Ms Hayman** will speak to CIAL's management approach in greater detail.

82 CIAL's aim is not to prevent land-use activities taking place or to add significant burden, however a balance does need to be struck. **Mr Kyle's** evidence provides a proposal to strike this balance and **Dr Bull** provides evidence on the bird populations and context in Waimakariri. CIAL's goal through the Proposed Plan is to trigger consideration of bird strike risk issues amongst landowners and Council staff, and to ensure that activities which could increase bird strike risk are appropriately managed or designed to mitigate that risk.

83 As notified, the Proposed Plan does not include any provisions that seek to manage the effect of bird strike risk activities; in RMA terms it is an effect with low statistical probability but of high consequence to health and safety.[39] **Mr Kyle** supports the relief sought by CIAL on the basis that it is consistent with the outcomes sought by the CRPS, and that the proposed management framework recognises that many of the bird strike risk activities can be appropriately managed.

84 Council's section 42A officer is of the view that management approaches outside of the Proposed Plan are more appropriate. This seems to be based on an independent ecological review of CIAL's submission. **Dr Bull** has responded to the independent ecological review where relevant. CIAL undertakes a suite of management approaches in relation to bird strike risk and this will be explained by **Ms Hayman**. The provisions sought by CIAL in the Proposed Plan are just one, crucial, element to ensure that CIAL is able to work with Council staff and landowners in order to efficiently implement the appropriate management approach.

Civil Aviation requirements

85 Civil Aviation Rules are made by the Civil Aviation Authority (*CAA*) under the Civil Aviation Act 1990. Civil Aviation Rule 139.71 requires:

> *An applicant for the grant of an aerodrome operator certificate* [i.e. CIAL] *must, if any wildlife presents a hazard to aircraft operations at the aerodrome, establish an environmental management programme for minimising or eliminating the wildlife hazard.*

86 Guidance on how to comply with Rule 139.71 is set out in an Advisory Circular (AC139-16, published by the CAA) (the *AC*). The

[39] The term "effect" under section 3 of the RMA includes *any potential effect of low probability which has high potential impact*.

AC notes at the outset that it is not exhaustive in addressing how to control bird hazards and that it presents methods to assist both aerodrome operators and local territorial authorities.

87 Of particular note, AC13-16 states:[40]

> *Particularly severe problems arise when birds make regular flights across an aerodrome (e.g., when they fly between roosts and feeding areas). The greatest problem at many aerodromes is the presence of one or more waste disposal sites near the aerodrome. These facilities provide food for many birds, mainly gulls, which may then use adjacent aerodromes as loafing and resting sites.*
>
> *Therefore, **it is crucial aerodrome operators make submissions during urban planning or district scheme reviews** and work with local authorities to ensure bylaws are established, so municipal authorities know that such activities influence bird populations, which can be hazardous to air transportation if near an aerodrome and approach or take-off flight paths for aircraft.*

88 The AC notes various types of land use which can be hazardous such as landfills, wastewater treatment plants, cropping, rearing of animals, recreational activities with large open grounds or waterbodies.[41] **Dr Bull** elaborates on land uses considered to be a bird strike risk activity in her evidence.[42]

89 The AC also specifies various management techniques for aspects of hazardous land uses (such as planting native trees to discourage birds or shift a population away from the area, and specific control methods for particular species). It recommends that local authorities are told about the hazards in the area and encouraged to develop land use restrictions and management techniques to minimise the presence of birds near aerodromes.

Relevant higher order planning framework

90 The relevant CRPS provisions are outlined in **Mr Kyle's** evidence. Particularly relevant to the issue of bird strike risk:

91 Objective 5.2.1(f) requires that *"development is located so that it functions in a way that … is compatible with, and will result in the safe, efficient and effective use of regionally significant infrastructure'*.

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[40] AC139-16 Wildlife Hazard Management at Aerodromes, page 11.

[41] Ibid, page 12-14.

[42] Which include the addition of permanent artificial waterbodies greater than 1000m2, intensive farming (including piggeries), fish processing, abattoirs and freezing works.

92 Policy 6.3.5 provides for:

92.1 the continued safe, efficient and effective use of regionally significant infrastructure;

92.2 the provision for efficient and effectively functioning infrastructure; and

92.3 seek to ensure that land use activities and new development are managed including activities that have the potential to limit the efficient and effective "*provision, operation, maintenance or upgrade of strategic infrastructure and freight hubs*".

93 The CRPS also recognises bird strike risk specifically as a necessary consideration in the context of provisions which promote enhancement / creation of wetlands (a bird strike risk activity).

Approach to available information

94 Council's section 42A officer questions whether there is sufficient evidence to justify CIAL's relief in relation to bird strike.[43]

95 There is substantial information on the rationale for provisions to manage bird strike risk off-airport, international guidance and best practice. **Dr Bull** has provided evidence on local bird populations, including information collected by CIAL. **Ms Hayman** will address the official recorded bird strikes and near misses at Christchurch Airport.

96 It is acknowledged that there are some gaps in the information available for Canterbury. The work to understand the exact flight patterns and behaviour of the various bird populations in the local context is ongoing.

97 However, it is submitted that there is sufficient evidence before the Panel to support the relief sought by CIAL[44] in the Proposed Plan. Where there is incomplete information, there is nevertheless some evidence that is supplemented with the clear international guidance outlined above.

98 To the extent that the Panel may consider there is any uncertainty or insufficient information, the precautionary principle is relevant and supports imposition of planning rules to manage the actual and

[43] *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraph 166.

[44] As refined in the statement of evidence of **Mr John Kyle** for Hearing Stream 10A, dated 2 February 2024.

potential effects of land use which could increase the risk of bird strike at Christchurch Airport.

99 The precautionary principle is inherently incorporated into the RMA through the definition of "effect", in particular s 3(f), the definition of sustainable management, and in s 32(2)(c) which requires an assessment of the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.[45]

100 In this case, the risk of a bird strike occurring at Christchurch Airport is evidenced by the historical CAA data and will be addressed in **Ms Hayman's** evidence. The gravity of a bird strike varies, but there is potential for bird strike to result in very serious outcomes, compromising public safety.

101 It is submitted that the relief sought by CIAL is required as part of the suite of regulation and active management undertaken by CIAL to manage the effects of bird strike risk. CIAL's relief is appropriate, given the risk of not acting. The provisions sought have been designed with the aim of placing as little burden on landowners as possible – focusing on facilitating discussion with CIAL and risk assessment / management plans where necessary. **Ms Hampson** concludes that regulating bird strike risk activities within 13km of Christchurch Airport is the most efficient approach from an economics perspective. **Mr Kyle** supports CIAL's proposed bird strike management framework, as it recognises that many of the bird strike risk activities can be appropriately managed.

Approach to bird strike risk management in Christchurch and Selwyn

102 Council's section 42A officer is critical of CIAL's relief relating to bird strike risk management within the 8km and 13km radii of the runway thresholds at Christchurch Airport on the basis that the radii, and their associated land use controls, do not exist in the Christchurch and Selwyn District Plans.[46]

Christchurch District Plan

103 The relief sought by CIAL in relation to the Proposed Plan is consistent with the relief that it sought in the Christchurch Replacement District Plan process (rules associated with 3km, km

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45 *Golden Bay Marine Farmers v Tasman District Council* NZEnvC Christchurch W42/2001, 27 April 200: the Court doubted the practicalities of implementing the precautionary principle as a legal standard and was firmly of the view that the precautionary principle is not extraneous to the RMA and does not provide additional weight to the decision-make. See also *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 at [21] and [22]; *Wratten v Tasman District Council* (1998) 4 ELRNZ 148.

46 *Officer's Report: Christchurch International Airport Ltd – Airport Noise Contours and Bird Strike*, dated 9 January 2024 at paragraphs 169 to 174.

and 13km radii).[47] However, the approach and drafting has been further refined with the benefit of additional information and extensive work in this area.

104 The Independent Hearings Panel for the Christchurch process accepted that regulation was necessary for certain land use activities in certain circumstances.[48] The Christchurch District Plan also contains objectives and policies providing for bird strike risk management.[49]

Selwyn District Plan

105 CIAL's submission on the proposed Selwyn District Plan sought a suite of provisions to ensure a consistent approach to managing activities that constitute a bird strike risk.

106 The proposed Selwyn District Plan includes a non-complying activity rule for landfills within 13km of a runway at Christchurch Airport, as well as a notification requirement to CIAL. It was not considered that any additional provisions relating to bird strike were necessary as, based on the evidence provided by CIAL's experts, only the activities associated with landfills were likely to generate bird strike risk in areas beyond 9km of Christchurch Airport.[50]

107 However, CIAL has appealed the Decision not to recommend an objective and policy framework relating to bird strike in the proposed Selwyn District Plan. CIAL has also sought a new definition for "bird strike risk activity" and insertion of the 8km and 13km bird strike risk management areas as an overlay, consistent with its relief sought on the Proposed Plan.

108 Appeals on the proposed Selwyn District Plan are yet to be heard.

PART ONE CONCLUSION

109 In summary:

109.1 Policy 6.3.5(4) of the CRPS applies to all areas that are subject to noise levels of 50dB Ldn or greater, except for specific types of land listed in the policy, and provides that

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47 See Part 6.7.4.3 Activity status tables – Bird strike Management Areas.

48 For example, various matters of control and discretion including intensive farming (17.11.2.3), activities within the Waimakariri Flood Management Area (5.4.3.3), stormwater design for utilities (11.10.5(h) and 11.10.6(j)), creation of waterbodies in the Specific Purpose Golf Resort Zone (13.9.6.6), subdivision servicing and infrastructure (8.7.4.3(f)).

49 For example Strategic Objective 3.3.12(b)(iv), Policy 6.7.2.1.2, Policy 8.2.3.4.

50 *PDP Hearing 4: Energy and Infrastructure*.

noise sensitive activities are to be avoided in those areas. The relief proposed by **Mr Kyle** gives effect to Policy 6.3.5(4).

109.2 The Updated Contours can and should be included in the Proposed Plan on the basis that they are the best available evidence of where noise levels of 50dB Ldn or greater will be experienced and where intensification and new residential rezoning should therefore be avoided.

109.3 Bird strike risk management is a core airport safeguarding matter, and the relief proposed by CIAL (and endorsed by **Mr Kyle**) strikes the right balance to implement the appropriate management response for certain types of incompatible land use.

PART TWO: VARIATION 1 TO THE PROPOSED WAIMAKARIRI DISTRICT PLAN

110 The second part of these legal submissions addresses CIAL's relief in relation to Variation 1 to the Proposed Plan (*Variation*).

111 **Ms Hampson** prepared a separate brief of evidence specifically relating to CIAL's relief on the Variation. In addition, the evidence of **Mr Sellars**, **Ms Smith**, **Mr Hawken** and **Mr Kyle** for the Proposed Plan also addresses the Variation.

Scope of Variation 1 to the Proposed Plan

112 As the Panel will be aware, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (the *Amendment Act*) came into force on 21 December 2021.

113 The Amendment Act required specified territorial authorities, including Waimakariri District Council, to apply the MDRS to existing residential areas and implement Policies 3, 4 and 5 of the NPS-UD (*the intensification policies*).

114 The Amendment Act provides a streamlined planning process (*ISPP*) for how Councils are to achieve the Act's requirements. This is achieved through the use of an intensification planning instrument (*IPI*).[51]

115 Where a Council had already notified a Proposed Plan before the Amendment Act came into force, it was required to notify a single variation to its Proposed Plan to incorporate the MDRS.[52] The

[51] RMA, section 80E, as inserted by the Amendment Act.

[52] RMA, schedule 12, clause 33(2), as inserted by the Amendment Act.

Variation is the IPI and must use the ISPP to incorporate the MDRS and give effect to the NPS-UD intensification policies.[53]

116 As required by the Amendment Act, Waimakariri Council notified Variation 1 (being a variation to the Proposed Plan) on 13 August 2022. It is important not to conflate the Variation and the Proposed Plan. These processes are separate and distinct from one another, each having different decision makers with different roles, inherent differences in procedure (e.g. cross examination) and different appeal rights.[54]

CIAL's relief on Variation 1

117 The Amendment Act required Councils to incorporate MDRS into every relevant residential zone by August 2022, provided that the MDRS may be less enabling of development in areas where a qualifying matter applies.[55]

118 Qualifying matters are defined in the National Policy Statement on Urban Development (*NPS UD*) and section 77I of the RMA and include:

> *any matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure.*

119 Christchurch Airport is nationally significant infrastructure. The qualifying matter required for the purpose of ensuring the safe or efficient operation of Christchurch Airport is land use controls applying to areas subject to 50dB Ldn or greater of aircraft noise (*Airport QM*).

120 The Variation as notified included an Airport QM on the basis of the Operative Contour. However, for the reasons explained earlier in part one of these legal submissions, the geographic extent of the Airport QM should be based on the Updated Contours in order to accurately reflect areas where residents will experience levels of noise of 50dB or greater.

121 As explained by **Mr Kyle**, the rationale underpinning CIAL's relief on the Proposed Plan is fundamentally the same for the Variation. Similarly, the evidence filed on behalf of CIAL reaches substantially the same conclusions for the Proposed Plan and the Variation.[56]

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53 RMA, schedule 12, clause 33(3), as inserted by the Amendment Act.

54 RMA, schedule 12, clause 36, as inserted by the Amendment Act. There are no appeal rights in relation to a variation to a proposed plan that is the specified territorial authority's IPI, but appeal rights on the underlying proposed district plan remain in-tact.

55 RMA, s 80F(1)(a) and 77I.

56 **Mr Sellars** is of the opinion that one of the reasons that house buyers are attracted to inner North Canterbury is the larger section sizes and low

122 For the same reasons outlined in part one of these legal submissions CIAL seeks that, within the Airport QM (based on the geographic extent of the Updated Contours), density standards are limited to those currently provided for in the Operative Plan. The Operative Plan densities are the most effective to ensure appropriate amenity outcomes for residents, and to ensure the effective and efficient operation of Christchurch Airport. CIAL's relief enables a level of development of land that has historically been zoned for residential use, but ensures that residential density is not increased any further.

123 Some guidance as to the interpretation of the CRPS and the evidence in the context of intensification within "existing residential zones" can be found in the decision of the Independent Hearing Panel determining the Replacement Christchurch District Plan.

123.1 Overall the Panel considered that, although there is no absolute direction in the CRPS to avoid any further noise sensitive activities in existing residentially zoned land within the Air Noise Contour, there is still a need to evaluate whether such activities should be avoided or restricted so as to give proper effect to Policy 6.3.5 and related CRPS objectives and policies.[57] The Panel recognised the need for an ongoing capacity to assess relevant reverse sensitivity and noise mitigation matters for residential intensification above a certain scale.[58]

123.2 In the end, the Panel determined that, for residential zones in the Christchurch District that sit within the 50dB Ldn Noise Contour, residential activities which do not meet the then permitted zone standards should have restricted discretionary activity status.[59] This demonstrates that density (amongst other things) was a key matter for decision makers to control in order to give effect to the CRPS. To further enable intensification or new residential rezonings in the Proposed Plan beyond that allowed under the Operative Plan provisions would be at odds with this approach.

124 We note that the map included as Appendix B(i) to CIAL's submission on the Variation did not accurately depict the densities sought within the Airport QM. This map was produced utilising Proposed Plan zones and associated densities. However, it was

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development density, and that this is unlikely to change in the foreseeable future. **Ms Hampson** concludes that there is little difference in the opportunity costs arising from CIAL's relief on the Proposed Plan and the Variation.

57 Decision 10 Residential (Part), Independent Hearings Panel, 10 December 2015, at [195].

58 Ibid, at [235].

59 Ibid, at [237].

clear in the body of the submission itself that the 'residential density areas' were to be based on the status quo i.e. Operative Plan densities. The map appended to **Mr Kyle's** evidence correctly demonstrates CIAL's relief in relation to residential densities within the 50dB Ldn Noise Contour and should be the map considered by the Panel. The densities sought under the Proposed Plan and Variation are the same; being those provided for in the Operative Plan.

PART TWO CONCLUSION

125 In relation to Council's obligations under the Amendment Act, the Panel must implement the Airport QM to prevent intensification or the creation of new residential land in areas that be subject to future aircraft noise levels of 50dB Ldn or greater.

126 Within the Airport QM (based on the geographic extent of the Updated Contours), density standards should therefore reflect those currently provided for in the Operative Plan.

Dated 11 February 2024

J Appleyard / A Lee
Counsel for Christchurch International Airport Limited

APPENDIX A: TIMELINE OF RELEVANT PLANNING INSTRUMENTS

Below is a brief summary timeline of relevant planning instruments and their purpose.

Document	Time of implementation	Comments
Plan Change 1 to Chapter 6 of the Canterbury Regional Policy Statement (*CRPS*) (*PC1 2007*)	Notified in 2007	This followed a process initiated by ECan in 2003 to develop a growth strategy for Greater Christchurch. PC1 2007 was determined and, at the time of the 2011 earthquakes, was on appeal to the Environment Court. The Minister for Canterbury Earthquake Recovery utilised powers under the Canterbury Earthquake Recovery Act 2011 (*CERA*) to revoke PC1 2007 to stop the Environment Court appeals process.
Public Notice under Section 27(1)(a) of CERA (see here)	Took effect from **8 October 2011**	New chapter inserted into the Canterbury Regional Policy Statement – "*Response to Canterbury earthquakes*". The amendments directed by the Minister set in place the Christchurch Airport Noise Contour protection framework, but exclude Kaiapoi from having to comply with the limitations on residential development in order to offset the displacement of residential activities which were within the Kaiapoi Residential Red Zone inside the 50dB Ldn noise contour.
Public Notice under Section 27(1)(a) of CERA (see here)	Took effect from **1 November 2011**	Waimakariri District Plan amended to give effect to the Christchurch Airport noise contour provisions and the exemption for residential development in Kaiapoi. The same notice also provided for land to be developed by Sovereign Palms Ltd in the north-east of Kaiapoi.
Public Notice under Section 27(1)(a) of CERA (see here)	Took effect from **24 November 2011**	Waimakariri District Plan amended to enable a higher level of density in Silverstream, West Kaiapoi in order to address the displacement of households from the "red zoned" areas.

Document	Time of implementation	Comments
Land Use Recovery Plan (*LURP*)[60]	Took effect in **December 2013**.	A regional planning document prepared under CERA. It puts land use policies and rules in place to assist the rebuilding and recovery of communities (including housing and businesses) disrupted by the Canterbury Earthquakes. Of most relevance, however, it amended the CRPS to include Chapter 6 (Recovery and rebuilding of Greater Christchurch) and identified 'greenfield priority areas'. The LURP acknowledges that noise sensitive activities must be avoided within identified airport noise contours. The LURP introduced the first iteration of what we know as 'Map A' into the RPS.
Replacement Christchurch District Plan	Took effect in **December 2015**.	The Independent Hearings Panel determined that, although there is no absolute direction in the RPS to avoid any further noise sensitive activities in existing residentially zoned land within the Air Noise Contour, there is still a need to evaluate whether such activities should be avoided or restricted so as to give proper effect to the CRPS. The Panel recognised the need for an ongoing capacity to assess relevant reverse sensitivity and noise mitigation matters for residential intensification above a certain scale.
National Policy Statement on Urban Development	Took effect in **December 2016.**	The purpose of the NPS-UDC was to ensure that councils enabled development capacity for housing and businesses (through their land-use planning infrastructure) so that urban areas could grow and change in response to the needs of their communities. The emphasis of the NPS-UDC was to direct councils to "*provide sufficient development capacity and enable development to meet*

[60] https://dpmc.govt.nz/our-programmes/greater-christchurch-recovery-and-regeneration/recovery-and-regeneration-plans/land-use-recovery-plan

Document	Time of implementation	Comments
Capacity (*NPS-UDC*)[61]		*demand in the short, medium, and long term."*[62]
Our Space 2018-2048: Greater Christchurch Settlement Pattern Update (*Our Space*)[63]	Final report endorsed by the Greater Christchurch Partnership in **June 2019.**	This document was expressly prepared to give effect to the NPS-UDC in Greater Christchurch and in particular the provision of "sufficient development capacity". Our Space identified that housing development capacity in Selwyn and Waimakariri is potentially not sufficient to meet demand over the medium and long term (10 to 30 years). It was intended that this document then form the basis of changes to Regional and District Planning documents to give effect to the NPS-UDC in a planned and collaborative way across Greater Christchurch. Our Space proposed that Map A of the CRPS be amended to include 'Future Development Areas' which would give effect to the NPS-UDC. We note that the Our Space Map A contains a note at the bottom which provides: "*While it is intended Our Space provides some direction to inform future RMA processes, [this map] is indicative only.*" Figure 10 of Our Space also incorporates the airport noise contours as a constraint on development.
National Policy Statement on Urban	Took effect in **August 2020.**	This national policy statement replaced the previous NPS-UDC. It introduced a range of policies and objectives additional to the NPS-UDC.

61 https://environment.govt.nz/assets/Publications/Files/National_Policy_Statement_on_Urban_Development_Capacity_2016-final.pdf

62 Refer for example OA2, PA1, PC1, PC3, PC4 of the NPS-UDC.

63 https://greaterchristchurch.org.nz/assets/Documents/greaterchristchurch/Our-Space-final/Our-Space-2018-2048-WEB.pdf

Document	Time of implementation	Comments
Development (*NPS-UD*)[64]		
Plan Change 1 to Chapter 6 of the CRPS (*PC1 2021*)[65]	PC1 made operative **July 2021**.	PC1 2021 was approved by the Minister for the Environment (the *Minister*) under the Streamlined Planning Process. PC1 2021 effectively amends the CRPS to include in Map A the Future Development Areas identified in Our Space, including at Rolleston, Rangiora and Kaiapoi. Map A as contained in Our Space and PC1 are identical. Both identify the 50dB Ldn Air Noise Contour. PC1 2021 also introduced new objectives and policies around the new future development areas. The PC1 2021 recommendation, which was approved by the Minister, states that any development in the new future development areas would still need to comply with Policy 6.3.5.
Private Plan Change 71 to the operative Selwyn District Plan (see here)	**June 2022**	Private plan change in Rolleston seeking to rezone land within the 50dB contour for residential use. Commissioner's decision concluded that it was clearly inconsistent with and does not implement objectives and policies relating to the development of noise sensitive activities, or rezoning of land for residential activities, under the 50dB contour.
Partially Operative Selwyn District Plan (see here)	Took effect **October 2023** (certain parts subject to appeal)	The notified version of the proposed Selwyn District Plan contained the 50dB Ldn Air Noise Contour. The Decision agrees that the 50dB Ldn and 55dB Ldn Noise Control overlays (analogous to those in the CRPS) are overlapping and additional. Provisions seek to 'avoid' noise sensitive activities apply regardless of

[64] https://environment.govt.nz/assets/Publications/Files/AA-Gazetted-NPSUD-17.07.2020-pdf.pdf

[65] https://www.ecan.govt.nz/your-region/plans-strategies-and-bylaws/canterbury-regional-policy-statement/change-chapter-6/

Document	Time of implementation	Comments
		whether these were contained within the 50dB or 55dB Noise Control overlay. As notified, the proposed Plan did not give effect to Policy 6.3.5(4) of the CRPS with respect to 'avoidance' of noise sensitive activities within the 50dB Ldn Noise Control Overlay and in terms of requiring noise mitigation for permitted residential activities within the 55dB Ldn Noise Control overlay. Amendments to the proposed Plan were recommended accordingly.

APPENDIX B

This Appendix provides extracts from relevant case law in which the Courts were required to consider land use planning rules under Air Noise Contours, and gave specific consideration to the importance of density controls. This Appendix also provides extracts from case law relating to the limited exemption for residential development in Kaiapoi.

CASE NAME	BACKGROUND	RELEVANT EXTRACTS
BD Gargiulo v Christchurch CC, C 137/2000, 17 August 2000, Jackson J (EnvC)	Appeal against Christchurch City Council's refusal to grant a subdivision and land use consent over land which was within the 50dBA Ldn noise contour. The Environment Court declined the appeal as the proposed plan implements a coherent pattern of objectives and policies which is consistent with the RPS in protecting the airport. The applicant's aspirations were outweighed by the public benefit of protecting the airport.	[31] … We draw two conclusions from this uncontroverted evidence: (a) There is a 10% chance that whoever lives on Lot 1 of Mr Gargiulo's subdivision will be highly annoyed by noise of aircraft movements (quite apart from other noise from the airport); and (b) Moving the house on Lot 1 to the back will not change (a); nor will it mitigate the annoyance outside the house. … [39] However, these issues do not have to be resolved just on their own facts on a case-by-case basis without further help: there is guidance in the RPS and in the district plans). **The CCC (and on appeal this Court) does not have to guess whether the effects of subdivision and a new house will be adverse, the RPS and the proposed district plan both imply (as we shall see when we consider them shortly) that subdivision within the 50 Ldn contour at a density greater than one lot per 4 hectares does have adverse effects**. So the real issue in this case is not whether there will be more than minor (cumulative) effects on the environment but whether granting consent(s) will create a precedent that undermines the integrity of the proposed district plan. We. do not want to phrase that too dogmatically, because ultimately those distinctions all revolve around the same set of issues: how to control

		cumulative effects. Nice legalistic distinctions are not particularly useful in this area. … [51] … All we can say here is that different objectives and policies in a district plan should be given different weights. Some should, under some plans, be given so much weight that they come close to prohibited activities (while always leaving it open for exceptional cases). **We find that is the position here: the cumulative effect of the objectives and policies we have quoted show that the density provisions of the proposed plan should be given considerable weight.** … [63]… In any event on the facts of this case we find that **the density of dwellings (which is controlled by subdivision size) is so important around the Christchurch International Airport that it is a dominating factor in terms of weight.**
Robinsons Bay Trust & Ors v Christchurch CC, C 60/2004, 13 May 2004, Smith J (EnvC) (*Interim decision*)	Decision on how much land (either land within the 50dBA contour line or 55dBA contour line) should be covered by a policy in the proposed Christchurch City Plan restraining noise sensitive urban development. The Environment Court concluded that the 50dBA Ldn line would be better for inclusion in the policy.	[24] We have concluded that below 55 dBA Ldn the major known effect of noise is annoyance (an amenity effect)… … [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. **...** [58] … **We do accept that there are likely to be a percentage of persons highly annoyed even below the 50 dBA Ldn noise contour**. Although that percentage is significantly less than at the 55 dBA Ldn contour, we accept this may lead to an increased level of complaints. In our view such complaints are going to be inevitable in any event as the noise levels for airport activity within the existing urban area moves towards the 50 and 55 dBA Ldn contours in the next twenty to thirty years. [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.** … [63] … Effectively, with the adoption of a 55 Ldn contour the Court would be accepting that there are areas where residential development is not discouraged that would have amenity levels lower than those generally

		anticipated in terms of the Proposed Plan in respect of noise. Disregarding noise from roads, it could be argued that many development areas of the city may be subject to noise in excess of that proposed under the Proposed Plan. However, in setting the noise level for this area, we take into account that the Proposed Plan has set out a general expectation in residential areas of 50 dBA Ldn. This provision is not critical because these standards are set for new activities to achieve compliance or to be dealt with as discretionary activities. **However it is indicative as to the expectation in respect of noise amenity generally.** [64] … We have concluded that the 50 dBA Ldn line is better for the following reasons: (1) the airport has significance in terms of the Proposed Plan, recognising its local, regional and national importance; (2) high individual SEL levels can have more impact at lower Ldns (under 55 dBA), suggesting a conservative line to avoid amenity impacts; (3) there is an amenity impact below 55 dBA Ldn and the Proposed Plan reflects a general expectation of lower Ldn levels in residential and rural areas; …
National Investment Trust v Christchurch CC, C 41/2005, 30 March 2005 (EC)	Decision relating to the urban growth and zoning provisions of the Proposed Christchurch City Plan. The Trust sought to re zone land within the 50 dBA contour.	[45] We have concluded that any urban growth Increasing residential densities between the 50 dBA and the 65 dBA contours is discouraged by virtue of policy 6.3.7… …

	The Environment Court upheld the council's zoning decision.	[48] We agree with the Court's summary in *Gargiulo v Christchurch City Council* which summarises the objectives and policies of the City Plan as *inter alia*: • " … • (c) keeping the density of dwellings within the 50 dBA Ldn contour to a level so that the number of people living within the noise affected area is kept to reasonable minimum." We **conclude a Living 1 zone within the 50 dBA contour would increase the number of people living within the contour without any necessity for such zoning being demonstrated.** … [109] The Court has previously considered the Living I zone as a lower density form of development and sees other Living densities such as 3 and 4 as being higher densities. In this case we must also consider whether the general policies relating to the airport may be of more importance than the policy of the City Plan relating to higher densities. **To the extent that such policies are in conflict, it is clear that the airport policies are more significant than the policies seeking higher densities for major extensions. This would in our view be a proper basis on which the Court could consider lower density because of the requirements to take into account the impact on the airport.** In the circumstances of this case we need not explore this possibility further because of our general conclusion.

Independent Fisheries v Canterbury Regional Council [2012] NZHC 1810	Independent Fisheries alleged that the Minister for Canterbury Earthquake Recovery made decisions (concerning the Canterbury Regional Policy Statement) that were unlawful as they were not earthquake recovery measures. The Minister's decisions related to amendments to the CRPS, including provisions relating to the Air Noise Contours and development at Kaiapoi.	[37] The changes to the city plan created residential zones at Prestons Road and Halswell West. The change to the Waimakariri plan zoned specified land within the 50 dBA Ldn contour at Kaiapoi for residential purposes pursuant to an exemption contained in chapter 22 of the RPS. **It was stated that this exemption was specifically provided to reflect the displacement of existing dwellings at Kaiapoi within the 50 dBA Ldn noise contour.** [38] Early in November 2011 lawyers for the first applicant wrote to the Minister seeking reconsideration of his decisions adding the two new chapters to the RPS. The letter **sought redress in the form of revocation of the 50 dBA Ldn noise corridor and the substitution of a 55 dBA Ldn contour.** It also sought reinstatement of a greenfield area that had been included in PCl before it was deleted by variation 4. **After receiving a briefing paper the Minister declined the request.** … [43] With reference to his decision to add chapter 22 to the RPS and exempt part of Kaiapoi from the effect of the 50 dBA Ldn air noise contour, the Minister deposes: 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.**

		32. I was aware that the Waimakariri District Council was stretched with the demands following the earthquakes and that my decision would assist to provide certainty and free staff resources to assist with earthquake recovery work instead of arguing over residential development boundaries. 33. I was advised that if the whole of Kaiapoi was exempted from the effect of the contour line further subdivision in the south-west could be developed, adding more residential sections and, while I understood Christchurch City Council and Christchurch International Airport Ltd would not necessarily be supportive of that decision, although Christchurch International Airport Limited said they would not object if the decision was made, I considered exempting the whole of Kaiapoi was the right decision. **The Minister goes on to say that in his view the situation in Kaiapoi was different from that in Christchurch where there were significant areas of land available for development outside the noise contour.** … [101] Similar considerations apply to chapter 22. Again the RPS is used as the vehicle to resolve an issue that existed long before the earthquakes. The noise contour had been considered by the Environment Court in *Robinsons Bay Trust v Christchurch City Counct* and again in *National Investment Trust v Christchurch City Council.* Moreover, the long term solution implemented by the chapter is obviously intended to outlive the CER Act. The evidence does not suggest that the actual operation of the airport has significantly altered, or will significantly alter, as a result of the earthquakes, at least in a way that directly impacts upon the 50 dBA Ldn contour. The inescapable conclusion is that chapter 22 was not driven in any significant sense by earthquake recovery objectives. [102] I do not accept that chapter 22 can be justified on the basis that the rezoning of land at Kaiapoi within the 50 dBA Ldn corridor will open the floodgates to further incursions into the corridor. As I will explain in

		more detail later, **the amendment to the Waimakariri District plan reflected a situation peculiar to Kaiapoi and rezoning through the district plan was effective as a discrete standalone measure without the backing of chapter 22.** … [142] **One of the explanations for inserting chapter 22 into the RPS is that unless the location and effect of the 50 dB A Ldn contour was made clear, developers would attempt to pursue developments at other locations within the contour on the coat tails of the Kaiapoi incursion.** In other words, the territorial authorities would be flooded with requests for private plan changes. **However, any possibility of that happening needs to be weighed against the detailed provisions in the Waimakariri district plan which make it clear that the circumstances giving rise to the incursion in Kaiapoi were unique.**
Canterbury Regional Council v Independent Fisheries Limited COA CA438/2012	Appeal of the High Court decision above. The Court of Appeal judgement cites CERA's advice to the Minister and clarifies the reasons for the exception at Kaiapoi.	[94] CERA's advice to the Minister that led to this decision is summarised in part in the High Court decision: [29] On 30 September 2011 CERA officials provided the Minister with briefing papers in relation to the possibility of residential development at Kaiapoi within the 50 dBA Ldn noise contour. These papers noted that **negotiations between the airport company and the greater Christchurch local authorities had resulted in a compromise whereby the airport company had agreed to an exception for residential development in north-eastern Kaiapoi provided the importance of the 50 dBA Ldn contour was recognised in planning documents.** [30] Having discussed the possibility of adding a special chapter to the RPS dealing with the issue of the noise contour, the briefing papers stated: It would also be possible to just change the Waimakariri District Plan and enable the subdivisions but this would not achieve the strengthening of the 50 dBA Ldn air noise corridor in the rest of greater

		Christchurch, and so would be opposed by CIAL [the airport company]. It was recommended to the Minister that a change be made to the RPS by adding a short chapter specifically dealing with the noise contour and supporting this with an amendment to the Waimakariri District plan. 19 It would also be possible to just change the Waimakariri District Plan and enable the subdivisions but this would not achieve the strengthening of the 50 dBA Ldn air noise corridor in the rest of greater Christchurch, and so would be opposed by CIAL [the airport company]. It was recommended to the Minister that a change be made to the RPS by adding a short chapter specifically dealing with the noise contour and supporting this with an amendment to the Waimakariri District plan. … [96] CERA's briefing paper then referred to the Minister's question whether the exemption from the noise contour should apply only to north-eastern Kaiapoi or be extended to cover all of the township. CERA's advice was: 25 We think that CIAL will object to allowing the exemption to cover all of the Kaiapoi township. Christchurch City Council does not support this proposal as staff consider it undermines the concept of an exemption. ECan has given qualified support. At this stage no comment has been received from Waimakariri or Selwyn District Councils but earlier conversations would suggest that they would not oppose the extended exemption area. 26 **Our assessment is that exempting either the north-eastern Kaiapoi or all of the Kaiapoi township can be justified on the basis of displacement of residential properties from the Red Zone. However, the larger the area exempted the greater the risk that the air noise contour will be undermined and others will also seek**

		to be exempted from the restriction of noise sensitive activities under the contour. … [99] **First, the exception to the restrictions imposed by the noise level contour for residential development in Kaiapoi was clearly designed to assist the recovery of Kaiapoi and was therefore in accordance with the purposes of the Act**. Indeed there is no challenge to the validity of the District Plan change implementing this aspect of the Minister's decision. [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**. If the Minister was to permit extra residential development in an area that might be affected by airport operations, it was proper, and arguably important, to consider the airport noise contour. The insertion of chapter 22 in the RPS, which was designed to strengthen the protection for Christchurch International Airport and provide certainty for Christchurch residents by settling the location of the 50 dBA Ldn air noise contour, was therefore in accordance with the overarching purpose of the Act.
Independent News Auckland Ltd & Anor v Manukau City Council, (2003) 10 ELRNZ 16	Proposal for 349 household units on a Business 5 zoned site, identified in the District Plan as being subject to aircraft noise from operations Auckland Airport. The Environment Court declined to grant consent. It held that positive effects were outweighed by the likely reverse sensitivity effects which could affect an	"[52] **On analysis, we are satisfied that the issues, objectives, polices and rules of the district plan demonstrate that generally, high density residential accommodation within the high noise areas should be avoided.** The reason for such an approach is to avoid actual and potential effects on the airport, including the adverse effect of reverse sensitivity." "[122] Of particular significance is the emphasis in issue 17.6.2.7, which explicitly recognises the importance of limiting the amount of residential development in areas affected or potentially affected by high aircraft noise

	airport, which is the most important international gateway for New Zealand.	(aircraft noise levels greater than Ldn 65) because it is not possible to mitigate the effects of aircraft noise on the external environment. **As Mr G J Osborne stated, this issue applies directly to the circumstances of the current case, where an acoustically insulated internal environment is proposed to be created, but nothing can be done to protect the residents from the effects of high aircraft noise when enjoying the outdoor recreational areas provided for in the development**. This proposal can be contrasted with other examples of sensitive activities such as hospitals and, perhaps, aged care facilities where patients and inhabitants are bed-ridden and immobile and have no expectation of enjoying the external environment." "[124] … We found that aircraft noise will have an adverse effect on the residents. We also found that when the effect of allowing this proposal are compared with the baseline, the adverse effects remain significant. Further, we found there to be a clear relationship to the number of people exposed to high aircraft noise and the introduction of, or increase in, the strength of opposition to airport operations."
Ardmore Airfield Tenants and Users Committee & Ors v Ardmore Airport Ltd & Ors, A 23/2005, 23 February 2005, Whiting J (EC) – Interim decision	Proposed plan change to introduce a planning framework for the airfield. One of the grounds of appeal was the absence of land use controls within identified noise boundaries. The Environment Court found, and the Council accepted, that it was a serious omission to not make provision for land use controls. The Court awaited these controls to be introduced via a plan change within 9 months.	"[111] Importantly, as we have said, NZS 6805:1992 provides for a two-pronged approach — noise management controls on the one hand and land use planning controls on the other. **The two need to be considered as a composite package** for reasons we will elaborate on in discussing Issue 3." "[136] **We are satisfied that the Papakura District Council has been remiss and guilty of a serious omission is not making provision for land use controls as part of the package**. The Council now accepts its responsibility and proposes to initiate a further plan change to introduce land use controls within a period of nine months…."

ORIGINAL

Decision No. C 41 /2005

IN THE MATTER	of the Resource Management Act 1991 (**the Act**)
AND	
IN THE MATTER	of a reference pursuant to Clause 14 of the First Schedule of the Act
BETWEEN	NATIONAL INVESTMENT TRUST
	(RMA 590A(ii)/99)
	Referrer
AND	CHRISTCHURCH CITY COUNCIL
	Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge J A Smith (presiding)
Environment Commissioner D H Menzies

Hearing at Christchurch on 26-28 and 31 January 2005

Appearances
Mr M R G Christensen and Mr J M Pow for National Investment Trust (**NIT**)
Mr J G Hardie for Christchurch City Council (**CCC**)
Ms J M Appleyard and Ms L L Sewell for Christchurch International Airport Limited (**CIAL**) and Canterbury Regional Council (**CRC**)
Mr P M James for Transit (**Transit**)
Mr G G Cleland for Hawthornden Road Residents' Association Incorporated (**the Residents' Association**)

DECISION

Introduction

[1] This is a case relating to the urban growth and zoning provisions of the Proposed Christchurch City Plan (**the City Plan**). It has been dealt with separately from the

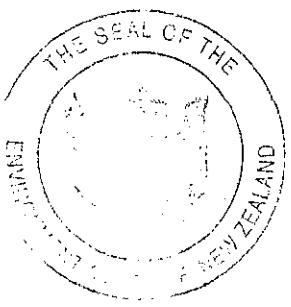
majority of Urban Growth references as some 40% of the land involved is inside the 50 dBA Ldn noise contour (**the 50 dBA contour**) for Christchurch Airport. It thus has features relating to the airport noise contour cases (particularly the decision in ***Robinsons Bay Trust***[1]), while involving the application of decisions from ***Suburban Estates***[2] and the subsequent Urban Growth cases, particularly the fifth case (***Yaldhurst/Masham***[3]) and the sixth (***Highsted***[4]).

[2] In respect of land outside the 50 dBA contour, there are a number of similarities with the area discussed in the ***Yaldhurst/Masham*** case. The land in this case, however, is on the city side rather than the rural side of State Highway 1.

[3] The land subject to this reference is between Hawthornden Road and Russley Road and is bounded to the north by the 55 dBA contour for the airport, and on the southern side by the boundary of Avonhead Park and Avonhead Cemetery, with a small block of Residential land constituting the balance of the southern boundary.

[4] It has been referred to throughout the investigation process as ***Block B*** and we annex hereto and mark as **A** a plan showing the general area the subject of this reference marked as Block B. For the purpose of this hearing however we shall refer to it as the ***Hawthornden/Russley block***. We note that subsequent to hearing this case, the Court has issued decisions in respect of the block marked on the plan as Block C. The zoning of that block has now been changed to Rural 5. The zoning of Block A and any standards relating to it have yet to be settled by a further hearing.

[5] In brief, the referrer seeks a special Living 1A (**L1A**) zone for the land between the 50 and 55 dBA contour on the Hawthornden/Russley block and a Living 1 (**L1**) zone for the balance beyond the 50 dBA contour. The proposed L1A zone is some 22 hectares and the proposed L1 zone some 30 hectares. The land is currently zoned on the City Plan as Rural 5.



1 C60/2004.
2 C217/2001.
3 C169/2002.
4 C139/2002.

The issues

[6] The key issue in this case is whether the airport policy provisions of the City Plan apply beyond the 50 dBA contour and also what effect those provisions have within the 50 dBA contour.

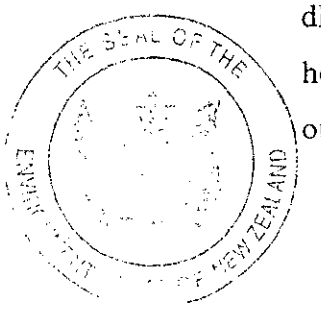
[7] In addition to these airport issues, the general urban growth issues need to be considered and applied. Most of the policies and objectives of the City Plan have already been considered in the relevant cases cited above, but the Court will need to have particular regard to the City Plan overlay relating to the airport and the provisions of policy 6.3.7, Volume 2 of the City Plan. The determinations on issues of law in the ***Suburban Estates*** decision and findings on matters of fact and judgment are also determinations and findings for the purpose of this decision. This is subject to two qualifications:

(1) The impact of the airport policy provisions is subject to the ***Robinsons Bay Trust*** decision and our determinations of law and findings of fact and judgment are relevant determinations and findings for the purpose of this decision. Thus the Court will need to integrate the two decisions (that is, ***Suburban Estates*** and ***Robinsons Bay***) in this decision.

(2) The Court's subsequent urban growth decisions have also amplified and/or clarified some aspects of the ***Suburban Estates*** decision. This Court will refer to aspects of these decisions as relevant and rely on some of those determinations and findings for this decision.

The proposal

[8] NIT seeks a zoning for land in the City Plan which is a combination of Living 1A (outer suburban boundary) with a minimum allotment size of 2,000 m^2 for land within the 50 dBA contour on the City Plan and Living 1 for the area outside the 50 dBA contour. The total area proposed to be zoned in this way is approximately 52 hectares, of which some 22 hectares is within the 50 dBA contour and 30 hectares outside.



[9] Both the Living 1 and Living 1A zoning would involve the connection to water, stormwater and sewer. Connection to stormwater involves the probability of the formation of detention ponds or some form of water storage and fixed rate discharge to the stormwater system.

[10] Issues of internal service roads and configuration of any area identified for Living zoning are problematic. No outline development plan has been provided by the referrer and it transpires that only a small proportion of land is held by entities associated with the referrer. The block of land held is relatively small (less than ten hectares) and straddles the 50 dBA contour, with the majority of that site being within the 50 dBA contour.

[11] It is not proposed that there be direct access from Russley Road for the subdivision and it is assumed that the access road or roads would connect with Hawthornden Road. Layout concerns and infrastructure servicing were key issues for Transit and the CCC.

The Court's role

[12] By virtue of the previous decisions cited, it can be seen that most relevant objectives and policies of the City Plan have been settled. We understand the remaining areas to be:

(a) the Urban Growth decisions (C217/2000 and following) have not explicitly discussed the overlays within the policies and objectives relating to the airport (this said, we note the decisions of the Environment Court and High Court[5] in ***Gargiulo*** on a non-complying application did discuss such policies);

(b) the application of and potential wording of policy 6.3.7 of the City Plan was discussed in ***Robinsons Bay*** but has not been fully settled;

[5] Environment Court C137/2000; High Court AP 32/2000 6 March 2001.

(c) the inter-relationship of the Rural-Residential policies in Chapter 6, particularly 6.3.11, 6.3.12, in relationship to Living zones may not have been fully settled.

[13] As the reference predates the 2003 Amendment Act, the Court needs to be satisfied as to whether Living zoning or Rural 5 zoning or something between:

(a) is necessary in the sense of being desirable or expedient[6] or better[7] in achieving the objectives and policies of the City Plan and the purpose of the Act;

(b) meets the statutory tests of the Act, in particular:

(1) it is consistent with superior documents, including the Regional Policy Statement (**RPS**) and

(2) meets the tests in section 32 of the Act;

(c) assists the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act's purposes;

(d) meets the overall purpose of the Act under Part II.

[14] Two guiding propositions can be initially stated:

(1) The issue is which of the zones (or something between) is better. There is no presumption that the Council's zoning is correct. In ***Guthrie v Dunedin City Council***[8] the Court noted:

> *It was accepted by both parties that the Court in considering such a reference commences with a "clean sheet of paper". There is no presumption in favour of any one zoning. In particular its inclusion in the rural zone at this stage does not amount to a presumption that rural zoning should continue.*

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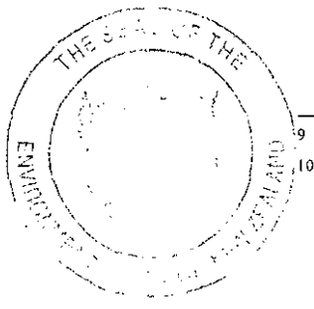
6 ***Countdown Properties (Northland) Limited v Dunedin City Council*** 1994 [NZRMA] 145 at 178.
7 ***Suburban Estates v Christchurch City Council*** C217/2001.
8 C174/2001 at page 10.

(2) This decision cannot affect the general zoning provisions of the City Plan. These are settled as are the policies and objectives of the City Plan. In ***Sangam Investments Limited v Frankton District Council***[9] the Court said:

> *Nothing in this decision should be taken to question the provisions of the proposed regional policy or the urban growth strategy of the proposed district plan – they are not challenged by this appeal. Nor should this decision be taken as an indication that the boundary between residential zoning ... and the Rural zoning surrounding it is generally vulnerable. The only issue which we have considered is whether the subject block should be rezoned Residential instead of Rural. This does not raise questions of high principle but a practical approach to the detail of the Residential-Rural interface.*

[15] In this case there is a zoning range between Rural 5, (which is the most restrictive) with a minimum lot size of four hectares for any new lots, and Living 1A inside the 50 dBA contour (2,000 m^2 per lot) and Living 1 outside it (650 m^2 per site). The imposition of a more restrictive regime (larger lot sizes) should be justifiable in RMA terms. As the Environment Court noted in ***Gargiulo v Christchurch City Council***[10]***:***

> *So there is no inherent conflict between private property rights and the public benefit. Indeed section 9 of the RMA appears to work on the hypothesis, perhaps even the presumption, that existing property rights should apply to land uses unless they are shown to be less efficient and effective and are controlled in district (or regional) plans. Only if those property rights are clearly shown to be inefficient and ineffective does the public benefit justify imposing limits on the exercise of private property rights relating to land use. In this case of course we do not have to examine that issue, because the city plans have already resolved the issue.*



[9] [1997] 3 ELRNZ 406 at 415.
[10] C137/2000 at para 72.

In this case however we must determine the issue as to whether the lot size restriction consequent on a Rural zoning better meets the RMA.

The particular rules proposed

[16] Outside the 50 dBA contour the decision of ***Suburban Estates*** is clearly of relevance, as are the decisions of the Environment Court on urban growth generally and particularly the ***Yaldhurst/Masham*** decision[11]. However there is no direct decision as to whether policies and objectives, which discuss the airport and its influence, are relevant outside the 50 dBA contour and if so to what extent.

[17] In respect of both the areas inside and outside the 50 dBA contour therefore, the interpretation of policy 6.3.7 becomes central to an understanding of the influence of these provisions. The issue has been discussed in general terms in the Court's decision ***Robinsons Bay Trust***[12] where the Court noted:

> *The application of policy 6.3.7 would be particularly limited in its scope. From the explanations given by Council, it appeared to be intended that policy 6.3.7 apply to proposed development at a density similar to existing living zones. Its application to development at Rural Residential densities of, say, 2000 m^2 or greater appears problematic. We had no clear responses as to whether this level of development was intended to be covered by this particular policy.*

The Court's approach

[18] We have concluded that an important issue for resolution before this Court is the impact of the City Plan provisions relating to the airport in the context of Chapter 6 particularly. We will examine the airport issues with respect to whether Living 1A zone or Rural 5 zone would be better within the 50 dBA contour, and/or outside the 50 dBA contour. In that discussion a critical element is to identify the application of policy 6.3.7. We therefore intend to discuss this policy first and then the other relevant provisions within Chapter 6 and elsewhere in order to ascertain the impact of the airport

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[11] C169/2002.
[12] C60/2004 at para [47].

provisions on greater density living within the 50 dBA contour and immediately outside it.

[19] We then intend to proceed to discuss the proposal in relation to the general consideration of matters relating to urban growth discussed in ***Suburban Estates*** and more particularly in the ***Yaldhurst/Masham*** case.

Policy 6.3.7

[20] It is clear that policy 6.3.7 is intended to only apply to land within the 50 dBA contour. This was the prime purpose of the Court's decision in ***Robinsons Bay Trust*** and we did not understand any party to be derogating from that position at this hearing. The zoning as Rural 5 of the Hawthornden/Russley block is justified in part by policy 6.3.7. A further question is whether policy 6.3.7 is intended to apply to housing densities of some 2,000 m^2 per lot within the 50 dBA contour.

[21] Curiously the Rural 5 zone description (Volume 3 4.1.6 page 4/5) states in part:

> ***Zone description and purpose***
> *The Rural 5 (Airport Influences) Zone surrounds most of Christchurch International Airport and extends to include the majority of that area within an "outer control" boundary line representing the ~~50~~ 55 dBA Ldn noise contour projected in accordance with NZS 6805 of 1992. This contour denotes the area within which noise levels are likely to normally exceed the ~~50~~ 55 dBA Ldn sound level measurement resulting from the operation of aircraft in and around the airport.*

Thus the question arises as to whether the Rural density is intended to address the area between 50 and 55 dBA contours.

[22] The issue has its genesis in the policy wording of 6.3.7 which now reads:

> *To discourage urban residential development and other noise-sensitive activities within the 50 dBA L_{dn} noise contour around Christchurch International Airport.*

[23] The explanation and reasons discusses amenity values in relation to residential properties. It states that:

> *Between the 50 dBA L_{dn} and the Air Noise Boundary (...) the establishment of aggregations of residential development to densities approximately that of Living zones and the establishment and/or extension of other noise sensitive activities will be discouraged. Residential development and other noise sensitive activities will not be allowed to occur within the Air Noise Boundary.*

Other policies and provisions of the City Plan put a considerable gloss on (or add confusion to) this statement. In our decision ***Robinsons Bay*** at paragraphs [46]-[49] and also at paragraphs [51]-[54] we discussed generally policy 6.3.7. Although that discussion is in the context of whether a 50 or 55 dBA contour should be adopted, there is general discussion of the policy itself. It was common ground that the final wording of these provisions had not been settled but it was not clear to the Court, nor accepted by the parties, that the Court necessarily had the power to entirely rewrite 6.3.7.

[24] The critical wording that the Court discussed in paragraph [47] of ***Robinsons Bay*** related to the wording *urban residential development and other noise-sensitive activities*. Since the time of that decision a reference relating to noise sensitive activities has been resolved and that wording is now agreed as follows:

> ***Noise sensitive activities means:***
>
> - ***Residential activities other than those in conjunction with rural activities and which comply with the rules in the Plan;***
> - ***Education activities including pre-school places or premises, but not including flight training, trade training or other industry related training facilities within the special purpose (airport) zone;***
> - ***Travellers' accommodation except that which is designed, constructed and operated to a standard to mitigate the effects of aircraft noise on occupants;***

- *Hospitals, health care facilities and any elderly persons' housing or complex.*

[25] Consequent on settlement of that wording, we ask ourselves whether there is any real distinction between ***urban residential activities*** and the first bullet point of the definition of noise-sensitive activities. This in turn brings into play policy 6.3.11 and 6.3.12 as they discuss the Rural-Residential living area (6.3.11) and the ***transition of low density housing ... adjacent to the urban boundary*** (6.3.12(b)).

[26] Policy 6.3.7 must be seen in context. Rural 5 zoning does not prevent all residential use of land. The City Plan provides for any lots created under four hectares existing as at 1995 to be utilised for one residence. It also permits subdivision to one lot per four hectares with a residence constructed on it. Outside the 55 dBA contour no special mitigation measures need to be taken. Between the 55 and 65 dBA contours acoustic insulation needs to be provided. In the Rural area construction within the 65 dBA contour is prohibited. In the Living area there are no additional controls within the 55 dBA contour beyond the mitigation measures already discussed.

[27] In the Rural area the same lot size rule applies between the 50 and 55 dBA contours as within the 55 dBA contour, namely one lot per four hectares. This may be a consequence of the change to the City Plan in which the 6.3.7 reference to the 50 dBA contour was superimposed over the existing one lot per four hectare rule provisions.

[28] However, on closer examination of the Planning Maps we conclude that the boundaries of the Rural 5 zone have consistently followed the 50 dBA contour fairly closely. We note the change to Volume 3 4/5 from 50 to 55 dBA occurred in 1999. We have no hesitation in concluding that the four hectare lot size provisions are seen by the City Plan as an appropriate method within both the 50 and 55 dBA contours.

[29] In looking at the Living zones, the effect of the contour lines is even less clear. There appears to be no special rules at all between the 50 and 55 dBA contours and there appear to be several thousand homes affected by this. We identified an amenity effect in ***Robinsons Bay*** as the main effect on persons living in the 50 to 55 dBA contours. Thus

in the Living zone there are several thousand houses between these contours subject to these potential effects.

[30] The City Plan has policies in the Living zone focussing on infill and consolidation of the built environment. There is no identification of provisions relating to the potential amenity effect of construction in Living zones between the 50 and 55 dBA contours.

[31] Notwithstanding enquiries by this Court both at this hearing and at previous hearings, including C60/2004, no attempt has been made to quantify the number of potential infill dwellings that could occur in Living zones within the 50 dBA contour. We were told that within the Hawthornden/Russley block, inside the 50 dBA contour, some 80 additional houses might be constructed. We are unable to compare this with the numbers generally provided for in either the Rural 5 or Living zones of the City Plan because of the lack of information.

[32] We are left to assess this impact as best we can. From our site visit to the area there appears to be a significant potential for further infill dwellings between the 50-55 dBA contours in the existing Living zones. As we understand it, such intensification can occur as of right, with no controls beyond general building controls in the Living 1 zone. We think we can confidently assume that some hundreds of further homes could be placed within the 50 to 55 dBA contour in the Living zones on this basis, a greater number than proposed by this reference.

[33] Even for houses within the 55 dBA contour in the Living 1 zone, the City Plan provides only for additional noise reduction inside the home. As we identified in ***Robinsons Bay Trust***, the amenity effect will largely occur outside the home and this would be greater within the 55 dBA contour than between the 50 and 55 dBA contours. The City Plan also only requires noise mitigation on buildings within the 65 dBA contour in the Living zones. There are a very limited number of homes which are within the Living zones and within the 65 dBA contour. These are largely between Withells and Avonhead Roads (close to the Hawthornden/Russley block), and we conclude that the number of dwellings which could be infilled in this area is relatively small in number. Nevertheless, having regard to the potential health effect within 65

dBA contour, it is perhaps surprising that no City Plan provisions relate to this potential effect in the Living zones.

[34] In short, the City Plan provisions allow for a significant increase in effect on amenity, particularly within the Living area but to a lesser degree within the Rural 5 zone by the ability for further lots to be created and new homes to be inserted into the environment.

[35] In respect of the 22 hectares within the 50 dBA contour on the Hawthornden/Russley block, we are talking of an increase from some five homes (at one per four hectares) to around 80 homes.

[36] When we examine policy 6.3.7 as it uses the words ***urban residential density*** it appears that these words could mean:

(a) urban growth;
(b) all noise-sensitive activities;
(c) all housing;
(d) only urban housing (i.e. no controls in rural areas).

[37] As we have already mentioned, the definition of noise-sensitive activities is somewhat curious in that it assumes that residential activities in rural areas are not noise-sensitive. We think rather that the drafting is intended to indicate that residential dwellings at appropriate densities can be inserted into the rural environment rather than there are no amenity effects as a result of their insertion.

Alteration of Policy 6.3.7

[38] We must now ask ourselves whether the Court has any power to correct the wording of policy 6.3.7 or whether it is bound only to interpret the current wording and seek provisions which achieve and implement that interpretation.

[39] We have concluded that the Court does have a power in terms of this reference to consider the appropriate wording of policy 6.3.7. There are four bases for this conclusion:

(1) It is a necessary corollary to previous decisions of the Court and the references now before it as to the application of policy 6.3.7 in the City Plan. Without a clear meaning to policy 6.3.7, the Court is unable to assess what objectives and policies are to be achieved by the relevant zoning. In the sense that this issue was discussed in ***J G and H Shaw and Halswater and Ors v Selwyn District Council***[13] we consider that it is implied in the reference that policy 6.3.7 must be clear so as to be effectively applied.

(2) We consider that explicit power exists under section 292(1)(b) to correct or give full effect to the City Plan. In ***Southern Public Health Services v Southland Regional Council***[14], the Court concluded that it did have the power for the purpose of clarifying an application to correct a plan provision even though it was not before it on a reference. In this case we are strengthened in that view as policy 6.3.7 has already been the subject of discussion before the Court in other reference cases. It was acknowledged by counsel that the wording of 6.3.7 may in any event be either explicitly or impliedly before the Court on these other references. Certainly we have no doubt that policy 6.3.7 generally has been before the Court and thus we conclude that under section 292(1)(b) we have the power to clarify the provision to give full effect to the City Plan.

(3) Section 293(1) provides a general power to direct changes to the City Plan. If this provision has not been specifically identified, which we consider it has been, then it must be a corollary to the references already before the Court.

(4) The changes made in this case would clarify the meaning and apply the policy for the purposes of settling on an appropriate zoning. Accordingly under section 293(2) we are able to conclude that any such change is minor and is given for the purpose only of clarifying the City Plan itself. On that

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13 H.C. [2001] NZRMA 399 at para [31].
14 C111/1998.

basis the Court has a discretion as to whether it is necessary to renotify. In a case such as this we consider the extent of change contemplated is so minor that no further opportunity needs to be given.

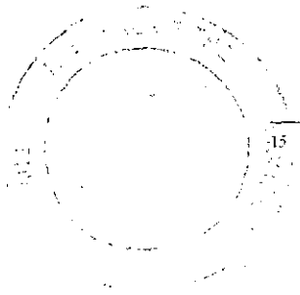
The wording of policy 6.3.7

[40] Although we accept that the wording of policy 6.3.7 is capable of several meanings, we have no doubt that its meaning on a holistic basis is clear. As we pointed out in ***Robinsons Bay Trust***, and has been similarly pointed out by the High Court in ***Gargiulo v Christchurch City Council***[15], policy 6.3.7 does not stand alone. It is surrounded by a formidable matrix of policies and objectives, all of which clarify the meaning of the core provision.

[41] In this case we conclude that the policy is aimed at urban and/or peripheral growth (if there is any distinction) by the provision's placement within the urban growth section. In that sense the word ***urban*** is really related to the issue of growth around the periphery of the city rather than about the outcome in terms of whether the zoning is urban or rural. The new definition of noise sensitive activities is clearer in this regard and changes the meaning of and necessity for the wording in 6.3.7. Prior to that change the scope of noise sensitive activities required clarification.

[42] We conclude that policy 6.3.7 is addressed at urban or peripheral growth involving noise sensitive activities as that term is now defined. We are reinforced in that view by reference to the Special Purpose Airport zone which provides for intensive use of that rural area but not for noise sensitive activities.

[43] The Living 1 zone has no rules to implement policy 6.3.7. If 6.3.7 was intended to apply to all residential activities, then clearly there has been a failure to incorporate rules within the City Plan to achieve this policy in the Living 1 zone generally, the development in that context being infill development.



[15] AP 32/2000.

[44] There are some problems generally with Chapter 6 which the Court has previously identified relating to loose use of words such as ***urban growth***, ***peripheral***, ***residential, urban*** and the like. It has been identified that there is a need to standardise the wording in Chapter 6 to avoid confusion. However there is no doubt in our minds that the overall purpose of the Chapter and policy 6.3.7 is clear. Once it is viewed in the way we have discussed, aimed at peripheral growth, then the outcome in respect of the density issue is clear.

[45] We have concluded that any urban growth increasing residential densities between the 50 dBA and the 65 dBA contours is discouraged by virtue of policy 6.3.7. Overall, policy 6.3.7 has been implemented by rules which are relatively liberal:

(a) there is no control to the 55 dBA contour in the Living zones and then only as to acoustic insulation within the 55 dBA contour;

(b) in Rural zones residential development up to the 65 dBA contour is permitted at one lot and one residence per four hectares (in this area at least).

The City Plan provisions could have made more restrictive provision for subdivision or further residences within the 50 dBA contour. In saying this we do not have a view as to whether such controls would have withstood the section 32 assessment process.

[46] Our view in this respect is reinforced by reference to the rural residential policies (6.3.11 and 6.3.12) and by general reference to the other provisions within Chapter 6 as they relate to the airport. We do not consider it is necessary for us to discuss these again in detail as their import is clear from a cursory reading. For example, 6.3.11 states:

> *Provision within the city for rural lifestyle development will continue to be limited in extent because of constraints on servicing, the presence of Christchurch International Airport, and the need to prevent low density sprawl of rural lifestyle development.*

[47] As noted in our ***Robinsons Bay Trust*** decision, the environmental result anticipated (Chapter 6/16) of

Continued unrestricted operation and growth of operations at Christchurch International Airport and protection of future residents from noise impacts

is sufficient to convince us that additional Living zones within the 50 dBA contour is not generally appropriate in terms of policy 6 as it relates to the airport matters.

[48] We agree with the Court's summary in ***Gargiulo v Christchurch City Council***[16] which summarises the objectives and policies of the City Plan as *inter alia*:

> ...
>
> *(c) keeping the density of dwellings within the 50 dBA Ldn contour to a level so that the number of people living within the noise affected area is kept to reasonable minimum.*

We conclude a Living 1 zone within the 50 dBA contour would increase the number of people living within the contour without any necessity for such zoning being demonstrated.

The area outside the 50 dBA contour

[49] In ***Robinsons Bay Trust*** this Court said in relation to areas outside the 50 dBA contour:

> *However there are a significant number of other policies which would stand in their way [between the 50 and 55 dBA L_{dn} contour], including most particularly 6.3.4, 6.3.6, 6.3.8 and 7.8.2. Nor do we think that many of these other policies are necessarily limited only to land within the 50 or 55 dBA Ldn contour. Many of these policies, particularly 7.8.1 and 7.8.2, as well as those under Chapter 13, could have application below the 50 dBA Ldn contour, depending on the evidence of effects.*

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16 C137/2000 at para [48].

[50] In this case no issues were raised in respect of hazardous activities (6.3.6) or incompatible rural activities (6.3.8). The particular effects submitted as being relevant to the airport operation beyond the 50 dBA contour were:

(a) amenity effect;
(b) bird strike;
(c) buffer zone;
(d) potential for precedent.

[51] There was an argument for reverse sensitivity from airport noise beyond the 50 dBA contour. The argument was relatively faintly made. We conclude there was no evidence which convinced us that there was any significant amenity effect from noise beyond the 50 dBA contour on these sites as a result of the airport operation. This is at the core of our decision in ***Robinsons Bay Trust***.

[52] Curiously enough, in the course of this hearing it came to our notice that State Highway 1 (Russley Road) was generating noise levels over the majority of this site, on an L_{dn} basis, well in excess of the levels received from the airport. Evidence was also given that on other sites with similar road noise levels, the Council had permitted development provided there was some form of setback and/or some form of noise screening from the State Highway. Certainly, during our site visit, the noise from the State Highway was constant and impressive within 100 metres of the road. The evidence was that there would need to be some 600 metres setback from the road, without a physical barrier, to achieve a similar noise contour to the 50 dBA contour.

Bird strike

[53] CIAL put a considerable amount of effort into establishing that bird strike is a reverse sensitivity effect of allowing any development on this site. The Court would have expected to see evidence from recent developments elsewhere to demonstrate there had been an increase in the risk of bird strike and some form of demonstrable evidence that residential development created increased levels of bird life within the areas. As it transpired, the evidence did not establish this at all.

[54] This position by CIAL was predicated on an argument that because there would be inadequate stormwater drainage, this would require detention ponds which would remain full of water, which would then attract birds. Each assumption on which the argument was predicated was undermined, not only with the evidence of other parties, but by the witnesses called for the CIAL, CCC and the Regional Council. We deal with them in turn:

(a) The drainage problem on the land

[55] Mr Trevor Webb gave evidence for the Regional Council. We accepted that the majority of the site was versatile land Classes 1 or 2. As such it was axiomatic that it was free draining, at least at a surface level. Accordingly we were disinclined to accept the evidence of the Council from one bore hole, at the bottom of a traditional swale, that the land is poor draining. However, as we explain later in this decision under the heading *Versatile soils*, we found after the hearing that a proportion of the site, including where the bore hole was dug, is identified as Class 3 soils, which may have a drainage impediment. This may explain the dispute between experts. However, we cannot accept that there is any likelihood of long-term ponding of water on the site or that in fact detention ponds are necessarily even required on the site. If such detention ponds are required, we accept the evidence of Mr O Kralj that such ponding is likely to only take place for less than 24 hours. This would, of course, be in times of extreme rainfall events. It was accepted by Council witnesses, including Mr P P Shaw, called for CIAL, that there would be significant areas both around and on the airport itself which would also be ponding at the same time.

(b) Bird attraction

[56] On this basis we are unable to see any basis upon which there would be any special attraction to birds on this site during these times. In fact, it was accepted by Mr Shaw that the birds, which may create a hazard, generally prefer large, clear areas such as parks and short grassed areas. In this regard Avonhead Park, just adjacent to the site, and the nearby Russley Golf Course are significantly greater candidates for the attraction of black backed gulls and Canada geese.

[57] Furthermore, we have identified from the United States Federal Aviation Administration Wild Life Hazard Management at Airports (1/3/00) report that crop production and livestock production are major attractants to bird life. There is no indication that residential areas are significant attractors of bird life at all. Accordingly the removal of this land from potential use for crop and livestock production (permitted under Rural 5) is likely to be a benefit.

(c) Category 37 Water Detention or Retention Ponds

[58] The USFAA Wildlife Management at Airports document discusses at Category 37 water detention or retention ponds. This is a discussion in terms of water detention and retention within airports themselves and notes that detention ponds are less attractive than retention ponds. The report itself identifies methods by which any problems can be overcome, including steep-sided narrow linear shaped rip-rap lined water detention basins and underground stormwater infiltration systems. Thus even if there were a water retention problem on site there are simple design solutions available.

(d) Increase in bird strike risk

[59] We conclude there is no evidence to support the hypothesis of birds being attracted to this area when the sites are developed. In any event it is difficult to see how any such effect would be distinguishable to any degree whatsoever from the much larger areas of open space at Avonhead Park just adjacent or Russley Golf Course, and of course the other large open areas owned by the airport immediately to the west. The evidence of Mr D G Elms on risk simply did not address how the zoning of this site as Living 1 would increase the risk of bird strike or by what degree.

[60] In conclusion, there is no evidence to satisfy us that there is likely to be any measurable increase in risk of bird strike as a result of this site being developed for living activities. In the event that we are incorrect in that conclusion, we are still satisfied that there are technical solutions available to overcome issues relating to open water.

Buffer zone

[61] This issue relates to a proposition that the City Plan anticipates that there will be a buffer zone between the boundary of the City and the airport. It was agreed that the City Plan implicitly sets out to protect the airport and clearly indicates that there may be constraints on growth towards the airport. The airport already owns portions of the land between its runways and the City to provide some of this *buffer* zone. The airport now seems to be intent upon utilising that land by having commercial enterprises upon it. Notwithstanding that, it is clearly intended to be part of the buffer between the airport and the City.

[62] In ***Robinsons Bay*** we concluded that the 50 dBA contour conserved options for the future[17]. The 50 dBA contour in fact sets a conservative buffer between the airport and surrounding activities. As we noted in that decision there are other policies which may have application beyond the 50 dBA contour. In ***Robinsons Bay*** we reached a conclusion that:

> *... the clear thrust of the matrix of policies and objectives, apart from Policy 6.3.7, is to limit residential development in proximity to the airport.*

[63] Interestingly, in this particular area there has been recent development just to the south of the Hawthornden/Russley block and also just to the south of Avonhead Park. The issue is whether the zoning of the Hawthornden/Russley block as Living 1 (or any particular parts of it) would not achieve the matrix of policies that we have discussed.

[64] We have concluded that the position of the 50 dBA contour does in fact form an appropriate boundary line for proximity to the airport. On this basis a Living 1 zone beyond that line would in general terms not offend against these policies and objectives. The matter is one of degree and we accept requires further assessment as part of the overall consideration of which zoning is better for this site.

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[17] Paragraph 64.

A precedent

[65] CIAL raised the issue of precedent largely in relation to areas within the 50 dBA contour. To that extent we have already discussed that aspect of the matter. There remains the question as to whether or not there might be some precedent in zoning this land as Living beyond the noise contour. From our examination of the City Plan there are only small areas of land beyond the 50 dBA contour which are zoned Rural 5. Some of those have already been addressed in other decisions of the Court, notably in the ***Yaldhurst/Masham*** decision. We see no suggestion in the decision that precedent was raised in that case.

[66] There is a small area of land subject to reference on Memorial Avenue and several other small sites. Having regard to the fact that the Environment Court (differently constituted) has already heard the evidence in the ***Yaldhurst/Masham*** case, this Court must ask itself why precedent is of importance in this case but not in the ***Yaldhurst/Masham*** case. We have concluded that the issue of proximity to the airport and the matrix of rules are matters that need to be examined on a case-by-case basis. On this basis we are unable to conclude that there is any precedent issue arising.

[67] With the exception of the Memorial Avenue site, we are not aware of any other references. In the event that a change is required to alter the zoning of land, then of course the Court begins again with a clean sheet of paper and the matrix of policies and objectives must be examined again. Usually plan changes involve amendment to the policies and objectives of the City Plan. Because any change to zoning would require a change to the City Plan, it is not possible to argue that there would be any precedent arising as a result of this rezoning.

[68] Although in ***Suburban Estates*** at paragraph [351] the Court did identify planning precedent as opposed to legal precedent as a concept to be taken seriously, the cases quoted in support related to the grant of a resource consent for a non-complying activity, i.e. ***Dye v Auckland Regional Council***[18] and ***Pigeon Bay Aquaculture v***

[18] [2001] NZRMA 513.

Canterbury Regional Council[19]. In any event, the Court went on to note at paragraph 353:

> *It is difficult to state definitively that any rezonings would, on a City-wide basis, set a precedent. Since each area we are considering is in a different part of the City and subject to policies that may have different application in each area we do not think there is any planning precedent in a general way. Whether there is for any of the areas we are considering is a matter we will consider at the appropriate time.*

[69] If the concern is that the Court's interpretation of policies and objectives may demonstrate that other areas are incorrectly zoned then this means the zoning does not achieve and implement the policies and objectives of the City Plan. In such circumstances the issue is not one of precedent but one requiring correction or replacement of the zoning in the City Plan by Council.

[70] We have concluded that in respect of this site there is no particular precedent in deciding which zoning better meets the objectives and policies of the City Plan. We acknowledge that we need to take into account the proximity to the airport in this particular case. This issue of proximity will have differing application on different sites.

Other criteria

[71] The decision in ***Suburban Estates*** directs the Court to various requirements for a rezoning of land. It is not clear whether the Court at paragraph [134] of ***Suburban Estates*** is referring to a plan change or to the consideration of references where the zoning of a particular site is in dispute. Clearly in this case the Court is deciding the appropriate zone. To that extent the various criteria of paragraph [134] still appear to be relevant as follows:

(1) which zoning better meets the primary objective of consolidation set out in Chapter 6 of the City Plan (whether a simple Living 1 would achieve the

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[19] [1999] NZRMA 209 paragraphs [49]-[53].

desired gradual increase in density or whether the land should be zoned as Living 3 or Living 4);

(2) whether a more sophisticated approach than generally just a Living or Rural zone would satisfy the specific policies and the general objectives;

(3) whether there is a binding development plan showing:

(a) the staging of development;

(b) medium or even high density development areas;

(c) possibly, maximum lot sizes as well as the provisions for walkways, cycleways and reserves required by the City Plan.

These criteria are to enable the Court to properly consider the outcomes of a Living zoning.

An outline plan

[72] The respondent, supported by the CIAL and CRC, argued that where there is a dispute as to zoning (as was clearly in contemplation in ***Suburban Estates)***, a binding development plan is required. The Council, CIAL and CRC all argue that such a plan is essential and without it the referrer cannot succeed. In this case the objectives and policies of the City Plan are now settled (with the exception of policy 6.3.7, which we have discussed, and other minor wording relating to the airport). To that extent it might be possible for a referrer to argue that the zoning itself is self-explanatory and accordingly an outline development plan is not necessary to understand the implications in terms of the settled objectives and policies of the City Plan.

[73] This is not one of those cases. It transpires that the referrer in this case is not directly a landholder in this area but has common trustees as a minor landholder. The trustees' particular property, of some 10 hectares, straddles the 50 dBA contour, the majority being within that contour. Accordingly major issues arise as to how any Living zoning could be applied to the land. This comes up in the context not only of stormwater ponds and the like, but also in terms of roading. All of these matters require co-operation between all landowners before any assessment can be undertaken as to whether it achieves or implements the objectives and policies of the City Plan.

[74] Similarly, issues relating to the detention ponds and how these are to be treated and where they are to be placed become critical in understanding the implications in terms of stormwater infrastructure. The referrer in final submissions highlighted that an outline development plan could be filed as a requirement of any interim decision of the Court. The difficulty for this Court is that it is difficult to see how one referrer can bind all other landowners in the group.

Roading and effect on State Highway 1

[75] One clear area where this problem arises is in respect of roading for any subdivision on the site. Transit is particularly concerned as to the potential for any entry off the limited State Highway to Russley Road. We accept that it would not be appropriate for there to be a connection from the block to the State Highway. To do so would be directly contrary to objectives and policies of the City Plan seeking to protect the infrastructural network, and particularly the roading network. We recognise the national importance of State Highway 1 in particular and the need to avoid potential for accidents and *side friction* by preventing residential subdivisions from directly accessing the State Highway.

[76] On the other hand Transit and the Council are currently at a preliminary design stage to extend Merrin Street, to intersect with Russley Road, create a roundabout and thereby allow traffic to access the Avonhead area from this street. The intention is to make Avonhead Road east of Russley Road an entry and exit only, with no connection to the Russley Road western lane. It is the intention to close down Avonhead Road west and stop this road, for inclusion in the airport.

[77] The extension to Merrin Street would need to traverse the Russley/Hawthornden block. Any such extension of Merrin Street would fundamentally change the area around the block, giving ready access to not only the State Highway system but to Merrin Street itself. This would form a suitable road on which feeder roads for the residential subdivision of this block might be situated. Current designs for the road shows it situated over land in the Hawthornden/Russley block not currently owned or connected to the referrer. There would need to be common agreement as to how the land could be developed. Issues also arise as to whether the limited accessways to the

State Highway currently enjoyed from Russley Road could then be closed and serviced off Merrin Street.

[78] Further issues arise relating to whether major infrastructure could or should be placed on this road and if so whether side roads could be serviced off this in the same way. The design has not even reached the stage of any form of notification to either the owners or the public generally.

[79] The potential new roading highlights the objective of the City Plan to achieve integrated development of infrastructure. It also highlights the potential for this site to have other uses, i.e. commercial use or hotels if there was a connection to Russley Road. This may change its orientation more towards the airport than towards the residential areas to the east.

[80] We note also in respect of roading matters that State Highway 1 itself represents a considerable constraint on the site generally and that it is accepted by the referrers that there would need to be special noise mitigation provisions relating to residential building setback from the State Highway. The referrers suggested 80 metres or 40 metres with bunding. Again, without a development plan it is difficult to assess what design would achieve an appropriate living environment. We note that the Council appears to have permitted new development next to the State Highway further to the south without any substantive barriers between that and the State Highway. From our experience of the site visit, we suggest that this would be a noise environment well removed from that envisaged in terms of the policies and objectives of the City Plan.

[81] We would imagine that a setback in the order of 80 metres with bunding would be appropriate on this site. Issues then arise as to how the area between the bunding and the State Highway could be treated. Such a strip of land might be capable of improvement for use for parks, recreational areas, a cycle lane, pedestrian walking and the like. In the absence of an outline plan it is difficult for us to assess whether such a setback is intended and whether it would meet the objectives and policies of the City Plan.

[82] Similarly, in respect of cycling and walking policies, the Merrin Street extension may make provision for these by including footpaths, an underpass across Russley Road and the like[20]. We have reservations about the safety of introducing cyclists or pedestrians to the State Highway, having regard to its extreme busyness and constrained nature. Accordingly, any issues as to access along or across the road need to be addressed on a wider basis including integration with the nearby Avonhead Park, the developments anticipated on the airport land and the potential for the State Highway to be four-laned and possibly made into a motorway. Without an outline development plan and further evidence we are unable to judge whether a Living zone would achieve and implement these policies of the City Plan.

Versatile soils

[83] The argument for the CRC is that the development is intended to take place on versatile soils, being Land Use Capability Classes 1 and 2. This is the way in which the evidence was presented to the Court by Mr T H Webb. Mr Webb did not produce to the hearing a copy of a land use capability map of the area and this was requested of him. This was provided to the Court after the hearing and shows a somewhat different situation to that stated to the Court by Mr Webb and as was common ground between the parties at the hearing.

[84] There is a large area of Land Use Capability Class 2 soils on both sides of Russley Road, including Special Purpose Airport land and some of the area subject to the current reference. However between Russley Road and approximately halfway into the site and over the middle 50% of its road length on Russley Road, there is a band of Class 3 soils. We attach and mark **B** a copy of a map of the area showing these soils. There is clearly a majority of the land therefore that is versatile soils Class 1 and 2 but a significant portion which is Class 3 and therefore not versatile soils.

[85] The CRC policy on versatile soils has been variously criticised by the Courts: ***Canterbury Regional Council v Waimakariri District Council and Pegasus Bay Coastal Estates (Pegasus Bay)[21], Suburban Estates Limited and Muir Park Corporate***

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20 *Yaldhurst/Masham* at para 45.

21 [2002] NZRMA 208.

and 21 others v Christchurch City Council[22] and *J G and H Shaw, Halswater Holdings Limited and Apple Fields Limited v Selwyn District Council*[23]. In the more recent decision Judge Jackson has suggested that residential use may in fact be a productive use of land[24] with versatile soils.

[86] The CCC policy on versatile soils (policy 2.1.1) is worded identically to the relevant RPS policy. This Court is not determining the wording of policy 2.1.1. We are determining which of the possible zonings would better achieve the policies and objectives of the City Plan and the Act.

[87] The versatile soil provisions of the City Plan policy and Regional Policy Statement are broad, general and allow for exceptions. As it transpires some of the land would not be on versatile soils but some would. We are not able to conclude that the zoning of this land as Living would fail to achieve and implement policy 2.1.1 or the relevant RPS policy. It is clear that the Council in a number of other decisions has zoned land situated on versatile soils for Living and we cannot therefore see a Living 1 zoning as conflicting with that possibility.

Unconfined aquifer

[88] During the course of the hearing the parties were able to agree that the land in question is situated in Zone 2 – Recharge Zone on the Natural Resources Regional Plan (**NRRP**). This Plan is one on which submissions have closed and are now being collated. The plan is therefore at an early stage. This zone is less sensitive than Recharge Zone 1 (where the Special Purposes zone for the Airport is situated). Again, while we accept that matters of contamination of groundwater recharge need to be taken into account, we cannot see this in itself as a bar to a Living zoning of the block outside the 50 dBA contour. Clearly, in respect of rural activities, there are some activities which have as great if not greater potential to contaminate groundwater.

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22 C217/2001.
23 C67/2004.
24 C67/2004 at para 32.

[89] Again, I understand that the criticism by Mr L R McCallum, the planner for the CRC, in this regard was not so much that these matters could not be addressed by a Living zone but that the failure to provide an outline development plan did not adequately satisfy the concerns the Regional Council had as to how these matters would be properly addressed. We accept that criticism.

Water and sewage

[90] Evidence was given to the Court by an engineer for the City Council, Ms K M Purton, who advised that there were already water pressure issues in this area of Hawthornden Road and that there was inadequate sewage disposal to serve the development of this site. That evidence conflicted with Mr Kralj's who suggested that the site could be serviced for water by an improvement to the existing system paid for by the developer and that, furthermore, a site-specific sewerage scheme could be developed until the city scheme is upgraded.

[91] In relation to water we are not sure that the system could be readily upgraded. Mr Kralj's suggestion of a stand-alone bore later connected to the city system seems fraught with problems. We have concerns as to whether it is appropriate to further pump this recharge zone. There were no details as to capacity or water quality or exact placement of the pump. With no outline plan these concerns are unanswered.

[92] In relation to sewerage, this area of Hawthornden Road is serviced by the Riccarton interceptor. Ms Purton advised that the capacity in the pipes was already fully utilised at peak periods and Council were continuously measuring levels in manhole shafts. It became clear from questions that the peak levels were largely a feature of water infiltration in storm periods rather than dry weather flows. Although Ms Purton was not able to advise how many connections had been made to the Riccarton interceptor in the last few years or what the further capacity for connection was, we are satisfied that the Riccarton interceptor is already overloaded and would not be able to handle flows at peak times even from a further 200 properties developed on this block. Having regard to the works required, including the upgrading of the entire line and treatment system, we accept that it is unlikely that this work will be completed within the plan period (ten years).

[93] Mr Christensen put to other witnesses that it might be possible to connect the site through the sewer servicing the Airport Special Purpose zone. Firstly, it became clear during the course of the hearing that the airport had an entirely separate water supply system (on its own land) which had adequate capacity to serve the Special Purpose zone. It also became clear that they were able to connect to another sewer which did not have the capacity problems of the Riccarton interceptor. We have no idea from the evidence we heard as to whether it is possible to connect the Hawthornden/Russley block to the water supply or sewer. No details have been provided in an outline plan to the Court, nor was any specific evidence given on this matter by any witnesses before the Court.

[94] Accordingly we are satisfied that there are significant problems with appropriate infrastructure for the development of this site within the next ten years in relation to water supply and sewer.

Consolidation

[95] Finally we come to the application of the policies of the City Plan which address consolidation and the development of larger peripheral areas. There was a particular issue between the parties as to whether this site was a consolidation or not. We have concluded on the facts that policy 6.3.1 could be appropriately implemented by any rezoning of this land to Living 1. We are satisfied that it is in a form that is not detached from the current urban boundaries and does not promote a dispersed or uncoordinated pattern of development.

[96] The recent development of land immediately to the south of the site and the existing development to the east of this site confirms to us that this site would be attached to existing residential areas. In fact, the area would also be serviced by the commercial area at the end of Merrin Street, an easy walk from this site on flat land. Objective 6.2 provides:

> *Patterns of land use that promote and reinforce a close proximity and good accessibility between living, business and other employment areas.*

Living zoning would provide a residential area close to the airport and near a major transport route. It has recreational facilities including the Avonhead and Burnside Parks close by. Existing and new residential construction shows us the area is seen as desirable. It would represent merely a further extension of the existing living areas recently developed to the south of Avonhead Park and separated only from this development by that park and to the east by the cemetery.

[97] The question of consolidation seemed to trouble many of the counsel and the witnesses before the Court and there were differing views as to whether such a development would be a consolidation. In this area we see two barriers to support consolidation in this area. The first is Russley Road; the second is the 50 dBA contour for the airport.

[98] Objective 6.1 states:

> *To accommodate urban growth with a primary emphasis on consolidation.*

The reasons states in part:

> *Consolidation does not necessarily entail containment of the City within its present urban boundaries, but does emphasise a compact pattern of development, in contrast to isolated and dispersed patterns of urban growth into what are currently rural areas.*

[99] The Court discussed this matter in ***Suburban Estates*** and particularly at paragraphs [52]-[56]. At paragraph [56] the Court said:

> *The policy is to achieve a gradual increase in population density by providing for higher building densities near the central city, suburban focal points and in larger areas of peripheral urban housing growth. Indeed in the third of those categories higher building densities are positively encouraged by the use of the words "promoting opportunities". The policy also makes it clear that new peripheral development must be consistent with a consolidated urban form. We take that to mean any new development must substantially meet most if not all of*

the criteria implied by the inclusive definition of consolidation already referred to.

[100] Turning to the reasons for the objectives for 6.1 the Court also concluded at paragraph [53] that this included:

- *minimising adverse effects on water quality and versatile soils through selective restraint on peripheral development;*
- *shortening private car trips by locating housing close to employment, schools and business areas;*
- *ensuring that safe and convenient pedestrian and cycling links are provided in new neighbourhoods;*
- *increasing population densities to support public transport;*
- *emphasis on a compact pattern of development;*
- *possible extension of the city/urban boundaries*

and should be contrasted with

- *an isolated and dispersed pattern of growth.*

[101] Overall we conclude that it can be said that this development achieves consolidation. In relation to vehicle trips, the proximity of both the airport and nearby schools and business areas indicates that this criteria is likely to be met.

[102] In relation to public transport, it is clear that further population will support public transport initiatives in the Avonhead area generally.

[103] Some criteria will be dependent upon the sort of outline plan that might be provided including effects on water quality, pedestrian and cycling links.

[104] Having regard to the type of developments envisaged by the Court elsewhere (for example ***Yaldhurst/Masham***) it can be seen that in general terms this area might be seen as achieving and implementing the consolidation policies and objectives of the City Plan.

Major extensions 6.3.9

[105] The next issue is whether a Living zone achieves or implements the policy promoting opportunities for higher building densities in larger areas of peripheral urban housing growth. This derives from 6.3.9 Urban Extensions which states:

> *6.3.9 To promote a range of incremental extensions to the urban area distributed over a number of peripheral locations, rather than a major extension in any one area.*

The explanation and reasons goes on to say:

> *Larger areas may be needed to accommodate significant increases in growth. Where major extensions are proposed, they should make provision for a diverse range of living and business opportunities and environments.*

If this policy applies then the site encounters similar difficulties to the proposal in the ***Yaldhurst/Masham*** case.

[106] The first question is whether or not such a policy is directly applicable when the issue as to the appropriate zone is before the Court. In general terms, however, it is clear that the Court in considering these matters has concluded that areas in the vicinity of 50 hectares are larger peripheral developments[25].

[107] In ***Yaldhurst/Masham*** at para 31 the Court noted:

> *At Living 1 zone densities the land would accommodate under 141 allotments so it qualifies as an incremental extensions (although in our opinion at the larger end if cumulative effects are taken into account).*

The land was 15.4 hectares.

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25 C171/2002 at para 18.

[108] We consider the area outside the 50 dBA contour is probably a major extension because it is around 30 hectares and would provide some 300 lots. Thus the criticism can be made as in ***Yaldhurst/Masham*** that no higher density mix is provided. On the other hand the Avonhead shopping centre is close by, as is the Special Purposes Airport zone. Such a mix could be said to be provided in the general locality including recreation areas, access routes, commercial and employment areas.

[109] The Court has previously considered the Living 1 zone as a lower density form of development and sees other Living densities such as 3 and 4 as being higher densities. In this case we must also consider whether the general policies relating to the airport may be of more importance than the policy of the City Plan relating to higher densities. To the extent that such policies are in conflict, it is clear that the airport policies are more significant than the policies seeking higher densities for major extensions. This would in our view be a proper basis on which the Court could consider lower density because of the requirements to take into account the impact on the airport. In the circumstances of this case we need not explore this possibility further because of our general conclusion.

Section 32 tests within the 50 dBA contour

[110] The section 32 analysis has been characterised by an assessment of what is the better zone to achieve the objectives and policies of the City Plan, and the purpose of the Act. We conclude that in respect of the area within the 50 dBA contour that a Living zone permitting noise sensitive activities does not better meet policy 6.3.7 than the Rural 5 zone. The Rural 5 zone is a zone particularly designed to take into account the effects of noise in the environment and to provide for housing densities accordingly. A Living 1A zone does not take into account the amenity effect of the airport generally. Although it does provide for mitigation in respect of houses within the 55 dBA contour a Living zone does not take into account the amenity effects between the 50 and 55 dBA contours.

[111] Accordingly, the effect on amenity for persons outside the homes between the 50 and 55 dBA contour is not addressed by the mitigation measures proposed. No complaint clauses and non-subdivision clauses are not an adequate measure to address

these effects. Without considering the more general provisions of the plan, we therefore conclude that the zoning even as a special low density Living zone cannot better meet the City Plan provisions than a Rural 5 zone.

[112] This position is reinforced by reference to the other provisions of section 32 in looking at matters in terms of costs and benefits and effectiveness and efficiency. The amenity impact of allowing development within the 50 dBA contour cannot be measured in monetary terms but this does not make it any less important. Benefits are personalised to the landowner developing the site and there is no wider benefit because there is not a current limit on the range of housing opportunities in Christchurch.

[113] Similarly, in terms of efficiency and effectiveness, non-noise sensitive activities which clearly constitute a more efficient use of the land were not before the Court on this reference. It is possible that other uses could be found for the land than those provided under the Rural 5 zone. However the further restraint on the land within the 50 dBA contour is clearly justified and better or necessary under section 32.

The land outside the 50 dBA contour and section 32 tests

[114] The Rural 5 zoning is essentially a holding pattern only for the Hawthornden/Russley block outside the 50 dBA contour. There are constraints on the land at or near the 50 dBA contour and near State Highway 1. Some nearby land to the south has already been developed. It is even recognised by the Planner for the City, Ms Dixon, and others that this land may have a higher and better use than as pastoral land.

[115] There are significant issues however with zoning the land outside the 50 dBA contour as Living 1 at the current time. We have identified a prime concern with issues relating to roading and water and sewage infrastructure. This is highlighted and exacerbated by the lack of any outline development plan to show how these issues might be properly addressed. We do not currently accept as a solution a private water supply or private sewerage scheme. Possibilities for connection to other schemes were not explored fully in the evidence before us.

[116] Generally speaking the land is appropriate for more intensive use than rural land but at this stage the infrastructure is not in place. In a recent decision of the Environment Court in ***Foreworld Developments Limited and Ors v Napier City Council***[26] the Court noted at paragraph [15]:

> *It is bad resource management practice and contrary to the purpose of the Resource Management Act – to promote the sustainable management of natural and physical resources; to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it. In McIntyre v Tasman District Council (W 83/94) the Court said:*
>
> > *We agree with Mr Robinson that in this case the extension of services such as the sewage system and roading should be carried out in a co-ordinated progression. We hold that if developments proceed on an ad hoc basis they cannot be sustainably managed by the Council – an aspect which is not commensurate with section 5 of the Act.*
>
> *There are similar comments in decisions such as Prospectus Nominees v Queenstown-Lakes District Council (C74/97), Bell v Central Otago District Council (C4/97), and confirmation that the approach is correct in the High Court decision of Coleman v Tasman District Council [1999] NZRMA 39.*

[117] It is not for this Court to dictate to the Council when these infrastructural improvements should be made. Moreover the referrer does not provide information as to how a co-ordinated development of the land could be achieved in practical terms. As the referrer is not the owner of much of the land, it is not possible to indicate whether the Merrin Street extension or private schemes would be acceptable to all of the landowners. An example of this is that the placement of stormwater detention ponding or holding tanks was shown over land not owned by the referrer. Other landowners may consider that all of the infrastructural requirements – roads, etc – should be contained on this referrer's land.

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26 W8/2005.

Deferred zoning

[118] One possibility suggested by the referrer was the potential for deferred zoning. We have concluded that there may be better methods to achieve and implement the policies and objectives of the City Plan and the Act than a Living zoning. This may involve a combination of Living and higher density zonings, as envisaged by the Court in the ***Suburban Estates*** decision and subsequent decisions. It may involve different zonings, such as Commercial or Business as for the Special Purposes zone (for non noise sensitive activities). It might involve zoning that would accommodate hotels, for example, if the Merrin Street extension was provided.

[119] We note that the City Plan specifically provides that one of the methods for implementation of the urban growth procedure is promoting and facilitating the redevelopment of land, e.g. through comprehensive development plans. To that extent we conclude a better method to achieve and implement the appropriate zoning would be to allow for the Council investigations into alternatives to be properly undertaken and completed. Any outcomes could either be achieved by the Council promoting a variation or change to its City Plan or by a privately promoted change once these important issues have been resolved.

[120] It seems essential that any plan for development should involve all of the properties and take a comprehensive approach. It would require a level of detail which has not been provided by the referrer at this hearing. Roading and infrastructural issues must be addressed on an integrated basis.

Section 5

[121] The Act has a broad single purpose:– to achieve sustainable management as that term is defined in the Act. This City Plan has been prepared clearly with this concept in mind and the application of the policies and objectives on its face should achieve that outcome. For our part we are satisfied that a zoning over all of the land as Rural 5 would better meet the object of the Act and the policies and objectives of the City Plan at the current time.

[122] In respect of the area outside the 50 dBA contour, we accept that there may be other uses of this land which would better enable the various parties, as identified under section 5. The core objective of the Act however is better met by preserving the options for the future at this stage by a Rural 5 zoning and allowing the Council and the parties to undertake further evaluation with a view to introducing a change, either during the life of this City Plan or at the time of the introduction of the next City Plan.

Outcome

[123] The reference has not succeeded and accordingly the decision of the Council in this matter is upheld.

[124] As a reference this is not a matter where costs are generally appropriate and this case appears to be no exception. Although the referrer has not succeeded in this case, we have some sympathy with the position of the owners of the land outside the 50 dBA contour and closer to Hawthornden Road. We accept that there are constraints over the use of this land and consider that the referrers have reasonably taken this reference to clarify the position. However, on the basis of the information before us we uphold the Council zoning decision but are tentatively of the view that there should be no order for costs. If any party disagrees with this course, they are to file application within twenty working days, replies within ten working days and final reply within five working days. If no application for costs is made within the time specified costs are to lie where they fall.

DATED at CHRISTCHURCH this 30th day of March 2005.

J A Smith
Environment Judge

Issued[27]: 30 MAR 2005

[27] Smithje\Jud_Rule\D\RMA 590A(ii)-99.doc.

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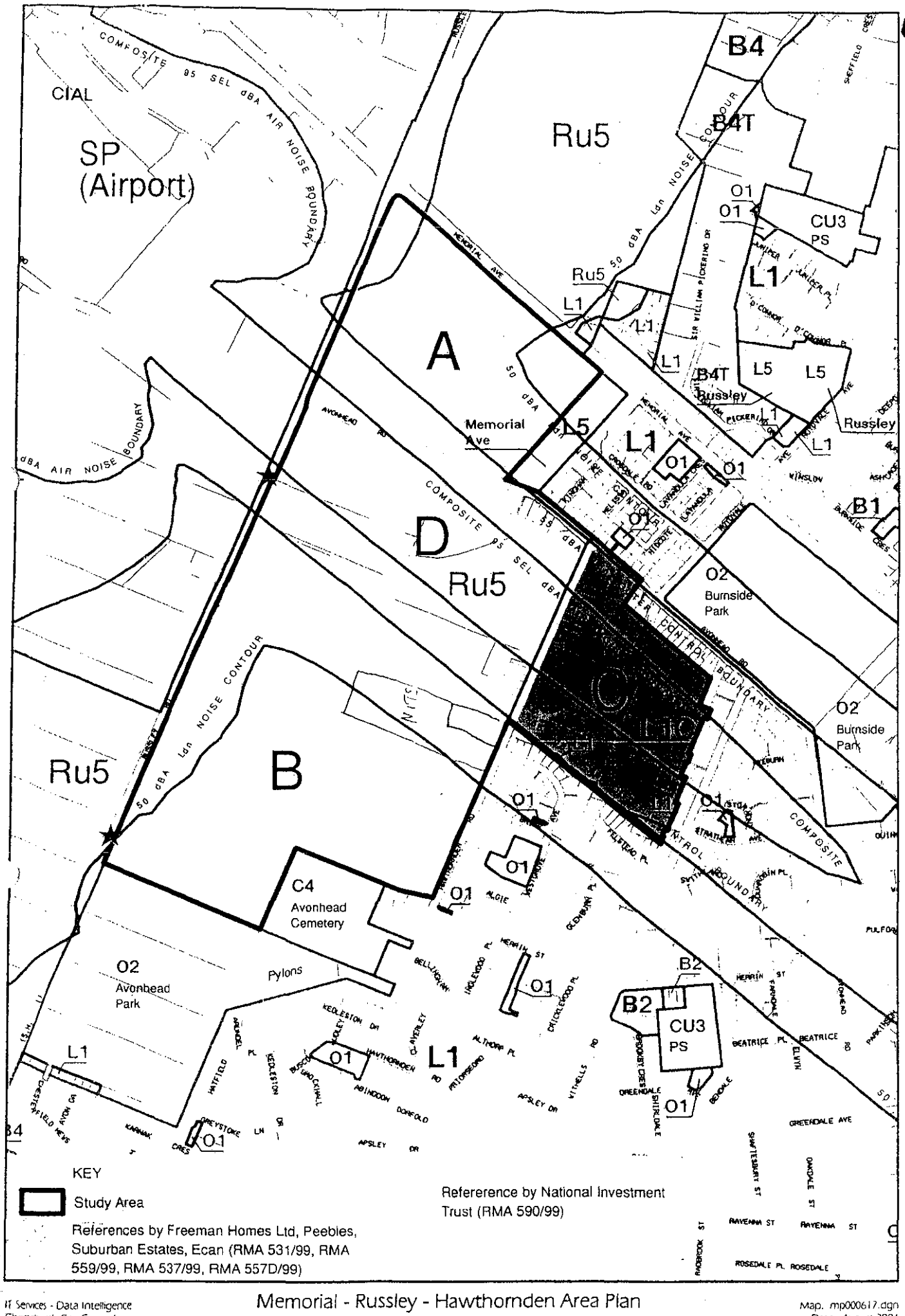
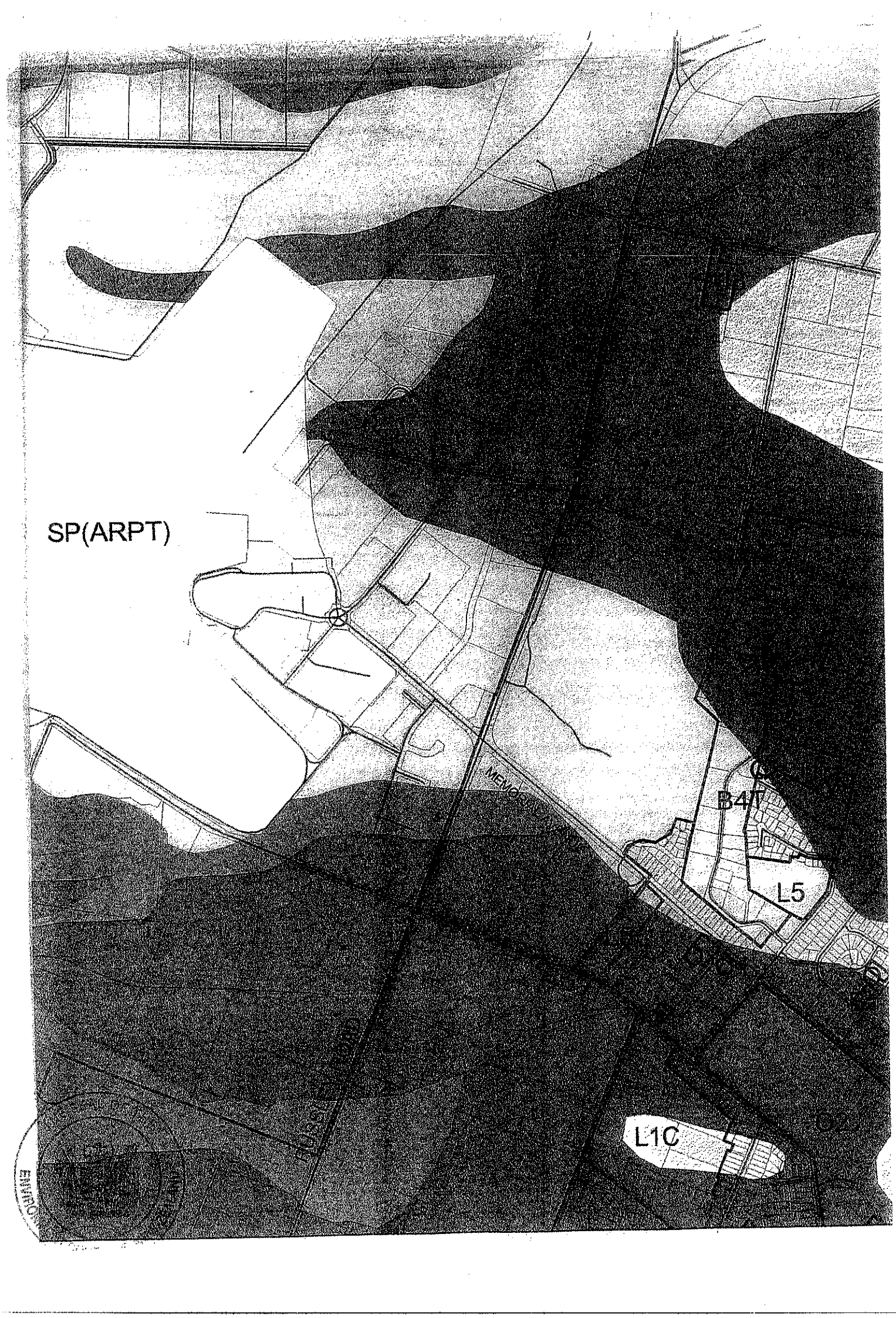


IT Services - Data Intelligence
Christchurch City Council

Memorial - Russley - Hawthornden Area Plan
Location Map

Map. mp000617.dgn
Date August 2004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ORIGINAL

Decision No. A103/2003

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two appeals under section 120 of the Act

BETWEEN **INDEPENDENT NEWS AUCKLAND LIMITED**

(RMA 901/01)

AUCKLAND INTERNATIONAL AIRPORT LIMITED

(RMA 906/01)

Appellants

AND **THE MANUKAU CITY COUNCIL**

Respondent

AND **CENTRAL GARDENS LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner C E Manning
Environment Commissioner D H Menzies

HEARING at Auckland on 3, 4, 5, 6 and 7 March 2003

APPEARANCES

Mr R Brabant for Central Gardens Limited
Mr S Brownhill for Manukau City Council
Mr D A Nolan and Ms C J Somerville for Auckland International Airport Limited

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION

Introduction

[1] The single main issue on this appeal is the potential for conflict between the owners and users of the Auckland International Airport and future residents of household units likely to be affected by the noise of landing aircraft.

[2] The appeal concerns an application for consent by Central Gardens Limited for the development of 349 household units on a Business 5 zoned site, at 18 Lambie Drive, Manukau City. The site is identified by the Manukau Operative District Plan 2002, as being subject to moderate and high levels of aircraft noise from aircraft operations at Auckland International Airport.

[3] The site is located directly beneath the westerly approach path for aircraft landing at the airport. Recognising the effect of noise generated by such aircraft, the district plan has endeavoured to minimise conflict between the development and use of the airport, and activities which are sensitive to airport noise. This is achieved by the adoption of rules for the purpose of limiting aircraft noise levels of more than Ldn 65 dBA to the high aircraft noise area[1] and noise levels of more than Ldn 60 dBA to the moderate aircraft noise area[2].

[4] The district plan also contains land use controls in relation to activities sensitive to aircraft noise[3] in the high aircraft noise area and moderate aircraft noise area. Household units, and therefore this development as a whole, are classified as activities sensitive to aircraft noise. Such activities in the high noise area are a non-complying activity. The majority of the site is located in the high aircraft noise area, with only the northern portion of the site located in the moderate aircraft noise area.

[5] The Council granted consent to the application on 12 September 2001. Auckland International Airport Limited appealed the Council's decision, primarily on the reverse sensitivity effects on the airport arising from the development. Independent News Auckland Limited, an industrial neighbour, also appealed on reverse sensitivity grounds, however that appeal was resolved. A draft consent order

[1] Referred to in the plan as HANA.
[2] Referred to in the plan as MANA.
[3] Referred to in the plan as ASANS.

was filed, the terms and conditions of which, formed the basis for the conditions of consent sought by Central Gardens.

[6] The Council initially resolved to defend its decision to grant the consent. Since the time of filing the appeals, the aircraft noise area rules of the then proposed plan (which was made operative, in part, on 21 October 2002) have changed as the result of a consent order issued by the Environment Court on 10 December 2001. As a consequence, the activity status of the proposal changed from discretionary to non-complying[4].

[7] Following the amendments to the proposed plan, the Council considered it necessary to review the proposal under the operative plan and determined not to support its original decision.

The locality and the proposal

[8] The property is zoned Business 5 under the district plan. It is 2.82 hectares in area with access legs to Lambie Drive and Ryan Place. It is effectively a rear site, although the width of the access leg at Ryan Place results in it meeting the district plan definition of a front site.

[9] The property is surrounded on three sides by industrial uses of various kinds, which include printing premises, a pressurised tank testing facility which releases odourised gases, warehousing, heavy vehicle servicing and panel beating.

[10] Immediately to the north of the site is an existing residential area with frontage to Ihaka Place. The north-east corner of the site adjoins the playing fields of the Seventh Day Adventist School which has frontage to Puhinui Road. The site is undeveloped and is basically flat (and gently contoured).

[11] The proposal is to construct, for residential use, 4 apartment towers, 23 terraced-houses, and 6 studio warehouse units. Associated with that development are the required site works, infrastructure facilities, parking, landscaping and facilities for the use of residents. These are to include a recreation building that would have a gym, lap pool, small shop and café. There would also be an outdoor

[4] At the time of the Council hearing it was also assessed as a non-complying activity under the then operative transitional plan.

swimming pool and changing room. Areas of open space around the buildings will be landscaped to provide a level of amenity for the development, as well as additional passive recreation areas.

[12] The 4 apartment tower blocks are to be arranged in a square configuration in the middle of the site, with recreation areas and the office/reception/gym building between them. Manager's accommodation will be on the upper level of that building. There will be two levels of parking for occupants, visitors, service vehicles and the like; one below ground, and one above.

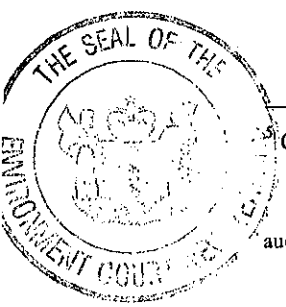
[13] The two-storied terraced houses are proposed to be built along the northern boundary at the interface with the adjoining Residential zone. Parking for these terraced houses is contained within each unit entitlement area.

[14] The six studio warehouse units with associated parking are proposed on the part of the site that has access to Ryan Place. These warehouse units provide an opportunity for small businesses to establish in premises that have flexible manufacturing/storage opportunities, office and living space.

[15] The main vehicle and pedestrian access to the property is from Lambie Drive. This has been designed as a two-way internal road providing access to all units. It will also comply with the requirements for emergency vehicle access. Vehicle and pedestrian access is also available through Ryan Place.

[16] The apartment towers each have 8 floors, with 10 apartments per floor, giving 80 apartments per tower. In addition, there are two levels of parking in each tower. The approximate height of each tower is 32.5 metres. There will be 320 apartments in total, 192 one-bedroom units and 128 two-bedroom units.

[17] The buildings comply with all the development controls and have been purpose-designed to meet the Council's latest Acoustic and Ventilation Standards for activities sensitive to aircraft noise.[5]



[5] Compliance with rule 5.21.4 – refer paragraph [48].

The hearing

[18] The hearing took place over a period of 5 days. During that time we heard extensive opening submissions from counsel. We also heard from a number of witnesses namely:

- Mr D J Snell, architect and designer of the proposal;
- Mr J M Burgess, traffic engineer;
- Mr A L McKenzie, mechanical engineer;
- Mr N I Hegley, acoustical consultant;
- Ms J A Hudson, planning and resource management consultant;
- Mr D J Medrickey, the project manager for the proposal – all called by Central Gardens.
- Mr J M McShane, environment and planning manager for the Airport Company;
- Mr D Osborne, planning consultant;
- Mr C W Day, acoustical consultant;
- Mr S Milne, executive director of the Board of Airline representatives of New Zealand Incorporated – all called by the Airport Company.
- Mr M A Nielson, resource management planner for the Council.

[19] At the conclusion of the evidence leave was given for the Airport Company and Central Gardens to file closing submissions. Two memoranda by Central Gardens and a memorandum by the Airport Company were filed – the last on Monday 19th May 2003. The closing memoranda were detailed and extensive, totalling in all 119 pages.

[20] In the interests of brevity we have not been able to address all of the matters referred to in the submissions and in the evidence. However, we have had regard to all that was said.

The relevant statutory setting and the legal framework

[21] As the proposal is a non-complying activity, sections 104 and 105 of the Act apply. The following parts of section 104 are relevant:

(i) subject to Part II – section 104(1);

(ii) the actual and potential effects on the environment of allowing the activity – section 104(1)(a);

(iii) the regional policy statement – section 104(1)(c); and

(iv) the district plan – section 104(1)(d).

[22] We are also required to determine whether the proposal satisfies the gateway criteria in section 105(2A). We therefore propose:

(i) firstly, to identify and discuss the relevant general criteria in section 104;

(ii) secondly, to discuss the gateway criteria in section 105(2A); and

(iii) thirdly, to exercise our discretion under section 105(1)(c).

Section 104 matters

Part II

[23] Section 5 is the "lodestar" of the Act. It was described in this way in ***Lee v Auckland City Council***[6]**:**

> In effect, section 5 of Part II of the Act is the only section in the present Act which contains the philosophy of sustainable management as its purpose, and the proscriptive criteria against which effects (as defined in section 3) and the plan provisions may be measured. Section 5 under the 1993 Amendment to the Act may be considered the "lodestar" which guides the provisions of section 104 and in this appeal we are guided by the over-arching purpose of sustainable management as defined.[7]

[24] The approach taken to the application of section 5 is now settled by several clear and consistent decisions[8].

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[6] 1995 NZRMA 241.

[7] At page 248.

[8] See *New Zealand Rail Limited v Marlborough District Council* 1994 NZRMA 70; *Trio Holdings Limited v Marlborough District Council* 1997 NZRMA 97; *North Shore City Council v Auckland Regional Council* 1997 NZRMA 59 (upheld on appeal in *Green and McCahill Properties v Auckland Regional Council* 1997 NZRMA 519); *Eden Park Trust Board v Auckland City Council* (A130/97); *Aqua Marine Limited v Southland Regional Council* (C126/97); and *Solid Energy New Zealand Limited v Gray District Council* (A8/98).

[25] The application of section 5 was summarised in ***New Zealand Rail Limited*** as follows:

> Part II of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not a part of the Act which should be subject to strict rules and principles of statutory construction which aims to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which is intended to allow the application of policy in a general and broad way.[9]

[26] The general approach taken by the Courts has been described as the "overall judgment" approach.[10] This requires an overall broad judgment of whether the proposal would promote the sustainable management of natural and physical resources. Such a judgment allows for comparison of conflicting considerations and the relative scale and degree of them[11], and their relative significance in the final outcome[12].

[27] Sustainable management requires that the use, development and protection of physical resources, in this case the Airport and the Central Gardens' site, be managed in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing – a matter that we will return to later in this decision.

[28] Also of relevance in this case is section 7, particularly:

(i) The ethic of stewardship – sub-paragraph (aa);
(ii) The efficient use and development of natural and physical resources – section 7(b);
(iii) The maintenance and enhancement of amenity values – section 7(c);
(iv) The maintenance and enhancement of the quality of the environment – section 7(f); and
(v) Any finite characteristics of natural and physical resources – section 7(e).

[9] Page 72.
[10] *Aqua Marine*, page 141.
[11] *North Shore City Council*, at page 93.
[12] *New Zealand Rail Limited.*

The relevant statutory instruments

The relevance of earlier plans

[29] We have already adverted to the fact that when the application was first assessed, the relevant district plan provisions included those under the transitional plan and the proposed plan. Since the time of filing the appeals, the proposed plan has been made operative and some of the plan provisions that the application is to be assessed against have changed significantly. All parties agreed that under section 88A of the Act, the operative plan is the only relevant district plan in terms of sections 104 and 105 of the Act.

The Auckland Regional policy statement

[30] Issue 2.3.4, contained in the "regional overview and strategic direction" section of the regional policy statement, is directly relevant to this appeal. It states:

> Regionally significant physical resources, including infrastructure, are **essential** for the communities' **social and economic wellbeing.** The location, development and redevelopment of infrastructure is of strategic importance in its effects on the form and growth of the region. However, the long-term viability of regionally significant infrastructure and physical resources can be compromised by the adverse effects, including cumulative effects, of other activities. These regionally significant resources can equally give rise to adverse effects, including cumulative effects on the environment, and on communities. **They can be adversely affected by conflicts if sensitive uses are allowed to develop near them or if they are inappropriately located.** (emphasis added)

[31] The policy statement goes on to say that regional infrastructure includes airports and airport flight paths. Examples of significant regional infrastructure are given in Appendix D. That appendix includes, as an example of regional infrastructure, the Auckland International Airport.

[32] The following key issues are identified in the policy statement (as part of Issue 2.3.4) in relation to regional infrastructure:

- Provision (or non-provision) of infrastructure is a major influence in the overall pattern and direction of regional development.
- The need for expansion, replacement or upgrading of infrastructure in order to avoid environmental problems and/or to increase the capacity of infrastructure to accommodate growth.

- The need to avoid, remedy or mitigate the adverse effects generated by proposed changes to infrastructure and to consider alternative ways of avoiding or remedying them. Relocation of infrastructure or restrictions on the location of infrastructure or restrictions on the establishment of sensitive land uses in close proximity may be required to overcome the environmental problems faced.

- An absence of co-ordination between infrastructure providers and other agencies responsible for urban growth and development may increase the likelihood of adverse effects.

[33] From these issues and the policy statements flow the "Strategic Direction" for the Auckland Region. Strategic objectives in 2.5.1 relevantly include:

> 1. To ensure that provision is made to accommodate the Region's growth in a manner which gives effect to the purpose and principles of the Resource Management Act, and is consistent with these Strategic objectives and with provisions of this RPS.
>
> ...
>
> ...
>
> 6. To promote transport efficiency, and to encourage the efficient use of natural and physical resources, including urban land, infrastructure, and energy resources.

[34] Strategic policy 2.5.2(3) further states:

> 3. Urban development is to be contained, within the metropolitan urban limits shown on Map Series 1 and the limits of rural and coastal settlements as defined so that:
>
> ...
>
> (iii) **urban intensification at selected locations** is provided for and encouraged. Selection of these places will take into account, amongst other things, any **significant adverse effects which arise from the interaction with any regionally significant infrastructure** and other significant physical resources. (emphasis added)

[35] Strategic policy 2.5.2(6) states:

> 6. Provision is to be made to enable the safe and efficient operation of existing regional infrastructure which is necessary for the social, and economic wellbeing of the region's people, and for the development of regional infrastructure (including transport and energy facilities and services) in a manner which is consistent with this strategic direction and which avoids, remedies or mitigates any adverse effects of those activities on the environment.

[36] The Airport is identified as a significant regional infrastructure in the regional policy statement. The statement notes that reverse sensitivity effects on regionally significant infrastructure must be taken into account when selecting locations for urban intensification.

The operative district plan

[37] As the proposal is a residential activity and the site is located in the Business 5 zone, the planning witnesses addressed both Business 5 and residential provisions of the plan. We have regard to those provisions. However, as we consider that the proposal fits comfortably within the relevant provisions of both the Business 5 and Residential zones, we do not propose to discuss them.

[38] Of particular concern to the issues raised by the appeal, are the objectives and policies relative to the Auckland International Airport. Section 17.6 of the district plan contains most of the resource management issues, objectives and policies relating to the operation of the airport, including the issue of aircraft noise and reverse sensitivity to that noise.

[39] Section 17.6.2.1 of the plan emphasises the local, regional and national importance of Auckland International Airport. This is reinforced in issue 17.6.2.2 which states in part that:

> There are significant positive effects arising from the operation of Auckland International Airport and it is important that the Airport is recognised and provided for so that it can serve the wider community, both now and in the future.

This is further reinforced by objective 17.6.3.8 which states:

> To recognise and provide for the positive effects arising from the operation of Auckland International Airport and to take these into account when considering any adverse effects of the Airport on the environment.

[40] The effect of aircraft noise is raised as an issue in Issue 17.6.2.7 which states:

> Amenity values and quality of the environment in some areas may be adversely affected by aircraft arising from use of the existing runway at Auckland International Airport.

The issue statement goes on to say:

> ...the District Plan recognises the importance of limiting the amount of additional residential development in areas affected or potentially affected by high aircraft noise (ie: aircraft noise levels greater than Ldn 65 dBA).

The issue statement having specifically identified additional residential development as a particular type of sensitive activity that should be limited within the high aircraft noise area, then goes on to state that:

> This is because, while it is possible to acoustically insulate dwellings and other activities sensitive to aircraft noise, it is not possible to use such methods to mitigate the effects of aircraft noise on the external environment.

[41] Issue 17.6.2.9 is also relevant. It states:

> The location of activities sensitive to aircraft noise in areas where high and moderate aircraft noise levels cannot be avoided creates incompatibilities between the operation of Auckland International Airport and land use activities.

The issue statement refers to as yet undeveloped areas of the City which are planned to accommodate regional growth and notes that parts of these areas will be adversely affected by aircraft noise. It then goes on to say:

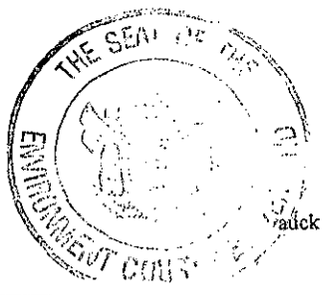
> Although they will still be able to be developed for residential purposes, as they are not within the High Aircraft Noise Area on the Planning Maps, they may require appropriate measures to be taken to mitigate aircraft noise such as the installation of acoustic insulation and ventilation systems. Within the High Aircraft Noise Area, the establishment of new Activities Sensitive to Aircraft Noise should generally be avoided, as people will inevitably be exposed to noise in the external environment.

This is further emphasised by objective 17.6.3.7 which says:

> To minimise conflict between the development and use of Auckland International Airport and activities which are sensitive to aircraft noise.

[42] In our view, policies 17.6.4.9, 10 and 11 are also relevant. They state:

> Policy 17.6.4.9
>
> The adverse effects of high and moderate levels of aircraft noise arising from the use of the existing runaway at Auckland International Airport on the amenity values and quality of life in existing and future residential areas of the City and on Activities Sensitive to Aircraft Noise in other areas should be avoided, remedied or mitigated.



The "Explanation/Reason" for Policy 17.6.4.9 says:

> The adverse effects of use of the existing runway can be avoided by limiting the location of sensitive activities in areas of high cumulative noise. Activities Sensitive to Aircraft Noise are defined in the District Plan to include activities, such as household units, hospitals, educational institutions, and rest homes. Adverse effects may be remedied or mitigated by the installation of acoustic insulation and ventilation systems in the case of buildings containing activities which are sensitive to aircraft noise within areas of high or moderate aircraft noise.
>
> ...
>
> and;
>
> Policy 17.6.4.10
>
> The location of new activities which are sensitive to aircraft noise in areas subject to high aircraft noise levels, (areas identified as being within the Ldn 65 dBA contour or higher are subject to high aircraft noise levels) should generally be avoided unless the adverse effects of those activities on Auckland International Airport can be avoided, remedied or mitigated.
>
> ...
>
> and further;
>
> Policy 17.6.4.11
>
> The location of new activities which are sensitive to aircraft noise in Business zones and the Mangere-Puhinui Rural zone which are subject to moderate aircraft noise levels, (areas identified as being between the Ldn 60 dBA contour and the Ldn 65 dBA contour are subject to moderate aircraft noise levels) should only occur if the adverse effects of those activities on Auckland International Airport can be avoided, remedied or mitigated.

[43] Interestingly the "Explanation/Reasons" for policies 7.6.4.10 and 7.6.4.11 says:

> The Airport and its flight paths are identified in the Auckland Regional Policy Statement as regionally significant infrastructure. The establishment of Activities Sensitive to Aircraft Noise within the High Aircraft Noise Area or, in the case of the Business Zones within the High or Moderate Aircraft Noise Areas, has the potential to compromise the sustainable management of that infrastructure.

[44] It is also worthy of note, that under paragraph 17.6.5 headed "Strategy for Aircraft Noise Management and Land Use Planning of Areas Affected by Aircraft Noise" the plan says:

> Areas of the City currently affected by aircraft noise arising from the use of the existing runway will continue to be affected. The degree to which some areas are affected may increase over time. In particular, there is an area within the Main Residential Zone which is bounded by Puhinui Road in the north, the NIMT in the west and the Grayson/Brett Avenue and Liverpool Avenue Business 5 land in the east and south which is and will continue to be within the High Aircraft Noise Area. Long term it is not desirable that this area remains zoned for residential purposes. It is the Council's intention to initiate a plan change and, subject to the outcome of that change, to set in place a programme to assist the transition of the area from residential to business zoning. It is envisaged that the Council would work with property owners and residents and stakeholders in the area to ensure that any such transition is as smooth as possible.

[45] The relevant issues, objectives and policies of the plan are given effect to by the rules and restrictions contained in the conditions of Designation 231 which relate to the Auckland International Airport and the rules in Chapter 5.21.

[46] Of importance is the definition of ASAN in Chapter 5.21:

> **"Activity sensitive to aircraft noise"** or **"ASAN"** means household units, minor household units, pre-schools/education facilities, schools, other educational facilities, childcare centres and other care centres, residential centres, hospitals, other health care facilities, rest homes and other homes for the aged.[13]

We note that activities sensitive to aircraft noise include a range of other activities in addition to household units. It is therefore necessary, when considering an application for a resource consent for an activity in one of the aircraft noise areas, to have regard to the type of activity that is subject to the application for consent.

[47] Under rule 5.21.2 an activity sensitive to aircraft noise shall be a non-complying activity save for some exceptions which are not relevant to these proceedings. Any such activity is subject to the acoustic standards and terms in rule 5.21.4. As mentioned, the proposal complies with the acoustic standards and terms of rule 5.21.4 and the relevant general development and performance standards.

[48] We also note, by way of analogy, rule 5.21.4C(g) which contains the following assessment criteria:

> **Nature, size and scale of development**
>
> (g) In the case of ASANS in the Business Zones in the MANA and in the case of any ASAN, (except household units, minor household

[13] Page 1, Clause 18 – Definitions, Plan.

> units and educational facilities) elsewhere in the MANA, whether having regard to all the circumstances (including location in relation to the Airport, likely exposure of the site to aircraft noise, noise attenuation and ventilation measures proposed, and the number of people to be accommodated), the nature, size and scale of development is likely to lead to potential conflict with and adverse effects upon Airport activities.

[49] The plan provides a two-fold method for managing the effects of aircraft noise, while at the same time providing for the continued operation and sustainable management of the airport as a significant physical resource. Firstly, by restricting the manner of the airport's operation by noise limitations and imposing obligations on the airport owners to acoustically insulate existing dwellings in areas affected by high and moderate aircraft noise. Secondly, by containing issues, objectives, policies and rules that control the establishment of activities sensitive to aircraft noise in the areas most affected by aircraft noise.

[50] Mr M A Nielson, a resource management planner for the Council, pointed out what he considered to be three particularly important points to draw on the district plan policies and accompanying explanations. These are:

(i) Policy 17.6.4.10 which specifically states that new sensitive activities in the high noise aircraft area should be avoided unless the effects of those activities can be avoided, remedied or mitigated;

(ii) Issue 17.6.2.7 indicates that the outdoor component of residential activities cannot be insulated from aircraft noise; and

(iii) The "explanation/reasons" to policies 17.6.4.10 and 17.6.4.11 state that new sensitive activities in the high noise aircraft noise areas have the potential to compromise the sustainable management of the airport.[14]

[14] Nielson, EiC, paragraph 17.17.

[51] We also consider it pertinent to refer to the "Anticipated Environmental Results" listed in clause 17.6.7 which relevantly states:

> From the identification of the resource management issues and the objectives, policies and rules for the Airport the expected environmental outcomes are identified as follows:
>
> - A reasonable quality of amenity values in rural, business and public open space zones adjacent to and neighbouring the Airport.
> - Avoidance of new Activities Sensitive to Aircraft Noise within the High Aircraft Noise Area.
> - Acoustic treatment of activities sensitive to Aircraft Noise within the High and Moderate Aircraft Noise Areas.

[52] On analysis, we are satisfied that the issues, objectives, polices and rules of the district plan demonstrate that generally, high density residential accommodation within the high noise areas should be avoided. The reason for such an approach is to avoid actual and potential effects on the airport, including the adverse effect of reverse sensitivity.

Effects of the proposal

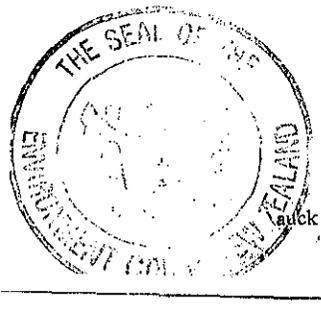
Positive effects

[53] In our view, a number of positive effects will result from the proposal. These include:

(i) the proposed development represents an efficient use and development of land and resources in that it will utilise a large area of land that has remained vacant for some time;

(ii) the proposal will enable people to reside close to employment opportunities and public transport, hence, it promotes more efficient use of transport networks and other infrastructure; and

(iii the site is designed and landscaped so as not to undermine or adversely affect either the adjacent industrial or residential areas.



Reverse sensitivity

Introduction

[54] As already noted, the single main issue in this case is the potential for conflict between the owners and users of the Airport and future residents of Central Gardens. It was submitted by Mr Nolan, on behalf of the owners of the airport, that reverse sensitivity effects on the airport will inevitably flow from granting the consent. Reverse sensitivity is relevant to section 105(2A)(a) "adverse effects on the environment", and section 104(1)(a) "actual and potential effects".

[55] The Airport Company's concern is succinctly encapsulated in paragraph 4.8 of the evidence of Mr Osborne where he said:

> Turning to the key issue of aircraft noise and reverse sensitivity, ...it is common ground that the site is exposed to high levels of aircraft noise. In the context of this application, the term "reverse sensitivity" refers to the likely sensitivity of new residents of the proposed residential complex to aircraft noise and the potential effect that resulting complaints or pressure from those residents could have on the future operations of Auckland International Airport.[15]

[56] Mr Osborne's comments reflect the reasons for appeal contained in the notice of appeal which assert that the proposed development:

> ...would expose a large number of people to moderate to high levels of aircraft noise in an area where residential uses are not expected to be located. The granting of consent therefore fails to take into account, or to adequately take into account, the reverse sensitivity effects of the proposed development on Auckland International Airport.

[57] Reverse sensitivity as a concept, although not specifically referred to in the Act, has been recognised as an effect that requires consideration.[16] In ***Auckland Regional Council v Auckland City Council*** the Environment Court defined reverse sensitivity as:

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[15] Osbourne, EiC, paragraph 4.8.

[16] See for example, *Arataki Honey Limited v Rotorua District Council,* A70/84; *McQueen v Waikato District Council,* A45/94; *Auckland Regional Council v Auckland City Council,* 1997 NZRMA 205; *Winstone Aggregates Limited* and the *Auckland Regional Council v Papakura District Council,* A96/98; *Wellington International Airport Limited & Ors v Wellington City Council,* W102/97; *Hill v Matamata-Piako District Council,* A065/99; *Winstone Aggregates Limited v Papakura District Council,* A49/02; *Gargiulo v Christchurch City Council,* C137/00; upheld on appeal to the High Court AP32/00, 6 March 2001, Hansen J.

> The term refers to the effects of the existence of sensitive activities on other activities in their vicinity, particularly by leading to restraints in the carrying on of those activities.[17]

[58] The term was defined in the article "Reserve Sensitivity – the Common Law Giveth and the RMA Taketh Away", by Bruce Tardy and Janine Kerr as follows:

> Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted , the established use may be required to restrict its operations or mitigate its effects so as to not to adversely affect the new activity.

[59] It is the appellant's position that to allow intensive residential development on this site would expose large numbers of residents to an unacceptable level of noise, with the inevitable consequence that they would endeavour by such means as complaints, lobbying of politicians, submissions on future district plans and the like to have the operations of the airport curtailed or at the very least restricted.

[60] Counsel for Central Gardens Limited contended, that the building would be designed with sufficient acoustic protection and ventilation systems to achieve a high quality internal environment. It further submitted that potential residents were likely to be more inclined to live an indoor lifestyle and that the complex offered good indoor recreation facilities; in any case the development was situated in an area where high levels of noise were permitted from industrial activities and notices on titles would inform potential owners of the surrounding noise environment.

[61] Mr Brabant made an analysis of the cases involving resource consent applications. He referred us to cases such as ***McQueen*** and ***Aratiki*** where the Court's attention was focused on whether or not the effects of the existing use were so significant that the proposed new use should not be permitted at all.

[62] Here, Mr Brabant argued, the challenge to the consent is somewhat different – it postulates complaints in the future, but more importantly postulates that when the provisions of the district plan fall due for review in the future, the airport would be placed at risk by the actions of the residents. Mr Brabant went on to argue, that it is only at this latter stage of the chain of events postulated by the airport that an actual effect on the airport could arise. That is because justified complaints of

[17] At page 206.

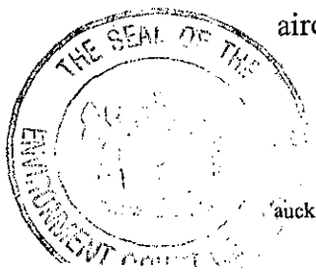
aircraft noise exceeding the rules of the district plan, could not form a basis for opposing the grant of consent, as the airport would be required to modify its operations to comply. Nor can unjustified complaints form a basis for overturning the consent granted by the respondent. The argument rather is, that those who complain, said to be including the residents of this proposed development, will become part of a potential group of opponents of continued aircraft operations as presently permitted by the district plan. Mr Brabant submitted that such a proposition is so speculative that it falls outside the legitimate scope of reverse sensitivity.

[63] Reverse sensitivity effects are not circumscribed by the rules of a district plan. In most, if not all cases, when the benign activity comes within the effects radius of the established activity, the established activity is acting within the rules of the relevant plan. Notwithstanding, complaints can be the first sign of a ground swell of opposition that can chip away at the lawfully established activity. It is this ground swell and its growth which can create potential to compromise the sustainable management of the established activity.

[64] Complaints, whether justified or unjustified in terms of the provisions of the district plan, are just one of the elements that contribute to the reverse sensitivity effect as claimed by the owners of the Airport. As we understand the Airport's case, it is the combination of a number of elements including complaints, lobbying of politicians, submissions on future district plans and the like which create the reverse sensitivity effect.

[65] We agree with Mr Nolan, that in principal, there is no rationale distinction between this case and cases such as ***Arataki.*** In ***Arataki,*** the concern was over the bees from the existing and lawful bee-keeping activity annoying or stinging the proposed campers, who could then be expected to take action against the bee-keeper. With an Airport, there are no bees, but instead there is aircraft noise, discharging from the lawful airport activities and reaching the site of the proposed new residents, with the potential to lead them to take action against the airport.

[66] The issue raised by Mr Brabant as to whether the proposition postulated by the Airport Company is speculative, is a question of fact to which we now turn. We deal with the alleged reverse sensitivity effects firstly by considering the impact of aircraft noise on residents, and secondly, by assessing likely cumulative responses.



Aircraft Noise

[67] Aircraft noise comes as a series of loud single events. The usual way of measuring it is to average the level of noise over a period, to produce a figure described by the phrase Leq. To gain a better idea of the disturbance caused by noise, a 10dBA penalty is added for night time noise (between 10pm and 7am) and the figure is expressed in dBA (Ldn). This differs from the way industrial noise is usually assessed. Industrial noise tends to be more continuous and is usually described by the level exceeded for 10% of the time (L_{10}). When asked to give the court some idea of the relationship between the various types of measurement, Mr C W Day, an acoustical engineer experienced in dealing with airport noise who was called by the appellant, gave the general formula $65dBA_{L10} = 62dBA_{Leq} = 67dBA_{Ldn}$ (where the number of loud single events are equally divided between day and night). The acoustic engineer called by the applicant, Mr N I Hegley, concurred with this description of relationships of the various methods of noise measurement.

[68] Aircraft noise contours are produced by taking the various noise levels produced by the combination of aircraft that will use an airport, distributing them onto their various flight paths and times of use and producing an Ldn figure. This figure is averaged over some months or even a year to obtain a figure that is representative of varied patterns of use, wind conditions and the like. Like other major airports, Auckland International Airport has set its noise contours by looking to potential future use and estimating the number and combination of aircraft expected to use it in 2030. The $65dBA_{Ldn}$ contour passes through the application site, leaving two thirds of the site where the apartment blocks are to be built in the high noise area.

[69] Current aircraft noise on the site varies from $60.5dBA_{L10}$ to $62dBA_{L10}$ and is expected to rise with increased use of the airport. Mr Day told us that the predicted increase in noise level for residents under the flight path from the existing runway would be 4 to 5 dBA Ldn and that such an increase is noticeable. This was not disputed.

[70] Witnesses called by the Airport Company told us that there were limited means available to the airport to reduce noise from its operations. Mr S Milne, the executive director of the Board of Airline Representatives in New Zealand, told us that there was little opportunity to reschedule night-time arrivals and departures away from their present time slots. He said that major overseas airports such as

Heathrow and Sydney operate under significant restraints including curfews. As a result of this, many overseas flights to and from New Zealand can only land and take off during certain "scheduling windows" and that New Zealand had to fit in with those slots. New Zealand, as a small country at the far end of the globe, has no ability to bring about a change to operations or curfews at those other airports to accommodate any curfew that future residents may wish to impose here, and the likely result of restrictions would be aircraft simply not travelling to New Zealand, with dire consequences for the country.

[71] Mr Milne also gave evidence, that while small incremental gains are being made in the noise performance of newer aircraft, they were not likely to be nearly as significant as those made prior to 1990. He described studies by the International Civil Aviation Organisation, which indicated that the cost of relatively modest improvements in noise performance would include higher operating costs, fuel burn, energy costs and air emissions; they concluded that there is limited potential for further reductions of noise at source and such reductions would involve significant costs. Mr Milne opined that the economics of airline operations are such that airlines would be unwilling or unable to upgrade aircraft prematurely merely to service the New Zealand routes, and that, if district plan requirements aimed to enforce such measures, the likely consequence would be the withdrawal of some services and significant fare increases on others. None of this evidence was seriously disputed.

[72] It was the applicant's case that such pressures would either not arise, or need not prevail because the residents would not experience significant adverse effects from airport operations due to the design of the complex and the surrounding environment of industrial noise.

[73] A condition of consent proposed by the applicant was that the combination of building materials used would create an internal noise environment in all habitable rooms of $35dBA_{L10}$ with exterior doors and windows of habitable rooms closed when the noise level at the boundary of the adjacent INL industrial site was $65dBA_{L10}$. Another condition was proposed to ensure that air quality was maintained in the enclosed environment by mechanical outdoor ventilation and/or air-conditioning capable of maintaining a temperature of not more than 25°. Further conditions prevent future alterations reducing the effectiveness of the buildings' acoustic design without council consent, and require the owner, among other things, to inform prospective residents of noise from overhead air traffic.

[74] Mr Hegley and Mr A L McKenzie, a graduate design engineer working for Economical Services Limited, the firm contracted to design mechanical services for the proposal, described in their evidence how the internal environment within the apartments could be achieved. Mr McKenzie told us that sufficient design work had been done to ensure that the required ventilation and air-conditioning installations could be incorporated into the buildings. This was accepted by the other parties.

[75] In the opinion of both Mr Hegley and Ms J A Hudson, a qualified planner with 22 years experience called by the applicant, the implementation of these conditions would ensure that residents of the building did not suffer adverse effects from aircraft noise.

[76] The first argument advanced to support this proposition was that residents of the apartments were likely to have chosen a predominantly indoor life-style. Ms Hudson commented that the nature of the development was such that residents were not reliant on access to outdoor living areas to have an acceptable quality of life and high standards of amenity. Mr Hegley likewise preferred this style of development to lower density development with increased outdoor areas for this site. He said "it is preferable to construct apartments on the site for people who do not want an outdoor lifestyle".

[77] No research was brought to our attention which showed that apartment-dwellers do not also enjoy the outdoors. Mr Day however commented that one of the advantages of living in a development like the one proposed was to take advantage of the more useable large outdoor recreation areas. He said that on this site the high external noise environment would significantly degrade these areas. He also noted the balconies attached to most units, and when asked about this in cross-examination told us that the balconies make up 20% of the total floor area for some of the apartments.

[78] Mr Day also referred us to the study of Bradley[18], which examined responses to aircraft noise in Toronto, Osaka, Oslo, Switzerland, the United Kingdom and Sydney. He pointed out that the climate in the northern hemisphere centres would require both insulation of at least the significance proposed for this development and the closing of windows and doors for long periods. Yet these centres, with higher density housing than Sydney showed a higher adverse response to aircraft noise,

[18] *Bradley (1996) Determining Acceptable Limited for Aviation Noise, Internoise 96*

despite the generally lower density housing and emphasis on outdoor living in the New South Wales capital. However, in cross-examination, he acknowledged that in the locations he had referred to it did get hot in the summer.

[79] We note that the property developer employed by the applicant to assist with the development of the site, Mr D J Medricky, acknowledged that the residents would have a variety of needs for open space. He told us that the architects design "has achieved a range of differing areas which have a multiple and varied use. This has been created with a mix of gardens, grass areas and elevated paving areas with seating and pergolas. It was important to have a variety of these different spaces to cater for the range of needs of the potential occupants". It is also proposed to provide an outdoor pool and barbeque area. We do not believe these areas have been provided for no purpose, and while potential residents will have varied needs, we find that there will be an expectation on the part of residents to enjoy both their balconies and the outdoor facilities of the site.

[80] The second leg of the applicant's argument was that the noise generated by the airport would not differ markedly from that permitted by the surrounding industrial properties, and for that reason residents would not perceive it as a nuisance. It was Mr Hegley's evidence that an agreement had been reached between the parties that if the noise from an adjacent industrial site was designed on the basis of 65dBA_{L10} and 90dBA_{L}max at the site boundary, the proposal would be within an acceptable limit for residents. He opined "It would be illogical for a level of 65-66dBA_{Ldn} not to be found acceptable for the same site simply because the noise came from a different direction".

[81] This was not the opinion of Mr Day. When pressed on this point by counsel for the applicant he told us that the noise level at the boundary of the site was restricted to 65dBA_{L10}. If noise at this level was produced from the INL site it would have reduced to 60dBA_{L10} by the time it reached the eastern façade of the site and to 50dBA_{L10} on the farthest side from the source. Even if the noise came from two sources contemporaneously, we infer that it would have considerably reduced by the time it is experienced in the central open air facilities. There would be no similar reduction in aircraft noise.

[82] Mr Day also disputed the statement that industrial noise controls the noise environment; moreover aircraft and industrial noise were different in kind and required different forms of assessment.

[83] We were not convinced by the second leg of the applicant's argument. The universally agreed difference in the measurement techniques used to assess aircraft as opposed to industrial noise, (Ldn as opposed to L_{10}) inclines us to the view that the types of noise are different in kind and in effect, and we accept Mr Day's evidence that the impact of industrial noise will diminish as distance from the site boundaries increases.

[84] The final argument of the applicant was that any noise effect on future residents of the apartments could not be considered adverse, because they had voluntarily and in full possession of the facts chosen to live in a noisy environment. Mr Hegley distinguished future residents from the average house or apartment buyer on the basis that they would be advised of both the adjacent industrial zone and noise from the airport. "They will be required to acknowledge these facts so that all owners can make an informed decision prior to purchasing an apartment." Ms Hudson proposed an amendment to condition 24 of the consent to make the noise situation clearer by replacing the words "overhead air-traffic" with the words "moderate to high levels of aircraft noise".

[85] This raises the question of whether the court should intervene to protect people from an adverse effect they have knowingly subjected themselves to. For the respondent council, which took a neutral stance in the proceedings, Mr Brownhill appositely referred us to the view taken by the Court in *Auckland Regional Council v Auckland City Council*. Referring to submissions based on leaving promoters of enterprises to judge their own locational needs, not protecting them from their own folly or failing to consider the position of these who come to a nuisance, the Court said:

> We consider that these submissions do not respond to the functions of territorial authorities under the RMA. ... To reject provisions of the kind proposed on the basis of leaving promoters to judge their own needs, or not protecting them from their folly and to failing [sic] to consider the effects [on] those who may come to the nuisance would be to fail to perform the functions prescribed for territorial authorities. It would also fail to consider the effects on the safety and amenities of people who come to the premises.[19]

With respect, we agree.

[86] We find that there would be an adverse effect on occupants of the premises from noise, and that those effects are properly of concern.

[19] [1997] NZRMA 205 at p 214

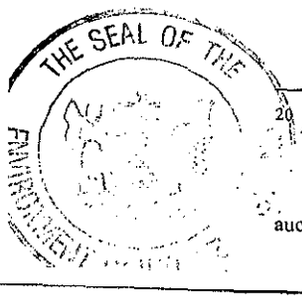
Permitted Baseline

[87] To assess the extent of those effects, we must consider how far those effects exceed those which are permitted by the plan. It was the respondent's submission that no activities fall within the permitted baseline for this site. Mr Brownhill referred us to the Court's decision in *Kalkmann v Thames – Coramandel District Council*[20] for the proposition that only permitted activities fall within the permitted baseline. He referred us to rule 14.12.3.1 by which the council reserves control over activities within 30 metres of a residential boundary in a business zone. Mr Brownhill then argued that because the activities contained within this application cannot be compartmentalised, the permitted baseline must be based on what could take place as of right within the whole application site.

[88] We do not agree. While this proposal cannot be compartmentalised, we can imagine a situation where provided an activity did not spill over into the 30 metres adjacent to the residential zone, it could occur as of right on what is a large site. In this respect we concur with the closing submissions of Mr Brabant.

[89] Among permitted activities beyond the 30 metre buffer with the residential zone are offices, and travellers accommodation. The applicant submitted that these uses could be situated in buildings identical to the apartment towers proposed except for the requirement for insulation. Mr Hegley noted that the effect of such an office –building would be to expose workers and office staff to a level of noise beyond what would be reasonable for a residential site. Ms Hudson likewise opined that there was no good reason to distinguish between the requirement of an occupant of traveller's accommodation for a good night's sleep and that of a permanent occupant of residential premises.

[90] Mr Osborne, disagreed. He noted that travellers' accommodation was not included amongst "Activities Sensitive to Aircraft Noise", opining that it was not sensitive compared with residential accommodation. He suggested that a hotel guest would have a totally different reaction to permanent residents, and that permanent residents lack the flexibility of hotel guests to seek a change of room or move to another establishment quickly. We concur with the views of Mr Osborne.



[20] A152/02 at paragraph 102

[91] We also find an element of fancy in some of the permitted activity scenario suggested by the applicant. For example when Mr Day was asked to compare the effect of noise on occupants of the apartments with that on occupants of an uninsulated office block, he responded that he was required to make some assessment of the materials used in construction, and had not encountered within the last fifteen years an office block of this size where the materials used did not provide some noise protection.

[92] Mr Brabant put to us that public open space was a permitted use on site, presumably to suggest, that for this reason we should give less weight to the appellant's evidence that adverse effects of aircraft noise on the open air areas of the site could not be mitigated. We consider that the users of public open space, as parks, sports fields and the like have different expectations than users of outdoor areas connected with their residence.

[93] We have considered the possibility of office-blocks or travellers accommodation being constructed on the site under the permitted baseline and the possibility of public open space being created. We find that when the effects of allowing this proposal are compared with that baseline the adverse effects on occupants remain significant.

[94] It was the appellant's case that when large numbers of residents are exposed to significant aircraft noise, this would inevitably lead to an attempt on the part of some residents to limit those impacts, and that if such an attempt was successful, the effects on Auckland International Airport, the Auckland economy, and even the New Zealand economy would be very severe. In considering the evidence on this matter we note that the word effect includes in its definition "any potential effect of low probability which has a high potential impact".

Response of residents to aircraft noise

[95] We now turn to the likely perception and response of the residents of the 349 household units who would be exposed to moderate to high levels of aircraft noise. Evidence for both the applicant and the Airport indicated that the proposed units may accommodate some 1000 people.

[96] The number of household units currently located within the high aircraft noise area in Manukau City is estimated to be 350 dwellings[21]. This proposal involves an additional 255 household units in the high aircraft noise area in this proposal. Mr Osborne noted that this is seven times the average net density of the adjacent residential area.

[97] As we have already mentioned, in considering the likely reaction of these new residents to the noise effect from overhead aircraft, Mr Day referred to a study of community responses to aircraft noise undertaken by Bradley.[22] Bradley compared the responses from six different overseas communities exposed to varying levels of aircraft noise expressed in Ldn dBA. At a level of Ldn 65, the Bradley graph indicates that a third of the community is likely to be highly annoyed about the noise. Mr Day noted that the Bradley study supported earlier findings by Schultz on the subjective response of communities to environmental noise.[23] From these studies Mr Day extrapolated the increase in people likely to be highly annoyed by aircraft noise in Manukau City to be more than 70% from this one proposed development.[24]

[98] Mr Brabant was critical both in cross-examination and in his submissions of the fact that full copies of those studies were not provided. In his closing submissions he said:

> In my submission it must be a matter of serious concern that a full copy of the study relied upon by the appellant in opening submissions and in cross-examination of the applicant's witnesses, was not made available.

This criticism of Mr Day was founded on lengthy cross-examination where it was alleged by counsel that the Bradley Report could not be relied on in the present circumstances.

[99] The Bradley Report was referred to in Mr Day's statement of evidence circulated prior to hearing. Central Gardens had its own acoustical consultant to subject the report, and the use made of it by Mr Day, to expert scrutiny. Mr Hegley had ample opportunity through evidence in rebuttal, to respond to Mr Day's usage of the report. He did not do so. Consequently Mr Nolan did not cross-examine him on this issue.

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[21] Evidence of CW Day, at 8.4

[22] Bradley (1996) *Determining Acceptable Limits for Aviation Noise*, Internoise 96

[23] Schultz (1978) *Synthesis of social surveys on noise annoyance,* J. Acoustic. Soc. Am., 64, 2, 377-405.

[24] Evidence of CW Day at 8.4

[100] In our view, in the absence of any challenge to the report or the use put to it by Mr Day, either in expert rebuttal evidence or by way of notification from counsel, we reject the criticism. Mr Day as an expert witness was relying on what appeared, from the circulated evidence, to be an internationally accepted study. If its use by Mr Day was to be challenged, then this should have been signalled and substantiated in the rebuttal evidence. In such a case we would expect the experts to then confer.

[101] We likewise reject the criticism that Mr Day was "evasive and adversarial". In our view such criticism was not warranted.

[102] We have regard to Mr Brabant's extensive cross-examination of Mr Day. Notwithstanding, we find that the Bradley study is a strong basis from which we can conclude that generally, for a population living in an external noise environment of Ldn 65, approximately 33% of the population are likely to be highly annoyed.

[103] Mr Hegley discussed in some detail the proposal and proposed conditions which he then assessed against the relevant provisions of the district plan. He concluded:

> The issue of whether residential activity should be allowed in the HANA as a matter of policy is outside my area of expertise, but I can say that this "greenfields" development will provide superior protection from aircraft and industrial noise then are enjoyed by its industrial neighbours in the adjoining residential zone.[25]

He opined that the number of proposed residents on the site is irrelevant because the same acoustic protection is required, whether for one new resident or a number.

[104] Mr Mendricky, also called by the applicant, submitted an analysis of complaint reports from Auckland Airport. From his analysis of those complaints he stated that there were only two complaints about noise from the high aircraft noise as compared to the relevant 110 complaints elsewhere from those listed in the complaint report summary. From this assessment, and his understanding of overseas research he seemed to be suggesting that the Court could conclude that there would be few people in the high airport noise area (within the proposed development) who would be annoyed or highly annoyed about the noise from over-flying aircraft.

[25] Hegley, EiC, paragraph 8.2.

[105] Mr Milne, the Executive Director of the Board of Airline Representatives of New Zealand (BARNZ), presented information on the wider issue of public opposition and complaints to aircraft noise at airports, on the basis of his many years of experience acting for BARNZ. He described discussions and negotiations in both the Auckland Airport Aircraft Noise Community Consultative Group (ANCCG) and the Wellington Airport Air Noise Management Committee (Wellington Committee).

[106] He told us that the Auckland Consultative Group, which has been meeting regularly since 1997, has a role in public consultation, the Noise Management Plan for Auckland Airport, Airport designation and monitoring. Mr Milne stated that a focus of the bi-monthly Auckland Group and Wellington Committee meetings is individual noise complaints received. The Auckland Group is presently reviewing noise complaints generated by noise that is Ldn 4dBA less than the level anticipated in the future.

[107] He stressed that the increase in traffic movements and size of aircraft using Auckland International Airport will result in a noticeable increase in the noise level from the present level. He noted from his experience in the transport sector as well as with the two committees, that community response tends to be less negative when members of the community are convinced that those responsible are taking steps to minimise noise.

[108] Mr Milne noted that unlike some other airports such as Wellington, where aircraft approach and depart over sea, half of all Auckland aircraft movements are over Papatoetoe and Manukau, and in the prevailing westerly winds, all landings are over these areas. Despite the seeming geographic advantage that Wellington Airport may enjoy, political pressure from Wellington residents from within the moderate to high aircraft noise area resulted in a bylaw which required Air New Zealand to 'hush-kit' aircraft and the imposition of a night curfew and noise abatement procedures for aircraft take off and landing. The promulgation of the Wellington City District Plan in 1994 drew resident submissions seeking further constraints on airport operations. A combination of noise abatement constraints outside the RMA, and planning restraints now apply to Wellington Airport.

[109] These potential impacts can be contrasted with the current situation at Auckland International Airport where, with the exception of the imposition of the noise contours, and associated controls, there is not a curfew or other such limitation to use of the existing runway. However, Mr Milne stated that as a direct result of

opposition from residents living close to the proposed second runway, a night -time curfew and other operational restrictions will apply to this runway. He was concerned that a future plan review would provide further opportunity for consideration of constraints on the Airport.

[110] The concern of BARNZ members, said Mr Milne, was that the substantial residential development proposed within the high aircraft noise area would result in resident and airport conflict about operation of the existing runway. This in turn he saw leading to bitterness and cost for all parties, including complaints and pressures for curfews and reduction in operations of the main runway. He opined that it was not only complaints that may lead to restrictions on the airport from highly annoyed residents, but pressure on the Council, community action groups (such as the 'Residents Against the Northern Runway' group), and instigation of opposition to aircraft operations.

[111] We also heard evidence about the imposition of curfews and operational constraints on other major airports such as Sydney Airport as the result of reverse sensitivity concerns about noise.

[112] While evidence seems to indicate that public pressure is more volatile and vociferous if there is a marked or proposed change in airport operations, nevertheless we find there to be a clear relationship to the number of people exposed to high aircraft noise and the introduction or increase in restraints on airport operations. The potential risk of operational constraints to this regional transportation resource posited by the witnesses, particularly Messrs Day and Milne, resulting from a sizeable increase in residents living in the high aircraft noise area, a significant proportion of whom would be highly annoyed by noise, therefore seems entirely realistic.

The gateways – section 105(2A)

[113] The first gateway requires us to determine whether the adverse effects on the environment as proposed to be remedied and/or mitigated, and taken as a whole, are more than minor.[26] It should be clear from our discussion of adverse effects, that we consider that to allow the proposal will be a catalyst likely to precipitate community

[26] See *Stokes v Christchurch City Council* C108/99.

reaction against the owner and users of the Airport, as a consequence of reaction to moderate to high aircraft noise.

[114] Such a community reaction would, in our view, be a direct reverse sensitivity effect that is more than minor. Consequently, the proposal fails to pass through the first gateway.

[115] The second gateway requires us to determine whether the activity proposed will be "contrary" to the relevant plan. A proposal which is a non-complying activity cannot for that reason alone be said to be contrary. The word contemplates being "opposed to in nature different to or opposite...also repugnant and antagonistic..."[27]. The second gateway process involves an overall consideration of the purpose and scheme of the plan as expressed in its objectives and policies, rather than a checking of whether the non-complying activity fits exactly within the detailed provisions of the plan[28]. A non-complying activity, is by reason of its nature, unlikely to find direct support from any specific provision of the plan[29].

[116] In the present case, the objectives and policies of the district plan recognise that above certain cumulative noise levels, measured in Ldn dBA, aircraft noise can cause a significant nuisance in noise-sensitive areas.[30] The district plan also recognises the regional significance of the airport and its flight paths, and their potential for effects on activities sensitive to high aircraft noise compromising the sustainable management of that infrastructure.[31]

[117] However, the plan does not prohibit sensitive activities, including residential accommodation, from establishing in high aircraft noise areas. Rather, it makes such activities non-complying. It further directs that such activities should generally be avoided "unless the adverse effects of those activities on Auckland International Airport can be avoided, remedied or mitigated".[32] Further, it provides for mitigation measures by way of acoustic and ventilation standards. However, in this case we hold that the effects of this activity on the considerable open air areas of this

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[27] *New Zealand Rail v Marlborough District Council* 1994 NZRMA 70 (HC at 80), 1993 2 NZLR 641 (HC).
[28] See *Eldersly Park Limited and Southern Moore Holdings v Timaru District Council and Countdown Properties Northland Limited* 1995 NZRMA 433 (HC).
[29] *Arrigato Investments Limited and Evensong Enterprises Limited v Auckland Regional Council and Rodney District Council* 2001 NZRMA 481 (CA) paragraph 17.
[30] See in particular Policy 17.6.4.8 and "Explanations/Reasons" for that policy.
[31] See Policy 17.6.4.11 and "Explanations/Reasons" for that Policy.
[32] See Policy 17.6.4.10.

complex cannot be adequately mitigated, and at the very least, the proposed development sits uncomfortably alongside this policy.

[118] Activities sensitive to aircraft noise cannot be said to be contrary to the district plan. Nor is residential accommodation per se contrary to the plan. However, the district plan specifically adopts an approach that seeks to limit reverse sensitivity effects on the airport[33]. The objectives and policies achieve this by requiring the reverse sensitivity effects to be avoided, remedied or mitigated. In some circumstances the remedying and/or mediation measures will suffice. In others they will not, and the "avoiding" aspects of the objectives and policies will come into play.

[119] In the present case, some 349 homes are proposed in an area identified in the district plan as being within the high and moderate air noise areas, and where the physical resource sought to be protected is New Zealand's largest international airport. In our view, the "avoiding" elements of the plan's objectives and policies predominate in this case. There is a plain and unambiguous thread of protecting the airport from increased residential density in the high aircraft noise area. We find that a residential proposal of this magnitude is contrary to the objectives and policies of the district plan.

Discretion – section 105(1)

[120] Having found that the proposal fails to pass the two gateways test, there is no need for us to consider the exercise of our discretion. However, in case we are wrong, we would exercise our discretion against granting the consent.

[121] The importance of the Auckland International Airport to the regional and national infrastructure and the need to ensure sensitive uses are developed so as to avoid conflict are not disputed. This is reflected in the relevant statutory instruments. The district plan manages the effects of aircraft noise. It also seeks to limit residential accommodation in the areas most affected by aircraft noise, in order to avoid adverse effects on the occupiers of such accommodation and thus in turn avoid the potential adverse effects of reverse sensitivity on the Airport.

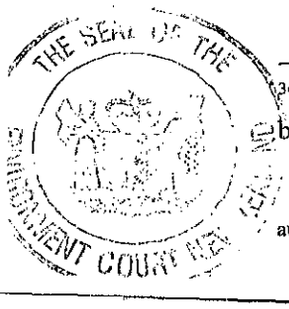
[33] See in particular Policy 17.6.4.9 and 17.6.4.11 and the "Explanation/Reasons" for those policies.

[122] Of particular significance is the emphasis in issue 17.6.2.7, which explicitly recognises the importance of limiting the amount of residential development in areas affected or potentially affected by high aircraft noise (aircraft noise levels greater than Ldn 65) because it is not possible to mitigate the effects of aircraft noise on the external environment. As Mr G J Osborne stated, this issue applies directly to the circumstances of the current case, where an acoustically insulated internal environment is proposed to be created, but nothing can be done to protect the residents from the effects of high aircraft noise when enjoying the outdoor recreational areas provided for in the development. This proposal can be contrasted with other examples of sensitive activities such as hospitals and, perhaps, aged care facilities where patients and inhabitants are bed-ridden and immobile and have no expectation of enjoying the external environment.

[123] In our view we should have regard to the nature, size and scale of the development[34]. The proposal will expose up to 1046 additional residents to high levels of noise in their home environment. It provides for reasonably generous outdoor recreational areas. It creates an activity which the plan recognises as being sensitive to aircraft noise in an area subject to high aircraft noise levels. While the proposed noise attenuation and ventilation measures would apply to the indoor recreational facilities and the units themselves, this will not, in our view, adequately protect recreation areas.

[124] We have discussed at some length the evidence relating to the potential adverse effects of reverse sensitivity. We have measured our findings against what we have found to be the "permitted baseline" We found that aircraft noise will have an adverse effect on the residents. We also found that when the effect of allowing this proposal are compared with the baseline, the adverse effects remain significant. Further, we found there to be a clear relationship to the number of people exposed to high aircraft noise and the introduction of, or increase in, the strength of opposition to airport operations.

[125] While the proposal results in a number of positive effects, they are outweighed by the likely reverse sensitivity effects which could affect an Airport which is the most important international gateway for New Zealand.



[34] See by way of analogy rule 5.21.4C(g) which requires the nature, size and scale of development to be had regard to for an ASAN in the Business Zone in the MANA.

[126] We also have regard to Part II matters, particularly those mentioned earlier in this decision. Section 5 does, among other things, direct that decision makers sustainably manage resources so that they meet the reasonably foreseeable needs of future generations. Section 7(d) and (e) are also particularly relevant. To allow a proposal that has the potential to conflict with such an important component of New Zealand's national infrastructure would not, in our view, be an efficient use and development of resources.

[127] We exercise our discretion against granting the consent.

Determination

[128] The appeal is allowed and the Council decision is set aside.

[129] Costs are reserved but it is our tentative view that costs should lie where they fall.

Independent News Auckland Limited (RMA 901/01)

[130] The parties to this appeal have settled and presented a memorandum of consent together with a draft consent order. Following the determination of RMA 906/01 no consent order will be approved.

DATED at **AUCKLAND** this 24th day of June 2003.

For the Court:

R Gordon Whiting
Environment Judge

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-000500
[2012] NZHC 1810

BETWEEN	INDEPENDENT FISHERIES LIMITED First Applicant
AND	R S PEEBLES Second Applicant
AND	CASTLE ROCK ESTATE LIMITED Third Applicant
AND	G F CASE, M M CASE AND MGM CASE Fourth Applicants
AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Applicant
AND	CLEARWATER LAND HOLDINGS LIMITED Sixth Applicant
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY First Respondent
AND	CANTERBURY REGIONAL COUNCIL, CHRISTCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL, SELWYN DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Second Respondents

Hearing: 2, 3 and 4 July 2012

Appearances: F Cooke QC, P Joseph and P Steven for Applicants
P McCarthy and K Stephen for First Respondent
M Perpick and J Ormsby for Second Respondents
J M Appleyard and T Lowe for Christchurch International Airport Limited (Intervener)
F Barton and S Everleigh for Prestons Road Limited (Intervener)

Judgment: 24 July 2012

RESERVED JUDGMENT OF CHISHOLM J

A **The application for review is granted.**

B **The First Respondent's decisions inserting chapters 12A and 22 into the Canterbury Regional Policy Statement are set aside.**

C **His decision revoking Proposed Change 1 to that Policy Statement is also set aside.**

D **Costs are to be resolved in accordance with [211].**

REASONS

Table of Contents

Introduction

[1] Following the devastating Canterbury earthquake on 22 February 2011 the Canterbury Earthquake Recovery Act 2011 (CER Act) was enacted by Parliament. Section 27 of the Act relevantly provides:

> **27 Suspension of plan, etc**
>
> (1) The Minister may, by public notice, suspend, amend, or revoke the whole or any part of the following, so far as they relate to any area within greater Christchurch:
>
> (a) an RMA document:
>
> ...

By virtue of the definitions in s 4 "Minister" means the Minister for Canterbury

Earthquake Recovery and "an RMA document" includes a regional policy statement and a district plan (both proposed and operative).

[2] In October 2011 the Minister, the Honourable Gerry Brownlee, used s 27(1)(a) to amend the 1998 Canterbury Regional Policy Statement (RPS) by inserting, and making immediately operative, new chapters 12A and 22. He also revoked proposed change 1 to the RPS (PC1) which was under appeal to the Environment Court. This revocation had the effect of terminating appeals by the applicants and others to that Court. Those decisions are challenged by the applicants in this application for judicial review.

[3] The Minister also amended the district plans of Christchurch City Council and Waimakariri District Council to enable specified areas of land at Prestons Road, Halswell West and Kaiapoi to be developed for residential purposes (and limited business purposes). Again, these amendments became operative immediately upon notification. Those decisions are not challenged by the applicants.

[4] In broad terms the applicants allege that the Minister's decisions concerning the RPS were made for unauthorised purposes and were thereby unlawful. They contend that the Minister's decisions were not earthquake recovery measures. Rather, those decisions reflected that the Minister had been persuaded to act in favour of the second respondents (who are described as the UDS partners)[1] by resolving longstanding disputes concerning long term growth policies for greater Christchurch[2] which were already in the hands of the Environment Court.

[5] Those allegations are denied by the Minister. He asserts that following the earthquakes he was faced with a pressing need for land to be freed up for urban residential subdivision and a planning framework in which the current status of PC1 was causing uncertainty for developers and councils, and thereby impeding the development of land for residential purposes. The Minister was also aware that there was no prospect of the Environment Court resolving the PC1 appeals quickly and

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[1] UDS stands for Urban Development Strategy.
[2] Greater Christchurch means the districts of the Christchurch City Council, Selwyn District Council and Waimakariri District Council. It also includes the coastal marine area next to those districts.

that council officers involved in those appeals were required for earthquake recovery planning.

[6] At a more specific level the applicants allege that the decisions of the Minister concerning the RPS are tainted with illegality for one or more of the following reasons:

- The Minister's use of the power under s 27 of the Act was principally exercised for ulterior (unauthorised) purposes, and not for the purpose for which the power was conferred by s 3 of the Act;
- That the Minister's decision entails the misapplication of a statutory power insofar as the Minister's decision (particularly in relation to Chapter 12A) implements a recovery strategy measure where, on a proper interpretation of the Act, another statutory power and procedure was intended to be used for that purpose;
- That the Minister failed to consider the question raised by s 10(1) of the Act as to whether the exercise of the power was "necessary" to achieve the statutory purpose in s 3; and thus in terms of s 10(2) of the Act, in the circumstances, his decisions were not reasonable;
- That insofar as the appeals before the Environment Court were terminated as a result of the exercise by the Minister of the s 27(1) power, the Minister has deprived parties of a fundamental right of access to the courts, and has exceeded his statutory power;
- That the Minister has failed to take into account relevant considerations.

Each of these specific allegations is denied by the Minister. And, supported by the second respondents and interveners, the Minister asserts that even if the Court finds reviewable errors, relief should not be granted.

[7] It is not disputed that the decisions in issue are amenable to judicial review.

Background

[8] After the RPS became operative in 1998 it became apparent to the second respondents that it lacked specific direction as to the location, timing and form of urban growth for greater Christchurch. They were particularly concerned about ad hoc developments arising from private plan changes. In 2003 the second respondents initiated a consultative process to develop a growth strategy for greater

Christchurch. Following public consultation they decided to support a detailed strategy in the form of PC1 which was publicly notified by the Canterbury Regional Council in 2007.

PC1

[9] Amongst other things PC1 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.

Judicial review proceedings in 2008

[11] In June 2008 the Regional Council's decision to appoint its own councillors to hear and determine the PC1 submissions was challenged in judicial review proceedings: *National Investments Limited v Canterbury Regional Council.*[3] National Investments Limited contended that the submissions arising from PC1 should be heard by independent commissioners because the UDS partners had entered into an agreement which the applicant believed had effectively predetermined PC1.

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[3] *National Investments Limited v Canterbury Regional Council* HC Christchurch CIV-2008-409-001280.

[12] The judicial review proceeding was settled on the basis that the Regional Council would appoint independent commissioners to hear and recommend decisions on the PC1 submissions. A consent order made in this Court on 31 October 2008 included an acknowledgement by the Regional Council that:

> ...
>
> 2. ...upon receiving...recommendations from [the] independent commissioners, Environment Canterbury must either:
>
> (a) accept those recommendations; or
>
> (b) (i) withdraw PC1 in its entirety; or
>
> (ii) appoint a new panel of commissioners to rehear the submissions; and
>
> ...

In due course three independent commissioners were appointed to hear the submissions and make recommendations to the Regional Council.

Hearings before the independent commissioners

[13] Hearings were conducted by the commissioners between April and September 2009. By that time there had been four variations to PC1 and those variations had attracted further submissions. As required by the consent order the commissioners' recommendations were adopted by the Regional Council in December 2009 (the Regional Council's decision).

[14] In broad terms the Regional Council's decision upheld the approach signalled by PC1 concerning the use of urban limits. In some cases, however, new greenfield areas for residential development resulted in changes to the location of the urban limits. "Special Treatment Areas" involving land owned by some of the applicants were also identified and Christchurch City Council was directed to investigate an appropriate zoning for the land within those areas (which were now within the urban limits). Although the use of a 50 dBA Ldn contour around the airport was upheld, there was provision for growth within that contour at Kaiapoi.

Appeals to the Environment Court

[15] The Regional Council's decision attracted approximately 50 appeals to the Environment Court. These included appeals by five of the applicants and the sixth applicant joined the appeals under s 274 of the Resource Management Act 1991 (RMA). Appeals were also lodged by Christchurch City Council, Waimakariri District Council and Christchurch International Airport Limited.

[16] Initially the first phase of these appeals was to be heard by the Environment Court in June 2011. But that hearing was adjourned for two months as a result of the earthquakes. Later requests by the UDS partners for further adjournments were refused.

[17] I pause at this stage to briefly outline the consequences of the Canterbury earthquakes.

[18] Although the earthquake in September 2010 caused considerable damage at Kaiapoi, it did not give rise to widespread RMA issues for greater Christchurch. That changed with the earthquake in February 2011 when the need for residential development became urgent, particularly as the result of the creation of residential red zones in the city. This was accentuated by two further significant earthquakes on 13 June 2011.

[19] The Government announced that it was prepared to make offers to purchase properties in the residential red zone, with such offers remaining open for nine months after receipt of the offer. As a result there was significant pressure from people wishing to relocate. Given the timeframe required for preparing bare land for development and erecting houses, land had to be made available for residential development as quickly as possible. Heavy demands were also being made on the time of council officers who were involved in drafting the earthquake Recovery Strategy required under the CER Act.

[20] Now I return to the appeals before the Environment Court. As time went by the UDS partners (second respondents) were able to reach agreement with some of

the appellants, including Prestons Road Limited, an intervener in this proceeding. The Prestons Road settlement meant that around 200 ha would come within the urban limits and be available for residential development. However, the settlements were opposed by some appellants and, while the Environment Court was not critical of the attempt to resolve matters, it declined to endorse the settlements at that time.

[21] It also transpired that the Regional Council did not intend to defend its decision, and this attracted strident criticism from some appellants. In an interim decision delivered by the Environment Court on 28 July 2011,[4] the Court observed:

> [37] ...CRC [Canterbury Regional Council] appears to be abdicating from its responsibilities as the local authority which decided the change...being appealed [PC1]. While the court accepts that, especially in relation to a policy statement or plan...a local authority may change its position after releasing its decision, it must do so in a fair and transparent way...

The Court went on to observe that the UDS partners' approach raised a number of concerns including possible unfairness to other appellants and persons not before the Court. It also commented that there had been no visible attempt to ensure fairness and that the Regional Council and UDS partners "seem to have tried to keep the process secret".[5]

[22] Ultimately the second phase of the appeal process was set down for hearing over the period November 2011 – March 2012. The UDS partners sought an adjournment on several grounds, including the likelihood that the draft Recovery Strategy that had been released would overrule PC1 and that council resources were required for earthquake recovery purposes. An adjournment was refused by the Environment Court in September 2011.

[23] The UDS partners then sought judicial review of the Environment Court's decision refusing an adjournment: *Canterbury Regional Council v The Environment Court of New Zealand.*[6] Other parties sought to join the review, both for and against. Before this application could be considered by the Court the Minister notified his decision revoking PC1. A notice of discontinuance was then filed.

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[4] *MHR Group Ltd & Ors v Canterbury Regional Council* [2011] NZEnvC 215.
[5] Ibid, at [39].
[6] *Canterbury Regional Council v The Environment Court of New Zealand* HC Christchurch CIV-2011-409-001953.

Minister's decisions

[24] Before discussing the Minister's decisions it is helpful to outline some events leading up to those decisions.

Background events

[25] As a result of the Regional Council's decision land owned by the fourth applicants (the Case family) came within a Special Treatment Area. In May 2011 the family's lawyers wrote to the Minister indicating that they understood the Minister might be turning his attention to the status of PC1. The letter put the Case family's position to the Minister and sought a meeting. Later representatives of the family met with CERA officials. The outcome conveyed to the family by the Minister was that, "whilst CERA is investigating options to accelerate developments to aid recovery, your client could usefully progress planning approval issues that would otherwise be required".

[26] The Minister also deposes that he met with Mr Dormer, a director of the first applicant (Independent Fisheries Limited). Among the topics discussed was the first applicant's desire to carry out a residential development on its land near the airport (which, as a result of the Regional Council's decision, was also within a Special Treatment Area). Mr Dormer also raised issues with the Minister on several other occasions at social functions. The Minister did not feel able to offer any individual assistance to Independent Fisheries Limited.

[27] There were also meetings between officials of the Canterbury Earthquake Recovery Authority (CERA) and representatives of the UDS partners. A letter from CERA dated 29 July 2011 indicates that there had been a number of discussions before that time about the possibility of interventions using CER Act powers. Key immediate interventions recorded in the letter included the use of s 27 of the CER Act to zone land for new housing and to amend the urban limit line within PC1 "to reflect the UDS partners' preferred position".

[28] During a meeting between CERA and the UDS partners liaison group on 28 September 2011, a request was made for the UDS partners to provide a revised PC1, taking into account the Canterbury earthquakes. A draft document was subsequently supplied to CERA by the UDS partners.

[29] On 30 September 2011 CERA officials provided the Minister with briefing papers in relation to the possibility of residential development at Kaiapoi within the 50 dBA Ldn noise contour. These papers noted that negotiations between the airport company and the greater Christchurch local authorities had resulted in a compromise whereby the airport company had agreed to an exception for residential development in north-eastern Kaiapoi provided the importance of the 50 dBA Ldn contour was recognised in planning documents.

[30] Having discussed the possibility of adding a special chapter to the RPS dealing with the issue of the noise contour, the briefing papers stated:

> 19 It would also be possible to just change the Waimakariri District Plan and enable the subdivisions but this would not achieve the strengthening of the 50 dBA Ldn air noise corridor in the rest of greater Christchurch, and so would be opposed by CIAL [the airport company].

It was recommended to the Minister that a change be made to the RPS by adding a short chapter specifically dealing with the noise contour and supporting this with an amendment to the Waimakariri District plan.

[31] Further briefing papers dated 7 October 2011 were supplied to the Minister with reference to the proposed chapter 12A. These papers noted that PC1 was developed as a result of the local authorities in Canterbury working together to identify areas for urban growth and that the change was presently before the Environment Court. The papers commented that PC1 did not take into account either agreements reached since the appeals were filed or the Canterbury earthquakes. It recorded that CERA staff had worked with the staff of local authorities to prepare a revised draft chapter 12A which incorporated those matters.

[32] After stating that it was within the Minister's powers under s 27 to add chapter 12A and to suspend or revoke PC1 "so as to avoid any confusion and

probably stop the present Environment Court proceedings", the briefing papers continue:

> 5 Exercising your powers under section 27 of the CER Act is in accordance with many of the purposes of the CER Act, but there is a risk that arguments could be made that public participation has been curtailed and that the subject matter is focused on growth as opposed to recovery. It is noted, however, that as the RPS can be overridden by a Recovery Plan dealing with land use issues and further changes can be made using section 27 powers, that these concerns can be addressed. Further to assist with the infrastructure recovery there needs to be long term planning including potential growth.

Later the Minister is given three options: "do nothing"; suspend PC1 "until the High Court has concluded whether the decision not to adjourn was correctly made or not"; or revoke PC1.

[33] With reference to the last alternative of revoking PC1 the Minister was briefed:

> 29 ...This would mean that there is no document before the Environment Court and so it should follow that the Environment Court no longer has any jurisdiction to consider the appeals. This will, however, raise concerns about the Executive's involvement in Court proceedings and misuse of power which could in turn result in judicial review of the revocation.

The briefing paper recommended that, given the complicated circumstances, the Minister should suspend PC1 "and see how the Court proceedings play out".

Minister's decision on 8 October 2011

[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.

Minister's decision on 17 October 2011

[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.

Changes to district plans

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

[37] The changes to the city plan created residential zones at Prestons Road and Halswell West. The change to the Waimakariri plan zoned specified land within the 50 dBA Ldn contour at Kaiapoi for residential purposes pursuant to an exemption contained in chapter 22 of the RPS. It was stated that this exemption was specifically provided to reflect the displacement of existing dwellings at Kaiapoi within the 50 dBA Ldn noise contour.

Requests for reconsideration

[38] Early in November 2011 lawyers for the first applicant wrote to the Minister seeking reconsideration of his decisions adding the two new chapters to the RPS. The letter sought redress in the form of revocation of the 50 dBA Ldn noise corridor

and the substitution of a 55 dBA Ldn contour. It also sought reinstatement of a greenfield area that had been included in PC1 before it was deleted by variation 4. After receiving a briefing paper the Minister declined the request.

[39] Later in November 2011 two directors of the sixth applicant wrote to the Minister seeking his intervention to enable further residential development at Clearwater. Again the matter was considered by CERA officials and the Minister ultimately replied that he was not prepared to intervene.

[40] The Minister's affidavit also indicates that there were other approaches to CERA officials about changing the urban limit line.

Minister's affidavit

[41] For the applicants Mr Cooke QC questioned the weight that should be given to parts of the Minister's affidavit. This was based on *Abbott v Coroners Court of New Plymouth*[7] in which Randerson J expressed concerns about a Coroner's affidavit when considering an application for judicial review of the Coroner's decision. The Judge noted that it is well established that judicial review proceedings generally proceed on the basis of the evidence before the decision maker at the time of the decision.[8]

[42] I agree with Mr McCarthy that that decision is distinguishable and that in the present context the relevant authority is *Kellian v Minister of Fisheries.*[9] In that case the Court of Appeal stressed the value of decision makers explaining their reasons when their decisions are challenged. It also indicated that when those reasons are provided they should be given "real weight".[10] Any such reasons must, of course, apply at the time the decision was made. It is not an opportunity to come up with new reasons after the event.

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[7] *Abbott v Coroners Court of New Plymouth* HC New Plymouth CIV-2004-443-660, 20 April 2005.
[8] Ibid, at [22].
[9] *Kellian v Minister of Fisheries* CA 150/02, 26 September 2002.
[10] Ibid, at [8].

[43] With reference to his decision to add chapter 22 to the RPS and exempt part of Kaiapoi from the effect of the 50 dBA Ldn air noise contour, the Minister deposes:

> 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.
>
> 32. I was aware that the Waimakariri District Council was stretched with the demands following the earthquakes and that my decision would assist to provide certainty and free staff resources to assist with earthquake recovery work instead of arguing over residential development boundaries.
>
> 33. I was advised that if the whole of Kaiapoi was exempted from the effect of the contour line further subdivision in the south-west could be developed, adding more residential sections and, while I understood Christchurch City Council and Christchurch International Airport Ltd would not necessarily be supportive of that decision, although Christchurch International Airport Limited said they would not object if the decision was made, I considered exempting the whole of Kaiapoi was the right decision.

The Minister goes on to say that in his view the situation in Kaiapoi was different from that in Christchurch where there were significant areas of land available for development outside the noise contour.

[44] In relation to the decision to incorporate chapter 12A into the RPS the Minister states in his affidavit:

> 38. I wish to highlight several aspects of the paper. As I have noted, I was aware generally and from the discussions I had with Mr Dormer and with Prof. Peter Skelton, one of Environment Canterbury's Commissioners, that Environment Canterbury was seeking a change to its operative RPS by adding a new chapter 12A through PC1.

39. I knew PC1 had been considered by the hearing commissioners who had recommended some changes and that the document had been appealed to the Environment Court by a number of disappointed parties. I also knew that negotiations had resolved a number of issues with developers and consent memoranda had been filed with the Environment Court. In particular, I was aware that the argument about the legality of having an urban limit line at all had been resolved. The parties may not have been in agreement about where the line was to be placed, but I understood that the concept of an urban limit line was accepted as a valid tool. In general I also understood that there was no real disagreement to the area that PC1 proposed to be within the line; the issue was what else should or could be included.

40. I also understood that the UDS Partners had sought adjournments of the Environment Court proceedings which had been unsuccessful and that that decision was the subject of judicial review proceedings.

41. I was surprised and concerned that the Environment Court did not grant adjournments as requested in May and September 2011 because of the level of uncertainty that the on-going litigation caused for developers and the local councils. By then it was apparent there was potentially considerable overlap between PC1 and the draft Recovery Strategy, which I am required to consider and approve. Even if the Recovery Strategy was not going to deal with projected growth, residential density and provision of infrastructure, the proposed Recovery Plans were another vehicle which could do that.

42. I was concerned the Environment Court proceeding was delaying the implementation of the earlier negotiated agreements which had resulted in draft consent orders being filed with the Court and would have allowed development to proceed. This was delaying the planning, rebuilding and recovery of greater Christchurch as sought by the CER Act. I was not at all confident the Environment Court process would result in an overall plan which could be implemented quickly. I could see the appeal processes stretching out for a very long time indeed.

43. I considered it extremely unhelpful that the very council officers who were required to contribute to the Environment Court hearing were the ones that should have been focussed on recovery planning. I knew that the procedural hearings for the appeals were held in Queenstown, as the Environment Court considered that none of the hearing venues available in Christchurch were satisfactory, and that it was uncertain whether the Environment Court planned to hold further hearings of the appeals in Queenstown as well. Having to travel to Queenstown on a regular basis for these hearings would have further compromised the councils' officers' ability to contribute to the region's recovery.

44. It was obvious, but confirmed from the Case family correspondence and my discussions with Mr Dormer, that as a result of my decision there would be perceived disadvantages to those who were attempting to have their properties included within the urban limit line through the appeal processes.

45. Giving effect to the proposed urban limit in PC1 did not, however, mean the limit could not be changed at a later date. PC1 itself contemplated this if there was a change of circumstances and I understood there was an ability to use the section 27 powers to make further changes if necessary.

...

48. Having considered the advice I received and for the reasons outlined in this affidavit I was in no doubt that the use of my section 27 powers to provide a specific chapter within the RPS to deal with the development of Greater Christchurch was necessary and was consistent with the relevant purposes of the CER Act. In my view the work already done by the UDS Partners to plan for urban development and the extensive consultation involved in that process were a useful starting point to provide certainty following the earthquakes. I also understood officials at CERA had been working with the UDS Partners staff to incorporate those agreements reached as part of the appeal process relating to developments at Prestons, Hills/Mills, Lincoln Land and Memorial Avenue and to make a number of additions to take into account matters following the earthquakes. What emerged was something beyond the UDS Partners' version of PC1.

49. In many ways, the inclusion of a new Chapter 12A based on the amended PC1 was a neat solution to assist to resolve the problems confronting the greater Christchurch area at that time.

50. I was faced with the prospect of significant numbers of people being unable to find appropriate accommodation in the region. That was not going to assist the recovery. I had to create a situation where there were sufficient opportunities for significant numbers of the local population to move to appropriate housing within the locality. That would not occur if there was rampant land inflation due to a restriction on supply. Along with those economic recovery factors, the social consequences would be terrible if people in the "Residential Red Zone" were not able to move. These were issues I did not feel the local authorities were capable of overcoming without assistance.

51. A further consideration was the obvious fact that CERA and the CER Act will expire in 2016. I was conscious that my decisions would need to be broadly acceptable to the UDS Partners, who will inherit those decisions and I wanted to put in place a document that was consistent with the work already done on infrastructure planning, traffic management and the like. It was, in my view, important that the UDS Partners were able and willing to work with the planning structures they would eventually inherit.

52. Other than in the general terms, I did not take into account any information about the specific circumstances of individual property developers, and others, who might be affected, one way or another, by the inclusion of a new Chapter 12A based on PC1 as amended. I was, as I have noted, aware from the correspondence on behalf of the Case family and my discussions with Mr Dormer that my

decision would impact to the disadvantage of some. Any concern that some parties may have lost the ability to continue an appeal which might theoretically have resulted in them gaining an ability to improve their position was discounted by the compelling need to provide the Councils, infrastructure providers and developers with certainty so that the pressing need for residential development to occur in appropriate places would not be delayed.

53. I also understood my decision was not necessarily going to be final. As the Recovery Strategy and future Recovery Plans are developed it is likely Chapter 12A will be reviewed and could change. Given the uncertainty about population movements in greater Christchurch I was not too concerned about the accuracy of the population projections in Chapter 12A as I knew these would be looked at again. Although I expected movement out of Christchurch after the earthquakes, and for more people to move into Christchurch during the rebuild, the numbers involved were hard to estimate. It was, therefore, easier to adopt what had already been drafted and consulted on rather than trying to update such figures during a time of great uncertainty.

54. I also made it clear to the UDS Partners that if individual cases of merit were presented to me I could potentially use my section 27 powers to amend the urban limit line to assist with the recovery. This is a point not lost on Mr Dormer, Mr Pebbles, the Case family and the representatives of Clearwater all of whom have approached me and/or CERA officials requesting a rezoning of their respective lands.

55. There was one aspect of the 7 October 2011 paper with which I did not agree. That was the recommendation I use my powers to suspend PC1. In my view suspension was not appropriate. It would still have left the appeal process in a sort of "suspended animation" and that would have been confusing for the various participants. There was also some doubt about what suspension would mean in practice. I was very keen that there be no doubt that the appeal process, and the time commitment by Council staff and others, had been brought to an end.

This part of the Minister's affidavit concludes by indicating that as a result of these matters he did not accept the recommendation made to him and instead elected to revoke PC1.

CER Act

[45] Although the CER Act contains 93 sections, the summary that follows will be confined to the parts of the Act that are directly relevant to the grounds of review before the Court.

Introduction

[46] After the earthquake on 4 September 2010 the Canterbury Earthquake Response and Recovery Act 2010 was enacted. But it was inevitable that more extensive legislation would be required after the earthquake on 22 February 2011, and the Canterbury Earthquake Recovery Bill was introduced into the House on 12 April 2011.

[47] The House instructed the Local Government and Environment Committee to hear evidence and report again by 14 April 2011. In its report the Committee said:

> The bill sets out a series of purposes that will guide decision-making by the Minister for Canterbury Earthquake Recovery and CERA, ensuring that there is adequate statutory power to enable community participation while promoting the focused, expedited, and timely recovery of greater Christchurch and its communities. Specifically, the bill provides for an overarching Long-Term Recovery Strategy to be developed by CERA in collaboration with stakeholders, as well as more specific Recovery Plans...
>
> ...
>
> All the submitters supported the need for the legislation recognising that extraordinary powers are necessary because of the extraordinary circumstances following the earthquakes...The Minister noted that the powers can only be used within the purposes of the bill, which [focuses] solely on the scope of earthquake recovery...
>
> ...
>
> At every step of this legislative process we have had assurances, including from the Minister, that this is enabling legislation, and that he intends to ensure maximum community involvement in the rebuilding of Canterbury. We intend to hold him, and others, to these assurances.

[48] On the second reading of the Bill on 14 April 2011 the Minister told the House:[11]

> ...I sincerely think that having a structure that allows rapid decision-making that can give effect to decisions that the community is on board with is exactly what is required here. That does require the taking of powers that are somewhat extraordinary...
>
> This bill is an enabling framework setting out a range of powers that may need to be exercised during the recovery process. It does have significant checks and balances on the use of those powers, and the most clear check

[11] (14 April 2011) 671 NZPD 18129.

> and balance is the requirement that all of those powers must be exercised in the recovery process and cannot step outside of that. What we have recognised with this bill is the need to restore social, economic, cultural, and environmental well-being in Greater Christchurch. Further, it recognises a need to facilitate, coordinate, and direct the planning, rebuilding, and recovery of Greater Christchurch, and it places importance on community participation in the planning of the recovery while balancing that against the need for timely, focused, and coordinated recovery processes.

The Bill also went through a third reading the same day and the Act came into force on 19 April 2011.

Purposes of the Act

[49] The purposes of the Act are directly relevant to the first ground of review which alleges that the Minister did not exercise his powers concerning the RPS for proper purposes. Section 3 provides:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
>
> (c) to provide for the Minister and CERA to ensure that recovery:
>
> (d) to enable a focused, timely, and expedited recovery:
>
> (e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:
>
> (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:
>
> (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:
>
> (h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

...

The remaining purpose, which is to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010, has no direct relevance.

[50] In the context of this proceeding the s 3 purposes need to be read in conjunction with s 10, particularly s 10(1). Section 10 provides:

> **10 Powers to be exercised for purposes of this Act**
>
> (1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.
>
> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.
>
> (3) The chief executive may from time to time, either generally or particularly, delegate to any employee of, or person seconded to, CERA any of the functions or powers of the chief executive under this Act or any other Act, including functions or powers delegated to the chief executive under any Act.

According to the applicants the Minister failed to comply with subs (1)[12] and his decisions concerning the RPS were not reasonably necessary in terms of subs (2).[13]

Community forum

[51] Part 2 of the Act describes functions and powers to assist recovery and rebuilding. Subpart 1 of that Part provides for input into decision making by a community forum:[14]

> **6 Community forum**
>
> (1) The Minister must arrange for a community forum to be held for the purpose of providing him or her with information or advice in relation to the operation of this Act.
>
> (2) The Minister must invite at least 20 persons who are suitably qualified to participate in the forum.

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[12] First ground of review.
[13] Third ground of review.
[14] There is also provision for a cross-party forum.

(3) The Minister must ensure that the forum meets at least 6 times a year.

(4) The Minister and the chief executive must have regard to any information or advice he or she is given by the forum.

The applicants allege that the Minister should have involved the community before making his decisions on the RPS.[15]

Development and implementation of planning instruments

[52] Under this heading Subpart 3 of the Act provides for three matters: Recovery Strategy; Recovery Plans; and "Provisions affecting councils and others" which includes s 27. This Subpart of the Act is relevant to the second ground of review and I now outline the three matters covered by it.

(a) Recovery Strategy

[53] Section 11 provides for development of the Recovery Strategy:

11 Chief executive to develop Recovery Strategy for Minister's consideration

(1) The chief executive must develop a Recovery Strategy and submit the document to the Minister for his or her consideration.

(2) The Governor-General may, by Order in Council made on the recommendation of the Minister, approve a Recovery Strategy.

(3) The Recovery Strategy is an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation) include provisions to address—

(a) the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment:

(b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction:

(c) the nature of the Recovery Plans that may need to be developed and the relationship between the plans:

[15] Second ground of review.

(d) any additional matters to be addressed in particular Recovery Plans, including who should lead the development of the plans.

(4) The Recovery Strategy must be developed in consultation with Christchurch City Council, Environment Canterbury, Selwyn District Council, Waimakariri District Council, Te Runanga o Ngai Tahu, and any other persons or organisations that the Minister considers appropriate.

A draft Recovery Strategy has to be publicly notified so that members of the public can make written comments. It must include one or more public hearings at which members of the public can appear and be heard, and it must be developed within nine months of the Act coming into force: ss 12 and 13.

[54] As provided by s 11(2) the final step in a Recovery Strategy is an Order in Council. Before the Minister can recommend an Order in Council the draft Order must be reviewed by the Canterbury Earthquake Recovery Review Panel (the Panel) and the Minister must have regard to the recommendations of the panel: ss 72 – 74.

[55] Similar processes are involved if the Recovery Strategy is changed: s 14.

[56] The effect of the Recovery Strategy is described in s 15. No RMA document within greater Christchurch can be interpreted or applied in a way that is inconsistent with a Strategy, and in the event of any inconsistency the Strategy will prevail. It is also provided that no provision of the Strategy that is incorporated in an RMA document can be reviewed, changed, or varied under Schedule 1 of the RMA.

(b) Recovery plans

[57] Recovery Plans are provided for in ss 16 – 26, with s 16 applying to recovery plans generally:

16 Recovery Plans generally

(1) The Minister may direct 1 or more responsible entities to develop a Recovery Plan for all or part of greater Christchurch for his or her approval.

(2) The direction must specify the matters to be dealt with by the Recovery Plan, which matters may include provision, on a site-specific or wider geographic basis within greater Christchurch, for—

(a) any social, economic, cultural, or environmental matter:

(b) any particular infrastructure, work, or activity.

(3) A responsible entity may request that the Minister direct it to develop a Recovery Plan.

(4) Where the Minister directs the development of a Recovery Plan, he or she must ensure that the direction is notified in the Gazette together with a list of all other Recovery Plans being developed or in force.

Although specific provision is made in s 17 for a Recovery Plan for the Christchurch central business district, those provisions have no direct relevance in the present context.

[58] The relationship between a Recovery Plan and the Recovery Strategy is described in s 18. Although a recovery plan must be consistent with the Recovery Strategy, a Recovery Plan may be developed and approved before the Recovery Strategy is approved. But once the Recovery Strategy has been approved the Plan must be reviewed, and if necessary amended, to ensure that it is consistent with the Strategy.

[59] Under s 19(1) it is for the Minister to determine how Recovery Plans are to be developed, including any requirements as to public consultation or hearings. Subsection (2) provides:

19 Development of Recovery Plans

...

(2) In acting under subsection (1), the Minister must have regard to—

(a) the nature and scope of the Recovery Plan; and

(b) the needs of people affected by it; and

(c) the possible funding implications and the sources of funding; and

(d) the New Zealand Disability Strategy; and

(e) the need to act expeditiously; and

(f) the need to ensure that the Recovery Plan is consistent with other Recovery Plans.

...

[60] Subject to s 20, the Minister does not have a duty to consult about a Recovery Plan and nothing in s 32 or Schedule 1 of the RMA applies to the development or consideration of a Recovery Plan. However, s 20 requires a draft Recovery Plan to be publicly notified and that notification must invite members of the public to make written comments in the manner and by the date specified in the notice.

[61] Once a Recovery Plan has been approved by the Minister and notice of the issuing of the Plan has been given in the *Gazette* under s 21, it can be changed from time to time under s 22. From notification of a Recovery Plan in the *Gazette* every person exercising functions or powers under the RMA must not make a decision or recommendation that is inconsistent with the Recovery Plan in relation to matters listed in s 23(1). Councils must amend an RMA document relating to greater Christchurch if a Recovery Plan so directs: s 24.

(c) Provisions affecting Councils and others

[62] As already stated, this segment of the Act begins with s 27[16] which gives the Minister power by public notice to suspend, amend or revoke the whole or any part of an RMA document: s 27(1)(a). Under subs (2) the Minister can, subject to specified safeguards, suspend or cancel any resource consent by public notice.

Other provisions

[63] Section 48(1) empowers the Minister to direct any council to take or stop taking any action, or to make or not to make a decision. Except in limited respects there are no rights of appeal against a decision of the Minister acting under the Act: s 68. The Act expires five years after the date of its commencement: s 93(1).

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[16] The relevant part of that section is quoted at [1] above.

First ground of review – power not exercised for proper purposes

[64] The crux of this allegation is that the Minister used s 27 for unauthorised purposes.

Applicants' argument

[65] The Minister's ulterior and unauthorised purposes were:

> 74.1 The long term RMA policy objectives for the growth of greater Christchurch area promoted by Chapter 12A, and the protection of the Airport's commercial interests involved in Chapter 22, neither of which were earthquake recovery purposes as defined by s3;
>
> 74.2 The suggested certainty and stability indirectly achieved by terminating the RMA procedures for amending a Regional Policy Statement (including the appeals to the Environment Court). This was (i) only an incidental bi-product of the introduction of the chapters, (ii) was not a prescribed statutory purpose under s3, and (iii) was an objective directly contrary to the purpose of community participation in planning for earthquake recovery required by s3(b); and
>
> 74.3 The adoption of the UDS Partners' preferred version of PC1, rather than the official version adopted by Ecan after consideration of the report by the Independent Hearings Commissioners. That simply preferred the UDS Partners' litigation position, irrespective of any alleged earthquake related purposes suggested to exist through the need for long term planning; and
>
> 74.4 Conceding to the demands of CIAL[17] in return for their acceptance to the release of land at Kaiapoi to accommodate earthquake displaced residents.

Any one or more of these purposes rendered the decision to amend the RPS unlawful.

[66] A power granted for one purpose must be used for that purpose and not for some unauthorised or ulterior purpose: *Lumber Specialties Ltd v Hodgson;*[18] *Unison Networks Ltd v Commerce Commission.*[19] Mala fides does not have to be established

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[17] The airport company.
[18] *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 (HC) at [58].
[19] *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [50].

and it is no answer that the decision maker acted in the public interest, for the public good, or that the decision was justified on policy grounds.

[67] While in some situations a statute will permit a statutory power to be exercised for an ulterior purpose in addition to the authorised statutory purpose, this is not such a situation. Section 10 expressly excludes the pursuit of any purpose that is not directed at earthquake recovery and paragraphs (a) – (i) of s 3 promote measures directed *specifically* and *expeditiously* at earthquake recovery.

[68] When amending the RPS the Minister's primary or predominant purpose was not earthquake recovery. At best that purpose was subsumed within the Minister's primary purpose which was:

> ...to facilitate urban planning for and accommodation of population growth within the greater Christchurch region for the next 30 years (until 2041); to protect the Airport by a noise control corridor; and to impose the UDS Partners' preferred version of PC1 which they were seeking to advance by their litigation strategy before the Environment Court.

This is illustrated by the very nature of the measures that were introduced by the Minister and the reasoning in the decision papers.

[69] Chapter 12A makes reference to the Canterbury earthquakes in an entirely perfunctory way. Within the 31 page document there are only six passing references to the earthquakes, which indicates that earthquake recovery was at best only incidental to the Minister's primary purpose of planning for urban development and population growth over the next 30 years. Earthquake recovery measures were achieved by re-zoning within the district plans. No change to the RPS was required.

[70] It is evident from chapter 12A that earthquake recovery was simply an "add on". While 7250 properties in Christchurch City and Waimakariri District were red-zoned and relocation of householders was required, chapter 12A provides for the development of 47,225 residential properties within the designated greenfield areas over a period of time well beyond the life of the CER Act.

[71] Despite its title chapter 22 is unrelated to earthquake recovery. It gives effect to a compromise deal struck between the Minister, the UDS partners and the airport

company. The collateral purpose behind the chapter is the safe and efficient operation of the airport company. That purpose is not authorised.

[72] The Minister's decision papers include acknowledgments that the substance of PC1 goes well beyond the s 3 purposes of the Act. Even the justification advanced in the discussion paper – certainty or predictability – is not included in the list of purposes set out in s 3. It is merely a by-product of the imposition of the two chapters.

[73] Applying the "materiality" or "but for" test used in *Poananga v State Services Commission*,[20] the Minister would not have made his decision to introduce changes to the RPS *but for* the desire to:

(a) introduce the long term planning policies which chapter 12A implemented;

(b) protect the airport's position which chapter 22 implemented;

(c) create greater certainty by eliminating the community participation process for determining an RPS under the RMA;

(d) prefer the UDS partners' version of chapters 12A and 22 over the version officially adopted by the Regional Council.

What is claimed to be the legitimate purpose – certainty and predictability – is only achieved by furthering the unauthorised purposes.

[74] Those purposes also conflict with s 3(b) of the Act which provides for community participation in the planning of the recovery of affected communities. The Minister "circumvented all community participation when he implemented PC1 ostensibly in the interests of long term planning". Moreover, the process leading to the decision was conducted under the "strictest secrecy and confidence".

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[20] *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) at 393 - 394.

First respondent's argument

[75] Parliament conferred the powers in the CER Act in order to ensure "restoration and enhancement" of greater Christchurch which involves a forward looking exercise with a long term focus. Parliament intended the powers to be effective, and it would be wrong to read them narrowly as the applicants' submission seems to imply.

[76] Any suggestion that each decision taken by the Minister must advance all of the purposes in s 3 is wrong. Decisions under the Act are unlikely to advance all purposes and sometimes they need to be balanced. This was recognised by the Minister in the second reading debate. Section 3(b) itself refers to enabling community participation "without impeding a focused, timely, and expedited recovery". Thus Parliament contemplated that community participation might not always be possible, especially where such participation could delay a timely recovery.

[77] Section 27 allowed the Minister to amend RMA documents including regional policy statements. The Minister's role under s 27 stands alongside his role in relation to the Recovery Strategy and Recovery Plans under s 11 – 26. To the extent that there is any conflict the decision under s 27 will be ineffective.

[78] Section 10(1) simply declares the law as stated in *Padfield v Minister of Agriculture Fisheries and Food*[21] and later New Zealand cases that a discretion must not be used "to frustrate the policy and objects of the Act". There is no basis for reading s 10(1) as excluding additional purposes that do not prejudice the express statutory purposes. Purposes that are not within the statute are not necessarily "invalid" or "improper" (*Attorney-General v Ireland*[22]) and an additional purpose that is consistent with the statutory purposes is not excluded by s 10(1).

[79] When including chapter 22 in the RPS the Minister was acting in accordance with the purposes of the CER Act. His briefing in relation to the Kaiapoi noise

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[21] *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997 (HL) at 1032 – 1033.
[22] *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA) at [42].

contour refers to relevant purposes of the CER Act. Although the noise contour was an important element of the Minister's decision, the driving factor was the need for new housing at Kaiapoi.

[80] Similarly he was acting within the purposes of the Act when he included chapter 12A and revoked PC1. The briefing to the Minister stated the purposes of the Act that were relevant to his decision and his affidavit confirms his view that providing a chapter in the RPS to deal with the development of greater Christchurch was consistent with the relevant purposes of the Act. He also explains the need to create sufficient opportunities for housing.

[81] Plainly the Minister's decisions were in accordance with the purposes of the Act. Those decisions:

(a) extended the urban limit to incorporate particular residential developments;

(b) reflected agreements reached in the course of the Environment Court hearing, and allowed for a planning framework that the councils could implement;

(c) also reflected community participation up to this point, PC1 having been subject to public submissions before the hearing commissioners and positions on it having been stated in the Environment Court.

Contrary to the applicants' argument, there are no acknowledgements in the briefing papers that the changes would be based on any improper purposes.

[82] A coherent planning framework was needed for earthquake recovery purposes. When providing that framework the Minister needed to keep long term matters in mind. He acted within the purposes of the Act.

Discussion

[83] Not long before the CER Act was passed the Supreme Court confirmed in *Unison*[23] that people exercising public power "must act within the scope of the authority conferred by Parliament and for the purposes for which those powers were conferred". Under those circumstances the reiteration of that philosophy in s 10(1) can only be seen as significant and worthy of special attention.

[84] Section 10(1) directs in strong terms that the Minister and Chief Executive of CERA:

> ...*must ensure* that when they each exercise...their powers...under this Act *they do so in accordance with the purposes of the Act*. (Emphasis added)

No doubt the inclusion of this provision reflects the extraordinarily wide and far reaching powers conferred by the Act. The Minister was, of course, obliged to observe the clear message that it conveyed. So is this Court when reviewing the Minister's decisions.

[85] The primary issue raised by this ground of review is whether the Minister's decisions concerning the RPS were "in accordance with" the purposes of the Act. Those words were interpreted in *Chan v Lower Hutt City Corporation*[24] as meaning in "harmony and conformity" with. I adopt that interpretation and now turn to the specific purposes contained in s 3.[25]

[86] While the focus of the purposes in the individual paragraphs differs, there is an unmistakable theme of earthquake recovery. The words "recover", "recovery", or "restore" appear in all of the paragraphs except for (e) and (h) and their absence from those paragraphs is explicable by the subject matter of those paragraphs. Presumably the Minister had the theme of earthquake recovery in mind when he commented on the second reading of the Bill "all of those powers must be exercised in the recovery process and cannot step outside of that".[26] In s 4 the word

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[23] *Unison Networks Ltd v Commerce Commission*, above n 19, at [50].
[24] *Chan v Lower Hutt City Corporation* [1976] 2 NZLR 75 at 82.
[25] That section is quoted at [49] above.
[26] See [48] above.

"recovery" is defined to include "restoration and enhancement". Obviously a decision does not have to satisfy each and every purpose listed in s 3, and in some cases a balancing of purposes might be required.[27]

[87] By its very nature earthquake recovery involves a forward looking exercise. Except to the extent that the Act expires after five years, the statutory purposes do not carry any particular time frame. The fact that a decision involves a long term perspective will not necessarily mean that the decision falls outside the purposes described in s 3. Indeed, s 11(3) describes the Recovery Strategy as "an overarching, long-term" strategy for the reconstruction, rebuilding, and recovery of greater Christchurch. But an Order in Council approving a Recovery Strategy is automatically revoked on expiry of the Act by s 93(2), which illustrates that the objective of the Act is to provide for earthquake recovery, as opposed to wider or longer term purposes.

[88] When the exercise of a public power revolves around a single purpose a Court reviewing the exercise of the power might be faced with a relatively straight forward decision about whether the decision was within the purposes for which it was conferred. But where, as here, there are mixed and overlapping purposes the Court is faced with a much more difficult task.

[89] The applicants and first respondent have approached this issue from different perspectives. Relying on *Poananga* the applicants contend that the decisions will be unlawful if any material reason behind the decisions falls outside the statutory purposes. On the applicant's analysis, that is the case here. On the other hand, the first respondent takes the less stringent approach, based on *Ireland*, that an additional purpose will only render the decision invalid if it thwarts or frustrates the policy of the Act. He contends that if any purposes were outside the Act (which is denied), they were purely incidental and did not affect the validity of his decisions.

[90] When deciding the approach that should be adopted in this case the following observations of the Supreme Court in *Unison* are relevant:

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[27] Community participation under paragraph (b), on the one hand, and a focused, timely, and expedited recovery under (d), on the other, offer an obvious example.

> [53] ...A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.[28]

The Court goes on to say that ascertaining the purpose for which a power is given is an exercise in statutory interpretation and in this area the Courts are concerned with identifying the *legal limits* of the power rather than assessing the *merits* of its exercise in any case.[29]

[91] Did the Minister's decisions involving the RPS step outside the statutory purposes or compromise the policy of the CER Act? When resolving that issue it is necessary to keep s 10(1) firmly in mind. That provision does not allow the Court much latitude. It indicates that, subject perhaps to de minimis, Parliament did not intend the Minister to pursue any purposes beyond those specified in the Act.

[92] On my analysis of the evidence, particularly the Minister's affidavit, the purposes behind the decision to amend the RPS and revoke PC1 came down to:

(a) freeing up land to enable residential development for those displaced by the earthquakes;

(b) implementing agreements that had resulted in draft orders before the Environment Court;

(c) providing certainty and predictability so that residential development could proceed without delay;

(d) enabling council officers to focus on recovery planning;

(e) bringing the PC1 appeals to an end;

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[28] Both *Poananga* and *Ireland* are relied on by the Supreme Court for that proposition.
[29] *Unison Networks Ltd v Commerce Commission*, above n 19, at [54].

(f) providing a specific chapter within the RPS (chapter 12A) to deal with the development of greater Christchurch, including the extension of the urban limits; and

(g) protecting the airport from "reverse sensitivity" claims by settling where the 50 dBA Ldn contour line is and its effects (chapter 22).

These matters are not in any particular order. Obviously some of them are interlinked and overlap.

[93] There can be little argument that the purposes in (a) – (d) are within the purposes of the Act. To the extent that it freed up council staff for earthquake recovery purposes, I also accept for the purposes of this ground of review that (e) comes within the statutory purposes. But it is difficult to see how, even on the most generous interpretation of the statutory purposes, (f) and (g) could come within those purposes, especially when s 27 is the vehicle.

[94] The purpose of an RPS under s 59 of the RMA is to provide:

> ...an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

It is at the apex of the RMA hierarchy of instruments and its impact can be far reaching for subsidiary planning instruments, not to mention the community generally.

[95] Clearly chapter 12A was inserted into the RPS to achieve long term objectives and policies relating to the location, timing, and form of urban growth through to 2041. While it is true that s 79 of the RMA requires an RPS to be reviewed after 10 years, even that period is twice the life of the CER Act. On that basis alone it is extremely difficult to reconcile chapter 12A with the earthquake recovery policy of the Act, let alone the specific purposes stated in s 3.

[96] It is no answer that the Minister might in the future decide to review the chapter or that it might be overtaken by the Recovery Strategy. For the purposes of

this proceeding the chapter needs to be considered as it stands, and in light of its history. As long as chapter 12A stands there can be no privately requested plan changes that do not align with it: clause 21(3) of Schedule 1 to the RMA. So the restrictions on land development imposed by the chapter could conceivably apply for the next thirty years.

[97] Closer examination of the chapter reveals that at best earthquake recovery is an incidental purpose within a very detailed document. The stated purpose of chapter 12A is to provide for development in a way which achieves quality outcomes and takes a sustainable development approach to managing growth. The chapter sets out "the intended sub regional land use distribution for Greater Christchurch for the planning period, particularly the areas available for urban development". [30] The planning period is until 2041.

[98] Importantly for present purposes, the introduction to chapter 12A then continues:

> The provisions of Chapter 12A have been reconsidered in the light of the Canterbury earthquakes and, *with some minor amendments and noting the impacts of the earthquakes,* are an appropriate and relevant policy approach for both the short term and long term development of Greater Christchurch. Since the earthquakes there is a heightened awareness of the risks of natural hazards and the need to avoid or mitigate such risks. The provisions of Chapter 12A are in accord with such an approach. (Emphasis added)

This relatively dismissive reference to the impact of the earthquakes is maintained in the remainder of the chapter where the references to earthquake recovery are isolated and cosmetic.

[99] Mr Edmonds, a planning consultant, has sworn an affidavit on behalf of the applicants. He compares chapter 12A with PC1 after the Regional Council's decision. Amongst other things he notes that there has been no attempt to alter the growth patterns to account for the earthquakes. He also confirms that changes to the location of urban limits included in the Regional Council's decision have been deleted, as have the Special Treatment Areas. Thus, one of the effects of the chapter

[30] Introduction to Chapter 12A at p1.

is to neutralise the recommendations of the independent commissioners that were adopted in the Regional Council's decision.

[100] When chapter 12A is read as a whole it is impossible to see how it serves any significant earthquake recovery purpose. To the extent that it addresses urban limits it is addressing issues that existed long before the earthquakes and it provides solutions that are likely to endure well beyond the expiry of the CER Act. It also has a geographic impact well beyond that attributable to earthquakes. In this respect I note that the statistics relied on by the applicants at [70] above have not been contradicted. Equally importantly, chapter 12A was not necessary to achieve or give effect to the zoning changes that were made by the Minister to provide housing for people displaced by the earthquakes. For reasons that I will give later,[31] I am satisfied that the changes to the district plans were capable of standing on their own feet.

[101] Similar considerations apply to chapter 22. Again the RPS is used as the vehicle to resolve an issue that existed long before the earthquakes. The noise contour had been considered by the Environment Court in *Robinsons Bay Trust v Christchurch City Council*[32] and again in *National Investment Trust v Christchurch City Council.*[33] Moreover, the long term solution implemented by the chapter is obviously intended to outlive the CER Act. The evidence does not suggest that the actual operation of the airport has significantly altered, or will significantly alter, as a result of the earthquakes, at least in a way that directly impacts upon the 50 dBA Ldn contour. The inescapable conclusion is that chapter 22 was not driven in any significant sense by earthquake recovery objectives.

[102] I do not accept that chapter 22 can be justified on the basis that the rezoning of land at Kaiapoi within the 50 dBA Ldn corridor will open the floodgates to further incursions into the corridor. As I will explain in more detail later,[34] the amendment to the Waimakariri District plan reflected a situation peculiar to Kaiapoi and

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[31] At [138] – [148].
[32] *Robinsons Bay Trust v Christchurch City Council* EnvC Christchurch C60/2004, 13 May 2004.
[33] *National Investment Trust v Christchurch City Council* EnvC Christchurch C41/2005, 30 March 2005.
[34] Also at [138] – [148].

rezoning through the district plan was effective as a discrete standalone measure without the backing of chapter 22.

[103] All of this means that insertion of chapters 12A and 22 into the RPS was not in accordance with the purposes of the CER Act as required by s 10(1). Rather than serving earthquake recovery purposes, the underlying purpose of these two chapters was to resolve longstanding issues by setting long-term planning strategies. Given that the revocation of PC1 is inextricably linked to those chapters, that decision is also tainted by the same illegality.

[104] Having said that, I accept that the Minister acted in good faith. Nevertheless, acting for an improper purpose in an administrative law sense can arise as the result of an *unintentional* misapplication of statutory power: *Aon New Zealand Limited v Attorney-General.*[35] Finally, as observed earlier with reference to *Unison,*[36] it is not for this Court to go into the merits of the Minister's decisions. It is enough that he stepped outside the legal limits of his power.

Conclusion

[105] The first ground of review has been made out.

Second ground of review – misapplication of statutory power

[106] The applicants contend that instead of using s 27 to amend the RPS the Minister should have used the Recovery Strategy or a Recovery Plan, thereby allowing public participation.

Applicants' argument

[107] Specific and separate provision for long term planning for earthquake recovery is available under the Act by means of the Recovery Strategy or a Recovery

[35] *Aon New Zealand Limited v Attorney-General* [2008] NZCA 524 at [55].
[36] At [90] above.

Plan. Failure to use one of those processes on this occasion has given rise to a reviewable error of law: *Poananga.*

[108] By using s 27 the Minister has avoided the safeguards built into the Act. These include review by the Panel and the requirement for the Minister to have regard to its recommendations. Having circumvented these controls in favour of an uncontrolled discretion, the Minister has misapplied the statutory power conferred on him.

[109] Section 27 cannot be used as an alternative means of establishing and implementing the long term planning objectives contemplated by ss 11 – 26. The approach adopted by the Minister is even more clearly unlawful because the Recovery Strategy that has been released states that the development of long term planning is not possible at this time.

First respondent's argument

[110] It cannot be disputed that the words of s 27 empowered the Minister to amend the RPS. The Minister was responding to "immediate needs" and his s 27 decisions are likely to be overtaken in due course by the Recovery Strategy/Plans. This is consistent with the briefing he received.

[111] The applicants' argument is not supported by the CER Act which provides alternative methods of achieving the same objective. An argument similar to that advanced by the applicants was rejected in *Pub Charity v Attorney-General*[37] and the legislation underpinning *Poananga*, upon which the applicants rely, was quite different. Here the express wording of s 27 contemplates far reaching decisions such as the suspension or revocation of RPS and the section should not be read down.

[112] Apart from consistency with the words of the Act, this interpretation best serves the purposes of the Act. If required the Minister can act quickly under s 27 with public participation still being possible through the Recovery Strategy/Plan

[37] *Pub Charity v Attorney-General* CA 103/4, 7 December 2004 at [101].

process. Section 27 does not carry any requirement for public participation so that the Minister can act under it without encountering delays.

Discussion

[113] The primary difference between the applicants and the first respondent is the role they ascribe to s 27. Whereas the applicants consider that the section has the limited role of supporting the Recovery Strategy and Recovery Plans, as well as providing for situations where quick and discrete action is required, the first respondent believes that it has a much wider and independent role which effectively stands alongside the Recovery Strategy and Recovery Plans.

[114] Taken in isolation s 27 certainly seems to confer very wide powers in relation to RMA documents, including RPS's. But once it is construed in the wider context of the Act, as it must be, it becomes apparent that its role is not as wide as first impressions might suggest. In my view it does not provide an alternative and independent mechanism in situations where the Recovery Strategy or a Recovery Plan should be used. The policy of the Act is for long term planning strategies which are likely to have far reaching implications to be developed through the public process of the Recovery Strategy or a Recovery Plan, except where quick and discrete action is required for earthquake recovery purposes.

[115] To a large extent this reflects the statutory safeguards that accompany the development of the Recovery Strategy and Recovery Plans. In the case of a Recovery Strategy the following safeguards have been included by Parliament:

(a) consultation with the local authorities and others listed in s 11(4);

(b) public notification inviting members of the public to make written comments: s 13;

(c) one or more public hearings: s 12(1);

(d) review by the Panel,[38] with the Minister being required to have regard to its recommendations: s 73(2) and 74(1);

(e) approval by way of Order in Council: s 11(2).

No doubt these safeguards reflect, first, the potentially far reaching consequences of the Recovery Strategy and, secondly, an underlying philosophy of community participation whenever possible.

[116] In many respects an RPS is similar to a Recovery Strategy. They are both at the apex of the hierarchy of statutory instruments. Both provide overarching long term Strategies. They are created or amended by a process involving public participation. And, very importantly, they are likely to have far reaching consequences for the community. All of this seems to be acknowledged by the Minister when he states at paragraph 41[39] of his affidavit that when he made his decisions "it was apparent there was potentially considerable overlap between PC1 and the draft Recovery Strategy".

[117] Assuming for the moment that long term strategies for the growth of greater Christchurch and the protection of the airport (in the form of chapters 12A and 22) were required for earthquake recovery purposes, those strategies would come within the scope of the Recovery Strategy described in s 11(3).[40] If that is the case development of those chapters should have included the safeguards specified by Parliament.

[118] It could not have been intended by Parliament that those safeguards could be side-stepped by using s 27(1) (which does not have corresponding safeguards). This is especially so where the effect of the Minister's decision was to put an end to litigation that was before the Environment Court. To the extent that quick action was required this could be (and was) accomplished by rezoning land via the relevant district plan. No compelling earthquake recovery reason has been demonstrated for

[38] Under s 72(1) the Panel consists of four persons with relevant expertise or appropriate skills. One of those people must be a former or retired Judge of the High Court or a lawyer.
[39] See [44] above.
[40] That provision is quoted at [53] above.

excluding community participation when making these far reaching changes to the RPS.

[119] An alternative scenario would be for chapters 12A and 22 to be developed by way of a Recovery Plan. Again the Minister's affidavit seems to indicate (at 41[41]) that he was aware of this possibility:

> Even if the Recovery Strategy was not going to deal with the projected growth, residential density and provision of infrastructure, the proposed Recovery Plans were another vehicle which could do that.

Development of the chapters by way of a Recovery Plan could have preceded the Recovery Strategy: s 19(2) of the CER Act. However, it seems that the Minister decided not to use the Recovery Plan process because of concerns about the implications of the Environment Court appeals. But that could not justify a departure from the statutory scheme.

[120] Had the Minister used the Recovery Plan process there would have been the following safeguards:

(a) notification in the *Gazette*: s 16(4);

(b) the Minister must have regard to the matters listed in s 19(2) when determining how the Recovery Plan was to be developed, including any requirements as to consultation or public hearings;

(c) public notification inviting members of the public to make written comments: s 20(2) and (3);

(d) the Minister must give reasons when approving a recovery plan: s 21(3);

(e) after a Recovery Plan has been approved there is notice in the *Gazette* and a copy of the plan is presented to the House of Representatives: s 21(4).

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[41] See [44] above.

Given the wide reach of the amendments to the RPS arising from the Minister's decisions, (b) is particularly significant. Under s 19(2)(a) and (b)[42] the Minister must have regard to (amongst other things) the nature *and scope* of the Recovery Plan as well as *the needs of people affected by it.*

[121] Those matters alone provide strong support for the applicants' contention that the Minister misused his statutory powers by using s 27 to amend the RPS and revoke PC1. However, before leaving this ground of review it is appropriate to say something about the first respondent's argument that s 27 offered an alternative method of achieving the Minister's objective.

[122] In my view the organisation and format of the CER Act counts against that proposition. Section 8 provides:

> **8 Functions of Minister**
>
> The Minister has the following functions for the purpose of giving effect to this Act:
>
> (a) establishing a community forum in accordance with section 6 and a cross-party parliamentary forum in accordance with section 7:
>
> (b) recommending for approval a Recovery Strategy for greater Christchurch under section 11:
>
> (c) reviewing the Recovery Strategy and approving any changes to it under section 14:
>
> (d) directing the development of, and matters to be covered by, Recovery Plans for all or part of greater Christchurch under section 16:
>
> (e) approving Recovery Plans and the review and changes to them under sections 21 and 22:
>
> (f) suspending, amending, or revoking the whole or parts of RMA documents, resource consents, and other instruments applying in greater Christchurch in accordance with section 27:
>
> (g) giving directions to councils or council organisations under section 48:

[42] This section is quoted at [59] above.

(h) directing a council to carry out certain functions of the council within a specified timeframe under section 49:

(i) issuing a call-in notice under section 50 and assuming certain responsibilities, duties, or powers of the council if a timeframe under that section is not complied with:

(j) compulsorily acquiring land in accordance with subpart 4:

(k) determining compensation in accordance with subpart 5:

(l) appointing a Canterbury Earthquake Recovery Review Panel under, and for the purposes outlined in, subpart 7 regarding development of delegated legislation:

(m) reporting to the House of Representatives on the operation of the Act in accordance with sections 88 and 92:

(n) any other functions provided in this Act.

These functions appear to reflect a broad hierarchy both in terms of time and subject matter which is consistent with the hierarchy in Subpart 3 of the Act. Within that hierarchy the powers under s 27(1) are more limited in scope than those relating to a Recovery Strategy or a Recovery Plan. That is why s 27(1) is not accompanied by similar safeguards.

[123] The first respondent relies on the *Pub Charity* case in which the Court of Appeal said:[43]

> [101] ...Nor do we believe that there is any general principle that a regulation-making power must be used in preference to an alternative statutory power where an Act provides for alternative methods of achieving the same objective. The fact that there are certain constitutional safeguards which follow from the making of Regulations but not from the use of the s 8(3) process does not alter that view.

However, in that case the Court was commenting about *alternative methods of achieving the same objective*. As already indicated, I do not accept that s 27(1) provides an alternative method of taking steps that were intended by Parliament to be taken under ss 11 – 26.

[124] Contrary to the submissions on behalf of the first respondent, I find the Court of Appeal's decision in *Poananga* very relevant. Ms Poananga received a letter from

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[43] *Pub Charity v Attorney-General*, above n 37.

the State Services Commission advising her that the Secretary of Foreign Affairs had informed the Commission that her personal views had been in sharp conflict with the policy of the Ministry and the situation had now been reached where her continued employment with the Ministry untenable. The letter gave Ms Poananga notice that she had been transferred under s 37 of the State Services Act 1962 from the Ministry to another Department at the same grading and salary. Section 37 gave the Commission the administrative power to transfer employees from one Department to another.

[125] When Ms Poananga's application for judicial review failed in the High Court she successfully appealed to the Court of Appeal. That Court held that the Commission could not transfer her administratively under s 37 contrary to her will when the real reason for the action was that she had been guilty of conduct constituting in substance a disciplinary offence. In that situation Ms Poananga was entitled to the benefit of the disciplinary procedures provided by ss 57 and 58 of the State Services Act to reply to the charges and be heard, and to exercise the right of appeal given by s 64 of that Act. It was only after those processes had been completed that she could be transferred against her will.

[126] On my analysis there are significant parallels between *Poananga* and the instant case:

(a) taken at face value the wording of the section that was used (s 37 of the State Services Act/s 27 of the CER Act) appeared to be wide enough to authorise the decisions under challenge;

(b) however, once the real reason for the decisions was taken into account (misconduct of Ms Poananga/resolving longstanding disputes by setting long term planning strategies and terminating the appeals to the Environment Court) it became clear that Parliament intended the alternative process prescribed by the statute to be followed;

(c) failure to follow the alternative process deprived the applicants of rights conferred by the statute.

In *Poananga* the Court of Appeal effectively found that there was a reviewable error because statutory scheme had been circumvented (although it declined to grant relief). Leaving aside the issue of relief, I do not believe that there is any basis on which that decision can be distinguished and I am bound by it.

Conclusion

[127] The second ground of review also succeeds.

Third ground of review – exercise of power not "necessary"

[128] This ground revolves around s 10(2) which provides:

> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.

Applicants' argument

[129] The decision paper which persuaded the Minister to exercise his s 27 power failed to direct his attention to the question whether it was *necessary* to exercise the power. This is a prerequisite under s 10(2) which contains two requirements: first, the Minister must, as a *subjective* requirement, consider it necessary to exercise the power in question; secondly, the Minister's view that it is so necessary must, as an *objective* requirement, be a reasonable one.

[130] In this case the Minister has not formed any opinion as to the need to exercise the power and has failed both the subjective and objective requirements of the legislation. He cannot repair the situation by stating in his affidavit that he considered his exercise of the powers conferred by the Act was necessary.

[131] Under s 10(2) the exercise of the power must be essential to achieve the statutory purpose, which inevitably involves options. If the purposes of the Act can be achieved without the exercise of the power proposed, then it is not necessary for the power to be exercised. In this case a more discrete exercise of the s 27 power

could have adequately responded to the need for further residential land to accommodate those displaced by the earthquakes.

[132] The need for certainty and predictability is no answer because it is not a stated purpose in s 3. Moreover, it is only achieved by overriding the community participation purpose, and then as a by-product.

First respondents' argument

[133] As the Minister deposed in his affidavit, he considered that the exercise of his powers under s 27 was necessary in each case. There were reasonable grounds for his view:

(a) need for people living in the residential red zone to be able to sell to the Crown and move on;

(b) need to make more land available for residential development which was pressing because of residential red zone decisions;

(c) importance of the airport operating without constraints such as curfews, so the need for the 50 dBA Ldn noise contour;

(d) absence of countervailing pressure on space for development and housing;

(e) need for people to know what activities and what development was allowed to take place near the airport;

(f) uncertainty that the present position of PC1 was causing developers and the local councils;

(g) delay caused by the Environment Court hearings and diversion of council officers from recovery planning;

(h) prospect of significant numbers of people not being able to find appropriate accommodation, and the risk of rampant land inflation;

(i) other powers available under the CER Act, the Recovery Strategy and Recovery Plans, would not be available as quickly as a decision under s 27.

[134] The timing of chapter 22 was driven by the need to find land in Kaiapoi to accommodate people living in the residential red zone. Chapter 12A reflected a need for developers and councils to have certainty. And PC1 needed to be revoked because it was causing confusion and would have impeded development for earthquake recovery purposes.

Discussion

[135] Like subs (1), subs (2) of s 10 is intended to constrain those exercising powers under the CER Act. I accept that it involves both the subjective and objective elements described by counsel for the applicants. However, contrary to their submission, I am prepared to accept that the Minister was subjectively satisfied that it was reasonably necessary to insert chapters 12A and 22 into the RPS and to revoke PC1. The only issue is whether in terms of s 10(2) those decisions were also reasonably necessary in an objective sense.

[136] Of course the Minister had to make his decisions in light of the circumstances prevailing at the time. When reviewing his decision the Court should proceed on a similar basis. Having said that, I acknowledge that the Court probably has the advantage of significantly more information than was available to the Minister. However, that is not unusual in a judicial review situation.

[137] There are two underlying questions: first, whether in all the circumstances it was reasonably necessary in terms of s 10(2) for the Minister to go beyond the amendments to the district plans; secondly, if so, whether it was reasonably necessary, again in terms of s 10(2), to amend the RPS in the detail, and with the consequences, that occurred in this case.

[138] A good deal of information is before the Court about the amendments that were made to the Christchurch City and Waimakariri District plans by the Minister. As already noted, the primary effect of these amendments was to rezone land at specific locations to provide for residential (and some business) development for earthquake recovery purposes. The applicants do not take issue with any of these amendments, and I accept that they were properly made under s 27.

[139] The amendments to the Christchurch City plan created Living G zones. This gave rise to what were effectively comprehensive and stand alone packages of objectives, policies and rules providing for a range of housing at Halswell and Prestons Road. Subject to the usual controls, residential activities were permitted.

[140] The Waimakariri District plan was also amended by way of a comprehensive set of objectives, policies and rules providing for residential development. Again, subject to the usual controls, residential development was a permitted activity. The primary difference between the amendments to this plan and those relating to the Christchurch City plan was that the new zoning in Kaiapoi was within the 50 dBA Ldn contour.

[141] This intrusion into the noise contour at Kaiapoi was accompanied by a detailed explanation of the relevant policy in the District plan.

> For these defined areas of Kaiapoi, under the 50 dBA Ldn aircraft noise contour consideration is made for the provision of residential development, having regard for the form and function of Kaiapoi and to offset the displacement of households within the Kaiapoi Residential Red Zone which were already within the 50 dBA Ldn contour and which were displaced as a consequence of the 2010/2011 Canterbury earthquakes. It also provides, as part of greenfields residential development, for Kaiapoi's long term projected growth. Such development provides for the contiguous and consolidated urban development of Kaiapoi. In recognition of the potential adverse effects of aircraft noise over Kaiapoi in the future, information relating to the 50 dBA Ldn aircraft noise contour and the potential for increased aircraft noise will be placed on all Land Information Memoranda for properties within the 50 dBA Ldn aircraft noise contour for Christchurch International Airport.

There were also associated amendments to the district plan relating to the airport noise contour.

[142] One of the explanations for inserting chapter 22 into the RPS is that unless the location and effect of the 50 dBA Ldn contour was made clear, developers would attempt to pursue developments at other locations within the contour on the coat tails of the Kaiapoi incursion. In other words, the territorial authorities would be flooded with requests for private plan changes. However, any possibility of that happening needs to be weighed against the detailed provisions in the Waimakariri district plan which make it clear that the circumstances giving rise to the incursion in Kaiapoi were unique.

[143] Assuming, however, that some added protection was needed in the RPS, a discrete amendment to that instrument could have achieved the desired result. For example, it could have been amended to make it clear that the intrusion into the corridor at Kaiapoi was an earthquake recovery measure reflecting the unique situation at Kaiapoi and that it should not be interpreted as a precedent, or something to that effect. Such an approach would have left the Environment Court to finally resolve the wider noise contour issue in due course. In my view chapter 22 went beyond what was reasonably necessary in terms of s 10(2).

[144] Similar considerations apply to chapter 12A. If it was necessary for earthquake recovery purposes to rezone the lands involved in the settlements that had not been accepted by the Environment Court, the Minister could have amended the relevant district plan/s to achieve the required zoning. But he went much further by introducing comprehensive provisions for the location, timing and method of expanding greater Christchurch over the next 30 years. It is said that this step was necessary to avoid earthquake recovery being hindered by the uncertainty arising from PC1. This is based on the RMA requirement for local authorities/consent authorities to "have regard to" a proposed regional policy statement when considering applications for plan changes (s 74 (2)) or resource consents (s 104(1)).

[145] That argument is not convincing. By themselves the Minister's amendments to the district plans were comprehensive and capable of standing on their own feet. To the extent that further rezoning was required for earthquake recovery purposes, that objective could also be achieved under s 27. If that was not enough to achieve the desired certainty and predictability, the RPS could have been amended along the

lines that nothing in the RPS was to be applied or interpreted in a manner that impeded the urban development of lands designated for earthquake recovery. And if there were any residual issues in relation to particular developments, the Minister could resort to s 48.

[146] It follows that chapter 12A also went too far. In terms of s 10(2) it was not reasonably necessary for earthquake recovery purposes.

[147] Finally, there is the revocation of PC1. There appear to have been two interlinked objectives driving the revocation. The first was to remove the concern of the UDS partners that PC1 was giving rise to uncertainty and that this situation would remain until the appeals to the Environment Court were resolved. The second was to overcome the impact on Council officers of the Environment Court's refusal to adjourn the appeals.

[148] As to the need to remove uncertainty, the short answer is that this could have been achieved by the discrete amendments to the RPS mentioned at [143] and [145] above. Turning to the refusal of the Environment Court to grant an adjournment, it is important to keep in mind that a judicial review application was already before this Court. If that application succeeded the staffing problem facing the Councils would probably have been resolved. If not, any further breathing space required for earthquake recovery purposes could have been achieved by a further suspension of PC1. No doubt it was for those reasons the briefing papers recommended that the Minister suspend PC1 "and see how the Court proceedings play out".

[149] Instead of taking that path the Minister revoked PC1 and thereby permanently deprived the applicants of the ability to have their appeals determined by the Environment Court (as discussed under the next ground of review). I am satisfied that in all the circumstances this step was not reasonably necessary in terms of s 10(2).

Conclusion

[150] This ground of appeal has also been made out.

Fourth ground of review – access to the Courts

[151] It is alleged that the Minister's exercise of power was fundamentally flawed because it had the effect of denying the applicants access to the Courts.

Applicants' argument

[152] The Minister's decision determined the appeals lodged in the Environment Court by the UDS partners in their favour and extinguished the applicants' appeals before that Court, as well as the possibility of any further appeals. This amounts to political interference in the administration of justice. Section 27 does not expressly confer such powers and those powers cannot arise by implication.

[153] The right of access to the Courts is deeply embedded in the common law and can be traced back to Magna Carta. It can be regarded as a constitutional right. The Courts have repeatedly affirmed that access to the Courts is an inviolable right which cannot be abrogated by implication: *R & W Paul Ltd v The Wheat Commission*[44] and *Chester v Bateson*[45] (which, like the present case, involved emergency legislation). Those cases have been followed in New Zealand.

[154] Modern expression of the underlying principle is found in Lord Hoffman's "principle of legality" that while Parliament can legislate contrary to human rights, if it does so it must squarely confront what it is doing and accept the political cost: *R v Secretary of State for the Home Department: Ex parte Simms.*[46] That principle has been applied in numerous decisions of the New Zealand Courts.

[155] This case is indistinguishable from *R v Lord Chancellor: Ex parte Witham.*[47] While there were other options available to the Minister he chose the option that extinguished the applicants' appeals to the Environment Court. This was despite the warning in briefing papers about the possibility of judicial review. The affidavit of the Minister fails to address and explain his stance.

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[44] *R & W Paul Ltd v The Wheat Commission* [1937] AC 139 (HL).
[45] *Chester v Bateson* [1920] 1 KB 829.
[46] *R v Secretary of State for the Home Department: Ex parte Simms* [2000] 2 AC 115 (HL) at 131.
[47] *R v Lord Chancellor: Ex parte Witham* [1998] QB 575.

[156] Had Parliament wished the Minister to exercise the extraordinary power of ousting the jurisdiction of the Courts under the CER Act it would have expressly said so. This happened when Parliament enacted the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010. In that case Parliament expressly removed the jurisdiction of the Environment Court in relation to the Hurunui Report.

First respondent's argument

[157] The applicants' submissions overlook the statutory context of both the CER Act and the RMA. In any event, access to the Courts remains available to the applicants, as is evidenced by this application for judicial review.

[158] As to the statutory context, the hearing of appeals against a Regional Council's decision on an RPS is only one step in the development of the final document. Parliament cannot have intended that the power to amend or revoke an RMA document under s 27 would be available before appeals were filed and after a proposed change became operative, but not during the intervening period. It would make more sense to exclude amendment or revocation of an operative RPS which had been confirmed by the Environment Court.

[159] Withdrawal of PC1 by the Regional Council would have produced the same result. It would be illogical if Parliament was not able to confer the same power on the Minister.

[160] The Environment Court was not adjudicating on private rights. It is necessary to distinguish between decisions that affect rights (or in this case, expectations, if that) and those that impede access to the Courts. In this case the applicants remain able to have recourse to the Environment Court, but the thing that their appeals challenged (PC1) no longer exists. In this respect the situation is analogous to *Cooper v Attorney-General.*[48] Access to the Courts is also available in the form of judicial review. Thus the Minister's decision did not prevent any right of access to the Courts.

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[48] *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC).

[161] For the second respondents Mr Ormsby advanced supplementary submissions concerning the cases relied on by the applicant. He submitted that they could be distinguished on the basis that they involved subordinate legislation.

Discussion

[162] For present purposes it does not matter whether the right of access to the Courts is best described as a common law right or a constitutional right. Either way, it is deeply embedded in the law of this country. I do not understand the first respondent to argue otherwise.

[163] Standing alongside that principle is the "principle of legality" which Lord Hoffman described in *Ex parte Simms*:[49]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights...The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Numerous cases were cited by Dr Joseph to demonstrate that this principle has been adopted in New Zealand, and I accept that they demonstrate that point.[50]

[164] Two questions now need to be answered: whether the applicants have been deprived of access to the Courts by the revocation of PC1; and, if so, whether the CER Act authorised the Minister to take that step.

[165] As to the first question, I am satisfied that the revocation of PC1 deprived the applicants of access to the Environment Court (and also the possibility of pursuing

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[49] *Secretary of State for the Home Department: Ex parte Simms,* above n 46, at 131.

[50] The cases cited by Dr Joseph included: *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [27]; *R v Gwaze* [2010] 1 NZLR 646 (CA) at [145]; *R v Pora* [2001] 2 NZLR 37 (CA) at [53]; *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR (CA) 495 at [35]; *Air New Zealand Limited v Wellington International Airport Limited* [2009] NZCA 259 at [152]; *Minister of Conservation v Maori Land Court* [2009] 3 NZLR 465 (CA) at [116].

any appeals against that Court's decision). This conclusion reflects a number of matters.

[166] First, in its supervisory role the High Court must diligently protect fundamental rights including the right of access to the Courts, especially where, as here, that right has been specifically conferred by Parliament (under the RMA). When considering whether the applicants have been deprived of that right the Court needs to look at the *substance* of what has happened. In this case the only tenable conclusion is that the revocation of PC1 had the direct consequence of removing the applicants' access to the Environment Court, which is hardly surprising given that that seems to have been the underlying purpose of the revocation.

[167] Secondly, I do not accept that conclusion is called into question by *Cooper* in which Baragwanath J stated:[51]

> ...the true purpose and effect of [Parliament's] amending legislation was not to deprive parties of access to the Court to secure enforcement of legal rights but rather to remove the rights themselves.

In that case Baragwanath J was addressing a situation where an amendment to the fisheries quota management legislation had the effect of reversing a Court of Appeal decision (and some other decisions) that had previously allowed fishermen in the same situation as the applicants in *Cooper* to apply for quota. Having interpreted the amending Act, the Judge held that it had been effective in achieving its purpose, namely, to keep out further entrants into the scheme who were not permit holders. In other words, the situation before Baragwanath J was quite different to that now before the Court.

[168] Thirdly, any distinction between depriving parties of access to the Courts and removing underlying rights is entirely academic in this case. This is because it is impossible to split the revocation of PC1 from its consequence, namely, depriving the applicants of access to the Environment Court so that they could complete the litigation that was already in progress.

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[51] *Cooper v Attorney-General,* above n 48, at 483.

[169] Fourthly, I am satisfied that the revocation deprived the applicants of a *private* right. In a very real sense RMA processes are capable of, and do, determine the private rights of individuals arising from their occupation, ownership, or other interest in land, water or air. In this case it is beyond argument that the applicants' private use of land was in issue. Revocation of PC1 terminated their ability to have that issue determined by the Environment Court and, if necessary, to pursue further appeals.

[170] Finally, it is unrealistic to suggest that the applicant's right of access to the Courts has survived by virtue of the judicial review now being pursued. Whereas the appeals to the Environment Court were directed at resolving *substantive* issues, this application for judicial review is confined to the *processes* that were followed (there is no suggestion of *Wednesbury* unreasonableness).

[171] Having reached the conclusion that the applicants were deprived of their right of access to the Courts, I now turn to the second question: whether this was authorised by s 27 or, indeed, by any other provision in the CER Act.

[172] Clearly s 27 does not *expressly* authorise the Minister to suspend, amend or revoke RMA documents for the purpose of removing the jurisdiction of the Environment Court. The general words in the section fall well short of that. So it is necessary to look at the other provisions of the Act to see whether they provide any compelling indications that Parliament intended to confer this power on the Minister. Having undertaken that exercise I am satisfied that Parliament did not intend to confer such a power. Indeed, the indications are to the contrary.

[173] Section 68, which addresses appeal rights, includes the following subsections:

> (4) Despite anything to the contrary in the Resource Management Act 1991, while this Act is in force there is no right of appeal under the Resource Management Act 1991 against a decision of a type described in section 69(1)(c) or (d), except as provided in sections 69 and 70.[52]

[52] Section 69(1)(c) concerns activities that are specified in a Recovery Plan as being subject to s 69 and s 69(1)(d) refers to decisions that have been called in by the Minister.

> (5) To avoid doubt, subsection (4) does not apply to or affect appeals or objections commenced under that Act before the commencement of this Act.

It is clear from subsection (5) that Parliament specifically turned its attention to the existing appeals to the Environment Court and decided not to intervene or give the Minister the necessary power.

[174] A further indication of Parliament's intention arises from the Christchurch City Council's submission to the Local Government and Environment Committee (which was included in the appendices to the Committee's report to the House):

> A second issue relates to the role of the Environment Court to consider and determine RMA appeals etc which are currently before it, but which might be affected by a Ministerial direction under the Act. For example, the Minister could exercise powers which affect an RMA document which is currently subject to appeals. If that is the case, while it is probably implicit that the Environment Court has no further jurisdiction to consider and determine the relevant appeal, it would probably be sensible to remove the Court's jurisdiction to consider such appeals...

Even though the very issue that has arisen in this proceeding was brought to the attention of the House, it elected not to remove the Environment Court's jurisdiction, or to authorise the Minister to do so.

[175] It is also significant that the previous year Parliament expressly removed the jurisdiction of the Environment Court when enacting the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act. Had the legislature intended the Minister to have the power to take similar action under the CER Act it might be expected that it would have done so in an equally forthright and clear fashion.

[176] I do not accept Mr McCarthy's proposition that this interpretation means that the Minister's power to amend or revoke an RMA document under s 27 would not be available while there are live appeals to the Environment Court that might be affected by the amendment. Carried to its logical extreme that would mean the Minister could not rezone any land in greater Christchurch because it is all subject to the PC1 appeals. Obviously that could not have been intended.

[177] The explanation is that there are important differences between the revocation of PC1 and Mr McCarthy's proposition. Whereas the purpose of revoking PC1 was to bring *all* the Environment Court appeals concerning PC1 to an end, any impact on those proceedings arising from the discrete use by the Minister of his powers under s 27 (for example, by rezoning) would be restricted to the particular land involved. Moreover, the effect on any appeals before the Environment Court would be an incidental consequence which would have been within the contemplation of Parliament.

[178] Another suggested anomaly is that the same outcome could have been achieved by the Regional Council withdrawing PC1 and thereby putting an end to the litigation. Again there is an important difference. Withdrawal of a proposed policy statement is explicitly authorised by Parliament under clause 8D of Schedule 1 of the RMA. When enacting that provision Parliament can be taken to have been aware of the consequences. On the other hand, there is no indication in the CER Act that Parliament intended to confer a similar power on the Minister.

[179] I agree with the applicants that there are strong parallels between this case and *Ex parte Witham*. In that case the Lord Chancellor increased court fees in purported exercise of his statutory powers. Although that step was within the scope of the statutory powers it was held to have the effect of barring many persons from seeking justice before the Courts. Laws J concluded:[53]

> Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door. That has not been done in this case.

The other member of the Court, Rose LJ, agreed. He considered that there was nothing in the section or elsewhere to suggest that Parliament contemplated, still less conferred, a power for the Lord Chancellor to prescribe fees that totally precluded the poor from having access to the courts. Rose LJ considered that clear legislation would have been necessary to confer such a power.[54]

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[53] *R v Lord Chancellor: Ex parte Witham,* above n 47 at 586.
[54] Ibid.

[180] Like the legislation in *Ex parte Witham*, when s 27 is taken at face value it appears to confer the power to revoke PC1. But once the consequences of exercising the power are taken into account it becomes apparent that the Minister has taken away the applicants' access to the Courts without the necessary authority of Parliament. It might also be added that whereas in *Witham* exclusion of access to the Courts appears to have been an *unintended* outcome, that was the *intended* outcome in this case.

[181] Finally, I do not accept Mr Ormsby's submission that the cases relied on by the applicants are distinguishable because they involve subordinate legislation. In my view they provide strong support for this ground of review.

Conclusion

[182] The applicants have also established this ground of review. To the extent that the applicants have been deprived of their right of access to the Courts, this is a serious error.

Fifth ground of review – failure to take into account relevant considerations

[183] Given that the applicants have succeeded on all the other grounds of review and that this ground traverses many of the matters that have already been traversed, I do not intend to address it.

Relief

[184] The applicants seek the following relief:

> (a) orders setting aside the Minister's decision to implement Chapters 12A and 22 by s 27; and
>
> (b) directions to the Minister under s 4 of the Judicature Amendment Act 1972 in light of the Court's findings, including in respect of the disputed land and its availability for development.

This relief does not expressly include setting aside the Minister's decision revoking PC1. While that is probably implicit, I will take the precaution of amending the

statement of claim to make it explicit.

[185] Relief is strongly opposed by all the respondents, Christchurch International Airport Limited, Prestons Road Limited, and Highfield Park Limited.

[186] In support of their application for relief the applicants rely on *Air Nelson Limited v The Minister of Transport*[55] which indicates that if a claimant demonstrates that a public decision-maker has erred in the exercise of power, there must be extremely strong reasons for declining relief. On the other hand, those opposing relief rely on *Rees v Firth*[56] to support the proposition that there should be a more "nuanced" approach reflecting the gravity of the error in the context of the circumstances of the case.

[187] Regardless of the approach that is adopted I am satisfied that this is an appropriate case for relief to be granted. In reaching that conclusion I have taken into account the following matters.

Delay

[188] The relevant decisions of the Minister were notified in October 2011. This proceeding was issued on 9 March 2012. Delay is not pleaded by the first respondent. However, it is relied on by the second respondents and the interveners.

[189] Shortly after the Minister's decisions were released three of the applicants requested the Minister to reconsider their individual situations. The Minister declined those requests on 21 February 2012. In the meantime the first applicant had taken advice from Dr Joseph and his opinion was provided to the Minister on 3 November 2011. That opinion was to the effect that the Minister's decisions concerning the RPS were unlawful. A reply from the Minister's office indicating that he was not prepared to review or alter the RPS to give effect to the first applicant's wishes was not communicated to the first applicant until 21 February 2012.

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[55] *Air Nelson Limited v The Minister of Transport* [2008] NZAR 139 (CA) at [60] and [61].
[56] *Rees v Firth* [2012] 1 NZLR 408 (CA) at [48].

[190] This proceeding was issued two weeks later and it was heard at the beginning of July 2012. Given the events recorded above and the complexity of the matter there was no delay in issuing the proceeding or having it heard that should count against relief.

Prejudice - second respondents

[191] Their position is that since the Minister made his decisions they have acted in reliance on chapters 12A and 22 being operative and would be severely prejudiced if the Minister's decisions are overturned. The decisions they have taken relate to such matters as: rezoning; subdivision consents; plan changes; requests for private plan changes; reviews; structural plans; consultation with the community; and commitment to expenditure.

[192] The second respondents claim that if the Minister's decisions are set aside those decisions will be undermined. They claim that "administrative chaos" would ensue if PC1 reverted to its original proposed state and the Environment Court proceedings were reinstated. They also contend that if this happened their attention would be diverted away from their recovery roles under the CER Act and the "recovery process is likely to be stalled".

[193] While I accept that there will be consequences for the second respondents, which is unfortunate, those consequences need to be kept in perspective. It is difficult to understand how there can be significant prejudice where rezoning has been completed or consents have been granted (which seems to account for a significant number of the plan changes/consents referred to). And where plan changes/consents are in progress the Minister could, if it was reasonably necessary for earthquake recovery purposes, ameliorate any prejudice by taking the steps suggested in [143] and [145] above and/or by using his powers under s 48.

[194] Ultimately it is necessary to balance the competing interests of the applicants and the second respondents. In my view that exercise supports relief. First, unless relief is granted the applicants will be permanently deprived of the ability to complete their appeals in accordance with their statutory rights under the RMA.

Secondly, that outcome would effectively condone the reviewable errors that have been found to exist. Thirdly, the second respondents were closely involved in those reviewable errors. Finally, overall fairness favours relief.

[195] There was a suggestion that the second respondents' preferences should prevail because they have to administer the instruments under consideration. While I can understand that point of view, in the situation under consideration the RMA provides for the Environment Court to be the final arbiter as to PC1. I also note that to the extent the local authorities were seeking a breathing space for their officers to focus on earthquake recovery matters, that objective has probably now been largely, if not completely, achieved by the passage of time.

Prejudice – airport company

[196] Christchurch International Airport Limited is strongly opposed to the reinstatement of the appeals before the Environment Court after a nine month hiatus. Apart from the cost and time involved in that step, the company is concerned about the uncertainty that would arise if chapter 22 is set aside and PC1 is reinstated.

[197] A particular concern highlighted by Ms Appleyard is that unless chapter 22 is retained there will be widespread attempts to undertake development within the 50 dBA Ldn contour. She submitted:

> 30 ...CIAL has invested huge amounts of time and resources over many decades to ensure residents are kept out of areas exposed to aircraft noise, namely the 50 dBA Ldn contour. There should be no suggestion given through these proceedings that any land within the contour is suitable for residential use.

[198] As will already be apparent from this judgment, it is concerned with process rather than merits. The judgment should not be taken as indicating that any land within the contour is either suitable or unsuitable for residential use. Those are matters for the Environment Court, not this Court.

Prejudice – Prestons Road Limited

[199] For several years this company has been pursuing a change to the City plan to rezone approximately 200 ha from rural to residential. As I understand it, the land is outside the urban limit identified in PC1. Although it was an appellant in the Environment Court proceedings, the company withdrew part of its appeal on the strength of an agreement reached with the UDS partners which it understood would clear the way for its land to be used for residential development.

[200] In reliance on the Minister's decision the company has committed major expenditure towards completing a residential subdivision. On site work has commenced. Whereas chapter 12A provided it with a "clear path" in completing that development, it is concerned that if the appeal succeeds and PC1 is reinstated the development might encounter "obstacles".

[201] These concerns cannot justify refusal of relief in this case. If there are any obstacles, and assuming (as seems to be the case) that residential development of this land is required for earthquake recovery purposes, the Minister could exercise his powers under s 27 or s 48.

Prejudice – Highfield Park Limited

[202] This company is part way through a private plan change to rezone approximately 260 ha of rural land in Christchurch for residential use. It has invested significant time and resources in having its land included within the urban limits. Although it acknowledges that the outcome of the plan change process is not guaranteed, it derived a high degree of confidence that it would be successful when the land was included within the urban limits.

[203] While reverting back to PC1 might not necessarily assist this company's application for a private plan change, any such prejudice cannot outweigh the prejudice to the applicants. In the end any issues involving this land will be for the Environment Court, unless, of course, the Minister is able to, and does, exercise his powers under s 27 or s 48.

Other grounds for opposing relief

[204] It was argued that when exercising its discretion to grant relief the Court should be careful not to undermine the legislative intent of the CER Act. The argument was that setting aside the first respondent's decisions would be contrary to the purposes of the Act because the decisions to implement chapters 12A and 22 into the RPS were necessary for the focused, timely and expedited recovery of greater Christchurch. Thus returning to the uncertainty surrounding PC1 would be a major step backwards.

[205] I reject that proposition. This application for judicial review has succeeded because chapters 12A and 22 *did not* achieve the legislative intent. It follows that granting relief for the purpose of remedying the error could not undermine the intent of the statute. To the contrary, it is supported.

[206] Another argument that was advanced is that there are alternative remedies and that no useful purpose would be achieved by granting relief. This argument focused on the subsequent approaches to the Minister. In effect the argument seems to be that any invalidity has been cured by the Minister reconsidering his decisions and/or referring the matter back to him would be futile.

[207] To the extent that this argument is opposing the setting aside of the Minister's decisions inserting chapters 12A and 22 into the RPS and revoking PC1, I reject the argument. The only way that the reviewable errors can be effectively addressed is by setting those decisions aside. On the other hand, for the reasons I give below I agree that this Court should not issue the directions sought in the second part of the prayer for relief.

Scope of relief

[208] I am satisfied that chapters 12A and 22, together with the revocation of PC1, should be set aside. However, I am not persuaded that it would be appropriate for the Court to provide the Minister with directions in respect of the lands belonging to the applicants or its availability for development. That reflects that this proceeding

is about the process rather than the merits. It will be for the Minister to decide whether he wishes to take any further steps in relation to the applicants' lands in light of this judgment.

Result

[209] The application for judicial review is granted. The Minister's decisions inserting chapters 12A and 22 into the RPS and revoking PC1 are set aside. It is important, however, that these orders are kept in perspective. There has been no challenge to the amendments to the district plans that were notified on 1 November 2011 and the rezoning implemented by those amendments (or any later amendments to the district plans that might have been made by the Minister) are not affected by this decision. It is confined to the RPS.

[210] Leave is reserved to any party to apply further should the need arise.

Costs

[211] My preliminary view is that the applicants should receive costs against the first respondent on the 3C scale with allowance for one extra counsel. In the case of the second respondents and interveners my preliminary view is that costs should lie where they fall. If any party or intervener wishes to make submissions they should do so within one month. Memoranda should not exceed three pages.

Collins J

Solicitors:
FMR Cooke QC, francis.cooke@chambers.co.nz
Pru Steven, pru@prustevenco.nz
Russell McVeagh, bronwyn.carruthers@russellmcveagh.com
Anthony Hughes Johnson QC, Christchurch, achj@xtra.co.nz
Crown Law, Wellington, ken.stephen@crownlaw.govt.nz
Wynn Williams, Christchurch, margo.perpick@wynnwilliams.co.nz
Wynn Williams, Christchurch, jared.ormsby@wynnwilliams.co.nz
Simpson, Grierson, Wellington, james.winchester@simpsongrierson.com
Chapman Tripp, Christchurch, jo.appleyard@chapmantripp.com
Anderson Lloyd, Dunedin, lauren.semple@andersonlloyd.co.nz
Anderson Lloyd, Christchurch, glenn.cooper@andersonlloyd.co.nz
Adderley Head, chris.fowler@adderleyhead.co.nz

IN THE HIGH COURT OF NEW ZEALAND AP32/00
CHRISTCHURCH

UNDER Section 299, Resource Management Act 1991

IN THE MATTER of an Appeal Against a Decision of the Environment Court

BETWEEN **B.D. GARGIULO**

Appellant

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

Appearances: P.A. Steven for the Appellant
J.G. Hardie for the Respondent
J. Appleyard for Canterbury International Airport Ltd.

Judgment: 6th March 2001

RESERVED JUDGMENT OF HON. JUSTICE JOHN HANSEN

Solicitors:
Lane Neave Ronaldson, Christchurch for Appellant
Wynn Williams & Co., Christchurch for Respondent

[1] This is an appeal from the decision of the Environment Court given on the 17th August, 2000. The Environment Court refused the appellant's application to grant a resource consent allowing him to subdivide a 4.6 hectare property he owns at Stanleys Road, near Christchurch International Airport.

[2] The appellant sought consent from the Christchurch City Council to allow subdivision of the site to create an additional allotment, with a further application to allow a dwelling to be erected on the new lot.

[3] Under the Transitional Plan, the property was situated in the Rural H (Horticultural) zone, and under the Proposed Plan, as Rural 5 (Airport Influences Zone). Under both documents consent was required, and the activity, both the subdivision and erection of a dwelling, was non-complying.

[4] The appellant accepted that the land was situated within the 50 dBA Ldn contour shown on planning maps contained in the proposed city plan. It is subject to a similar airport noise influence, identified by way of a noise exposure line in the Transitional District Plan.

[5] The 50 dBA figure is arrived at by taking both take off and landings over a weighted period, but ignores engine testing, glare etc. Although some of the land in Rural 5 is outside the 50 dBA area, the airport company's view is that the whole of the land is affected by the airport operation.

[6] Any subdivision under 4 hectares required consent.

[7] The Environment Court, having considered the relevant objectives and policies in the Proposed Plans and the Transitional Plan, and those contained

in the relevant chapter in the Regional Policy Statement, concluded an increase in density of population within the 50 dBA Ldn contour was "positively discouraged". The appellant submitted that the Court found the objectives and policies made subdivisions and dwellings below 4 hectares close to a prohibited activity, although this appears to overstate the position.

[8] From the appellant's point of view, whether or not the location of the site within the 50 dBA Ldn contour has any consequence in terms of objective and policies in the Proposed Plan is the issue for the Court on the appeal.

[9] In its decision the Court concluded that granting this particular application on its own would only have minor effects. The Court said:

> "We have to consider not only the direct effects of permitting subdivision of Mr Gargiulo's land and (separately) a dwelling on Lot 1 but also the cumulative effects since they are included in the definition of 'effect'. For the CCC Mr D Douglas gave his opinion that the cumulative effects on the airport would be more than minor. Neither Mr Batty (for CIAL) nor Mr Horne (for Mr Gargiulo) agreed and we think they are right. It is hard to see that one extra allotment and one extra dwelling somehow create a cumulative effect by themselves that will affect the International Airport in a more than minor way. Of course that is always precisely the problem with cumulative effects: any one incremental change is insignificant in itself, but at some point in time or space the accumulation of insignificant effects becomes significant."

[10] Further, at paragraph 64 the Court concluded:

> "We have found that the adverse effects of the proposal – including any cumulative effects – are probably minor and therefore the first threshold test in Section 105(2A) is met. We do not have to consider the second test once the first is passed. "

[11] Having done that the Court then went on to consider the Regional Policy Statement and the Proposed Plan, as it relates to the effects of the proposed activities on the operation of the airport. In paragraph 39 the Court held:

> "However, these issues do not have to be resolved just on their own facts on a case-by-case basis without further help: there is guidance in the RPS and in the district plan(s). The CCC (and on appeal this Court) does not have to guess whether the effects of subdivision and a new house will be adverse, the RPS and the proposed district plan both imply (as we shall see when we consider them shortly) that subdivision within the 50 Ldn contour at a density greater than one lot per 4 hectares does have adverse effects. So the real issue in this case is not whether there will be more than minor (cumulative) effects on the environment but whether granting consent(s) will create a precedent that undermines the integrity of the proposed district plan. We do not want to phrase that too dogmatically, because ultimately those distinctions all revolve around the same set of issues: how to control cumulative effects. Nice legalistic distinctions are not particularly useful in this area."

[12] In its consideration of the Transitional Plan the Court held that:

> "Similar considerations apply in respect of the transitional plan although the level of protection of the International Airport in the objectives and policies is considerably lesser."

[13] In the context of the Transitional Plan the Court also found that the density requirements differed, and that there was no minimum site size for sub-division. At paragraph 11 the Court held:

> "Since 1958 the Airport has been given some protection by a line drawn at what is now the 50 dBA Ldn noise contour. Inside that line there have been controls over the construction of new residences. However, the Transitional Plan contains no minimum lot size for subdivision of rural allotments for farming purposes. Consequently developers who put up a case that small allotments, including allotments under 4 hectares were 'economic units' within the meaning of the plan, obtain subdivisions down to smaller sizes and a consequential right to build a house of them. That is how much of Stanleys Road was subdivided into allotments smaller than 4 hectares. It was clear that CIAL does not want that pattern to continue."

[14] Ms Steven next referred to the objections and policies of the Transitional Plan, where the Court held at paragraph 43:

> "The site is zoned rural H (Horticulture) in the Transitional Plan. The purpose of the zone is to give maximum protection to the land for the production of food. Subdivision and erection of a dwellinghouse are therefore contrary to the objective unless they can be seen as serving that purpose. On the evidence of effects described earlier that is not the case."

[15] Ms Steven then submitted that the findings in paragraph 62(a) of the decision could not apply to an assessment under the Transitional Plan. She then submitted that rules out any question of there being a precedent effect that would undermine the integrity of the Transitional Plan in terms of paragraph 68(c). As a consequence, she submitted that the Court erred in its interpretation of the objectives and policies in the Proposed Plan, and the RPS and the conclusions in paragraph 73 would have been materially different but for this error. It was submitted, but for the error, the Court would have exercised its discretion under s.105(1)(c) and s.104 quite differently.

[16] It is apparent from reading the Environment Court decision that the appellant faced considerable evidentiary problems in the case. The appellant chose only to call a planner and a horticulturist . Ranged against them were experts that gave evidence relating to the impact of the airport of development within the zone; the psychological impact of noise on residents; the possibility that intensive sub-division would lead to lobby groups to limit the airport, evidence of the economic impact of the airport on the Canterbury economy; and other matters. That evidence was all accepted by the Environment Court. Indeed, it appears from reading the decision that some of the most telling evidence against the appellant's application to subdivide

came from answers in cross examination to questions posed by counsel for the appellant. It is unnecessary to repeat them here, but some of those questions and answers were set out by the Learned Environment Court Judge in his decision. A reading of the decision makes it clear that the Environment Court was clearly impressed with the quality of the evidence of the experts called in opposition to the application, and accepted their evidence almost unequivocally.

[17] It is clear, therefore, that the evidence accepted by the tribunal was overwhelmingly against the application.

[18] The initial submissions of both respondents seem to me to go right to the heart of this matter.

[19] Both counsel pointed out that the most important part of the Act is Part II. Indeed, it has been described as the lodestar guiding the interpretation of all following sections and decision making. In ***Lee v Auckland City*** [1995] NZRMA 241 at 248 Judge Kenderdine said:

> "In effect s.5 of Part II of the Act is the only section in the present Act which contains the philosophy of sustainable management as its purpose, and the proscriptive criteria against which effects (as defined in s3) and the plan provisions may be measured. Section 5 under the 1993 amendment to the Act may be considered the lodestar which guides the provisions of s.104 and in this appeal we are guided by the over-arching purpose of sustainable management as defined."

[20] That is an approach that has consistently been applied.

[21] Section 5 provides:

"5 **Purpose –**

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, 'sustainable management' means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while:

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."

[22] Part III of the Act then goes on to set out duties and restrictions on people under the Act, and under s.9 restrictions on the use of land. The appellant's proposal is non-complying requiring a resource consent.

[23] Resource consents fall within Part VI.. That deals with the method of making applications for resource consent, and sets out the process by which applications are notified and submissions can be lodged. It also sets out the powers of the consent authority, and the Environment Court on appeal..

[24] For present purposes, two sections are significant. They are section 104 and section 105.

"**104 Matters To Be Considered**

(1) Subject to Part 2, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to—

(a) Any actual and potential effects on the environment of allowing the activity; and

.....

(c) Any relevant national policy statement, New Zealand coastal policy statement, regional policy statement, and proposed regional policy statement; and

(d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and

.....

(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application

105 Decisions On Applications

[(1) Subject to subsections (2) and (3), after considering an application for—

.....

(c) A resource consent (other than for a controlled activity or a discretionary activity or a restricted coastal activity), a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108.]

.....

[(2A) Notwithstanding any decision made under section 94(2)(a), a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that—

(a) The adverse effects on the environment (other than any effect to which section 104(6) applies) will be minor; or

(b) The application is for an activity which will not be contrary to the objectives and policies of,—

(i) Where there is only a relevant plan, the relevant plan; or

(ii) Where there is only a relevant proposed plan, the relevant proposed plan; or

(iii) Where there is a relevant plan and a relevant proposed plan, either the relevant plan or the relevant proposed plan.] "

[25] Section 2(A) of s.105 applies a threshold test which must besatisfied before the decision making body is free to exercise its discretionary powers.

[26] There was no disagreement that "subject to Part II" in s.104 means "Part II matters are to be given primacy and the exercise of discretionary judgment must be informed by the statutory purpose, and made in fulfilment of that duty.", as Ms Appleyard submitted.

[27] That means in this case there is a requirement, amongst other things, to provide for "economic wellbeing" and for people's "health and safety" in terms of section 5(2).

[28] The simple submission of both counsel appearing for the respondents was that once the expert evidence was accepted, the application could not possibly succeed.

[29] That seems to me to be abundantly clear. The promotion of "sustainable management" would not be possible in this case given the expert evidence.

[30] The Court must take into account the relevant Proposed Plan, and they have done so here. They have also considered the Transitional Plan, but it seems to me that the Proposed Plan must hold primacy over that in any event.

[31] It is quite clear that in considering the terms of s.5(2) that includes matters such as the economic importance of the airport to the Christchurch district, and health and safety issues arising from the operation of the airport. It also involved the reverse sensitivity issues considered in the judgment.

[32] In face of the overwhelming evidence against the proposal, it is impossible to say that the purposes of Part II have been satisfied. Once the Environment Court accepted that evidence its decision was inevitable.

[33] The Court also considered the effects on the environment under s.104(1)(a), where the definition of environment includes people and communities.

[34] Again, that led to emphatic findings by the Environment Court. Firstly, at paragraph 30, then paragraphs 31 and 36, and then, finally the crucial paragraph 37. These read:

> "30. We give considerable weight to Mr Day's summary of his views when he wrote (C.W. Day brief of evidence-in-chief para 9):
>
> > 'The District Plan Policies recognise the concept of reverse sensitivity. The Plan Objectives also include: 'to control rural dwelling densities in recognition of the particular resource limitations, including any need to protect Inerational Airport operations' (Objective 13.1.7). The Plan Rules establish the level of control required (ie. Minimum 4 ha) to achieve these policies and objectives for this site. In my opinion the proposed increase in density and the land use application, do not meet the Plans Policies and Objectives.
> >
> > The proposed residential development does not represent appropriate land use planning around this significant national resource. When there is no general shortage of land for residential development around Christchurch why chose (sic) to locate new residential activity in areas affected by airport noise
>
> 31. We draw two conclusions from this uncontroverted evidence:
>
> > (a) There is a ten percent chance that whoever lives on Lot 1 of Mr Gargiulo's subdivision will be highly annoyed by noise of aircraft movements (quite apart from other noise from the airport); and
> >
> > (b) Moving the house on Lot 1 to the back will not change (a); nor will it mitigate the annoyance outside the house.
>
> 36. So we are satisfied Dr Staite was considering effects of noise exposure at or below the level which will be applicable to Mr Gargiulo's property (ie.53-55 dBA Ldn) over the next ten years. We also accept Dr Staite's evidence that there can be adverse health effects which are not known to the persons affected by them ie. subconscious effects. As a whole his evidence confirms Mr Day's view that the CCC has taken the correct approach in imposing restrictions on development in the Rural 5 zone in the proposed plan.
>
> 37. In one way the evidence of Mr Day and Dr Staite may have been unnecessary since the proposed plan speaks for itself. However, their

evidence is consistent with, and gives extra reasons to give weight to the objectives and policies in the RPS and the proposed plan. Their evidence is also relevant of course to the issue of sustainable management which is at the core of this case. We find that allowing subdivision of any land in the Rural 5 zone tends to dis-enable people from providing for their health and safety [s5(2) or the RMA]."

[35] Those matters seem to me to be a complete answer to this appeal, and it must be dismissed.

[36] The problem here is the appellant's focus on matters set out in paragraphs 9 and 10.thereof and the Transitional Plan. This narrow focus fails to take into account all of the matters the Court was obliged to traverse and ignores the factual findings of the expert evidence.

[37] In the circumstances, it it unnecessary to go on and consider the errors of law individually.

[38] However, I have some difficulty in accepting any of them as questions of law.

[39] Ms Steven complained that nowhere in the relevant documents is there a limitation relating to the 50 dBA line. That, of course, was accepted by Mr Hardie, who said if one read Rural 5 for 50 dBA there would be no problem. The difficulty with Ms Steven's submission is that the Court did not rely on the 50 dBA Ldn noise contour. What, in fact, was said can be found at paragraph 39, where the Court stated:

"The CCC (and on appeal this Court) does not have to guess whether the effects of subdivision and a new house will be adverse, *the RPS and the proposed district plan both imply* (as we shall see when we consider them shortly) that subdivision within the 50 Ldn contour at a density greater than one lot per 4ha does have adverse effects." (My emphasis)

[40] Frankly, having read the documents, that is an inevitable and necessary implication.

[41] Ms Steven was also critical of the characterisation of this proposed subdivision as urban development. Again, that seems to me an inevitable finding on the basis of the evidence before the Environment Court, and one this Court could not possibly criticise.

[42] Most of the matters complained of in the purported errors of law relate to the reading and interpretation of the various documents and policy statements. As this Court has stated on a number of occasions, the Environment Court is entitled to utilise its specialist knowledge in assessing the evidence before it. In ***B.P. Oil New Zealand Ltd v Waitakere City*** [1996] NZRMA 67, Temm J said at 69:

> "It is not for this Court, on an appeal under s.299, 'to delve into questions of planning and resource management policy'. The function of the Court is to see 'that the statute, the district plan and the regional plan have been correctly interpreted', and that no relevant considerations have been overlooked, that no irrelevant matters have been taken into account, that the decision of the Tribunal is properly based on the evidence before it, and that the decision reached is a reasonable one. (See *Stark v Auckland Regional Council* [1994] 3 NZLR 614, 616). "

[43] (See also ***Linley Buildings Limited v The Auckland City Council*** (1984) 10 NZTPA 145 AT 160; ***Stark v Auckland Regional Council*** [1994] 3 NZLR 614 at 617; and ***Terrace Tower (N.Z.) Ltd v Queenstown Lakes District Council & Others*** (HC Dunedin unreported AP27/00 Chisholm J. 9 February 2001). The matters complained of seem to me to be all related to planning and resource management policy.

[44] There is a further formidable hurdle to the submissions of the appellant. As Mr Hardie pointed out, where there are errors of law that would not materially affect the matter, this Court should not refer the matter back to the Environment Court . (See ***Manos v Waitakere City Council*** [1994] NZRMA 353 at 359, where Blanchard J stated:

> "While I have identified errors of law in the reasoning of the Tribunal no good purpose would be served in quashing its decision and remitting the matter back again for rehearing since they did not materially affect the decision. Furthermore, the nature of the appellant's proposal would seem to make a repetition of the Tribunal's negative decision well-nigh inevitable, especially as it would have to deal with the proposal as a non-complying activity."

[45] And further in ***B.P. Oil N.Z. Ltd v Waitakere City Council*** (supra) at 69 Temm J stated:

> "It is not every error of law will justify intervention by the High Court. Such an error must have a material effect on the Tribunal's decision before this Court will grant relief (See *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.)

[46] I have already commented on the emphatic findings of the Environment Court in relation to the expert evidence. There is an inevitability about such findings. In the words of Blanchard J. in ***Manos***, ".....the nature of the appellant's proposal would seem to make a repetition of the Tribunal's negative decision well nigh inevitable." Add to this the overwhelming evidential finding, and even if there were errors of law, they clearly would not materially affect the decision.

[47] The failure to satisfy the Court on Part II matters is decisive, but the questions of law do appear to be attacks on factual findings and matters of

"planning and resource management policy" dressed up to purport to be errors of law.

[48] Accordingly, this appeal fails and is dismissed.

[49] Memoranda as to costs are to be submitted within 10 days of the handing down of this decision

Signed at 10.24 am/~~pm~~ on 6TH MARCH 2001

J. W. Thomson J.

ORIGINAL

Decision No. C 60 /2004

IN THE MATTER	of the Resource Management Act 1991 **(the Act)**
AND	
IN THE MATTER	of references pursuant to Clause 14 of the First Schedule to the Act
BETWEEN	ROBINSONS BAY TRUST
	(RMA 518A/01)
AND	NATIONAL INVESTMENT TRUST
	(RMA 590B/99 and 527A/01)
AND	CHRISTCHURCH INTERNATIONAL AIRPORT LIMITED
	(RMA 525B&C/99 and 507E/01)
AND	CLEARWATER LAND HOLDINGS & OTHERS
	(RMA 568A,B,C/99, 498A/01)
AND	SUBURBAN ESTATES LIMITED
	(RMA 526A/01)
	Appellants
AND	CHRISTCHURCH CITY COUNCIL
	Respondent

BEFORE THE ENVIRONMENT COURT

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Environment Judge J A Smith (presiding)
Environment Commissioner S J Watson
Environment Commissioner D H Menzies

Hearing: Christchurch on 22-26 March, 29 March to 2 April and 5-8 April 2004

Appearances:

Mr B R D Burke for Robinson Bay Trust, National Investment Trust, Country Estates (Canterbury) Limited (**Robinson Bay**)

Mr E D Wylie QC and Mr T A Coull for Clearwater Land Holdings Limited (**Clearwater**)

Ms P A Steven and Mr K J Reid for Suburban Estates Limited (**Suburban Estates**)

Ms J M Appleyard and Ms B J Burt for Christchurch International Airport Limited (**CIAL**), Board of Airline Representatives (**BARNZ**) and the Canterbury Regional Council (**the Regional Council**)

Mr J G Hardie for the Christchurch City Council (**the Council**)

INTERIM DECISION

Introduction

[1] How much land should be covered by a policy restraining noise sensitive peripheral urban development?

[2] In this case two alternatives were put to the Court:

(1) A line on the Christchurch City Proposed Plan (**the Proposed Plan**) known as the **50 dBA contour line**. This modelled noise contour of 50 dBA Ldn covers a large area of land to the north-west of Christchurch International Airport (**the Airport**) flight path. Importantly, it also covers most of the undeveloped land to the south of the Airport flight path to the existing urban fringe.

(2) A line on the Proposed Plan known as the **55 dBA contour line**. This covers significantly less land to the north of the airport flight path and is around 500 metres further away from the existing city boundary on the southern side of the airport than the 50 dBA Ldn contour line.

[3] A copy of the plan showing the urban areas and the airport and the 50 and 55 dBA Ldn contour lines is annexed hereto and marked "**A**". We were told that the area

to the south of the airport where there is likely to be significant pressure for ongoing urban scale development is the area of critical concern. There are a number of additional references and appeals relating to this area to be determined with reference to the wording of Policy 6.3.7 to the Proposed Plan.

[4] The parties accept that there should be a policy 6.3.7:

> *to discourage peripheral urban growth involving noise sensitive activities within a dBA Ldn contour from the Christchurch International Airport Limited.*

[5] The single issue for this Court is whether this should be at the 50 dBA Ldn line or at the 55 dBA Ldn line. There may be a necessity for consequential changes directly to the explanation and reasons to Policy 6.3.7 and also to other various policies to ensure that the reference to the contour line is consistent throughout the Proposed Plan.

[6] There are other relevant references yet to be resolved, particularly:

(1) the question of the definition of noise sensitive activities and particularly whether various forms of travellers' accommodation should be incorporated within that definition;
(2) the issue of controls over the airport noise that have yet to be resolved which are also the subject of reference.

[7] All parties agree that in addition to the decision of this Court, the final wording of the provisions of the Proposed Plan will need to await the resolution of these two particular issues as well.

Proceedings before the Court

[8] The proceedings in this matter have taken a particularly tortuous route to hearing. These proceedings are part of a large group of proceedings relating to the airport which were initially dealt with together. The group consists of a significant number of references to the Proposed Plan itself and various Variation 52 (**the Variation**) and section 120 appeals. The Court, in preliminary decisions, decided it

should deal with jurisdictional issues in the first instance and identified the question of contour lines as a preliminary jurisdictional issue on which it issued a decision[1]. That decision was successfully appealed to the High Court[2]. Unfortunately, the interpretation of the High Court decision led to ongoing disputes between the parties. These disputes were the subject of further hearings and directions, particularly relating to questions of discovery, before this Court. Potential hearing dates were set and then abandoned.

[9] After the parties had agreed to these proceedings being heard in March and the timetable was set, there were ongoing difficulties requiring further Court directions and conferences as close as one week to the hearing. The end result was that Clearwater sought to take no active part in the proceedings, while reserving their rights. Their status in these proceedings became increasingly tenuous the further the hearing progressed. Mr Coull appeared for Clearwater on the last day of hearing and advised that they were withdrawing proceedings RMA 498A/99, 498B/99, 498C/99, and their notices of interest in 507B/01 and 507D/01. We understand the withdrawal results from an accommodation between the CIAL and Clearwater. No particular details were given to the Court. No other party sought costs in respect of that matter and accordingly those proceedings are at an end, with no order for costs being made. If 498A/99 and 568A/99, B and C are not at an end Clearwater is to advise the Court forthwith. We assume that 568A/99, B and C are also withdrawn although this was not explicitly addressed by Mr Coull.

[10] Because of Clearwater's limited role in the proceedings, the lead role in respect of the hearing was taken over at very short notice by Ms P A Steven for Suburban Estates. Suburban Estates called many of the same witnesses proposed by Clearwater, particularly Dr B F Berry and Dr R B Bullen. However, during the course of the hearing, and after the presentation of the Suburban Estates case, Ms P A Steven withdrew the Suburban Estate's reference RMA 526/01, being the entire reference on Variation 52. No other party sought costs and accordingly those proceedings are at an end and there is no order as to costs.

1 ***Clearwater Resort Limited v Christchurch City Council*** C94/2002.
2 ***Clearwater Resort Limited v Christchurch City Council*** AP 34/02, Young J 14/3/03.

[11] Mr Burke only received instructions for Robinsons Bay very close to the hearing when a conflict of interest arose between Clearwater (et al) and Robinsons Bay and both parties instructed alternative counsel. The withdrawal of the Suburban Estates references, occurring as it did on 31 March during the hearing, placed the case of Robinsons Bay Trust, National Investment Trust and Country Estates Canterbury Limited in some difficulty. Mr Burke had only had limited participation in the hearing to this time and had already presented the case for his client.

[12] Initially there was a question as to whether or not Mr Burke had adopted the evidence of Suburban Estates witnesses. Our notes indicated that he had done so both at the commencement of the hearing and during the course of his opening for the parties he represented. This issue was not pressed further by other counsel. We have therefore concluded that the evidence presented by Suburban Estates was also presented on behalf of Robinsons Bay and will be considered as evidence on the Robinsons Bay and National Investments references. Mr Burke took an active role in the proceedings from 31 March and performed an exemplary task in presenting the case for his clients through cross-examination of the remaining witnesses for the CCC and CIAL.

The scope of the hearing

[13] This reference concerns Policy 6.3.7 of the Proposed Plan and, specifically, whether noise sensitive activities should be discouraged within the 50 dBA Ldn contour line or the 55 dBA Ldn contour line.

[14] The hearing does not include a consideration of movement of the contour lines. That issue was considered in the earlier High Court appeal. While the computer modelling for the contour lines was reconsidered on a without prejudice basis prior to this hearing, all parties agreed at the commencement of the hearing that the location of the modelled noise contour lines was not at issue.

[15] The scope does include consideration of what the noise contour line signifies. This is addressed by consideration of the New Zealand Noise Standard 6805: 1992 (**the Noise Standard**) which is expressly adopted as underpinning the contour lines. The Noise Standard indicated two guideline aspects – the first, a control on land use within

the modelled contour; the other, by implication, a control on noise generated by airport operations. While Policy 6.3.7 refers to a noise contour, the focus of this hearing was on peripheral urban growth involving noise sensitive activities within the lines on the Proposed Plan.

[16] The hearing did not address the relationship of the noise contour lines with other interrelated policies which also influence land users near the airport.

[17] However, the scope did address noise perception and effects as a basis on which conclusions could be reached as to whether the 50 or 55 dBA Ldn contour would better represent the outer control boundary.

[18] As noted, the scope did not address the **definition** of noise sensitive activities. This is to be considered in the future.

[19] We have already noted that this decision must be an interim decision having regard to the matrix of inter-dependent policies which also require resolution, particularly those relating to controls over airport noise and the definition of noise sensitive activities. In simple terms, the question is whether the 50 dBA Ldn contour line or the 55 dBA Ldn contour line better provides for the purpose of the Act, the Regional Policy Statement (**RPS**) and the undisputed policies and objectives of the Proposed Plan.

Points of agreement

[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 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.

(4) The Christchurch City Council and Robinsons Bay agree that either the 50 or 55 dBA contour lines can be adopted without doing violence to the Proposed Plan or the Regional Policy Statement (**the RPS**). Although various witnesses for CIAL suggested to the contrary, under cross-examination they accepted either contour would fit the Proposed Plan and RPS. Notwithstanding the suggestions that the 55 dBA contour line would be contrary to the RPS, Mr McCallum, called for the Regional Council, later accepted in answer to questions that the Proposed Plan did not prohibit development within these contours. He acknowledged that there were other policies and objectives which also militated against development within these contours. He accepted the Proposed Plan as

promulgated by Council was not contrary to the RPS on this issue. We conclude that neither would a 55 dBA Ldn contour line be contrary to the RPS. In fact, Mr McCallum indicated, surprisingly, that some urban residential development within the 50-55 dBA Ldn contour could be justified under the Proposed Plan. We conclude he could only hold such a position if such development is not contrary to the RPS.

[21] We have concluded, having regard to the provisions of the Plan not in dispute, that either the 50 or 55 dBA Ldn contours could be inserted into Policy 6.3.7 in the Proposed Plan without causing any violence to either the objectives and policies of the Proposed Plan or to the Regional Policy Statement. The reasons for this conclusion are:

(1) The Proposed Plan permits a level of residential development to the 65 dBA Ldn contour. The controls on development below this noise contour arise in a number of different ways. Policy 6.3.7 is but one policy constraint;

(2) The 55 dBA Ldn contour for the outer control boundary is in the Noise Standard and represents a notional balancing of the various positions of parties. This standard is also noted in both the Regional Policy Statement and in the Proposed Plan;

(3) Either line represents an approach to the balance required between the interests of the landowner and the airport operating with minimal constraints.

[22] The question then is whether or not the adoption of a higher standard (the 50 dBA Ldn contour line) is appropriate in this Proposed Plan rather than whether 55 dBA Ldn is appropriate.

Noise issues and effects

[23] There are effects of noise above and below 50 and 55 dBA Ldn. There appeared to be a common approach by the experts to noise which we briefly cite as follows:

(a) noise above 65 dBA Ldn is of concern and is described as a noisy environment;

(b) noise between 55 and 65 dBA Ldn has potential health effects and would be described as a moderately noisy environment;

(c) noise below 55 dBA Ldn is considered a low noise environment and has limited health effects.

[24] We have concluded that below 55 dBA Ldn the major known effect of noise is annoyance (an amenity effect). Dr R F S Job, a psychologist called by CIAL, suggested that the effects of noise continued well below 50 dBA Ldn and even below 40 decibels. Mr C W Day, from CIAL, took a more constrained position that there were effects of noise above 45 dBA Ldn. Having heard all the witnesses, including Dr Berry and Dr Bullen, we have concluded that the annoyance effect of noise decreases under 50 dBA Ldn and is assimilated by background noise at around 45 dBA Ldn. While in a laboratory setting it might be possible to measure effects below that, the noise environment around Christchurch Airport cannot be said to be without other noise sources. We were told by Mr M J Hunt, a noise expert called for Suburban Estates and adopted by Robinsons Bay, that 50% of Christchurch had Ldn levels in excess of 50 dBA. This also accords with the extensive range of evidence this Court has heard in other cases as to noise levels in a diverse range of circumstances. Even in the rural area, we would be expecting ambient Ldn levels to be between 40 and 50 dBA in an non-urbanised state, even without the presence of the airport.

[25] The Council conducted a wide sample residential postal survey of Christchurch in 2002 to assess residents experience with respect to four types of noise environments to identify their "most bothersome noise". Mr J T Baines gave evidence as to the background and the results of that survey. Four types of environmental noise catchments were selected: airport, road traffic, industrial and general neighbourhood noise. Within each catchment, a selection of 400 residential properties was identified to achieve reliable statistical results. "Highly annoyed" levels were relatively similar in areas away from road traffic noise although the prime annoyance was due to the target noise, i.e. 17.1% of respondents in the Airport noise catchment were highly annoyed by aircraft noise; 20.6% of respondents in the Industrial noise catchment were highly annoyed by Industrial noise, and 17.4% of respondents in the General Neighbourhood

catchment areas were highly annoyed by neighbourhood noise. These are largely similar outcomes and reflect the different target noise groups of the analysis. What is clear from this is that a similar number of people are highly annoyed by whatever the dominant noise was within their area, even in a general residential area. These outcomes need to be considered against 39.7% who were highly annoyed within the Road Traffic noise catchment.

[26] Interestingly, in response to questions on positive noise (noise people enjoyed) aircraft noise ranked third after bird and animal life and the sound of children and ahead of sources such as the wind and the ocean and miscellaneous neighbourhood sounds.

[27] We also note that for the Taylor Baines survey the catchment for the airport related noises included very few properties that were within significant noise contours (above 65 dBA Ldn) and a relatively small number that were receiving noise in excess of 55 dBA Ldn. We should explain that although the contours are shown as 50 and 55 dBA Ldn on the Proposed Plan, this is not the current noise environment. We were told that the current noise environment is some 5-7 decibels lower than the drawn contours. The contours represent an estimated noise environment when the airport is fully utilised on its current configuration.

Ldn as an annoyance measure

[28] We accept that the percentage of persons highly annoyed within the 50-55 dBA Ldn contour would be lower than that above 55 dBA Ldn. We consider that a reasonable estimate, based on the various expert witnesses we heard, is about half the level of people being highly annoyed in the 50-55 dBA Ldn contour compared to above 55-60 dBA Ldn. However, it is also clear that a complaint level can exist well below the 50 dBA Ldn contour. Examples were given from both Sydney and Vancouver showing that complaints were occurring well beyond the 55, and even the 50 dBA Ldn, noise contours.

[29] We have concluded that the reason for this is that the Ldn is a useful gauge for measuring annoyance at moderate to high noise levels. It is a less reliable indicator at lower noise levels. The reason for this is founded on the basis by which the Ldn is

calculated. Ldn consists of taking single event noise levels (**SELs**) and averaging these over a period, in this case a rolling twelve month average whereas the Standard provides for a rolling three month average. This also involves adjusting the SELs with a weighting of 10 dBA Ldn for noises occurring between 2200 hours and 0700 hours.

[30] The experts had a high level of agreement that aircraft noise consisted of a lesser number of high energy events. Mr Day, for example, gave evidence that SELs on the 50 dBA Ldn contour when the airport is fully utilised could still be up to the order of 82-85 dBA SEL. The Ldn achieved would, however, be a result of how many of those individual SELs occur, together with lesser noise events and over what period. The difficulty is that Ldn does not directly recognise loud noise events, such as those in the order of 82-85 dBA, that may occur very infrequently. If, for example, there was a limited number of such events, say four or five a day with several at night, it is perfectly possible that the Ldn could be no more than 50-55 dBA.

[31] Evidence given about the difficulties at Sydney Airport by Dr Job indicates that these individual events, standing out against a lower ambient noise level, may create greater disturbance than the environment for people living in a higher Ldn environment but with less differentiation in the range of noise between ambient noise and SELs. A low ambient noise level would mean a low number of aircraft SELs would stand out even with a lower the overall Ldn.

[32] Notwithstanding that, all the experts agreed that the Ldn was the best, if imperfect, descriptor of annoyance levels available. However, we take into account that in assessing Ldns we must regard the lower level Ldns from airport noise with somewhat more caution because of this limitation.

Objectives and policies of the RPS

[33] In considering which contour is better for inclusion in the policy, we have concluded that we should look at the settled objectives and policies of the Proposed Plan and then the provisions of the Act, particularly section 32 and section 5.

[34] The Environment Court and High Court have considered the relevant objectives and policies of the RPS and of the Proposed Plan in the context of an application for subdivision consent[3]. Although those cases were prior to Variation 52, the Environment Court analysis of the RPS remains incisive for current purposes. To that end we will not repeat paragraph 41 of the decision of the Environment Court which identifies parts of Chapter 7 (objective 2 and policy 6) and Chapter 12 (objective 2 and policy 4) of the RPS as relevant.

[35] In addition to this, Chapter 15 of the RPS contains a significant number of statements relating to the airport, including issue 1 which, among other matters, identifies land use as a potential impediment to the expansion of the airport.

[36] Policy 4 of Chapter 12 of the RPS provides an Explanation as follows:

> *The discouragement of noise sensitive development, particularly residential use and residences, in the vicinity of airports and sea ports to minimise the extent of area and number of residences subject to adverse noise impacts, and the discouragement of all urban uses and residences in areas where there is a greater risk of crashes, particularly take off and landing zones, and other risks associated with activities that occur at airports and sea ports such as the storage of hazardous substances.*
>
> ...
>
> *Because of the paramount importance of maintaining the safety of aircraft and ship operations, it is essential that priority be directed at controlling the location and density of noise sensitive land uses, thereby avoiding existing noise problems being further exacerbated, rather than regulating the use of airports and sea ports where that could either reduce safety margins or impede efficient airport and sea port operations.*
>
> ...
>
> *Policy 4 recognises the need to reinforce the use of Air Noise and Outer Control Boundaries along with compatible land use planning principles in areas*

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3 ***Garguilo v Christchurch City Council*** (E.C.) C137/2000;
Garguilo v Christchurch City Council (H.C.) AP 32/00 Hansen J 6/3/2001.

adjacent to major airports to ensure continuation of their efficient operation (see New Zealand Standard 6805:1992).

As we have already noted, we accept in light of this that either contour would be consistent with the RPS.

The provisions of the Proposed Plan

[37] The Environment Court in ***Garguilo v Christchurch City Council***[4] also discussed the provisions of the Proposed Plan in paragraphs 44-47 inclusive. The decision discussed Volume 2 Policy 6.3.7, but the wording of the Proposed Plan at that time was somewhat different to that in Variation 52. Reference within the explanation and reasons discussed the 55 dBA Ldn contour and stated that:

... between the 55 Ldn contour and the Air Noise Boundary, new residential development will be discouraged (except for limited development in the Living 1C zone) ... This policy is expected to protect airport operations and future residents from adverse noise impacts.

[38] Discussion also identified other provisions within the Proposed Plan (Volume 2: Objective 6.3 including Policy 6.3.11; Section 7 including Policies 7.8.1 and 7.8.2; and Sections 10 and 13) leading the Court to a conclusion contained in paragraph 48 as follows:

If it is possible, without being totally simplistic, to summarise the effect of all those objectives and policies in so far as they relate to subdivision and residential use close to the international airport, they come down to three sets:

(a) restricting use of buildings for noise sensitive activities close to the airport (not relevant in this case);

(b) requiring noise attenuation measures in certain buildings within the 55 dBA Ldn contour (again not relevant in this case);

[4] Above C137/2000 at paras 44-47.

(c) keeping the density of dwellings within the 50 dBA Ldn contour to a level so that the number of people living within the noise affected environment is kept to a reasonable minimum.

We find that these objectives and policies are a package: all sets are applicable, but if the first do not apply then the third, more general, set of policies still applies.

[39] On appeal in the High Court, the High Court at paragraphs 39 and 40 addressed the issue in this way:

[39] Ms Steven complained that nowhere in the relevant documents is there a limitation relating to the 50 dBA line. That, of course, was accepted by Mr Hardie, who said if one read Rural 5 for 50 dBA there would be no problem. The difficulty with Ms Steven's submission is that the Court did not rely on the 50 dBA Ldn noise contour. What, in fact, was said can be found at paragraph 39 where the Court stated:

> *"The CCC (and on appeal this Court) does not have to guess whether the effects of subdivision and a new house will be adverse, the RPS and proposed district plan both imply (as we see when we consider them shortly) that subdivision within the 50 Ldn contour at a density greater than one lot per 4 ha does have adverse effects."*
> *[my emphasis].*

[40] Frankly, having read the documents that is an inevitable and necessary implication.

[40] It can be said that these findings are only marginally relevant to the question of the appropriate policy. However, what both these decisions do is reinforce the view we have formed, having heard all the evidence and read the relevant policy provisions, there are a plethora of objectives and policies that seek to protect the airport and limit the introduction of any potentially incompatible activity, particularly residential dwellings.

[41] Putting aside the provisions of policy 6.3.7 and its explanation and reasons, the overwhelming thrust of the Proposed Plan is towards limiting any development in proximity to the airport. These policies and objectives are achieved and implemented by the various zoning and rule provisions which encapsulate the activities broadly within the Rural 5 zone to the south of the airport flight path. The status of any subdivision below four hectares as a non-complying activity within this area further reinforces our view as to the intention of the objectives and policies. We conclude the intention of the Proposed Plan is that the policies and objectives are achieved and implemented by the rules[5] which limit residential activities close to the airport.

[42] This Court has already commented[6] that this is an odd situation where we are effectively retrofitting a policy to an existing matrix of policies and objectives and existing rules. However, our conclusion is that the clear thrust of the matrix of policies and objectives, apart from Policy 6.3.7, is to limit residential development in proximity to the airport. Policies 6.3.11 and 7.8.2 are clear examples of this, together with the environmental result anticipated to Volume 2, Chapter 6 (page 6/16) of the Proposed Plan, namely:

> *Continued unrestricted operation and growth of operations at Christchurch International Airport and protection of future residents from noise impacts.*

Section 32 considerations[7]

[43] Section 32 is noted to be subject to achieving the purpose of the Act which is encapsulated within section 5. In addition to that evaluation, which we will undertake shortly, there are various other criteria which should be examined in considering the appropriate policy to be included in the Proposed Plan. Several of the tests in section 32 have already been encapsulated within our preceding considerations. The questions of necessity under section 32(a)(i) and section 32(1)(c) could be considered in the context of which of these alternatives are desirable or expedient[8]. On the other hand, in

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5 ***Suburban Estates v Christchurch City Council*** C217/2001 para 274.
6 ***Clearwater Resort Limited v Christchurch City Council*** C94/2002 at para 25.
7 The references to the Act are to the Act prior to 1 August 2003.
8 ***Guthrie v Dunedin City Council*** C174/2001.

Suburban Estates v Christchurch City Council[9] the Environment Court, in considering these words in combination with the description of most *appropriate*, expressed the formulation of **better**. We adopt the formulation of **better** in this case because there is a clear option and thus this phrase most appropriately captures the test for the Court.

[44] In reaching a conclusion as to which policy would be better, we take into account the further criteria set out in section 32(1), namely:

- other methods and means (section 32(1)(a)(ii) and (iii)); and
- benefits and costs (section 32(1)(b)).

Alternative methods or means

[45] Section 32(1)(a) refers variously to other methods (section 32(1)(a)(i)), other means (section 32(1)(a)(ii)) and alternative means (section 32(1)(a)(iii)). This must include the potential to do nothing which, of course, is not in dispute in this particular case. The parties are agreed that a policy is necessary and that minimal restriction on landowners' rights would be achieved by the use of the 55 dBA Ldn contour line.

[46] Acquisition of the land would be a possibility for CIAL, to protect the airport, but would be extremely expensive. In the circumstances, such an alternative is not required in a real sense in this particular case. We have reached this conclusion because there are settled policies and objectives which already significantly restrict the ability of landowners to develop their land in accordance with their wishes. 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.

[9] C217/2001 at para [276].

[47] The application of Policy 6.3.7 would be particularly limited in its scope. From the explanations given by Council, it appeared to be intended that Policy 6.3.7 apply to proposed development at a density similar to existing living zones. Its application to development at Rural Residential densities of, say, 2000 m^2 or greater appears problematic. We had no clear responses as to whether this level of development was intended to be covered by this particular policy.

[48] However, as we have already discussed, there are a wide range of other policies, rules and other provisions of the Proposed Plan which would still apply to any development in the area. Having regard to that limitation, it must be said that the established policies and objectives and other provisions of the Proposed Plan already form a formidable matrix restricting development. Policy 6.3.7 contributes only one element to this in the context of peripheral urban growth. In short, it supplies an additional control over land use development within the noise contours. Thus its application to the 55 dBA Ldn contour line "releases" only the land between 50-55 dBA Ldn which is affected by other policies and on which the development is still non-complying.

[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[10]. It was not clear to us what alternative means would produce this outcome. We conclude that in these circumstances alternative means are not appropriate.

[50] Against the use of the 50 dBA Ldn contour is the additional limitation or barrier this would place on landowners being able to develop their land in an unrestricted way. Because of the significant limitations on the use of this land in any event, we are unable to see this as effectively disenabling these residents if the contour was fixed at 50 dBA

[10] ***Christchurch International Airport Limited v Christchurch City Council*** AP 78/1996 decision of Chisholm J at page 3.

Ldn. The land has historically not been available for urban development, nor does this Proposed Plan (putting aside Policy 6.3.7) provide for such urban development.

[51] The potential for future urban development between 50 and 55 dBA Ldn noise contours may be a benefit from the adoption of a 55 dBA Ldn contour. The adoption of this contour would enable owners of the land to pursue urban development of this land without coming into direct conflict with Policy 6.3.7. However, there are a significant number of other policies which would stand in their way, including most particularly 6.3.4, 6.3.6, 6.3.8 and 7.8.2. Nor do we think that many of these other policies are necessarily limited only to land within the 50 or 55 dBA Ldn contour. Many of these policies, particularly 7.8.1 and 7.8.2, as well as those under Chapter 13, could have application below the 50 dBA Ldn contour, depending on the evidence of effects.

[52] The full wording of Policy 6.3.7, as it currently appears in the Proposed Plan, and its associated explanation and reasons is annexed hereto and marked **"B"**. We do not take the wording:

> *The intention of this policy is that, in general, the 50 dBA Ldn contour (shown on the planning maps) should mark the limit of urban residential growth in the direction of Christchurch International Airport.*

as indicating that development should occur to that contour.

[53] We also attach and mark **"C"** the Policies 7.8.1 and 7.8.2 and their associated explanations and reasons. It is clear that there may need to be consequential amendment to the explanation and reasons of Policy 7.8.1 to ensure that the contour referred to as the outer control boundary is the same as that in Policy 6.3.7. Although Policies 7.8.1 and 7.8.2 note that surrounding land users need protection from adverse effects of the airport, the appropriate limit of the application of that rule remains unclear. It could therefore be said that the use of the 55 dBA Ldn contour in Policy 6.3.9 favours the adoption of this contour in Policy 6.3.7.

[54] In the end whether 55 dBA Ldn is appropriate or not turns largely on whether the level of effect constituted by a 55 dBA Ldn contour is considered appropriate in the circumstances of the case. If it is considered appropriate, then it could be said that the inclusion of the 55 dBA Ldn contour in Policy 6.3.7 will enable the residents in this area and not provide an unreasonable imposition upon the airport. Alternatively, if we conclude that the effect on amenity of aircraft noise between 50-55 dBA Ldn noise contours is not appropriate, then the 55 dBA Ldn noise contour would not enable the airport and would create unacceptable effects on noise sensitive activities within the 50-55 dBA Ldn contour.

Benefits and costs

[55] Section 32(1)(b) requires an evaluation of the likely benefits and costs and the extent to which any provision is likely to be effective. We have concluded that the benefits to landowners from the adoption of the 55 dBA Ldn contour rather than the 50 dBA Ldn contour are minimal in this case. The realities of the situation are that there is a significant matrix of policies, objectives and rules against the establishment of urban residential activity in proximity to the airport. Some provisions relate to flooding, some to versatile soils, and still others to infrastructural and other requirements. Even with Policy 6.3.7 at the 55 dBA Ldn noise contour and equivalent provisions in Policies 6.3.9, 7.8.1 and 7.8.2, there would still be potential for effects to be considered on a case by case basis in respect of applications for non-complying activity resource consent.

[56] We conclude the argument for the developers is even more constrained. A new Policy 6.3.7 may ease the way for the developers who have filed references to the Proposed Plan to argue that their sites should be rezoned. However such a benefit is still contingent and we are unable to conclude at this stage that the alteration of the policy in this way would lead to any different outcome in respect of those references.

[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.

[58] By the same token, we are unable to conclude firmly from the evidence that we have heard that there is in fact any significant cost imposed upon the airport from the imposition of the 55 dBA Ldn as opposed to the 50 dBA Ldn contour. Many witnesses gave evidence based on an assumption that higher density would lead to curfews on the airport. The only distinction between 50-55 dBA Ldn noise contours was that a 55 dBA Ldn contour may introduce a higher concentration of noise sensitive activities to the land between 50 and 55 dBA Ldn. The proposition was that with a higher population in the low noise area there would be more agitation for a curfew. Having heard all the evidence, we have concluded that a curfew due only to the inclusion of buildings between the 50 and 55 dBA Ldn noise contour is unlikely. We do accept that there are likely to be a percentage of persons highly annoyed even below the 50 dBA Ldn noise contour. Although that percentage is significantly less than at the 55 dBA Ldn contour, we accept this may lead to an increased level of complaints. In our view such complaints are going to be inevitable in any event as the noise levels for airport activity within the existing urban area moves towards the 50 and 55 dBA Ldn contours in the next twenty to thirty years.

[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.

Section 5

[60] The Act has a single over-arching purpose of sustainable management as that term is defined in section 5. The land in question between the 50 dBA Ldn and 55 dBA Ldn noise contours is land which has little, if any, current urban development. This land is able to be utilised now while not providing for the construction of significant physical resources on it. On the other hand, the physical resource of the airport itself has local, regional and national significance. The continued viability of the airport enables the wider community to provide for their social and economic wellbeing in particular.

[61] The health and safety of people in the community can also be provided for by providing some reasonable constraints over the development of land in proximity to the airport. In this particular case the effects of noise from over-flying aircraft can not in this particular case be entirely avoided or remedied. The contours represent the maximum exposures taking into account the reasonable operation of the airport and appropriate noise reduction measures. Sustaining the airport as a physical resource to meet the reasonably foreseeable needs of future generations militates towards some flexibility in the operation of the airport. Having regard to the known effects of low Ldn noise levels and SEL events, a cautious approach should be adopted in fixing contours.

[62] We accept that this case is not comparable with either Wellington or Auckland Airports and that each airport must be considered on its own merits. In this case the natural and physical resources surrounding the airport between the 50 and 55 dBA Ldn contour are largely in a rural state. The Council has sought to reach a reasonable balance between permitting development in the area and safeguarding the airport as a physical resource. We are satisfied that they have also been minded to maintain the amenity of people who may reside in that area, within reasonable bounds.

[63] To that end, some minor guidance is obtained by reference to the expectation in terms of the Proposed Plan for amenity within the General, Living and Rural zones. In Volume 3 at page 11/7, the Proposed Plan sets out Development and Critical Standards in respect of noise. The relevant development standard is 50 dBA Ldn and the critical standard is 59 dBA Ldn. Effectively, with the adoption of a 55 Ldn contour the Court

would be accepting that there are areas where residential development is not discouraged that would have amenity levels lower than those generally anticipated in terms of the Proposed Plan in respect of noise. Disregarding noise from roads, it could be argued that many development areas of the city may be subject to noise in excess of that proposed under the Proposed Plan. However, in setting the noise level for this area, we take into account that the Proposed Plan has set out a general expectation in residential areas of 50 dBA Ldn. This provision is not critical because these standards are set for new activities to achieve compliance or to be dealt with as discretionary activities. However it is indicative as to the expectation in respect of noise amenity generally.

Conclusion

[64] We must now conclude which noise contour would be better for inclusion in Policy 6.3.7. We have concluded that the 50 dBA Ldn line is better for the following reasons:

(1) the airport has significance in terms of the Proposed Plan, recognising its local, regional and national importance;

(2) high individual SEL levels can have more impact at lower Ldns (under 55 dBA), suggesting a conservative line to avoid amenity impacts;

(3) there is an amenity impact below 55 dBA Ldn and the Proposed Plan reflects a general expectation of lower Ldn levels in residential and rural areas;

(4) the 50 dBA Ldn noise contour line better complements the existing Proposed Plan policies (discussed earlier);

(5) the 50 dBA Ldn 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 changed in the future to realise the potential for any appropriate development. We conclude that the 50 dBA Ldn line preserves the potential of land for future generations;

(6) in terms of the Noise Standard, the 50 dBA Ldn line would have some effect in setting an amenity standard for noise from the airport operation. As future noise approaches the contours, the expectation of people outside the 50 dBA Ldn line is that they will receive less than that level of noise.

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

Consequential changes

[65] We have not considered in detail whether any changes should be made to the explanation and reasons. Overall they appear to us to be in order although minor changes may need to be made in due course once the Court has considered the associated references relating to air noise boundary controls and the wording of noise sensitive activities.

[66] Again, dependent on those matters, it appears to us that Policy 6.3.7 itself may be improved to link it more directly with peripheral urban growth. We consider that wording:

> ***To discourage peripheral urban growth involving noise sensitive activities within the 50 dBA Ldn contour of the Christchurch International Airport***

may be more appropriate. This is, however, dependent upon an appropriate definition of noise sensitive activities being settled in terms of other references. To that extent the wording for the policy is indicative only and would need to be settled as part of the final decision of the Court.

Costs

[67] This decision is interim only and will be finalised once the associated references are resolved. Our preliminary view is that costs should lie where they fall. Because of the uncertain nature of the continuing involvement of Robinsons Bay in all the other references before the Court, we have concluded that any application for costs should be filed within twenty working days, any reply within ten working days and a final reply

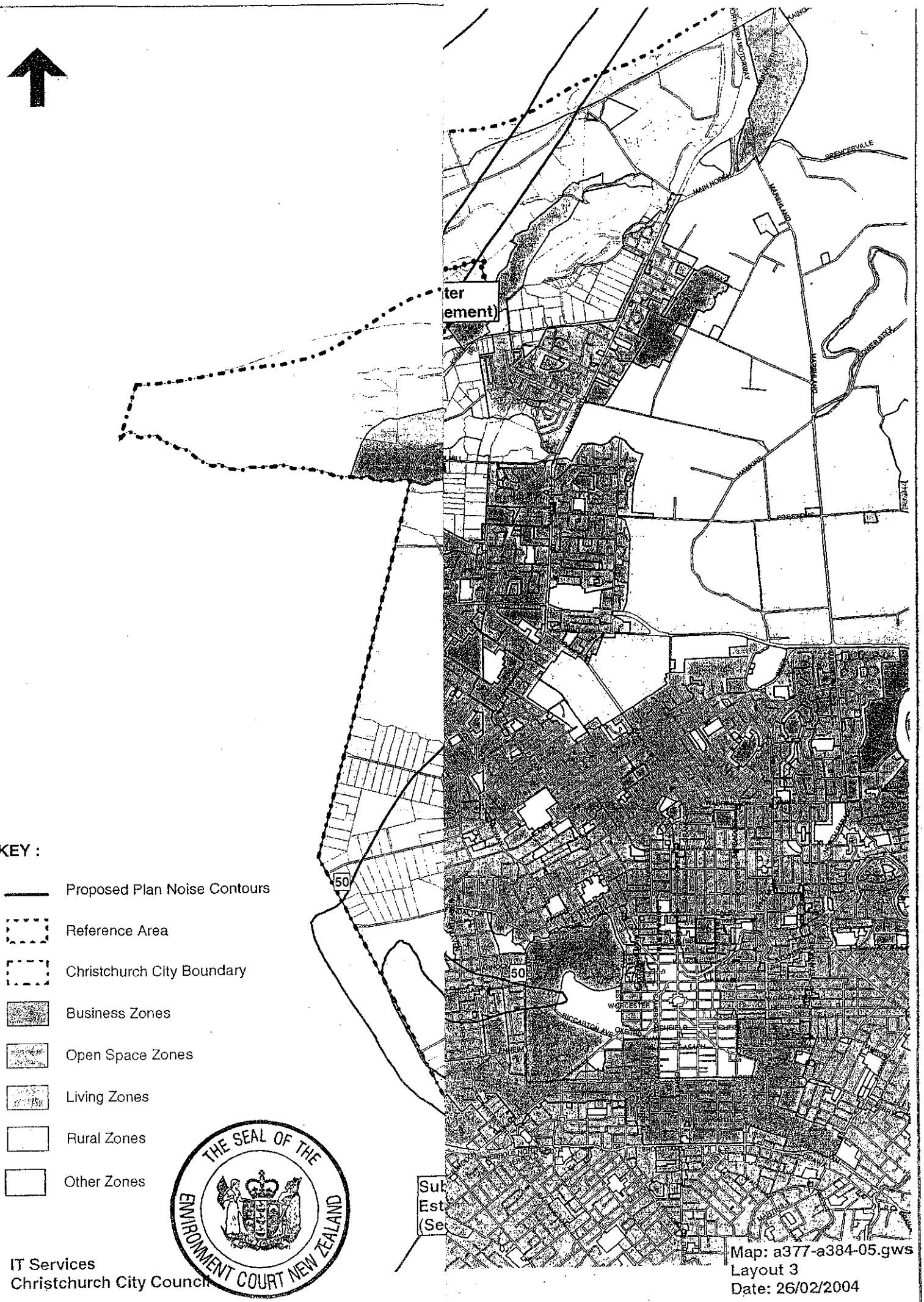
within five working days thereafter. An application for costs is not encouraged and if none is filed within the time limit set, costs are to lie where they fall.

DATED at CHRISTCHURCH this 13th day of May 2004.

J A Smith
Environment Judge

Issued[11]: 13 MAY 2004

11 Smithje/Jud_Rule/D/RMA518A-01.


KEY :
Proposed Plan Noise Contours
Reference Area
Christchurch City Boundary
Business Zones
Open Space Zones
Living Zones
Rural Zones
Other Zones
50
50
THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND
IT Services
Christchurch City Council
Map: a377-a384-05.gws
Layout 3
Date: 26/02/2004

Most of the rural coastal margin in the City is unlikely to be developed and is often unsuitable for development because of unstable dune formations, or potential inundation.

Some portions of the Port Hills are too steep for residential development and are susceptible to erosion and downstream siltation, particularly if large scale earthworks are likely. Often these areas are of high landscape value and are unsuitable for development for these reasons.

Avoidance of development in areas susceptible to hazards is justified to protect life and property from undue risk. The cost of protection works can be excessive in undeveloped areas, and caution has to be exercised that mitigation measures (such as filling) do not in themselves detract from the environment by impeding natural floodplains, displacing surface waters, or interrupting natural drainage patterns. In assessing a location's suitability for growth, the degree of risk, and its ability to be mitigated, has to be taken into account. Low or moderate risk can in many cases be adequately controlled by mitigation measures, or the degree of risk is so low it can be accepted.

Policy : Airport operations

6.3.7 ~~To ensure that urban growth does not occur in a manner that could adversely affect the future growth and operations of Christchurch International Airport.~~ To discourage urban residential development and other noise-sensitive activities within the 50 dBA Ldn noise contour around Christchurch International Airport.

Explanation and reasons

~~The International Airport is a facility of major significance to the regional economy. Domestic and international passenger movements, freight and Antarctic operations utilise this airport which is not curfewed as to hours of operation. It is unrealistic not to expect noise beyond its boundaries, potentially at levels that would adversely impact people living nearby. Urbanisation in close proximity to the airport could generate complaints and pressures for curfewed operations, with serious impacts on airport operations and the regional economy. This also recognises future growth of the Airport through intensified activities, particularly growth in Airport movements. It is important that there be no extensions to urban residential zones within the 50 dBA Ldn contour to avoid disturbance from aircraft noise.~~

~~In order to ensure the International Airport's operations can continue without undue restriction, urbanisation will be prevented where noise impacts are expected to be significant. While aircraft are expected to be quieter by the year 2000, movements are anticipated to be more frequent. As a result of projections and noise investigations, residential development will not be allowed to occur within the 65 dBA Ldn noise contour or within the SEL 95 dBA contour for a Boeing 747-200 aircraft. The Air Noise Boundary shown on the planning maps is a composite line formed by the outer extremity of the SEL 95 dBA and 65 dBA Ldn noise contours.~~

~~Between the 55 dBA Ldn contour and the Air Noise Boundary, new residential development will be discouraged (except for limited development in the Living 1C Zone) and all additions to existing dwellings will be required to be insulated. Insulation against noise will be required for all new developments between the 55 dBA Ldn contour and the Air Noise Boundary. This policy is expected to protect airport operations, and future residents from adverse noise impacts.~~

~~The policy provides that the 50 dBA Ldn noise contour will generally be the limit of residential development and other noise-sensitive activities in the vicinity of Christchurch International Airport.~~ The intention of this policy is that, in general, the 50 dBA Ldn contour (shown on the planning maps) should mark the limit of urban residential growth in the direction of Christchurch International Airport. Between 50 dBA Ldn and the Air Noise Boundary[1] (also shown on the planning maps) the establishment of aggregations of ~~new~~ residential development ~~and~~ to densities approximating that of Living zones and the establishment and/or extension of other noise sensitive activities will be ~~discouraged., except for limited development in the Living 1C Zone and other living zones which are already largely built out.~~ Residential development and other noise sensitive activities will not be allowed to occur within the Air Noise Boundary. Acoustic insulation will be required for all new residential development and noise sensitive ~~development~~ activities and all additions to such ~~uses~~ activities between the Outer Control Boundary[2] and the Air Noise Boundary.

[1] The Air Noise Boundary is a composite line formed by the outer extremity of the 65 dBA Ldn noise contour and the SEL 95 dBA noise contour for a Boeing 747-200 aircraft on the main runway and a Boeing 767-300 aircraft on the subsidiary runway.

[2] The Outer Control Boundary is the 55 dBA Ldn noise contour.

Christchurch International Airport is a facility of major importance to the regional economy. Domestic and international ~~passenger~~ movements, freight and Antarctic operations utilise the airport 24 hours a day, 365 days a year, and a non-curfewed operation is a pre-requisite for the sustainable management ~~of the~~ for airport purposes and in the long term of the relevant natural and physical resources. It is not possible for noise associated with aircraft ~~movements~~ operations to be contained within the boundaries of the airport. ~~boundaries and it is~~ It must therefore be accepted that the continued operation and future growth ~~in aircraft movements~~ of the airport will have some adverse impact on residents in the surrounding area., ~~which cannot be avoided. However, there are limits in the Plan on the amount of noise that can be generated (refer Volume 2, Section 7 Transport - Policy 7.8.2 (b) and Volume 3, Part 8 Special Purpose Zones - Section 3. Rules - Special Purpose (Airport) Zone).~~

Aircraft noise has an adverse effect on the quality of the living environment ~~and~~, on the amenity values that people obtain from ~~using~~ the use of their residential properties, (both indoors and ~~for~~ outdoors) ~~activities~~ and on the health of affected

people. Overseas research shows that sleep is disturbed and people are "highly annoyed" by aircraft noise as low as 42 to 43 dBA Ldn. Between 50 dBA Ldn and 55 dBA Ldn, 4 to 13% of the population are "highly annoyed" by aircraft noise. Aircraft noise also has the potential to have adverse effects on public health has indicated that these effects may occur as the result of levels at or below 50 dBA Ldn. Past experience in Christchurch, confirmed by international experience, shows has shown also that high levels of annoyance result in produce complaints and pressures for curfews or other restrictions on airport operations. The risk of complaints and pressure for curfews is likely to grow as the number of aircraft movements increases. Both the likelihood of affects adverse to people and of complaints from people (and of pressure for curfews) will increase as the number of aircraft movement increases and as noise levels begin to approach those indicated by the (predicted) noise contours.

This policy is intended to, together with limiting the amount of noise generated by aircraft movements, will ensure that the operations of Christchurch International Airport's operations can continue without undue restriction, and that safeguards residential amenities and the quality of the environment life for people living around the airport are safeguarded. The cost to the community of foregoing residential development on land within the 50 dBA Ldn is relatively small because the need for land for residential development can be met at other locations. In the Christchurch context it is not necessary to permit urban residential development to occur on land within the 50 dBA Ldn contour as sufficient land for residential expansion can be provided at other locations.

The Outer Control Boundary, which is the threshold for the requirement for insulation, and the Air Noise Boundary are identified on the planning maps. The 50 dBA Ldn is also shown as the point of reference for the application of Policy 6.3.7.

In this section, "noise sensitive activities" means residential activities (unless otherwise specified), education activities including pre-school places or premises, travellers' accommodation, hospitals, healthcare facilities and elderly persons housing.

This policy and the other provisions in this Plan that implement it are based upon the premiss that noise generated by aircraft movements will not exceed that indicated by noise contours identified on the planning maps. These contours have been calculated following the approach recommended in the New Zealand Standard NZS 6805:1992, *Airport Noise Management and Land Use Planning.* On the basis of present knowledge it is estimated that the noise levels indicated by these contours will be approached in about the year 2020. If and when this happens the levels of noise in the vicinity of the airport will be significantly higher than at present, as will the effects of airport noise.

NZS 6805:1992 provides that once noise contours have been established the airport operator shall manage its operations so that the limit specified for the Air Noise Boundary is not exceeded, and that if this occurs noise control measures may be necessary. Because there is a designation in place affecting the majority of the land used for the purposes of the Christchurch International Airport it is not possible for effective rules to be included in this Plan for the control of noise resulting either from airport operations or from engine testing. Engine testing is, however, subject to the requirements of *the Christchurch International Airport Bylaws 1989* approved by the Governor General in *The Christchurch International Airport Bylaws Approval Order 1989.*

The Council will continue to monitor the growth of airport related noise and will require the airport operator to contribute to this monitoring process. That monitoring will enable the Council to consider whether (and if so, what) additional measures are necessary for the control of noise from airport operations and engine testing. These measures may include removal of the designation from this or subsequent plans and the establishment of rule based controls.

Policy : Incompatible rural activities

6.3.8 To have regard to the presence of any incompatible activities in the rural area in assessing urban growth proposals.

Explanation and reasons

Any residential development extending into the rural area may bring potential residents into closer contact with orchards, viticulture, intensive livestock operations, or rural industries, a problem which is already apparent with poultry farming operations on the edge of the urban area. Adverse effects can include smell, noise or spray drift. Other activities in the rural area may potentially conflict with growth of the urban area, such as landfills and sewerage treatment facilities, quarries and motorsport facilities.

Rural activities which have legitimately established should not be expected to relocate to accommodate urban growth, unless the developer has taken clear steps to mitigate any adverse effects, or compensate the rural activity if it wishes to relocate by voluntary agreement. The onus is clearly on the urban developer, and urban growth proposals will not be viewed favourably by the Council if incompatible activities are present, unless specific measures to address these effects have been identified.

Policy : Urban extensions

6.3.9 To promote smaller a range of incremental extensions to the urban area distributed over a number of peripheral locations, rather than a major extensions in any one area.

Explanation and reasons

The policy seeks to achieve a pattern of small incremental additions distributed around the urban edge, consistent with the consolidation strategy,

Objective : Access to the City

7.8 Recognition of the need for regional, national and international links with the City and provision for those links.

Reasons

International access to Christchurch for both passengers and freight is provided by Christchurch International Airport and via Lyttelton Harbour, with regional and national access also being provided for by rail, road and sea.

It is essential for the continued development of industry, commerce and tourism in Christchurch that a high level of road access is maintained between the rail, road, airport and port facilities and the City, to provide access for passengers, freight, employees and visitors.

Policies : Airport services

7.8.1 To provide for the effective and efficient operation and development of Christchurch International Airport.

7.8.2 To ~~minimise~~ avoid, remedy or mitigate nuisance to nearby residents through provisions to mitigate the adverse noise effects from the operations of the Christchurch International Airport and Wigram Airfield.

~~7.8.3 To limit the noise generated by aircraft movements at Christchurch International Airport.~~

Explanation and reasons

It is essential to protect the operation of transport facilities from other land uses to allow them to function effectively and safely. It is also necessary to protect outside uses from the noise and related activity associated with transport facilities. The two principal ways of minimising impacts of the landuses on each other is by separating the transport facility from other activities through a buffer of land, or by requiring the various land uses to meet stringent conditions to minimise impacts. ~~**In addition, the amount of aircraft noise that can be generated by aircraft movements associated with the airport will also be limited.**~~

Controls have been in place for many years to limit the extension of residential development towards the International Airport because of the potential conflict between airport activities and residential activity. There is unavoidable nuisance associated with the International Airport, particularly noise, and the nature of its operation does not fit well with noise sensitive activities, such as residential occupation.

Controls are necessary to safeguard the continued operation and development of facilities at the International Airport as they are essential to the development and economic well being of the City. Similarly, surrounding landuses also need protection from the adverse ~~e~~affects of these facilities which, ~~for example, could be~~ are required to operate on a continual basis. The potential effects of airport operations are influenced by the density of surrounding development, particularly residential development and the degree to which buildings are insulated against the impacts of noise. **Rules will be primarily aimed at new residential activity and other noise sensitive uses, but will also apply to the extension of existing residences and buildings.**

In the future, while aircraft are likely to become less noisy, more aircraft movements are expected to occur. It is anticipated that these factors may cancel each other out in terms of noise impacts on surrounding activities, resulting in a long term continuance of current noise levels.

~~As a result of projections and noise investigations, residential development will not be allowed to occur within the 65 LdN noise contour, and between the 55 and 65 LdN contours new residential development will be discouraged and all additions to existing dwellings will be required to be insulated. Insulation against noise will be required for all new development between the 50 and 55 LdN noise contours.~~

If further residential development takes place in the vicinity of the International Airport, it is likely this could lead to requests to restrict and curfew airport operations. This could in turn have adverse effects on the economy of the City and beyond. Residential development closer to this airport potentially subjects residents to adverse noise impacts and a buffer surrounding this airport is considered the most effective means of protecting its operation.

In the urban area, an area of land in the north-west of the City is affected by noise contours projected form cross runway 11/29. Within the existing urban area affected by the 55 dBA Ldn noise contour, new buildings will be required to be subject to some insulation as a measure for mitigating the effects of aircraft noise.

In addition to limiting the density of residential and other noise sensitive activities, requirements for the insulation of buildings have been developed for activities in the vicinity of the Christchurch International Airport. These requirements relate to the position of the building in relation to projected noise contours which take into account the noise produced by aircraft and aircraft operations over a 24 hour period. Within the "outer control boundary" set at the 55 dBA Ldn contour and shown on the planning maps, insulation measures are required for buildings, depending on the sensitivity of the internal building space for specified uses. These measures apply between the 55 dBA Ldn line and the 65 dBA Ldn/95 SEL dBA line, the latter composite line being defined as the "air noise boundary" and will entail higher levels of noise insulation as the levels of noise exposure increase toward the air noise boundary.

Within the Air Noise Boundary, where noise levels are expected to be most intrusive, and potentially damaging to health, no new residential buildings or travellers' accommodation other noise-sensitive activities are permitted. A limited exemption applies to a small number of existing larger vacant allotments within the air noise boundary which were existing as at 24 June 1995 and to allotments within the Living 1C zone where limited development is provided for, subject to compliance with insulation requirements.

The rules are more flexible for alterations to existing buildings within the air noise boundary, where the "affected building" already exists or for some vacant lots existing at 24 June 1995.

~~At the 65 dBA Ldn noise contour, Christchurch International Airport will be required to limit aircraft noise to 65 dBA Ldn. The limit equates with the utilisation of the existing runways at full capacity.~~

Wigram Airfield shall provide for general aviation, training and/or recreational activities utilising primarily single engine or light twin engine aircraft in contrast to Christchurch International Airport which is a full international airport operating 24 hours a day and providing services to the largest aircraft currently operating and which operate both day and night.

While not concerned with aviation operations in the same sense or degree as the International Airport, aircraft operations from Wigram Airfield for general aviation, training and/or recreational activities will also create noise effects which will impact upon surrounding areas and land use activities.

Because of the relatively restricted range of aircraft types likely to be operating from Wigram Airfield (primarily single engine and light twin aircraft), together with a restriction in the hours of any such operations, noise projections have identified a limited area within which adverse noise impacts are likely to occur.

Residential or other noise sensitive development will not be allowed to occur within the 65 **dBA** ~~LdN~~ **Ldn** noise contour, and between the 55 and 65 **dBA** ~~LdN~~ **Ldn** contours any new or replacement residential development and all additions to living or bedroom areas on properties will be required to be insulated against noise. **Appendix 11 (to Volume 3, Part 8, General City Rules) contains standards to ensure noise sensitive activities are required to be insulated against noise.**

~~Because of the limited scale and hours of operation, no restriction on residential development shall be applied below the 50 and 55 LdN contours, as is the case around the International Airport where a higher degree of restriction on residential development has been applied for some years.~~

~~In this section, "noise-sensitive activities" means residential activities (unless otherwise specified), education activities including pre-school places or premises, travellers' accommodation, hospitals, healthcare facilities and elderly persons housing.~~

In this explanation, "noise sensitive activities" means:

- Residential activities other than those in conjunction with rural activities and which comply with the rules in the Plan;
- Education activities including pre-school places or premises, but not including flight training, trade training or other industry related training facilities within the Special Purpose (Airport) Zone;
- Travellers accommodation, hospitals, healthcare facilities and any elderly persons housing or complex.

Policy : Bus services

7.8.3 To ensure bus termini and interchanges are located to enable convenient linkages within and beyond the City, whilst minimising adverse effects on the roading network.

Explanation and reasons

There is a need in the City for bus facilities to cater for the needs of City, tourist and long distance buses. It is essential that they be sited so as to be accessible from all parts of the City and from outside the City, but the function of the road network and the pleasantness of the environment should not be compromised by parked or manoeuvring buses and associated vehicles.

This policy therefore seeks to encourage the efficient movement of people and buses through the provision of accessible facilities, while not compromising the efficiency of the road network.

Policy : Transport links

7.8.4 To ensure high quality transport links between rail, road, port and airport facilities and the City for passengers, freight, employees and visitors.

Explanation and reasons

High quality transport links involve an efficient, safe network appropriate to the types of vehicles which will be using the link. Passenger routes need to return a high environmental quality in addition to providing an efficient link, whereas routes used mainly by commercial delivery vehicles need to provide protection to surrounding landuses in minimising adverse effects. An example of this is Christchurch International Airport which is laid out in such a way as to encourage passenger transport to use Memorial Avenue and commercial vehicles onto Harewood Road. The Port of Lyttelton is also linked to the City by both rail and arterial road links. Rail facilities are similarly linked by road to tourist/passenger destinations and connections for freight distribution and collection.

It is essential to maintain and further develop links that are both efficient and safe to support the viable operation of transport links into, and within, the City for people and goods.

Policy : Rail corridors

7.8.5 To provide for the protection of rail corridors for transport purposes.

Explanation and reasons

The railways play an important role for Christchurch by moving people and goods, particularly bulk goods, over long distances. It is therefore important that they are able to continue to provide an efficient and effective service through the protection of the corridors used.

The rail corridors also provide a potentially valuable resource for other forms of transport. The Council in conjunction with NZ Rail is already using some corridors for pedestrian/cycleways and it is expected that these links will continue to be developed.

If the land occupied by the rail network in part or in total was no longer required for railway purposes in the future, it could provide alternative transport corridors for public transport, or "green corridors" for cyclists and pedestrians. Protection of the corridors is required to ensure an effective and efficient rail service is able to operate.

Environmental results anticipated

Providing for regional, national and international links with the City is expected to produce the following outcomes:

- The effective and efficient operation and development of Christchurch International Airport.
- Enhanced visual amenity for passengers along transport corridors throughout the City.
- Protection of the amenity of land uses surrounding transport facilities and corridors.
- High quality transport links between rail, road, port and airport facilities and the City.
- An effective and efficient rail service within the City and recognition of the value of rail corridors for a range of transport related uses.

Implementation

Objective 7.8 and associated policies will be implemented through a number of methods including the following:

District Plan

- The identification of Special Purpose Zones relating to elements of the transport system, e.g. as applying to the City's roads, rail corridors, and Christchurch International Airport.
- The identification of a Rural 5 (Airport Influences) Zone. Controls on the density of dwellings in Rural Zones, the extent of expansion of urban uses into the rural area and noise insulation standards for dwellings and noise sensitive uses in proximity of the airport.
- Zone rules such as building insulation requirements for the Rural 5 Zone.
- City rules regarding Transport, e.g. controls on high traffic generators on arterial roads.
- The establishment of special controls to safeguard continuing aviation activity at Wigram Airfield and the establishment of noise insulation standards for dwellings and noise sensitive uses in that vicinity.

Other methods

- Provision of works and services , e.g. through the district road programme to maintain and improve directional signage, to provide new links and upgrade existing roads.
- Co-ordination and liaison with transport operators, e.g. Christchurch International Airport Limited, Lyttelton Port Company Limited, and Road Transport Association, including liaison with the Council's own Companies.

ORIGINAL

Decision No. A 023 / 2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of seven appeals under section 174 of the Act

BETWEEN **ARDMORE AIRFIELD TENANTS AND USERS COMMITTEE**

(RMA 793/03)

UNIVERSITY OF AUCKLAND

(RMA 802/03)

J & K ANTUNOVICH

(RMA 813/03)

PAPAKURA DISTRICT COUNCIL

(RMA 814/03)

ARDMORE RESIDENTS ACTION GROUP INC

(RMA 816/03)

J & S SOUTHCOMBE

(RMA 817/03)

MANUKAU CITY COUNCIL

(RMA 818/03)

Appellants

AND **ARDMORE AIRPORT LTD**

Respondent

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

AND

IN THE MATTER of eight references under clause 14(1) of the First Schedule to the Act

BETWEEN **NEW ZEALAND WARBIRDS ASSOCIATION**

(RMA 643/03)

ARDMORE AIRPORT LTD

(RMA 644/03)

ARDMORE AIRFIELD TENANTS AND USERS COMMITTEE

(RMA 646/03)

JET IMPORTS LTD

(RMA 647/03)

UNIVERSITY OF AUCKLAND

(RMA 654/03)

J & S SOUTHCOMBE and J & D EDWARDS

(RMA 655/03)

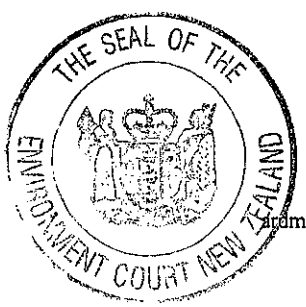
ARDMORE RESIDENTS ACTION GROUP

(RMA 656/03)

MANUKAU CITY COUNCIL

(RMA 657/03)

Referrers



AND **PAPAKURA DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner H A McConachy
Environment Commissioner K Prime

HEARING at Auckland on 10, 15 and 16 November 2004

APPEARANCES

Ms H Atkins and Ms M Stirling for Papakura District Council
Mr T Gould and Ms R Jordan for Ardmore Airport Ltd
Mr A Green and Mr J Young for Manukau City Council
Mr A Allan and Ms J Goodyer for Admore Residents Action Group and Others
Mr I Cowper for Ardmore Airfield Tenants and Users Committee; New Zealand Warbirds Association; and Jet Imports Ltd

INTERIM DECISION

Introduction

[1] The Ardmore Aerodrome was built during World War II, and commenced operating as an airfield in 1945. It has operated since then, now being the country's largest airfield for general aviation, training and a range of aircraft related activities.

[2] The airfield was privatised in 1995 and is now owned and operated by Ardmore Airfield Limited. That company is a requiring authority, and has issued a Notice of Requirement for the continuing operations of the airfield.

[3] The Papakura District Council is the local authority in whose territory the airfield is situated. It has introduced controls through Plan Change 6 to its district plan, which provide limitations on the operations that are conducted from the airfield.

[4] These proceedings relate to appeals from both the decision on the Notice of Requirement and the decision on the Plan Change.

[5] The provisions of the Notice of Requirement and Plan Change 6 are complementary, and these appeals accordingly address both matters at the same time. These appeals examine the legal and planning framework that is proposed for the airfield.

The proceedings

[6] These proceedings relate to the establishment of noise contours and provisions relating to the control of noise at Ardmore Aerodrome. The proceedings are:

(i) 8 references against Plan Change 6 to the Operative Papakura District Plan, introducing district plan noise controls for Ardmore Aerodrome; and

(ii) 7 appeals against a Notice of Requirement issued by Ardmore Airport Limited as requiring authority for Ardmore Aerodrome, altering aspects of its existing designation to better provide for the management of noise at the aerodrome.

The parties and their positions

[7] The parties to these proceedings can be divided into four camps:

(i) the Council;

(ii) Ardmore Airport Limited;

(iii) those who reflect the interests of residences and properties surrounding the airport; and who are concerned about the effects on their amenity; and

(iv) those who reflect the interests of the users of the airport; and who are concerned that the potential uses of the airport are not unnecessarily constrained.

[8] We were told that discussions have been occurring between the parties over some months preceding the hearing. As a result of those discussions, many of the parties, including the Council and Ardmore Airport Limited, agreed on a joint position that represents a compromise in relation to both Plan Change 6 and the Notice of Requirement.

[9] This agreed position was advised to the Court in the form of a draft consent order and a supporting joint memorandum of counsel dated 4 November 2004[1]. A copy of the joint memorandum and draft consent order is attached as Appendix 1 and Appendix 2 respectively.

[10] Three appellants, all of whom are in the camp that reflect the interests of the users of the airport, have not agreed to the draft consent order. They are:

(i) The Ardmore Tenants and Users Committee, an unincorporated body, comprising the various tenants of the airfield, and representing those who use the airfield. There are approximately 80 bodies who have businesses at the airfield, or who operate from the airfield. This committee provides the organised voice for those bodies;

(ii) The New Zealand War Birds Association, an organisation that was formed to ensure the preservation, and operating condition, of the aviation heritage of New Zealand. They own no aircraft themselves, but organise the aviation events at which their members can display and fly their planes; and

(iii) Jet Imports Limited, the owner of two hunter jets that have been based at Ardmore since 1995. These aircrafts are the only "fast jets" in the country, and are the major attraction at air shows throughout New Zealand. They are also used for training purposes with the Navy's Frigate.

[1] Those parties are Ardmore Airport Limited, Papakura District Council, Manukau City Council, Ardmore Residents Action Group, University of Auckland, J & S Southcombe, J & D Edwards and J & K Antonovich, as well as a number of section 274 parties.

The hearing

[11] The hearing took place in Auckland during the month of November 2004. On the first day of the hearing we heard submissions from counsel for all of the parties.

[12] We then read the briefs of evidence tendered by the parties. By agreement we read the written evidence of the following:

(i) four statements of evidence tendered on behalf of the consenting parties namely:

(a) the evidence of Gregory John Osborne, a resource management consultant;

(b) the evidence of Ronald Eugene Reeves, an internationally recognised acoustical consultant;

(c) the evidence of David Stuart Park, an aviation consultant; and

(d) the evidence of Richard Garry Gates, the chief executive officer of Ardrmore Airport Limited.

(ii) seven statements of evidence tendered on behalf of the appellants opposed to the draft consent order namely:

(a) Allan Robert McCreadie, an engineer with his own business Armadillo Engineering, based at Ardmore Airport;

(b) Brian William Putt, a town planning consultant;

(c) Peter Houghton, the general manager of New Zealand War Birds Association;

(d) David William Phillips, director of Jet Imports Limited;

(e) David William Brown, the chief executive officer and owner Christian Aviation;

(f) E Garth Hogan, the owner and managing director of Pioneer Aero Restorations Limited based at Ardmore Airport;

(g) F Craig Lindsay Hunter, the general manager for Ardmore Flying School Limited;

(h) Don Cracken, the general manager/operations of Flight Line Aviation Limited; and

(i) John McShane, environment and planning manager for Auckland International Airport Limited.

(iii) statements of evidence of three witnesses exchanged by Ardmore Airport Limited prior to the hearing but not adduced as evidence before the Court by Ardmore Airport Limited, namely:

(a) Michael John Foster, a resource management and planning consultant;

(b) Nicholas Jon Roberts, a consultant planner; and

(c) Christopher William Day, an acoustical consultant.

There was no cross-examination.

[13] We then undertook an extensive site visit to the airport. This included a detailed examination of the airport facilities and its surrounding countryside and a circuit flight around the airport.

[14] We then reconvened in Court to hear closing submissions from Ms Atkins for the Council and Mr Allan for the parties he represented.

[15] Finally, written submissions were later received addressing the appropriate use, if warranted, of section 293 of the Act.

Background

[16] Ardmore Airport is located approximately 1.5km north east of the Metropolitan Urban Limits, defining the edge of Papakura township, and within convenient driving distance of Manukau and Auckland Cities. Despite its proximity to such a large population base, the airport is situated within a predominantly rural environment.

[17] It is the busiest airport in New Zealand in terms of aircraft movements. It has extensive flight training operations. There are more than 300 aircraft permanently based at the airport. Aircraft and helicopter services and associated industries have been established on the airport grounds.

[18] Within the rural area surrounding the airport, the activities include horse breeding and training, horticulture and the rearing of various types of livestock. There are a number of "hobby farms" and lifestyle blocks within the area where subdivision has and continues to occur. There is a small research facility, operated by the Physics Department of the University of Auckland, located to the south, a conference centre and a number of residential properties.

[19] The juxtaposition of the airport with the surrounding rural land, which has been incrementally developed over the past decades into smaller holdings, is a recipe for conflict. Conflict between the growth and development of the airport on the one hand, and the use and enjoyment of surrounding properties on the other.

Current noise controls

[20] At the present time, Ardmore Airport is not required to comply with any airport specific noise controls. The noise provisions of the plan do not apply to noise generated by the airport activities. This includes general activities, such as the maintenance of aircraft, and specific aircraft related activities such as engine testing.

[21] Notwithstanding the absence of planning noise controls, there are a number of noise controls currently in place at Ardmore. These have been developed over the years in response to noise concerns raised by residents and the Papakura District Council.

[22] These controls apply to both fixed wing aircraft and helicopters and cover flight paths, operating altitudes and operating hours. They are contained in various publications including:

(i) the Civil Aviation Authority Aeronautical Information for Pilots;

(ii) the Civil Aviation Good Aviation Practice publication titled "Operations, In, Out and Around Auckland";

(iii) the Ardmore Airport Operations Manual;

(iv) the Fly Friendly Programme (a programme voluntarily adopted by Ardmore Airport Limited to create an awareness and culture among aircraft operators at Ardmore of noise abatement requirements); and

(v) the Ardmore Airport Noise Management Plan.

[23] Some examples of the noise controls contained in these publications include:

(i) helicopter descent segments and minimum altitudes;

(ii) approved helicopter/training locations;

(iii) requirements for helicopters to use the fixed wing aircraft circuit pattern at night;

(iv) permitted hours of operation for circuit training and ex-military jet operations;

(v) minimum altitude requirements for forced landing practice;

(vi) general requirements for pilots to operate the aircraft to minimum noise.

[24] However, there are no planning noise controls applying to the operation of Ardmore Airport at the present time. It is accepted that the facility is able to continue to operate under the existing designation.

[25] Ardmore Airport is currently the only major airport in New Zealand without air noise controls to protect its future operation and provide certainty for the community. Consequently, all parties recognise that there is a need for change. There is a need for more planning certainty, to avoid conflict between the continued growth and development of the airport and the use and enjoyment of surrounding properties.

New Zealand Standard NZS 6805:1992

[26] In 1991 the Standards Association of New Zealand published New Zealand Standard NZS 6805:1992 "Airport Noise Management and Land Use Planning" with a view to providing a consistent approach to noise planning around New Zealand

airports. The Standard uses the "noise boundary" concept as a mechanism for local authorities to:

(i) "establish compatible land use planning" around an airport; and

(ii) "set noise limits for the management of aircraft noise at airports".

[27] The noise boundary concept involves fixing an Outer Control Boundary and a smaller, much closer Air Noise Boundary around the airport. The Standard recommends, that inside the Air Noise Boundary, new noise sensitive uses (including residential) should be prohibited. Between the Air Noise Boundary and the Outer Control Boundary, new noise sensitive uses should also be prohibited unless provided with sound insulation. The Air Noise Boundary is also nominated as a location for future noise monitoring of compliance.

[28] The Standard is based on the Day/Night Sound Level (Ldn) which uses the cumulative "noise" that is produced by all flights during a typical day, with a 10 dB penalty applied to night flights. Ldn is used extensively overseas for airport noise assessment and it has been found to correlate well with community responses to aircraft noise.

[29] To establish location of the noise boundaries NZS 6805 states a projection should be made of future aircraft operations to determine the future Ldn contours for the airport. It is recommended "that a minimum of a 10-year period be used as the basis of the projected contours" using the integrated noise model.

[30] The integrated noise model calculates Ldn contours from operational information. The location of the Air Noise Boundary is then based upon the projected Ldn 65 dBA contour, and the location of the Outer Control Boundary is based on the projected Ldn 55 dBA contour. The Standard also recommends that, where appropriate, night time single event noise levels should be considered in the location of the Air Noise Boundary.

[31] The Standard provides for a two pronged approach - land use planning on the one hand, and airport noise management on the other. The implementation of the two parts of the Standard can be achieved in several ways. According to Mr Day, the acoustical expert who gave evidence for the Council, the Standard has been implemented by most airports in New Zealand having prescribed land use controls

(within the contours) in the district plan, and noise management rules within the airport's designation.

Planning history

The operative plan

[32] Ardmore Aerodrome has its own zone under the Papakura District Plan. The surrounding land is zoned Rural Papakura and Rural Takanini/Drury. Permitted activities within both these zones are generally limited to farming, forestry, and horse training/breeding activities and ancillary housing. The aerodrome is located near to the Papakura district boundary with Manukau City. The land within the Manukau City boundary in this vicinity is zoned Rural 1, and again, permitted activities are generally limited to farming activities, forestry activities and ancillary housing.

[33] The Ardmore Aerodrome zone is contained within the industrial part of the urban section of the district plan. Within the zone any part of the site is permitted to be used for "aviation activities" which are defined to include *"runways, taxiways and navigational equipment, passenger terminals, maintenance workshops, aircraft testing facilities..."* as well as any ancillary activities.

[34] The rural zoning surrounding the Ardmore Aerodrome zone currently does not limit reverse sensitivity development.

Designation

[35] Existing planning provisions that apply to the airport are contained in two existing designations[2] and the Ardmore Aerodrome zone underlying the designation. The designations:

(i) designate land for aerodrome "and aerodrome purposes". The former incorporates the four runways, the hangars, the dwellings on village way and land between the runway and Airfield Road. The latter is predominantly vacant land to the south which contains some buildings used for administrative purposes;

[2] Referenced in the operative plan as No. 222 and No. 223.

(ii) set out the locations of runways, bases and a series of specific airport-related height controls, termed "surface controls" which overlay the standard zone height controls around the airport;

(iii) restrict the use of land, 9000 metres distance from each sealed runway, by requiring the consent of the airport authority for any new structure over 4 metres in height;

(iv) deal specifically with helicopter operations, identifying specific final approach and takeoff paths, approach and departure paths and the like.

The proposed planning package

[36] It has been agreed by the consenting parties following extensive consultation, that the method of implementation should be a three-tiered approach involving:

(i) an alteration to the existing designation. This involves:

- the replacement of outdated designation provisions; and
- a requirement to comply with specific noise management provisions included within the district plan.

(ii) Plan Change 6 to the Papakura Operative District Plan replacing outdated requirements and introducing specific noise management restrictions on airport operations within the ambit of the Resource Management Act; and

(iii) the implementation of a Noise Management Plan, primarily to deal with those matters which fall outside the district council's jurisdiction. The Noise Management Plan itself contains some necessary flexibility with regard to control over aircraft in flight, to enable timely future safety and operational changes.

[37] The present proposal provides for the noise contours, together with additional controls agreed by the airport, to become part of the Papakura District Plan. The important features relevant to these proceedings are:

(i) the noise contours (the Air Noise Boundary and Outer control Boundary) are based upon a design capacity of 275,000 aircraft movements per annum[3];

(ii) inclusion of a maximum single noise event (SEL) to ensure no noisier aircraft may be located at Ardmore;

(iii) restrictions on the hours of certain flight operations (circuit training);

(iv) restrictions on the number of movements of ex-military jets;

(v) restrictions on general noise emissions produced at the airport (such as maintenance of aircraft, excluding engine testing);

(vi) restrictions on engine testing;

(vii) controls on air shows;

(viii) the introduction of a Noise Management Plan;

(ix) acoustic treatment of houses within the Air Noise Boundary (65 dBA Ldn); and

(x) monitoring.

[38] Of particular concern to these proceedings are:

- (i) above, namely that the noise contours have been assessed upon 275,000 aircraft movements per annum.

- Also of concern are the matters referred to in (ii) to (vi) above. The appellants opposing the draft consent order, maintain that these are matters of airfield management, which the airport authority should deal with in its operation of the airfield. If they need to appear in a regulatory form, they should be part of the designation.

[3] One aircraft movement constitutes either a take off or a landing.

- The final matter of concern is the absence of land use controls within the identified noise boundaries as recommended by the Standard.

The issues

[39] The issues that remain may conveniently be addressed under three main headings:

(i) the design capacity on which the noise boundaries are calculated and the consequent effect on the calculation of the air noise boundaries;

(ii) The type of controls which relate to the operation of the airfield, and whether those that are appropriate should be contained in Plan Change 6 or the Designation;

(iii) the need for land use controls within the identified noise boundaries.

[40] Before discussing the issues it is useful to consider the statutory criteria and the relevant statutory instruments.

The statutory criteria

[41] The proceedings before the Court are seven appeals under section 174 of the Act, and ten references under clause 14 of the First Schedule to the Act. The criteria to be considered on appeals under those sections are stated separately. Although many of them are common to both, and they have been presented as a composite package, we remind ourselves that decisions have to be made on each class of appeal or reference.

Designation considerations

[42] The Environment Court's powers in determining appeals from a requirement for a designation are prescribed by section 174. The Court may:

(i) confirm the requirement;

(ii) cancel the requirement; or

(iii) modify the requirement, or impose such conditions, as the Court thinks fit.

[43] Subsection (4) of section 174, directs that in determining an appeal, the Court is to have regard to the matters set out in section 17 of the Act. Subsection (1) gives directions to territorial authorities considering a requirement.

> 1. Subject to Part II, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169) and all submissions, and shall also have particular regard to-
>
> (a) whether the designation is reasonably necessary for achieving the objectives of the public work, or project or work for which the designation is sought;
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work, or project or work;
>
> (c) whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method;
>
> (d) all relevant provisions of any national policy statement, New Zealand coastal policy statement, regional policy statement, proposed regional policy statement, regional plan, proposed regional plan, district plan, or proposed district plan.

Plan change considerations

[44] The starting point for considering the plan change is section 74. That section requires a Council, as a territorial authority, to prepare its district plan in accordance with:

(i) its functions under section 31;

(ii) the provisions of Part II;

(iii) its duty under section 32; and

(iv) any regulation.

[45] Section 31 prescribes the Council's functions in relation to giving effect to the Resource Management Act in a district plan. The three key functions relevant to these references are in subsections (a), (b) and (d) as follows:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district;

(b) The control of any actual or potential effects of the use, development, or protection of land, ...

(d) The control of the emission of noise and the mitigation of the effects of noise.

[46] These functions relate to the management and control of effects. This is to be distinguished from the prescriptive allocation of resources for land use per se, referred to in ***Burn v Marlborough District Council***[4] as "the wise use philosophy" of the Town and Country Planning Act 1977.

[47] Section 32 contains directions that apply to the Council in relation to making decisions on accepting or rejecting any submission on a proposed plan.

[48] Sections 75 and 76 are also important. Section 75 requires a district plan to state (among other things):

(a) the significant resource management issues for the district;

(b) the objectives sought to be achieved by the plan;

(c) the policies for those issues and objectives, and an explanation of the policies; and

(d) the methods (including rules if any) to implement the policies.

[49] Section 76 enables the Council to include rules in a district plan, for the purpose of carrying out its functions under the Act, and to achieve the objectives and policies of the plan. In making a rule the Council:

> ...shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect,...

[50] The following passage from the Environment Court decision ***Wakatipu Environmental Society v Queenstown Lakes District Council***[5] is applicable to a district plan in general:

[4] [1998] NZRMA 305 at 331.
[5] [2000] NZRMA 59, 80; paragraph [52].

> A district plan must provide for the management of the use, development and protection of land and associated natural and physical resources. It must identify and then state (inter alia) the significant resource management issues, objectives, policies and proposed implementation methods for the district. In providing for those matters, the territorial authority (and on any reference to the Environment Court) the Court shall prepare its district plan in accordance with:
>
> - its functions under section 31;
> - the provisions of Part II;
> - section 32;
> - any regulation; and
> - must have regard to various statutory instruments.

The above passage is equally applicable to a plan change.

[51] The following passage from the Planning Tribunal's decision ***Nugent v Auckland City Council***[6] summarises the requirements derived from section 32(1):

> ...a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.

The role of Part II

[52] The introductory Part of section 171(1) is prefaced by the words *"subject to Part II"*. Placed there, at the start of the provision identifying matters to which regard is to be had, its effect is to defeat the direction to have regard to the matters listed, where to do so would conflict with anything in Part II. This means, that the directions in Part II, which include sections 5, 6, 7 and 8, have to be considered as well as those in section 171 and indeed override them in the event of conflict[7].

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[6] [1996] NZRMA 481.

[7] See *Ministry of Conservation v Kapiti Coast District Council* Planning Tribunal Decision A024/1994; *Paihia District Citizens Association v Northland Regional Council* Planning Tribunal Decision A77/1995; *Russell Protection Society v Far North District Council* Environment Court Decision A125/1998; *Bungalow Holdings v North Shore City Council* Environment Court Decision A025/2001; *Beadle and ors v The Minister of Corrections and the Northland Regional Council* Environment Court Decision A074/2002; *Beda Family Trust and ors v Transit New Zealand Limited* Environment Court Decision A139/2004; *McGuire v Hastings District Council* [2001] 12 NZRMA, 557.

[53] Furthermore, section 74 requires that a district plan change shall be prepared in accordance with the provisions of Part II. The provisions of Part II accordingly underlay both the notice of requirement and Plan Change 6.

[54] Section 5, is of course, fundamental to the Act. We therefore quote it in full:

> **5. Purpose-**
>
> 1. The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> 2. In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while-
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[55] To fully understand section 5 in the context of the Act it is necessary to look at the definitions of *"natural and physical resources"*, *"structure"*, and *"environment"*. Natural and physical resources are defined in section 2 as:

> Includes land, water, air, soil, minerals and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

"Structure" is defined in section 2 as:

> Means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft.

"Environment" is defined in section 2 as including:

> (a) ecosystems and their constituent parts, including people and communities;
>
> (b) all natural and physical resources;
>
> (c) amenity values;

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) – (c) of this definition or which are affected by those matters.

"Amenity values" is defined in section 2 as:

> Means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[56] Our approach is to weigh the matters in section 5(2) in order to reach a broad judgment as to whether a policy or rule would promote the sustainable management of natural and physical resources. The values in section 5 have been variously referred to as *"indicators"*, *"guidelines"*, *"directions"*, or *"touchstones"* for promoting the goal of sustainable management[8].

[57] The matters in section 5(2)(a), (b) and (c), are all to be accorded full and equal significance. Accordingly, they are to be applied having regard to the circumstances of each case[9]. Applying section 5 involves a broad overall judgment of whether a proposal, or in this instance, the provisions of the proposed plan change and the notice of requirement, would promote the single purpose of the Act. This allows for the balancing of conflicting considerations in terms of their respective significance or proportion in the final outcome[10].

[58] Other Part II matters of relevance are:

(i) the efficient use and development of natural and physical resources – section 7(b);

(ii) the maintenance and enhancement of amenity values – section 7(c);

(iii) the maintenance and enhancement of the quality of the environment – section 7(f); and

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[8] See *Faulker v Gisborne District Council* [1995] 3 NZLR 622, 632; *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, 94; also noted as *Green and McCahill Properties Limited v Auckland Regional Council* (1996) NZ 158 (ENV C); *Caltex New Zealand Limited v Auckland City Council* (1996) ELRNZ 297, 304; *Baker Boys Limited v Christchurch City Council* Environment Court Decision C60/1998; and *Kiwi Property Management Limited and ors v Hamilton City Council* Environment Court Decision A045/2003.

[9] See *Winstone Aggregates Limited v Papakura District Council,* Environment Court Decision A049/2002, and the cases there referred to in paragraphs [19] to [23].

[10] See *Trio Holdings v Marlborough District Council* [1997] NZRMA 97.

(iv) any finite characteristics of natural and physical resources – section 7(g).

The relevant statutory instruments

The Auckland Regional Policy Statement

[59] The Act requires specific consideration to be given to the Auckland Regional Policy Statement by:

(i) requiring a territorial authority to have particular regard to all relevant provisions of a regional policy statement and proposed regional plan – section 171(1)(d);

(ii) requiring that Councils *"have regard to...any proposed regional policy statement"* – section 74(2) of the RMA – when preparing or reviewing their plans; and

(iii) that district plans must not be *"inconsistent with the regional policy statement"* – section 75(2)(c).

[60] The regional policy statement was analysed by the planning witnesses in some detail. We do not propose to quote at length from the regional policy statement. There was no disagreement by the parties as to its relevant content or its relevant purpose.

[61] In summary, the regional policy statement provides specific recognition of the continued operation of Ardmore Airport as one of the listed regional issues. It identifies that regionally significant infrastructure is essential for the communities' social and economic wellbeing and identifies the need to expand, replace or upgrade existing infrastructure to increase its capacity[11].

[62] Significantly, as Mr Roberts points out, the regional policy statement makes an important distinction between existing infrastructure with urban environments and rural environments. Within urban environments, the obligation is on the infrastructure provider to avoid, remedy and mitigate adverse environmental effects.

[11] See in particular: Issue 2.3.2 and commentary; Issue 2.3.4 and commentary; Objective 2.5.1.6 and Policy 5.2.2.6.

In "rural areas" (as specifically defined in the regional policy statement), the obligation is on the local authority and surrounding landowners to avoid significant reverse sensitivity effects which may compromise the safe and efficient operation of existing regional infrastructure resources[12].

[63] Within this context, potential significant adverse effects on "amenity values", and "rural character", as defined in the Act and in the Regional Policy Statement, require consideration.

Operative Papakura District Plan

[64] Mr Roberts pointed out that the district plan was originally notified in July 1993 just less than 2 years after the introduction of the Resource Management Act and 1 year before notification of the Regional Policy Statement. Therefore, he said it has:

> ...been prepared in a regional policy "vacuum" (in the sense that it does not contain the same clear overall direction that the ARPS does). This was an inevitable outcome of the timing requirements of the RMA.

[65] Notwithstanding Mr Roberts' comments, we note that both the rural and urban sections of the plan contain several objectives and policies that align it with the regional policy statement with respect to existing infrastructure. For example the rural section of the district plan contains specific objectives and policies relating to the off-site effects of the airport. For example objective 6.8.1 states:

> (a) To provide for the co-ordinated comprehensive development of *Ardmore Aerodrome* as a base for commercial and recreational operations including:
>
> - Aero club's activities and competitions;
> - Aerial top dressing;
> - Charter and private flights;
> - Emergency services;
> - Flying schools;
> - Gliders;
> - Helicopters;

[12] See in particular: Policy 2.6.1.3 and supporting commentary; Policy 2.6.4; and Policy 2.6.7.

- Industries associated with aviation, including assembly, repair and maintenance of aircraft;

- Scheduled flights.

(b) To achieve the compatible use and/or development of the land surrounding the aerodrome and relative harmony with the airport operations.

[66] The stated reasons for this objective reads:

> Ardmore Aerodrome is a major air transport facility in the Auckland region which has local, regional and national significance. It also has a commercial facility, and contributes to the economic base of the region. It is also an educational and recreational facility. Its future operation must be protected from inappropriate activities in its vicinity.

[67] Then follows supporting policies, reasons and anticipated results. Of interest under the heading anticipated results the plan says:

> Ardmore Aerodrome will continue to be a significant land use in the district and a significant contributor to the economic base of the district. Uses and activities in the vicinity of the aerodrome will be affected by it and will have some limitations placed on them because of the aerodrome.

[68] Like the rural area provisions of the regional policy statement, the rural section of the operative plan contains specific provisions requiring the avoidance of significant reverse sensitivity effects which may compromise the safe and efficient operation of existing regional infrastructure resources. In this respect, the district plan anticipates that there will be some limitations placed on development and activities around the airport to provide for a safe and efficient operation.

[69] Special provision is made for the Ardmore Aerodrome in section 3, the urban Papakura section of the plan. The relevant provisions are contained in Part 6.14 Ardmore Aerodrome zone with the zone overview reading as follows:

> The establishment of the special zone for the Ardmore Aerodrome results from the need both to enable and protect all aviation activities conducted within the NZS 6805 1992 noise footprints and CAA Rules.

[70] Clause 6.14.5 lists the zone outcomes which expand on the need to enable and protect existing aviation activities:

> The outcome...will be the operation of a unique activity node which makes a significant contribution to the present wellbeing and future development of the district. Aviation activities will be conducted in such a way that the potential of the facility is not limited by unnecessary controls. At the same time Ardmore will function in recognition of NZS6805 – 1992 aircraft noise

> footprints and appropriate levels of local amenity and environmental quality. The strategy is aimed at the continuation of those special aviation related activities which have become established within the zone in such a way that the activities are properly managed to secure amenity values both within and beyond the zone.

[71] The supporting objectives provide for uses related to the aviation function of the Ardmore Aerodrome and to protect environmental quality and the amenities of sensitive, adjoining rural areas. Similarly, the policies strike a balance between protecting the development of the airport and imposing controls which protect the environmental quality of the surrounding land.

[72] As part of the explanation in Part 6.14.7 the plan says:

> Ardmore Aerodrome is a significant general aviation facility and comprises a valuable economic and social asset to the district. For this reason, its continued functioning as a regional and national facility should not be unnecessarily constrained.
>
> Of necessity, such facilities are located in rural areas with the result that the activities related to an aerodrome often cause annoyance or disturbance to adjoining, non-aviation activities. The environmental effects of aviation are often in conflict with the expectations of rural amenity.
>
> The objectives and policies for the Ardmore Aerodrome zone is to enable the future functioning of the aerodrome and recognition of the amenity characteristics of the locality.

[73] As pointed out by Mr Roberts the operative plan reflects the fact that the district plan was prepared prior to the release of the regional policy statement. It does not reflect the emphasis provided in the regional policy statement, particularly 2.6.4 Policy: Rural Areas, regarding the avoidance of significant reverse sensitivity effects which may compromise the safe and efficient operation of existing regional infrastructure. This inconsistency is redressed, at least in part, by Plan Change 6.

[74] Against the background and statutory and planning regime we now discuss the identified issues.

Issue 1 – The design capacity on which the noise boundaries are calculated and the consequent effect on the calculation of the air noise boundaries

[75] According to the evidence, the maximum capacity of runway 03/21, which is the main runway currently in use, is 350,000 aircraft movements per year, with operational modifications such as air traffic control. Improvements to infrastructure,

such as the establishment of a parallel 03/21 runway could achieve a capacity of 380,000 movements. Hence it is understandable that initially Ardmore Airport Limited sought air noise contours based on 353,000 aircraft movements.

[76] The consenting parties have agreed that the noise contours should be based on 275,000 aircraft movements per year. The consenting parties include the requiring authority and owner of the airport, Ardmore Airport Limited.

[77] We were told by the Airport owner's counsel, Mr Gould, that Ardmore Airport Limited agreed to this lower base figure in exchange for a Memorandum of Understanding with the Papakura District Council, in an attempt to reach agreement with all the parties. He pointed out that the airport company recognises that the tenants and users would like to see the airport planning based on a higher growth scenario, however it also recognises the amenity needs of the surrounding residents. To that extent, the airport company accepted contours based on a low growth scenario in an attempt to find some "common ground" between the competing interests.

[78] The tenants and users maintain that the noise contours should be based on 350,000 aircraft movements per year. A figure they say, fairly represents the capacity of the aerodrome, relying on its current one way configuration and support facilities.

[79] Mr Cowper, counsel for the tenants and users, submitted that it is not a wise use of resources to plan for anything less than the capacity of the airfield, as the consequential changes of land use around the airfield will themselves become permanent, thus limiting further growth.

[80] Basically the tenants and users' concern, is that the controls adopted by the consenting parties will:

(i) unreasonably restrict the operation of the airport;

(ii) limit the growth of activities;

(iii) will result in the under use of a valuable infrastructure resource; and

(iv) could jeopardise its financial survival.

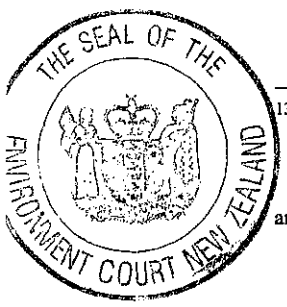
[81] That the requiring authority has agreed to the lower ceiling of 275,000 aircraft movements is significant. Its position was explained by its Chief Executive Officer, Mr Gates:

> AAL agrees that the airport is a significant national and regional strategic asset and should be recognised as such. AAL also recognises that it has had to accept contours based on a low growth forecast (1.9%) in an attempt to reach a compromise position that is generally acceptable to the broad spectrum of differing interests and expectations. As I noted above, this process has not been an easy one for the airport, and it is inevitable that there will be people in both camps who will not be happy with the proposed restrictions, either because they are too restricted, or not restricted enough. However, AAL has attempted to strike a reasonable balance between the competing interests of the surrounding community and airport users, and although AAL wishes to develop the airport as an asset and an important resource, it also recognises its responsibilities as a good corporate citizen and the need to be a good neighbour[13].

[82] We are conscious that the consenting parties have reached a consensus after extensive negotiations, and that the consensus reached, reflects a degree of compromise by all of the parties. Normally, this Court would be loathe to reject such a compromised consensus. In this case, there are a significant number of businesses affected who reject the compromise. It is therefore necessary for us to examine the evidence and be satisfied that the accord reached reflects the single purpose of the Act.

[83] We found the evidence of Mr Foster to be helpful. Mr Foster is a resource management planning consultant. He was engaged by Ardmore Airport Limited. His brief was exchanged in accord with the pre-hearing timetable. The exchange took place prior to the agreement reached by the consenting parties. His brief was not presented to the Court in support of the consenting parties' position. However, the tenants and users rely on the written statement of Mr Foster which we read by consent.

[84] Mr Foster, is an experienced planning consultant with extensive experience. Over the last 20 years he has, according to his evidence, taken a particular interest in aviation planning. He has provided specialist aviation planning advice to a number of airport companies over that time. It is worth quoting parts of his evidence in full. He had this to say:



[13] Gates, brief of evidence, paragraphs 72 and 73.

...I consider that the overall level of growth allowed for and the operational restrictions proposed are very restrictive and failed to adequately recognise the strategic importance of Ardmore, as New Zealand's dominant general aviation facility, from both a national and regional perspective[14].

And:

The appropriate airport planning view, in my opinion, is that sustainable management of an existing airport as a developed resource involves recognition that activity at airports must be permitted to grow, while ensuring that the environmental effects of such growth are managed and mitigated in a fair and equitable manner as determined between the airport operator and the surrounding community[15].

And:

The setting of noise boundaries protects the airport from residential encroachment and also ensures that the neighbouring residences are not exposed to unreasonable noise from the airport. However, the setting of noise boundaries around the airport effectively sets a ceiling on the total operations of the airport. It is therefore very important to allow for reasonable growth at the airport so that future operational constraints, such as curfews, do not occur[16].

And:

As I understand it, Ardmore has reluctantly agreed to accept a lower growth rate of 275,000 aircraft movements over the life of the district plan. The figure of 275,000 aircraft movements referred to in the ARGAAS Report[17] is an estimated runway capacity forecast for Ardmore, based on one sealed runway. I am advised that AAL accepts that improvements to infrastructure could be made to achieve a capacity of 380,000 aircraft movements as also identified in the ARGAAS Report, by, for example, the establishment of a parallel 03-21 runway. I consider that this is the documented capacity of the airport[18].

And:

AAL has accepted 275,000 aircraft movements as its basis for the future planning given community discontent with the possibility of 350,000 aircraft movements based on medium growth, and 380,000 aircraft movements on a high growth forecast. 275,000 aircraft movements represent less than the 1.9% compound growth rate to achieve 302,500 in 2005, as forecast in 1997 at the then hearing of the NOR (subsequently withdrawn). This compound growth rate is lower than any other airport I have been involved with[19].

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[14] Foster, brief of evidence, paragraph 13.
[15] Foster, brief of evidence, paragraph 21.
[16] Foster, brief of evidence, paragraph 25.
[17] Auckland Regional Aviation Assessment Study 1995.
[18] Foster, brief of evidence, paragraph 65.
[19] Foster, brief of evidence, paragraph 69.

[85] Mr Foster's firm view, that the level of growth should reflect the airport's capacity, was based on the need to fully utilise such an important piece of infrastructure. He pointed out that:

(i) Ardmore fulfils a multi-purpose general aviation role, the bulk of movements being for flight training, but it can act as an alternative airport to Auckland International Airport for beach 1900 aircraft;

(ii) With more than 300 aircraft permanently based at the airport and within a 30-minute driving distance for a quarter of New Zealand's population, Ardmore is strategically located to fulfil its role as New Zealand's premier pilot training facility;

(iii) The tenants of Ardmore provide a complete range of services to general aircraft users;

(iv) Ardmore is of particular importance to the Auckland region and the national economy, with approximately 500 people employed by the various organisations operating at the airport; and

(v) Ardmore is recognised as a national training facility.

Thus, he said, Ardmore is of national and regional importance. Without its existence, other facilities could not currently absorb the projected growth in air movements.

[86] He concluded:

> Ardmore is the busiest airport in New Zealand. It has more aircraft traffic than Auckland, Wellington or Christchurch International Airports. In aviation terms, this airfield is nationally significant and can, in my opinion, be deemed to be a national strategic asset.[20]

[87] The importance Mr Foster attributes to Ardmore Airport as a significant part of New Zealand's aviation reflects the provisions of the Auckland Regional Policy Statement and the District Plan particularly as it is proposed to be amended by Plan Change 6. Those instruments recognise the importance of Ardmore and the Regional Policy Statement gives a clear direction to territorial authorities to provide for the protection of important infrastructure from reverse sensitivity issues.

[20] Foster, brief of evidence, paragraph 46.

[88] Mr Foster's firm view, was echoed by Mr Day the acoustical consultant engaged by the airport. Likewise his brief of evidence was exchanged prior to the agreement reached by the consenting parties and was not presented in support of their consenting position. Again, we were invited, by consent, to read his evidence which thus forms part of the Court's record.

[89] Mr Day said:

> The Ardmore Tenants and Users Association has submitted that 350,000 aircraft movements per annum should be used as the basis for the airport noise contours at Ardmore. In my opinion this approach has considerable sense in that airport planning and noise control guidelines should be based on long-term planning for this airport. In terms of effects on the surrounding community, the increase in noise level from the current 200,000 aircraft movements per annum to 350,000 aircraft movements per annum would cause an increase in noise level of approximately 2 – 3 dB. As discussed previously, this is less than used in other New Zealand airports and would not generally be detectable by the residents ie the adverse effects would be minimal. AAL have however agreed to a more conservative 275,000 aircraft movements per annum[21].

[90] On the other hand, Mr Roberts, a planning consultant engaged by Ardmore Airport Limited, was not so definitive. He said:

> The proposed noise contours are based on 275,000 aircraft movements per annum as opposed to the 353,000 aircraft movements per annum used to define the noise contours as part of the 1996 NOR process. The figure was agreed on after discussions with PDC and the EWG and compares with the current 230,000-240,000 aircraft movements per annum. My understanding is that the maximum capacity of runway 03/21 is 350,000 aircraft movements with operational modifications such as air traffic control. As such, constraining airport movements to 275,000 per annum will only allow for limited growth in comparison to the capacity of this component of regional aviation infrastructure. On this basis I could not support a reduction in noise contours to provide for only 200,000 movements per annum as requested in the relief sought by J & S Southcombe and J & D Edwards. This is particularly so when considering the regional policy direction set out in the ARPS to allow for the efficient operation and growth of regional infrastructure as described in the following sections of my evidence[22].

And:

> I agree that developing contours based on 350,000 movements would provide greater flexibility for airport operations. However, it would also impose greater costs on surrounding residents. I therefore consider that while based on a low growth scenario, implementing noise contours based on 275,000 movements achieves a minimal sustainable growth level to address the balance of considerations that in my view is required in such situations. It allows for an expansion of 25,000 above its historical peak of

[21] Day, brief of evidence, paragraph 12.8.
[22] Roberts, brief of evidence, paragraph 100.

> 250,000 movements in 1974 and provides an additional 35,000 movements above recent operational peak (240,000 movements). It will mean that the airport's operations are able to grow at a minimum low level without being unduly compromised or representing a reasonable level of effects that also provides assurance to surrounding residents. **If complimented by an appropriate set of land use controls to reflect the "other side, of NZS 6805, it is consistent with the balance required to maintain consistency with the ARPS provisions requiring avoidance of reverse sensitivity effects** (including cumulative effects) on the safe and efficient operation of existing regional infrastructure within "rural areas" and those that state plans should make provision for the avoidance of significant adverse effects on "amenity values" and the "rural character" of rural areas. In saying this however, I consider that any reduction in the contours below 275,000 movements would be overly restrictive given the significance of Ardmore Airport to the regional aviation network and would be unsustainable[23]. (Highlighting ours)

[91] We pause to comment on the highlighted words. The "other side" of NZS 6805, namely an appropriate set of land use controls, referred to by Mr Roberts has not as yet been implemented. The consent position is that the Council resolves to proceed to initiate a plan change to make provision for such controls. Without knowing the details of the proposed land use controls, Mr Roberts is unable to make an assessment as to whether the proposals are appropriate or not. Similarly, we as a Court are unable to make such an assessment.

[92] Mr Roberts' conclusions were more conciliatory than those of Mr Foster and Mr Day. They reflect the evidence of Mr Osborne, a planning consultant who presented a brief supporting the consenting parties' position. He considered that, based on the now somewhat dated Auckland Regional Aviation Assessment Study (1995), 275,000 movements would be consistent with growth of approximately 2.5% over the period 2001-2011. This appears to differ from Mr Foster's finding that 275,000 movements represents less than a 1.9% compound growth.

[93] The difference can be explained by the two witnesses using a different methodology and, it would appear different base figures. Without cross-examination it is difficult for us to reconcile the different approaches. However, both Mr Foster and Mr Osborne respectively opined that: future forecasting is *"crystal-ball" gazing*[24] and *"a somewhat speculative exercise"*[25].

[23] Roberts, brief of evidence, paragraph 184.
[24] Osborne, brief of evidence, paragraph 59.
[25] Osborne, brief of evidence, paragraph 3.3.4.

[94] Mr Osborne concluded:

> I understand that developing contours based on 350,000 annual movements would reflect the theoretical capacity at the aerodrome if there were no night-time curfews or other such controls in place. While this would retain maximum flexibility for the aerodrome, I do not believe that this approach is consistent with the forecasting approach taken in NZS 6805:1992. I also do not believe that 350,000 annual movements is likely on the basis of observable long-term trends in aircraft movements at Ardmore. In my view, establishing noise contours based on 275,000 movements per annum would provide for a realistic level of growth at the aerodrome and accommodate any short-term volatility in aircraft movements.

[95] Of interest Mr Park, an aviation consultant who presented a brief on behalf of the consenting parties had this to say:

> The total number of movements should, in my view, allow for reasonable growth in the airport operations. NZS 6805 suggests a minimum of a 10 year growth projection should be provided for. I agree that 275,000 annual movements provide a limited scope for the airport to grow its business. I *also note that there is nothing in NZS 6805 that requires planning to be* based on any particular growth scenario.
>
> However as explained at paragraph 36 of my evidence, the decision was made sometime ago by AAL to accept 275,000 limit. This is a commercial decision taken by the owner of the facility and it is not contrary to NZS 6805.

[96] There is considerable force in the submission that the noise contours should be modelled based on the estimated operational capacity of the airport. Ardmore is an important and significant part of the region's and New Zealand's aviation infrastructure. All of the parties accepted that this was the case. Moreover, the Auckland Regional Policy Statement recognises its significance and importance and the need for its protection.

[97] However, as Mr Allan pointed out, we must not ignore the impacts that the aerodrome has on the existing surrounding environment. We are required to recognise the need to balance the competing interests of the airport with those of the nearby residents. We note the paucity of information presented as to the number of residents affected and the effects of the airport on them and their activities.

[98] Mr Day directly addressed this issue from an acoustical consultant's perspective. He premised his comments by the observation that at most overseas airports the effects of airport noise are not generally considered outside the L_{dn} 65 dBA contour. He told us that in New Zealand it is generally regarded that airport noise levels of between L_{dn} 55 to 65 dBA are regarded as low to moderate and not a

sensible location for new housing development. Aircraft noise levels above L_{dn} 65 dBA are regarded as high and not suitable to new residential development.

[99] By an analysis of the projected noise contours, based on 275,000 aircraft movements, being overlaid on the GIS mapping system, he was able to calculate the number of dwellings in each contour. He produced a table setting out the number of dwellings in each contour along with a comparison of other significant airports in New Zealand. We reproduce this table:

Table No. 1 – Dwellings Within Current Noise Contours

Airport	**55-60 dBA**	**60 – 65 dBA**	**> 65 dBA**
Ardmore	33	26	2
Auckland	1880	230	0
Wellington	>5000	2900	380
Nelson	146	10	0

[100] Mr Day pointed out, that Ardmore Airport currently has significantly fewer dwellings affected by airport noise than the airports listed. He also noted that two houses inside the L_{dn} 65 dBA contour are only just inside at L_{dn} 65 dBA.

[101] Mr Day then discussed the often used "Schultz curve" developed from a number of overseas surveys. It shows the percentage of people highly annoyed versus the noise level (L_{dn} dBA). More recently, analysis by Bradley of particular overseas airport studies, indicated that community response to airport noise is significantly greater than the Schultz curve which applied to general transportation.

[102] By multiplying the number of dwellings by the national average of 2.4 persons per dwelling, Mr Day was able to produce a table that gave a comparison of the number of people likely to be annoyed under the current noise contours, the future noise levels and the differential or increase in number of people highly annoyed. We reproduce this table:

Table No. 2: Number of People Highly Annoyed

Airport	Current Contours	Future Contours	Increase in People Highly Annoyed
Ardmore	31	40	9
Auckland	1000	3200	2200
Nelson	76	178	102

[103] With regard to contours based on 350,000 movements per annum Mr Day said:

> In terms of effects on the surrounding community, the increase in noise level from the current 200,000 movements per annum to 350,000 per annum would cause an increase in noise level of approximately 2-3 dB. As discussed previously, this is less than used at other New Zealand airports and would not generally be detectable by the residents ie the adverse effects would be minimal[26].

[104] While Mr Day's evidence addresses the effects on humans, there is no direct evidence of likely effects on existing activities such as the small research facility operated by the University and the various livestock activities that we understand are carried out relatively close to the airport.

[105] We are thus not in a position to adequately determine what is the appropriate balance to give effect to the purpose of the Act as set out in section 5 and elaborated on in sections 6, 7 and 8. The importance of Ardmore by its contribution to the existing aviation infrastructure cannot be underestimated. To restrict the operation of the airport and limit the growth of activities below the capacity of the aerodrome would result in the under use of a valuable infrastructure resource, contrary to the statutory directions contained in sections 7(b) and 7(g).

[106] Ardmore is a resource which is likely to be put under pressure as the region's population continues to grow. It is well known to this Court that the Auckland region's transport infrastructure has been put under enormous pressure by the sprawling urbanisation of rural land arising from the region's population growth. In fact the region's transport infrastructure has not developed commensurately with population growth.

[26] Day, brief of evidence, paragraph 12.8.

[107] To under use an existing resource such as the Ardmore Airport should not, in our view, be permitted unless there is evidence which establishes to an appropriate standard, that the purpose of the Act will be better promoted by so doing. Unfortunately the lack of evidence is such that we are unable to make an informed decision.

[108] Based on the evidence we have read, it is our tentative view that the airport's potential should not be unnecessarily compromised. Based on Mr Day's evidence the effects would be minor. As we have noted, he said, that in terms of the surrounding community, an increase in noise level from the current 200,000 movements per annum to 350,000 per annum would cause an increase in noise levels of approximately 2-3 dB. This would not generally be detectable by the residents.

[109] However we are mindful of Mr Allan's submissions, to the effect that the need to protect the airport's potential needs are to be balanced against the interests of the residents and their activities. These are matters that are directly related to the statutory directions contained in sections 7(c) and 7(f). But we have no evidence before us which enables us to undertake such a balancing exercise.

[110] To do so we require evidence relating to such matters as:

(i) the area of land affected by air noise contours based on 350,000 movements per annum; and

(ii) the number of people affected and the manner in which they and their activities will be affected.

[111] Importantly, as we have said, NZS 6805:1992 provides for a two-pronged approach – noise management controls on the one hand and land use planning controls on the other. The two need to be considered as a composite package for reasons we will elaborate on in discussing Issue 3.

[112] Mr Gould submitted that the appropriate level of use of the airport is a matter to be determined by Ardmore Airport Limited as both the airport operator and the requiring authority. The consequent noise controls should be determined by reference to that level of use.

[113] We agree to the extent that it is not appropriate for this Court to direct a requiring authority how to use its airport. That is an executive decision to be made by the requiring authority. However, in this instance, it is Plan Change 6 which sets the noise contours. In assessing what the appropriate contours should be in the plan change is a resource management issue to be determined under the provisions of the Act. Having set the level of the contours other consequential land use controls follow. It is therefore necessary that the base level for those contours are set at a sustainable level.

Issue 2 – the type of current controls which relate to the operation of the airfield, and whether those that are appropriate should be contained in Plan Change 6 or the designation

[114] The tenants and users were concerned that there are number of controls included in Plan Change 6 which relate to the operations of the airfield, and which seek to control flights from the airfield, and the noise that is generated by those flights.

[115] The issues of concern relate to the controls on:

(i) flying curfews;
(ii) training flights;
(iii) noise controls and limits;
(iv) airport management;
(v) ex-military jet flights;
(vi) noise management plan; and
(vii) air shows

[116] It is the view of the tenants and users that these controls are more properly contained within the designation, if at all, as they are matters of airfield management, rather than appropriate for regulatory attention. It was the submission of the tenants and users, that the notice of requirement, if it had followed the intent of NZS:6805, would have set out the noise contours, and provided for the airport to be managed to each of those limits. That would have identified both an air noise boundary and an outer control boundary. Those boundaries would be calculated from the noise generating activities of flights from the airfield, and establish the noise impact that the airfield may have.

[117] Mr Cowper submitted:

> The boundaries are calculated on the basis of the noise of the aircraft which use the airfield, with penalties applied depending on the time of day or flights, and the mix of aircraft that are using the airfield. The boundaries therefore are based on an assumed number of flights by an assumed mix of aircraft, at an assumed range of times. Any change to any one assumed parameter would require an adjustment to another assumed parameter to enable those noise limits to be met.

[118] In Mr Foster's language, the boundaries *"represent an overall noise budget or 'bucket of noise' for the airport operators to then decide how to allocate and manage on a daily basis"*[27].

[119] The noise control boundaries thus assume a range of flights, and allow airfield management to ensure that the boundary limits are maintained. It was said by Mr Cowper to be a duplication to regulate and then have separate controls on the number of such flights, since such controls are already implicit in the air noise boundaries that have been established.

[120] Mr Cowper submitted that the noise management plan, provided for in the district plan, is more appropriately contained as a mechanism in the designation, identifying methods for achieving compliance of the noise controls.

[121] In considering this issue we were particularly referred to the evidence of Mr McCreadie, Mr Putt, Mr Foster and Mr Day. In our view the evidence which most directly address this issue is the evidence of Mr Ronald Eugene Reeves, an internationally recognised acoustical engineer specialising in transportation noise and air quality. His brief of evidence was presented in support of the consenting parties.

[122] It was Mr Reeves' view that the use of the noise contours alone is not always sufficient to adequately control airport noise. He pointed out that the use of the L_{dn}, which is a cumulative noise metric designated to summarise the complexities of the noise environment into a single number, does not adequately express the totality of the effects of noise on critical human activities such as communication or sleep. In addition to those limitations, he said that the unique nature of the aircraft noise environment at many general aviation airports, and Ardmore in particular, indicate that additional methods of analysis are indicated. For this reason, he said, many

[27] Foster, brief of evidence, paragraph 84.

countries provide for additional analysis and controls based on SEL, time of day (curfews), or other operational controls to protect community amenity and wellbeing.

[123] Of Ardmore he said:

> Ardmore airport is unique from most other airports in respect to composition of the noise environment. Operations at Ardmore consist of operations by aircraft with widely differing noise characteristics. The EMJ aircraft are arguably among the loudest in the world with the exception of high performance military aircraft and the now retired British Airways and Air France Concorde which use after burning or reheated engines. Conversely, the training aircraft operating from Ardmore Airport are among the quietest aircraft. In such instances, it is necessary for airports to delineate the L_{dn} contribution of the various aircraft types or identify other control measures as appropriate[28].

[124] He then referred to the New Zealand Standard and in particular noted paragraph 1.1.4 which says:

> The Standard provides the minimum requirement needed to protect people from the adverse effects of airport noise. A local authority may determine that a higher level of protection is required in a particular locality, either through the use of the air noise boundary concept or any other control mechanism.

[125] He then referred to the various controls which are the concern of the tenants and users and concluded:

> The combination of L_{dn} contours and the supplementary control measures as provided by the New Zealand Standard are required at Ardmore in order to assure amenity and wellbeing. It is my opinion that the measures proposed in Plan Change 6 provide a balanced, prudent, and practical methodology consistent with the New Zealand and international practices for ensuring the continued long term aviation activities at Ardmore Airport in view of community amenity and wellbeing concerns[29].

[126] We were impressed with Mr Reeves' brief of evidence. This was so despite the fact that he was not cross-examined. Unfortunately, we did not have the opportunity of cross-examination to have his hypothesis more closely tested.

[127] On the evidence before us, we are tentatively of the view, that at least some of the additional measures proposed, and which are the concern of the tenants and users, address the unique characteristics of Ardmore Airport. However, for reasons that will become more clear when we discuss Issue 3, we consider that the proposed restrictions need to be considered as part of a complete package which includes land

[28] Reeves, brief of evidence, paragraph 4.3.
[29] Reeves, brief of evidence, paragraph 4.9.

use controls within the identified noise boundaries. One should not be considered without the other. To do so may well lead to an unbalanced decision.

[128] It may well be, that from an administrative point of view, and in the interests of the requiring authority, such additional controls would be more conveniently placed in the notice of requirement and designation. However the requiring authority has chosen not to do so. That is an executive decision. As such we are not in a position to interfere with it.

Issue 3 – the need for land use controls within the identified noise boundaries

[129] The third concern of the appellants was the lack of any land use restrictions around the airport. The noise boundaries identify the area affected by airport noise. NZS 6805 proceeds on the basis that the boundaries both identify the scope of the obligations of the airport operator and managing its noise, and also identify the areas within which land use controls are needed.

[130] Mr Foster said:

> I note to date that PDC has chosen not to introduce, via proposed Plan Change 6, a prohibition on new noise sensitive users inside the ANB for Ardmore, nor has it introduced restrictions on sensitive activities and the OCB without appropriate acoustic treatment. This, in my opinion, is a serious omission that should be rectified as a matter of urgency[30].

And again:

> There is no major international or provincial airport in New Zealand operating or intending to operate in the future, without this tiered approach to the management airport noise. Clearly, Ardmore is out of step and the blame for the present situation lies with PDC[31].

[131] Mr Foster's views were echoed by Mr McCreadie, Mr Putt and Mr Day.

[132] As Mr Cowper said, the Papakura District Council now acknowledges the need for such provisions. They have indicated that they will be introduced by way of a further plan change in nine months time. No detail of the proposed rules are given, and of course, such provisions would be subject to objection and appeal, and may or may not provide adequate controls. In the meantime there is a possibility of urban development continuing to crowd the airport's boundaries.

[30] Foster, brief of evidence, paragraph 28.
[31] Foster, brief of evidence, paragraphs 28 and 30.

[133] Mr Foster pointed out that NZS 6805 is concerned with both the land use planning and the management of aircraft noise in the vicinity of an airport, for the protection of community health and amenity values. The setting of noise boundaries protects the airport from residential encroachment and also ensures that the neighbouring residences are not exposed to unreasonable noise from the airport.

[134] The Standard also recommends that inside the air noise boundaries, new noise sensitive activities (including residential) should be controlled by land use planning. In some instances such development should be prohibited. In other instances such development should be discretionary with provision for acoustic insulation.

[135] Mr Day pointed out that the procedure at most other airports has been that the airport agrees to place within the designation, noise controls on its operation. The balancing arm of NZS 6805 is that the Council then agrees to put land use controls in the district plan to avoid incompatible land use and subsequent reverse sensitivity effects on the airport.

[136] We are satisfied that the Papakura District Council has been remiss and guilty of a serious omission is not making provision for land use controls as part of the package. The Council now accepts its responsibility and proposes to initiate a further plan change to introduce land use controls within a period of nine months. The detail of such controls is in our view necessary for us to make an informed and balanced decision on the first two issues. Without knowing what those land use controls will finally be, we are not in a position to adequately assess the balance between the airport's importance as a significant piece of aviation infrastructure and the amenity of the local surrounding community. We are of the view that a complete package needs to be considered when undertaking such a balancing exercise.

[137] We thus propose to give an interim decision which we hope will be of some assistance to the parties in progressing this matter.

[138] We had considered, at the suggestion of some counsel, to give directions under section 293 of the Act with regard to the land use planning provisions. We accordingly invited submissions from counsel and we thank counsel for their detailed submissions. However on reflection and having read the submissions we think the most appropriate course is for the Council to initiate a plan change as

indicated within nine months. We think that is the most appropriate course. These proceedings are to be put on hold until such time as the plan change for the land use planning provisions catches up.

Determination

[139] We accordingly direct that these proceedings are to be put on hold until such time as the Papakura District Council initiates a plan change to make provision for land use planning within the noise contours, and the proposed plan change reaches a position that will enable these proceedings to be finally determined. The Council is to file a memorandum with the Court on or before Monday, the 31 October 2005 setting out the stage that the proposed plan change has reached. A copy of the memorandum is to be served on the other parties.

[140] When the proposed plan change has reached the stage when these proceedings can then be finally determined a judicial conference in Court for Chambers is to be held to propose a timetable for the efficient determination of these proceedings. If the decision of the Council on the proposed plan change is appealed, any such appeal is to be heard together with these proceedings.

[141] Costs are reserved.

DATED at **AUCKLAND** this 23rd day of February. 2005.

For the Court:

R Gordon Whiting
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Appendix 1

In the Environment Court

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under: the Resource Management Act 1991

in the matter of: a Notice of Requirement by Ardmore Airport Limited for alteration to designation and Proposed Plan Change 6 to the Papakura District Plan

between: **Papakura District Council** (RMA 0793/03)

J & K Antunovich (RMA 0813/03)

University of Auckland (RMA 0802/03)

Ardmore Residents Action Group Incorporated (RMA 0816/03)

Manukau City Council (RMA 0818/03)

J & S Southcombe (RMA 0817/03)
Appellants

(Contd)

Joint Memorandum of Counsel in Support of Draft Consent Order

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Dated: 3 November 2004
Hearing Date: 10 November 2004

and: **Ardmore Airport Limited**
Respondent

and between: **Ardmore Airport Limited** (RMA 0644/03)

New Zealand Warbirds Association Incorporated (RMA 0643/03)

Ardmore Airfield Tenants and Users Committee (RMA 0646/03)

J & S Southcombe and J & D Edwards (RMA 0655/03)

University of Auckland (Physics Department) (RMA 0654/03)

Ardmore Residents Action Group Incorporated (RMA 0656/03)

Jet Imports Limited (RMA 0647/03)

Manukau City Council (RMA 0657/03)

Appellants

and: **Papakura District Council**
Respondent

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

JOINT MEMORANDUM OF COUNSEL IN SUPPORT OF DRAFT CONSENT ORDER

MAY IT PLEASE YOUR HONOUR:

1 These appeals relate to the establishment of noise contours and provisions relating to the control of noise at Ardmore Aerodrome (*the Aerodrome*). In September 2001 Ardmore Airport Limited (*AAL*) as the owner and requiring authority for the Aerodrome issued a notice of requirement (*NOR*) for alteration to its current designation to incorporate for the first time, provisions relating to the control of noise generated by airport users. This was accompanied by Proposed Plan Change 6 (*PC6*) to the Operative Papakura District Plan (*District Plan*), initiated by Papakura District Council (*PDC*), which seeks to alter the District Plan to include provisions which link to the designation, in particular by providing noise contours around the Aerodrome. The two processes are mutually supportive and interdependent for their effect.

2 Submissions were received on PC6 and AAL's NOR, and a hearing took place in July 2002 before independent Commissioners appointed by the Council. The Commissioners issued their recommendations in December 2002. The Council issued a decision in July 2003 which amended the Commissioners recommendations on PC6 and the NOR. The Council recommended that AAL confirm its NOR for an alteration to its existing designation, subject to certain modifications and conditions.

3 In August 2003, AAL accepted PDC's recommendation to confirm the designation but rejected the modifications made by PDC.

4 In September and October 2003, 15 appeals and a number of s274 notices were filed.

5 On 6 May 2004, the Court advised the parties that RJ & CJ Carr (a s274 party) had withdrawn from the proceedings as an interested party.

SETTLEMENT PROPOSAL BY MAJORITY OF THE PARTIES

6 Since the appeals were lodged, the parties have entered into discussions. As a consequence, the majority of parties have now reached agreement as to a settlement of the appeals on PC6 and AAL's designation. Those parties are AAL, PDC, Manukau City Council (*MCC*), Ardmore Residents Action Group (*ARAG*), University

of Auckland, J&S Southcombe, J&D Edwards and J&K Antunovich, as well as the majority of s274 parties (collectively referred to in this Memorandum as the *'majority of parties'*).

7 The essential features of the agreed settlement between the majority of parties are shown in the **attached** draft Consent Order. In particular the majority of parties have agreed to amendments to the provisions of PC6 and AAL's designation as set out in more detail below.

8 The Ardmore Tenants and Users Committee (*Tenants and Users*), have not agreed to the draft Consent Order, and consequently lodged a Memorandum with the Court dated 14 October 2004 (*the October Memorandum*) indicating that they wish to pursue their issues on appeal at the hearing. The majority of parties understand that Jet Imports Limited (*Jet Imports*) and New Zealand Warbirds Association Limited (*Warbirds*) also do not agree with the position reached in the draft Consent Order, but those parties have not lodged any evidence or any memoranda with the Court setting out their position.

AMENDMENTS TO PROPOSED PLAN CHANGE 6 TO THE OPERATIVE PAPAKURA DISTRICT PLAN

Noise contours

9 A number of parties sought that the noise contours be based on a number of movements different to the 275,000 movements provided for in the noise contours in Council's decision.

10 Appeal 0646/03 (Tenants and Users) sought noise contours based on 350,000 movements per year and recognition of the Aerodrome's capacity to accommodate that number of movements.

11 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) sought noise controls that excluded ex-military jet aircraft and were based on a lower and more realistic (but unspecified) number of aircraft movements per year.

12 Noise experts on behalf of AAL and PDC have undertaken further remodelling of the contours, including refinements due to updates in the INM modelling used to develop the contours and the inclusion of helicopter flight tracks.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

13 Consequently, the parties to the draft consent order have proposed that the contours be established as set out in Appendix A to the draft Consent Order, based on the following:

13.1 275,000 movements; and

13.2 A Single Event Noise Level (*SEL*) of 115dBA for all new aircraft intending to operate from the Aerodrome.

14 The majority of parties understand that the Tenants and Users, Jet Imports Limited, and the Warbirds do not accept the revised contours as shown in the draft Consent Order, and maintain their position that the contours should be based on a larger number of aircraft movements.

15 Therefore, it is submitted that this issue requires determination by the Court at the hearing.

Definitions

Activities Sensitive to Aircraft Noise (ASANs)

16 Appeal 0657/03 (MCC) sought the inclusion of a definition of 'Activities Sensitive to Aircraft Noise' to provide guidance as to the matters that will be considered in assessing applications for discretionary activities within the Outer Control Boundary (*OCB*) and Air Noise Boundary (*ANB*) as envisaged by the proposed Rule 8.14(t). It is proposed that this definition be included.

Ex-Military Jet aircraft

17 Appeal 0644/03 (AAL) sought that the definition of 'Ex-military Jet aircraft' as publicly notified and recommended by the Commissioners be reinstated, as the definition as amended by the Council was capable of encompassing all jet aircraft. For similar reasons, appeal 0647/03 (Jet Imports) sought removal of the definition altogether.

18 The majority of parties propose to reinstate the definition of 'Ex-Military Jet aircraft' as publicly notified and recommended by the Commissioners. The majority of parties believe that this would address Jet Imports concerns, but have not been able to confirm that with the appellant.

Public Holiday

19 The Council inserted a definition of 'Public Holiday', which was not included in PC6 as notified. Appeal 0644/03 (AAL) did not oppose the inclusion of a definition of 'public holiday' but rejected the

inclusion of ANZAC day as this would prevent commemorative flyovers on that day.

20 The definition of 'Public Holiday' inserted by the Council is now largely superfluous, and it is proposed by the majority of parties to delete it. No other party has appealed this definition and therefore it is submitted that this issue does not require determination by the Court at the hearing.

Section 6.8- Reasons for Policies and Anticipated Results

Introduction of land use restrictions

21 Appeal 0644/03 (AAL) sought amendment to Rule 3.1- Reasons for Policies to reflect a commitment by PDC to implement a further plan change introducing land use restrictions consistent with the principles of NZS 6805. Appeal 0646/03 (Tenants and Users) sought the use of NZS 6805 in full for land use controls for the contoured areas.

22 The majority of parties propose that Section 6.8- Reasons for Policies be amended to require the Council to notify a further plan change introducing additional land use restrictions on activities within the ANB and OCB consistent with the principles of NZS 6805, within 9 months of the provisions becoming operative.

23 The majority of parties submit that this amendment would address the concerns of the Tenants and Users. However, in its October Memorandum Counsel the Tenants and Users has listed this matter as an outstanding issue to be determined at the hearing.

Anticipated Results

24 Appeal 0657/03 (MCC) sought an amendment to Policy 6.8 to reflect the obligation to balance the need for the Aerodrome to function efficiently and effectively, with the need to address the impact of aircraft noise on the surrounding community.

25 The majority of parties propose to reword this section to better reflect the requirement for balancing of these needs.

26 Appeal 0644/03 (AAL) sought deletion of the words 'fixed wing aircraft' from the Anticipated Results section, as it is a misnomer to describe the noise contours as 'fixed wing aircraft noise contours', as they include noise from helicopters.

27 The majority of parties propose to delete the words 'fixed wing aircraft' from the Anticipated Results section.

28 For clarification, it is also proposed to delete the words 'discretionary activities' in reference to applications on land within the ANB and OCB, as activities within this area could be other than 'discretionary' activities.

29 No other appeals have been lodged on the above amendments, and therefore it is submitted that these issues do not require consideration by the Court at the hearing.

Rule 8.14(t) – assessment criteria

30 Appeal 0657/03 (MCC) sought the inclusion of specific assessment criteria with which to assess adverse effects arising from an activity on the operation of the Aerodrome.

31 It is proposed to include assessment criteria in Rule 8.14(t) as set out in Appendix A of the attached draft Consent Order. This amendment links to the definition of ASANs outlined at paragraph 16 above.

32 No other party has appealed this matter, and therefore it is submitted that the Court is not required to consider this issue at the hearing.

Clause 6.3 – Resource Management Issues, Clause 6.4 - Resource Management Strategy, Policy 6.6.1.3, Clause 6.8.6 – Ardmore Aerodrome Zone Description

33 Appeal 0657/03 (MCC) sought amendment to Clause 6.3 to reflect the operational nature of the Aerodrome and greater recognition of the Aerodrome as an important facility for the general aviation industry. The appeal sought amendment to Clause 6.4 so that the resource management strategy corresponds with the noise rules in PC6.

34 The appeal also sought to amend Policy 6.6.1.3 to clarify that the noise controls in PC6 and the Noise Management Plan (*NMP*) should be considered together to control aviation industry noise emissions. The appeal sought that the reference to specific noise management controls being independent from other industrial zone noise controls be removed together with the reference to best practicable option. Similarly, the appeal sought amendment to clause 6.8.6 to remove reference to the noise management regime being independent to the industrial zone general noise controls.

35 The majority of parties propose to amend Clauses 6.3, 6.4 and 6.8.6 to reflect the above. Policy 6.6.1.3 is also proposed to be amended,

and now adequately addresses MCC's concerns. No other party has appealed on these matters, and therefore it is submitted that the Court is not required to consider these issues at the hearing.

Clause 6.14.5 – Outcomes

36 Appeal 0657/03 (MCC) sought to amend Clause 6.14.5 as it was submitted that this implied that there might be unnecessary controls on aviation activities at the Aerodrome.

37 It is proposed to amend Clause 6.14.5 as requested by appeal 0657/03. No other party has appealed this issue, and it is therefore submitted that the Court is not required to consider this issue at the hearing.

Ardmore Aerodrome Zone: Clauses 6.14.6- Objectives and Policies

38 Appeal 0644/03 (AAL) sought deletion of Policy 6.14.6.2.8, which it asserted sought to restrict Ex-Military Jet movements. Appeal 0647/03 (Jet Imports) sought deletion of the Policy for similar reasons.

39 AAL is satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and does not wish to pursue this point on appeal. However the appeal by Jet Imports Limited remains and therefore it is submitted that the Court is required to consider this issue at the hearing.

Clause 6.14.7 - Explanation

40 Appeal 0657/03 (MCC) sought deletion of reference to the Aerodrome 'not be(ing) unnecessarily constrained' as it ignores the need to protect the surrounding community and suggests such protection may, on occasion, be unnecessary.

41 The majority of parties propose that the Explanation be amended to remove the phrase 'it should not be unnecessarily constrained'. As no other appeals were lodged on this issue, it is submitted that the Court is not required to consider this issue at the hearing.

Rule 6.14.9.2- Maximum Noise Level from any Aircraft

42 A number of parties appealed PDC's decision on the maximum permissible noise level (SEL) limit from aircraft operating from the Aerodrome. The SEL limit was originally imposed following a concession by AAL that no new 'noisier' Ex-Military Jets than currently operating from the Aerodrome, would be allowed to be permanently based at the Aerodrome.

43 The Commissioners' recommendations imposed an SEL of 125 dBA at the measurement point. PDC's decision amended the rule to reduce the maximum permissible noise level from SEL 125 to SEL 100 dBA between the hours of 8.00pm and 7.00am Monday-Saturday and on Sundays and Public Holidays, and SEL 125 dBA at all other times.

44 Appeal 0644/03 (AAL) sought reinstatement of the Commissioners' recommendations on the basis that the new rule posed an unreasonable restriction on AAL's operations and would be cumbersome to administer. Similarly, appeal 0643/03 (Warbirds) sought that changes made by the Council to the Commissioners recommendations be rescinded. Appeals 0646/03 (Tenants and Users) and 0647/03 (Jet Imports) sought removal of the SEL controls altogether.

45 Appeals 0655/03 (Southcombe/Edwards), 0656/03 (ARAG) and 0654/03 (University) sought that the SEL limit be reduced to 100dBA at all times.

46 Appeal 0657/03 (MCC) sought that a lower SEL limit be imposed, with an exemption for Ex-Military Jets that currently operate above that level. The appeal also sought that a more certain measurement point be articulated and that it be legally accessible by the Council and AAL.

47 The parties to the draft Consent Order propose that Rule 6.14.9.2 be amended as set out in the Annexure A to the attached draft Consent Order. Essentially it is proposed that the SEL limit for any aircraft operating from the Aerodrome be set at 115dBA, with an exemption for aircraft based at the Aerodrome on 1 July 2004. This would allow the existing Ex-Military Jets based at the Aerodrome to continue their activities, subject to the restricted flight hours and restricted number of movements, described later in paragraphs 52-55 and 62-68. The proposed Rule specifies that the movements of the Hawker Hunter (the noisiest Ex-Military Jet based at the Aerodrome) be limited to a maximum of 58 movements per annum from the total limit of 180 movements.

48 The Rule retains the measuring point as on runway centre line, 1700 metres forward of the commencement of takeoff roll, as this measuring point is convenient for the measurement of new potentially noisy Ex-Military Jets at other airports for certification purposes, before they are allowed to fly at the Aerodrome.

49 The proposed Rule also provides an exemption for aircraft brought to the Aerodrome for maintenance and/or restoration to undertake essential flight checks and departure from the Aerodrome, and specifies that these movements will be included in the total allocation of 180 movements per annum for the Ex-Military Jets.

50 The Rule allows PDC to request a certificate from an appropriately qualified acoustic consultant for aircraft which have the potential to exceed the maximum SEL before the aircraft can fly from the Aerodrome. It is also proposed to amend the Rule to require such a certificate to be provided to PDC within 6 weeks of the request.

51 However, the majority of parties understand from the Tenants and Users October Memorandum that this party wishes to pursue its appeal in relation to noise controls and limits, and therefore it is submitted that this issue will need to be considered by the Court at the hearing.

Rule 6.14.9.3 – Restrictions on Flight Hours

52 Appeal 0644/03 (AAL) sought that the curfew on circuit training and scheduled flights be reinstated from between '10pm to 7am' to '10:30pm to 7am' as notified in PC6. It was submitted that imposing a curfew of '10pm to 7am' constituted an unreasonable restriction on airport operations. For similar reasons appeal 0646/03 (Tenants and Users) sought a removal of the limits on circuit training.

53 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) both sought that hover training practice and sling load training be limited to the hours of 8am to 5pm (NZLT) Monday to Friday.

54 The parties to the draft Consent Order have proposed an extension to the curfew for circuit training until 10:30pm in the summer months, to allow sufficient time for night circuit training. The proposed Rule also clarifies that night training is further restricted on Sunday evenings. Paragraph (f) of the proposed rule allows variations to these restrictions under limited circumstances, as approved by the Ardmore Airport Noise Consultative Committee, although not beyond 11pm NZLT.

55 However, the majority of parties understand from the Tenants and Users October Memorandum that this party wishes to pursue its appeal in relation to flying curfews and training flights, and therefore it is submitted that this issue will need to be considered by the Court at the hearing.

Ex-Military Jets and other jet aircraft

56 As noted above, appeal 0644/03 (AAL) appealed both Policy 6.14.6.2.8 and Rule 6.14.9.2 on the basis that these provisions placed unreasonable restrictions on airport operations (in particular, on Ex-Military jet aircraft).

57 Appeal 0643/03 (Warbirds) appealed Policy 6.14.6.2.8 and Rule 6.14.9.4 (described in more detail at paragraphs 62-68 below) which it asserted attempted to restrict movements of Ex-military Jet aircraft.

58 Appeal 0647/03 (Jet Imports) sought removal of the definition of 'Ex-Military Jet' aircraft altogether, and removal of the limits on Ex-Military Jet aircraft in Rules 6.14.9.2 and 6.14.9.4.

59 Appeal 0646/03 (Tenants and Users) sought removal of limits on jet movements, SEL controls and other controls on aircraft overflying events.

60 Appeals 0655/03 (Southcombe/Edwards), 0654/03 (University) and 0656/03 (ARAG) all sought that the use of jet aircraft from the Aerodrome be a prohibited activity. The parties are satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and do not wish to pursue this point on appeal.

61 In order to address concerns relating to the operation of jet aircraft at the Aerodrome, the majority of parties propose to insert a new paragraph (c) into Rule 6.14.9.3, which provides for a night curfew on business jet aircraft that are not Ex-Military Jets.

Rule 6.14.9.4 – Ex-Military Jet movements

62 Appeal 0657/03 (MCC) sought that the number of Ex-Military Jet movements be reduced to a number that reflects the current level of Ex-Military Jet movements, as it was not aware of any evidence that suggests an increased number of movements is required.

63 As noted above at paragraph 60, appeals 0655/03 (Southcombe/Edwards), 0654/03 (University) and 0656/03 (ARAG), all sought that the use of jet aircraft from the Aerodrome be a prohibited activity.

64 Appeal 0646/03 (Tenants and Users) sought removal of the limits on jet movements, as it was submitted that the controls are unreasonable, unduly restrictive and ultra vires.

65 Appeal 0647/03 (Jet Imports) sought that the limit of 170 movements per annum on Ex-Military Jet aircraft be removed, as there is no reason to treat these aircraft any differently to other types of aircraft. It was submitted that the limit of 170 movements would not allow pilots of the current Ex-Military Jet aircraft to remain proficient, let alone provide for new aircraft to come to Ardmore. It was submitted that if a limit must be set, it should be a minimum of 750 movements per annum.

66 Appeal 0643/03 (Warbirds) sought deletion of Rule 6.14.9.4 restricting Ex-Military Jet aircraft movements.

67 Appellants 0657/03 (MCC), 0655/03 (Southcombe/Edwards), 0654/03 (University) and 0656/03 (ARAG) are satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and do not wish to pursue this point on appeal. Therefore, the majority of parties do not propose to make any further changes to the Rule as per the Council's decision.

68 However, the majority of parties understand from the Tenants and Users October Memorandum that this party wishes to pursue its appeal in relation to Ex-Military Jet movements, and therefore it is submitted that this issue will need to be considered by the Court at the hearing.

Rule 6.14.9.6 – Engine Testing

69 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) sought the introduction of a requirement that any engine testing is to take place within the engine testing enclosure, with no exemptions. The parties are now satisfied that not all aircraft can be safely tested within the confines of the engine testing enclosure, and therefore are not pursuing this issue on appeal.

70 In this regard, the draft Consent Order reflects the Council's decision with amendments to paragraph (ii) and the Explanation to reflect the fact that the engine testing enclosure has been constructed.

Rule 6.14.9.7 – Airshow

71 Appeal 0646/03 (Tenants and Users) sought removal of the limits on airshows.

72 The majority of parties do not propose to make any changes to the Rule in the Council's decision. However, the parties understand from the Tenants and Users October Memorandum that this party

wishes to pursue its appeal in relation to airshows and therefore it is submitted that this issue will need to be considered by the Court at the hearing.

Rule 6.14.9.8 – Noise Management Plan

73 The Noise Management Plan (*NMP*) is part of the 3-tiered approach to managing Airport noise, developed following detailed discussions between AAL and PDC. Essentially, the three tiers are:

73.1 An alteration to the existing designation for the Airport to replace outdated provisions and require compliance with specific noise management provisions included in the District Plan;

73.2 PC6 to the District Plan replacing outdated provisions and introducing specific noise management restrictions on airport operations within the ambit of the RMA; and

73.3 Implementation of the NMP to deal with matters outside PDC's jurisdiction, which needs to contain some flexibility with regard to control over aircraft in flight to enable timely future safety and operational changes.

74 The NMP made provision for an 'Environmental Working Group' to deal with issues arising from the NMP.

75 Appeal 0644/03 (AAL) sought reinstatement of Rule 6.14.9.8 as notified, which required a 60% majority of the EWG before changes could be made to the NMP (as PDC's decision amended the majority to 55%).

76 Appeal 0644/03 (AAL) also sought removal of an amendment to Rule 6.14.9.8 and the Explanation by PDC's decision which provided that the NMP 'may impose more stringent requirements on the operation of Ardmore Aerodrome than those contained in Rule 6.14.9', as the amended rule, including modifications, may result in operation restrictions that are unsafe and unworkable.

77 Appeal 0646/03 (Tenants and Users) sought restoration of the existing arrangements for the EWG, as the change to the majority requirement is inappropriate and unreasonable.

78 Appeals 0655/03 (Southcombe/Edwards), 0656/03 (ARAG) and 0654/03 (University) sought incorporation into the District Plan of all operational matters in the NMP that have a direct bearing on the

noise contours. Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) sought listing in the District Plan of the minimum requirements to be included in the NMP.

79 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) also sought deletion of the helicopter descent segment from the NMP and insert of a Rule in District Plan requiring all helicopters arriving or departing from the Aerodrome to cross the perimeter boundaries at 500 feet above ground level (*AGL*). Appeal 0654/03 (University) sought a new rule requiring the NMP to contain as a minimum standard that all aircraft movements be at least 1000 ft in any direction away from the University of Auckland's Ardmore Field Station.

80 Appeals 0655/03 (Southcombe/Edwards), 0656/03 (ARAG) and 0654/03 (University) also sought insertion of a new Rule requiring the NMP to be approved by PDC before it adopts PC6, and insertion of a new rule requiring an EWG.

81 Appeal 0657/03 (MCC) sought that the NMP be available for public inspection and that the matters to be covered in the NMP are clearly articulated.

82 As explained above, the NMP and its contents have deliberately been left to the side of the District Plan provisions, to provide for the necessary flexibility to enable timely future safety and operational changes. The NMP is designed to be a 'living' document to enable response to Civil Aviation Authority (*CAA*) regulations, to keep pace with industry requirements and to deal with changed circumstances. Although the contents of the NMP fall beyond the parameters of this hearing, the NMP forms part of the proposed planning regime and is therefore important evidence for the Court.

83 AAL in consultation with ARAG, the Councils and other parties, has reviewed the original NMP proposed and made a number of improvements to this document to better achieve the strategy of having the parties work together in a co-operative manner to resolve issues. Pivotal to these improvements has been an amendment to the structure and functioning of the EWG. The EWG has been renamed the 'Ardmore Airport Noise Consultative Committee' and reworked to ensure that representation on the committee is balanced and appropriate to the issues it will consider. This has included removal of the voting provisions previously set out in the NMP, and reflected in PC6 which meant that the group would very likely become politically driven, confrontational and ineffective

in satisfactorily addressing noise issues. The revised AANCC is intended to encourage the parties to work together co-operatively, sharing information and reaching decisions by consensus.

84 The draft Consent Order submitted by the majority of parties reflects the revised NMP, including the removal of the % majority required to amend the document. The objectives of the NMP have also been set out in Rule 6.14.9.8. The majority of parties submit that the changes made would adequately address the concerns raised in the Tenants and Users appeal. However, the parties understand from the Tenants and Users October Memorandum that this party wishes to pursue its appeal in relation to the NMP and therefore it is submitted that this issue will need to be considered by the Court at the hearing.

Rule 6.14.9.9 Affected Dwellings

85 Appeal 0644/03 (AAL) sought that the definition of 'affected dwellings' effectively enabling those persons defined to seek compensation from AAL for acoustic insulation of houses, be reinstated to the Commissioners' recommendations of including houses within the 65 dBA contour (which is consistent with NZS 6805), rather than within the 63 dBA area as amended by the Council's decision.

86 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) sought retention of the requirement that acoustic insulation be installed by AAL for affected dwellings and introduction of a requirement that air conditioning systems also be installed.

87 The draft Consent Order proposes to reinstate the 'affected dwellings' definition of 65 dBA, which is consistent with NZS 6805, as notified and recommended by the Commissioners. References to the District Planning Maps have also been updated to reflect the maps re-released by PDC earlier this year.

88 As Tenants and Users, Warbirds and Jet Imports have not raised this issue in their appeal, it is submitted that the Court does not need to consider this issue at the hearing.

Rule 6.14.9.10 Monitoring

89 Appeal 0657/03 (MCC) sought that Rule 6.14.9.10 be amended to require full monitoring of aircraft noise to be establishing within two years of PC6 becoming operative. It also sought that all monitoring information be provided to the public, and the inclusion of a complaints register as part of the monitoring programme.

90 Appeal 0656/03 (ARAG) sought the introduction of clearer monitoring requirements, and appeal 0655/03 (Southcombe/Edwards) sought the introduction of continuous monitoring requirements.

91 Appeal 0644/03 (AAL) sought reinstatement of Rule 6.14.9.10 as recommended by the Commissioners so that the word 'busiest' and 'ongoing basis' be removed as these restrictions would be unlawful and unreasonable.

92 The draft Consent Order presented by the parties reflects the remodelled contours produced by agreement between the noise experts for the parties to the draft Consent Order. The Rule now clarifies how monitoring is to be undertaken with reference to use of the INM model used to produce the refined contours agreed between the noise experts. The Rule also clarifies that both the results and the underlying inputs from physical noise monitoring will be provided to PDC, and that Ex-Military Jet movements are to be recorded on a monthly basis. The Rule specifies that the records of Ex-Military Jet movements and administration and logging of engine testing is to be provided to the Council in a collated form.

Rule 6.14.9.11 Non-complying activities

93 Appeal 0644/03 (AAL) sought the deletion of this rule, which was not included in PC6 as notified or the Commissioners recommendations, as Rule 6.14.9 provides a method by which compliance can be ensured if there is an exceedence.

94 Appeal 0643/03 (Warbirds) sought that all changes proposed by PDC which involve amendments to the Commissioners' recommendations be rescinded.

95 The draft Consent Order deletes Rule 6.14.9.11, as the majority of parties considered that it was not necessary for the reasons mentioned above.

Provision for community fund

96 Appeal 0657/03 (MCC) sought that a community fund be set up to help provide for adverse effects of aviation activities at the Ardmore Aerodrome on the surrounding community.

97 MCC is satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and does not wish to pursue this point on appeal.

Use of runways

98 Appeal 0655/03 (Southcombe/Edwards) sought that runway 07/25 be reopened so that air traffic is split equally between runway 03/21 and 07/25, therefore reducing adverse noise effects on properties below the flight fan.

99 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) sought the introduction of a requirement that AAL relocate the centreline of grass runway 03/21 to less than 120m from centreline of the sealed runway and prohibit parallel or simultaneous takeoffs.

100 The appellants are satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and do not wish to pursue this point on appeal.

Simulated engine failure

101 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) also sought the introduction of a requirement that simulated engine failure take place within the flight fan only.

102 The appellants are satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and do not wish to pursue this point on appeal.

Helicopters

103 Appeals 0655/03 (Southcombe/Edwards) and 0656/03 (ARAG) sought the introduction of a requirement that helicopter hover areas, practice areas and sling load training areas be at least 200m from the airport boundaries.

104 The appellants are satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and do not wish to pursue this point on appeal.

Aerobatic flight

105 Appeal 0654/03 (University) sought that safety controls be introduced into PC6 in relation to aerobatic flight to ensure that all exiting manoeuvres occur at a height of 1000 ft and must take place over the airfield, or alternatively banning aerobatics over the airfield and requiring this to take place at a remote location away from surrounding residential activity.

106 The appellant is satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and does not wish to pursue this point on appeal.

Low level circuit flying

107 Appeal 0656/03 (ARAG) sought a new rule excluding low level circuit flying and requiring all circuits to be at a minimum height of 1200ft AGL.

108 The appellant is satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and does not wish to pursue this point on appeal.

Other minor amendments

109 There were minor inconsistencies in wording in the Council's decision. In particular, in some places reference is made to 'Ardmore Aerodrome' and in others simply 'the Aerodrome' which is a defined term. As such, it is proposed that references to 'Ardmore Aerodrome' be replaced in the appropriate places with 'the Aerodrome'.

110 Reference is made in Clause 6.14.7 to the 'Complaints Committee'. This reference originated from the NMP. However, as described above the Environmental Working Group (the successor of the Complaints Committee) has been renamed the Ardmore Airport Noise Consultative Committee. It is therefore proposed that the reference in Clause 6.14.7 be amended accordingly.

111 Reference is made in Clause 6.14.7 to Council's 'overall discretion' to ensure general compliance with the NMP. However, it is considered by the parties that it would be more appropriate to refer to Council's 'statutory role' rather than 'overall discretion' to ensure compliance. It is proposed that Clause 6.14.7 be amended accordingly.

AMENDMENTS TO AAL'S DESIGNATION

District Plan References

112 As noted at paragraph 87 PDC re-released its planning maps earlier this year. The District Plan references have therefore been updated to reflect the current planning maps.

Clauses 2-3 Location of Runway Centrelines and Bases

113 Appeal 0813/03 (Antunovich) sought that AAL's NOR be amended so that bases for the approach surface for the southwest end of Runway 03/21 have an elevation of 35.66m above mean sea level (*AMSL*) and in all other respects are the same as the NOR served by the Minister of Civil Aviation in 1989.

114 Appeals 0816/03 (ARAG) and 0817/03 (Southcombe) sought that AAL relocate the centreline of grass runway 03/21 to less than 120m from the centreline of sealed runway and prohibit parallel or simultaneous takeoffs.

115 Appeal 0817/03 (Southcombe) sought that runway 07/25 be reopened so that air traffic is split equally between runways 07/25 and 03/21, thereby reducing adverse noises effects on properties near the flight fans. As noted above at paragraph 100 the appellants are satisfied with the agreement reached between the majority of parties as outlined in the draft Consent Order and do not wish to pursue this point on appeal.

116 The draft Consent Order reflects the changes proposed by AAL and agreed to by the majority of parties to resolve the issue with the Antunovich property (Appellant 0813/03). Essentially, AAL has reviewed the location of the approach surface to remedy the current situation where it passes through the Antunovich's house, by a combination of moving the surface back, so its origin (base location) is 25m inset from the end of the seal at the southwest end of runway 21, and making the height of the surface origin the same as the height of the runway at that point.

Clause 10 – Ardmore Aerodrome Sound Emissions

117 Appeal 0818/03 (MCC) sought that clause 10 be amended to state that as physical monitoring is required to demonstrate compliance with Rule 6.14.9.2, AAL shall obtain a registrable instrument in favour of the Authority and PDC providing legal access to the SEL measuring point.

118 AAL is currently in the process of securing a registrable instrument over a property containing one of the SEL measuring points, and the appellant does not wish to pursue this issue on appeal.

Clause 12 – Noise Management Plan

119 Appeals 0817/03 (Southcombe) and 0816/03 (ARAG) sought that a condition be imposed on the designation requiring AAL to have the NMP approved by PDC before the Court makes its decision on PC6. The appeals also sought that clause 12 be amended to require a 55% majority of the EWG to change the NMP.

120 Appeal 0816/03 (ARAG) sought that AAL delete the helicopter segment from the NMP and require all helicopters arriving and departing the Aerodrome to cross the perimeter boundaries at 500ft

above ground level (*AGL*). The appeal also sought that the NMP be attached to the NOR and AAL's decision as a condition of consent.

121 Appeal 0818/03 (MCC) sought that clause 12 be amended to state that the NMP will not be inconsistent with Rule 6.14.9 of the District Plan and that the NMP may contain more stringent requirements on the operation of the Aerodrome than those contained in the District Plan.

122 Amendments to the NMP have been explained at paragraphs 83-84 above.

CONCLUSION

123 PDC accepts that it is appropriate to amend the following provisions of the Plan: Zoning Maps C5-C7, D4-D7, E4 and E5 and Ardmore Airport Height Surfaces, Part 10 -Definitions, Section 6.8 of Part 6 – Reasons for Policies, Section 6.8 of Part 6 – Anticipated Results, Rule 8.14, Clause 6.3 – Resource Management Issues, Clause 6.4 – Resource Management Strategy, Policy 6.6.1.3, Clause 6.8.6 (Ardmore Aerodrome Zone Description), Clause 6.14.1- Introduction, Clause 6.14.2 – Overview, Clause 6.14.4- Resource Management Strategy, Clause 6.14.5 –Outcomes, Clause 6.14.6 – Objectives and Policies, Clause 6.14.7 - Explanation, Clause 6.14.7 – Methods, Rule 6.14.8.1- Permitted Activities, Rule 6.14.8.2- Discretionary Activities, and Rule 6.15- Industrial Zones Rule and to delete Rule 6.14.8.3 and to insert a new Rule 6.14.9 – Ardmore Aerodrome Sound Emissions.

124 AAL accepts that it is appropriate to amend the District Plan References, Clauses 2,3 and 12, and the Advice Note to the designation.

125 Following discussions the majority of parties have agreed by consent that the relief sought under paragraphs 16 and 17 of RMA 0814/03, paragraph 1 of RMA 0793/03, paragraph 8 of RMA 0813/03, paragraph 8 of RMA 0802/03, paragraph 8 of RMA 0816/03, paragraph 7 of RMA 0818/03, paragraph 8 of RMA 0817/03, paragraph 85 of RMA 0644/03, paragraph 6 of RMA 0655/03, paragraph 6 of RMA 0654/03, paragraph 6 of RMA 0656/03, paragraphs 5.1.4, 5.2.4, 5.3.4, 5.4.4, 5.5.4, 5.6.4, 5.7.4, 5.8.4, 5.9.4, 5.10.4, 5.11.4, 5.12.4, 5.13.4 and 5.14.4 of RMA 0657/03 can be determined by amending the District Plan and designation as set out in Annexures A and B of the attached draft Consent Order.

Dated at Auckland this 3rd day of November 2004.

for Papakura District Council

for Ardmore Airport Limited

for Ardmore Residents Action Group Incorporated

for Manukau City Council

for J & S Southcombe

for New Zealand Warbirds Association Incorporated

for Ardmore Airfield Tenants and Users Committee

for J&S Southcombe and J&D Edwards

Dated at Auckland this 3rd day of November 2004.

for Papakura District Council

for Ardmore Airport Limited

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THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Dated at Auckland this 3rd day of November 2004.

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THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

for Jet Imports Limited

for University of Auckland

for J& K Antunovich

for Warren Simpson (s274 party)

for PG & ML Kenny (s274 party)

for Hamlin Holdings Limited (s274 party)

for Airfield Farms Limited (s274 party)

for Roberts Holdings Limited (s274 party)

for Murdoch, Reynolds and JH & LA Graham Family Trusts (s274 party)

for B&K McMath, B Webb, J Rigby, A Burke, D Kirkbride, J Rennell, J Brosnan, W Simpson (s274 party)

for J Rigby (s274 party)

for RE Burnell (s274 party)

for MB Burnell (s274 party)

for B&J Hearing (s274 party)

for E&N White (s274 party)

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

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for MB Burnell (s274 party)

for B&J Hearing (s274 party)

for E&N White (s274 party)

for L&M Lipscombe (s274 party)

for M&C Spencer (s274 party)

Appendix 2

In the Environment Court

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under: the Resource Management Act 1991

In the matter of: a Notice of Requirement by Ardmore Airport Limited for alteration to designation and Proposed Plan Change 6 to the Operative Papakura District Plan

between: **Papakura District Council** (RMA 0793/03)

J & K Antunovich (RMA 0813/03)

University of Auckland (RMA 0802/03)

Ardmore Residents Action Group Incorporated (RMA 0816/03)

Manukau City Council (RMA 0818/03)

J & S Southcombe (RMA 0817/03)
Appellants

and: **Ardmore Airport Limited**
Respondent

and between: **Ardmore Airport Limited** (RMA 0644/03)

New Zealand Warbirds Association Incorporated (RMA 0643/03)

Ardmore Airfield Tenants and Users Committee (RMA 0646/03)

J & S Southcombe and J & D Edwards (RMA 0655/03)

University of Auckland (Physics Department) (RMA 0654/03)

Ardmore Residents Action Group Incorporated (RMA 0656/03)

Jet Imports Limited (RMA 0647/03)

Manukau City Council (RMA 0657/03)

Appellants

and: **Papakura District Council**
Respondent

BEFORE THE ENVIRONMENT COURT

Environment Court Judge R G Whiting sitting alone pursuant to section 279 of the Resource Management Act 1991 (*the Act*) **IN CHAMBERS** at **AUCKLAND** on the day of 2004.

[DRAFT] CONSENT ORDER

HAVING CONSIDERED the Appellants' notices of appeal and the Respondents' notices of reply, and upon reading the Memorandum of Counsel filed herein, **THIS COURT HEREBY ORDERS BY CONSENT** that:

1 The Operative Papakura District Plan (*the Plan*) be amended by amending:

1.1 Maps C5-C7, D4-D7, E4 and E5, and Ardmore Airport Height Surfaces and deleting Map Ardmore Airport General Plan;

1.2 Part 10 –Definitions;

1.3 Section 2- Rural Papakura; Section 6.8 of Part 6 – Reasons for Policies, Section 6.8 of Part 6 – Anticipated Results and Rule 8.14;

1.4 Section 3 – Urban Papakura, Part 6 (Industrial Zones); Clause 6.3 – Resource Management Issues, Clause 6.4 – Resource Management Strategy, Policy 6.6.1.3, Clause 6.8.6 (Ardmore Aerodrome Zone Description), Clause 6.14.1- Introduction, Clause 6.14.2 – Overview, Clause 6.14.4- Resource Management Strategy, Clause 6.14.5 –Outcomes, Clause 6.14.6 – Objectives and Policies, Clause 6.14.7 - Explanation, Clause 6.14.7 – Methods, Rule 6.14.8.1- Permitted Activities, Rule 6.14.8.2- Discretionary Activities, and Rule 6.15- Industrial Zones Rule and by deleting Rule 6.14.8.3 and inserting a new Rule 6.14.9 – Ardmore Aerodrome Sound Emissions;

as set out in Annexure A of the **attached** Draft Report.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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2 Ardmore Airport Limited's existing designation be amended by amending the District Plan Reference, Section 2 – Location of Runway Centrelines, Section 3 – Location of Bases, Section 12 – Noise Management Plan, and the Advice Note as set out in Annexure B of the **attached** Draft Report.

Dated at Auckland this day of 2004.

_____

Environment Court Judge Whiting

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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4/11/2004 12:54

ANNEXURE A

1 AMENDMENTS TO THE ZONING MAPS

1.1 Amend ~~Rural Zone~~ Maps ~~R2 and R3~~C5-C7, D4-D7, E4 and E5 by plotting on the Air Noise Boundary and the Outer Control Boundary as shown in Attachment 1. Amend Map Ardmore Airport Height Surfaces.

1.2 Delete ~~Urban~~ Map ~~U 18~~ Ardmore Airport General Plan

2 AMENDMENTS TO SECTION 1 OF OPERATIVE DISTRICT PLAN - GENERAL PAPAKURA

2.1 Amend Part 10 "Definitions" by inserting new definitions as follows:

Aerobatic Flight *-*

(1) an intentional manoeuvre in which the aircraft is in sustained inverted flight or is rolled from upright to inverted or from inverted to upright position; or,

(2) manoeuvres such as rolls, loops, spins, upward vertical flight culminating in a stall turn, hammerhead or whip stall, or a combination of such manoeuvres

Aerodrome *means Ardmore Aerodrome as defined by land contained within the Aerodrome boundary.*

Aircraft *in terms of the Civil Aviation Act 1990, means any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth.*

Aircraft Engine Testing Noise *means aircraft testing for the purposes of engine maintenance and does not include normal operational aircraft engine run-ups. (i.e.: aircraft warming up prior to take-off) or any noise generated by the taxiing or towing of aircraft to or from the designated engine testing location.*

Aircraft Movement *means one aircraft take-off, landing, touch-and-go, or missed approach. A "Touch-and-go" shall be deemed to be two aircraft movements.*

Activities Sensitive to Aircraft Noise (ASANs) *means household units, residential activities, comprehensive residential development, institutional*

activities, studio warehousing, temporary household units, rehabilitation facilities, pre-school/education facilities, schools, other educational facilities, child care centres and other care centres, hospitals, other health care facilities, rest homes and other homes for the aged.

Air Noise Boundary *is a line formed by the outer extremity of the 65 dBA L_{dn} noise contour.*

Airport Authority *means Ardmore Airport Limited or any person appointed in place of Ardmore Airport Limited as the requiring authority for Ardmore Aerodrome pursuant to section 180 of the Resource Management Act 1991.*

Aerodrome Boundary *means the boundary of the land designated by the Airport Authority for aerodrome purposes.*

Airshow *means the event referred to in Rule 6.14.9.7.*

Best practicable option *in relation to an emission of noise means the best method for preventing or minimising the adverse effects on the environment having regard, among other things to:*

(a) the nature of the emission and the sensitivity of the receiving environment to adverse effects; and,

(b) the financial implications and the effects on the environment of that option when compared with others; and,

(c) the current state of technical knowledge and the likelihood that the option can be successfully applied.

CAA *means the Civil Aviation Authority of New Zealand.*

CAR *means Civil Aviation Rule.*

Circuit training *means the use of the Fixed Wing Circuit or the Helicopter Circuit for training purposes.*

dBA *is a measurement of sound pressure level which has its frequency characteristics modified by a filter so as to more closely approximate the frequency bias of the human ear.*

Ex-Military Jet aircraft ("EMJ") *means any Fixed wing aircraft designed for~~, historically associated with, or capable of being used for~~ military purposes ~~(including, without limitation, a replica)~~ propelled other than by a propeller.*

Fixed Wing Circuit *means that pattern, located on the southern side of the Aerodrome flown by fixed wing aircraft for the purpose of sequencing themselves to or from runways 03/21 and/or 07/25 grass.*

General Aviation *is defined by the Civil Aviation Authority (CAA) as all aviation activity at civil aerodromes other than regular passenger flights scheduled by international and domestic airlines.*

Helicopter Circuit *means that pattern located on the northern side of the Aerodrome flown by helicopters.*

L_{10} *means the noise level which is equalled or exceeded for 10% of the measurement period. L_{10} is an indicator of the mean maximum noise level and is used in New Zealand as the descriptor for intrusive noise (in dBA).*

L_{dn} (Day/Night Level) *means the day night noise level which is calculated from the 24 hour L_{eq} with a 10 dBA penalty applied to the night-time (2200-0700 hours) L_{eq}.*

L_{max} (Maximum sound pressure level) *means the maximum sound pressure level measured during the sampling period.*

L_{eq} (Time-average sound level) *means the time averaged noise level (on a logarithmic, energy basis).*

MBZ *means that area denominated under Civil Aviation Rules as the Ardmore Mandatory Broadcast Zone or MBZ.*

Notional Boundary *means a line 20 metres from the façade of any rural dwelling or the legal boundary where this is closer to the dwelling.*

NZLT *means NZ local time: time referenced regardless of whether daylight saving is in effect.*

NZS 6805:1992 *refers to the New Zealand Standard NZS 6805 1992 "Airport Noise Management and Land Use Planning".*

Obstacle Limitation Surfaces (OLS) *means those defined areas about and above an aerodrome intended for the protection of aircraft in the vicinity of an aerodrome. Such surfaces for Ardmore Aerodrome Runways are depicted in both the Papakura and Manukau City District Plans.*

Outer Control Boundary *is a line formed by the outer extremity of the 55 dBA L_{dn} noise contour.*

~~**Public Holiday** means any of the following days: New Years Day, the second day of January or some other day in its place, Waitangi Day, Good Friday, Easter Monday, Anzac Day Sovereigns Birthday, Labour Day, Christmas Day, Boxing Day and Auckland Anniversary Day.~~

Scheduled Flight *means freight or passenger flights that are established on a permanent timetable basis.*

SEL (Sound Exposure Level) *means the A-weighted sound level which if maintained constant for a period of 1 second, would convey the sound energy as is actually received from a given noise event*

$$SEL = 10 \log \int_{t_1}^{t_2} \left[\frac{P_{A(t)}}{P_O} \right]^2 dt$$

where p is in pascals and t in seconds – p_o is the reference sound pressure of 20 micropascals.

3 AMENDMENTS TO SECTION 2 OF OPERATIVE DISTRICT PLAN -RURAL PAPAKURA

3.1 Amend the "Reasons for Policies" and the "Anticipated Results" in Section 6.8 (Ardmore Aerodrome) of Part 6 (Objectives and Policies) to read as follows:

Reasons for Policies

Specific provision for the management of resources on the Aerodrome site itself are contained in the urban section of the District Plan. The policies and rules in this part of the Plan relate to the off-site effects of the Aerodrome. In general terms, areas which are close to the Aerodrome may experience some restriction of activities due to noise or for safety reasons. ~~*No additional land use restrictions are proposed in the Rural Papakura Zone or the Rural Takanini / Drury Zone. Instead, it is considered that the restrictions already inherent in these Zones (e.g. additional dwellings and subdivision are discretionary activities) will allow the existing objective and policy (i.e. Objective 6.8.1(b) and policy 6.8.2(a)) in relation to compatibility of surrounding land uses to be implemented.*~~ *Consistent with the principles for airport planning contained in NZS 6805-1992 "Airport Noise Management and Land Use Planning", the Council will notify a further plan change introducing additional land use restrictions on activities within the Air Noise Boundary and Outer Control Boundary by way of a future*

plan change within 9 months of these provisions becoming operative.

Anticipated Results

~~Ardmore~~ The Aerodrome will continue to be a significant land use in the District and a ~~significant~~ contributor to the ~~economic base of the District~~local economy. ~~Uses and activities in the vicinity of the aerodrome will be affected by it and will have some limitations placed on them because of the aerodrome.~~Controls on aircraft noise will ensure that the operation of the Aerodrome does not significantly adversely affect people living in the area. When considering resource consent applications, the Council will have regard to whether activities in the vicinity of the Aerodrome will adversely affect its operations.

The Airport Authority and the Papakura District Council have jointly undertaken an investigation of aircraft noise which has resulted in ~~fixed wing aircraft~~ noise contours being established and shown on the Zoning Maps. These contours will be used by the Council as the basis for rules controlling aircraft noise so as to ensure that the operation of the aerodrome does not significantly affect people living in the area. When any future applications for resource consent ~~to discretionary activities~~ within the L_{dn} 55 and 65 dBA aircraft noise contour (represented by the Outer Control Boundary and the Air Noise Boundary on the Zoning Maps) are considered by the Council it will have regard to whether those activities carried out in the vicinity of the Aerodrome will adversely affect the operations of the Aerodrome.

3.2 **Amend Rule 8.14 by inserting an additional clause (t) as follows:**

(t) In respect of any application ~~for a discretionary activity~~ in the Rural Papakura or Rural Takanini / Drury Zones on land within the L_{dn} 55 and 65 dBA aircraft noise contours around the ~~Ardmore~~ Aerodrome (represented by the Outer Control Boundary and the Air Noise Boundary on the Zoning Maps), the Council will have regard to whether the proposed activity ~~will adversely affect the operations of the Aerodrome~~is defined as an Activity Sensitive to Aircraft Noise in this Plan, and if so:

- *Whether, having regard to all the circumstances (including location in relation to the airport, likely exposure of the site to aircraft noise, noise attenuation*

and ventilation measures proposed, and the number of people to be accommodated), the nature, size and scale of the proposed activity is likely to lead to potential conflict with and adverse effects upon the operation of the Aerodrome;

- *Whether the design and construction of any structure to be used for the proposed activity would achieve an internal noise environment of L_{dn} 40 dBA while providing adequate ventilation; and*

- *Any other relevant matter set out in section 104 of the Resource Management Act 1991.*

4.0 AMENDMENTS TO PART 6 (INDUSTRIAL ZONES) OF SECTION 3 OF OPERATIVE DISTRICT PLAN URBAN PAPAKURA

4.1 Amend Clause 6.3 (Resource Management Issues) by inserting an additional bullet point as follows:

- *The operation and growth of ~~Ardmore~~ the Aerodrome to meet the reasonably foreseeable air transport needs while minimising adverse noise effects on the surrounding community.*

- *The Aerodrome is an important facility for the general aviation industry as it provides pilot training and recreational flying services. The operation of the Aerodrome should recognise the importance of those services.*

4.2 Amend Clause 6.4 (Resource Management Strategy) by making an addition to the fifth bullet point as follows:

- *to establish at ~~Ardmore~~ the Aerodrome a zone for aviation-~~related~~ activities with specific ~~noise~~ controls relating to ~~on ground aerodrome activities, aircraft movement numbers and hours of operation~~aircraft noise.*

4.3 Amend Policy 6.6.1.3 to read as follows:

6.6.1.3 *~~To establish at Ardmore Aerodrome a zone for~~To provide for aviation-related activities at the Aerodrome while controlling the adverse effects of aircraft noise.*

~~*with specific noise management controls which are independent of other industrial zone noise controls and which are designed to implement the best practicable option in dealing with the actual and potential noise effects arising from the use of the Aerodrome.*~~

4.4 Amend Clause 6.8.6 (Ardmore Aerodrome Zone Description) to read as follows:

Ardmore Aerodrome Zone

This zone makes provision for the aviation industry and related uses at ~~Ardmore~~ the Aerodrome. The site is designated as "Aerodrome" in the District Plan as a requirement of the Airport Authority. The zone includes noise management controls that are tailored to the specific effects generated by the Aerodrome~~, independent of other general industrial zone requirements,~~ to ensure that the noise impact of the Aerodrome is minimised by use of best practicable options.

4.5 Amend ARDMORE AERODROME ZONE, Clause 6.14.1 - INTRODUCTION, to read as follows:

The Ardmore Aerodrome Zone makes provision for the aviation industry and related activities on the ~~Ardmore~~ Aerodrome site. The site is designated as "Aerodrome" in the District Plan. This designation is the requirement of the Airport Authority which controls the operation of the Aerodrome.

4.6 Amend ARDMORE AERODROME ZONE Clause 6.14.2 - OVERVIEW to read as follows:

The establishment of this special zone for the ~~Ardmore~~ Aerodrome results from the need both to enable and protect all aviation activities conducted within the NZS 6805-1992 noise footprints and CAA Rules and to regulate activities which are not part of the public work. Subsequent to consultation with the local community and the Airport Authority the District Council has implemented a noise contour around ~~Ardmore~~ the Aerodrome based on 275,000 Aircraft Movements per year including Ex Military Jet Aircraft. A contour including Ex Military Jet Aircraft movements has been implemented to ensure that the Air Noise Boundary and the Outer Control Boundary reflect actual noise emissions allowing for effective monitoring to be undertaken.

Buildings and uses which are not part of the designated public work are subject to the provisions of the zone and to the consent of the Airport Authority in terms of Section 176 of the Act.

Subdivision is permitted within the ~~Z~~zone. Recognition of the particular requirements of aircraft hangarage, on-site sewerage reticulation, stormwater disposal and bylaw standards needs to be given in any determination of leasehold or subdivision section size.

4.7 Amend ARDMORE AERODROME ZONE Clause 6.14.4 - RESOURCE MANAGEMENT STRATEGY to read as follows:

The resource management strategy for the Ardmore Aerodrome Zone is:

- *to establish a framework of controls which secure the on-going operation and growth of ~~Ardmore~~ the Aerodrome for aviation and aviation-related activities.*

- *to establish general environmental and noise controls to secure appropriate amenity within the zone and in surrounding areas.*

4.8 Amend ARDMORE AERODROME ZONE - OUTCOMES Clause 6.14.5 to read as follows:

The outcome of this strategy will be the operation and growth of a unique activity node which makes a significant contribution to the present well-being and future development of the District. ~~Aviation activities will be conducted in such a way that the potential of the facility is not limited by unnecessary controls.~~ At the same time, ~~Ardmore~~ the Aerodrome will function in recognition of NZS 6805-1992 "Airport Noise Management and Land Use Planning" to achieve appropriate levels of local amenity and environmental quality. The strategy is aimed at the continuation of those special aviation-related activities which have become established within the zone in such a way that the activities are properly managed to secure amenity values both within and beyond the zone.

4.9 Amend ARDMORE AERODROME ZONE - Clause 6.14.6 - OBJECTIVES AND POLICIES and Clause 6.14.7 - EXPLANATION to read as follows:

Objective:

6.14.6.1 To provide for uses related to the aviation function of the ~~Ardmore~~ Aerodrome.

Policies:

6.14.6.1.1 To permit a wide range of aviation-related activities within the zone including the bulk storage of aviation fuels and other aviation related hazardous substances.

6.14.6.1.2 To limit the establishment of non aviation related activities.

Objective:

6.14.6.2 To protect environmental quality and the amenity values of sensitive, adjoining rural areas, including the sensitivity of those areas to aerodrome-related noise, while recognising the operation and growth of ~~Ardmore~~ the Aerodrome.

Policies:

6.14.6.2.1 To adopt the best practicable option in minimising the noise impact of the Aerodrome on surrounding land uses.

6.14.6.2.2 To manage future growth and development of the District and ~~Ardmore~~ the Aerodrome in accordance with the approach promoted in New Zealand Standard 6805:1992 Airport Noise Management and Land Use Planning (NZS 6805:1992).

6.14.6.2.3 To impose controls which protect the environmental quality and amenity of neighbouring properties.

6.14.6.2.4 To impose amenity controls at site boundaries.

6.14.6.2.5 To adopt controls on noise, vibration, air pollution, glare, and soil and water contamination.

6.14.6.2.6 To require the establishment and maintenance of buffer areas between industrial activities and adjacent activities.

6.14.6.2.7 To limit the height and location of activities.

6.14.6.2.8 To control the adverse effects of Ex-Military Jet Aircraft using ~~Ardmore~~ the Aerodrome by limiting their activities in terms of maximum noise levels, operating hours and flight numbers.

6.14.7 EXPLANATION

~~Ardmore~~ The Aerodrome is a significant general aviation facility and comprises a valuable economic and social asset to the District. For this reason, ~~its continued functioning~~the Aerodrome should be enabled to continue functioning as a regional and national facility ~~should not be unnecessarily constrained~~.

Of necessity, such facilities are located in rural areas with the result that the activities related to an aerodrome often cause annoyance or disturbance to adjoining, non-aviation activities. The environmental effects of aviation are often in conflict with the expectations of rural amenity.

The objectives and policies for the Ardmore Aerodrome Zone will enable the future functioning and growth of the aerodrome in accordance with best practicable options and NZS 6805:1992 while minimising adverse noise impacts on surrounding land uses.

4.10 Amend ARDMORE AERODROME ZONE – Clause 6.14.7 by adding the following Clause on METHODS:

6.14.7 METHODS

There are four accepted methods available to control aviation activities:

i) Zoning and Rules;
ii) Noise Management Plans;
iii) Operational Requirements of Other Organisations;
iv) Designations.

The District Plan through zoning, rules and designation can put in place provisions and standards to provide for the development of the Aerodrome and associated activities and to control adverse

effects. Such controls, however, must be enforceable and must not conflict with operational requirements of other statutory organisations. Although ~~Ardmore~~ the Aerodrome is designated under the District Plan and controlled by a requiring authority, it has been seen as more appropriate to control certain elements of the aerodrome operations by way of zoning and rules. This enables the council to respond to any changes in aerodrome operations (such as the cessation of ex-military jet aircraft operations) and modify the noise contour and zone provisions if required.

Because of the safety issues involved, the activities of agencies such as the Ministry of Civil Aviation also have a bearing on the operations of the Aerodrome. Further, Council recognises that there are many aspects of aerodrome operations which are best controlled through a noise management plan as opposed to specific rules due to potential conflict with other regulations and the need to allow aspects of aerodrome operations to be continually modified and improved in response to industry changes and to achieve best practice noise management.

A combination of these various methods has been adopted as they represent the most effective means of achieving the objectives and policies for the Aerodrome. The designation requires compliance with the Ardmore Aerodrome Zone rules which allow for effective monitoring and enforcement, if necessary. Compliance with and on-going review of the Ardmore Aerodrome Noise Management Plan is a requirement in the District Plan. This ensures that the various flight related operational aspects of the Aerodrome are controlled and regulated while providing a process of enforceability through the Ardmore Airport Noise ~~Complaints~~ Consultative Committee and through Council's ~~overall discretion~~statutory role to ensure general compliance with the Noise Management Plan. This combination of control methods has proven to be effective and efficient for the majority of New Zealand's large airports.

4.11 Amend ARDMORE AERODROME ZONE Rule 6.14.8.1 Permitted Activities by deleting Clause 3 relating to the "Ardmore Aerodrome General Plan" and amending Clause 2 (General Provisions) to read as follows:

2. General Provisions

Activities not provided for by way of the ~~Ardmore~~ Aerodrome Designation shall comply with the following:

- *Part 6, Rules 6.15–3 (Air Pollution and Odour Control), 6.15–4 (Hazardous substances) and 6.15–5 (Bulk and Location Controls). For the purposes of Rule 6.15-5 the Ardmore Aerodrome Zone shall be deemed to be subject to the Bulk and Location Controls of the Industrial 1 Zone.*
- *Part 13, Rule 13.8.*
- *Part 15, Rule 15.8.*

4.12 Amend ARDMORE AERODROME ZONE Rule 6.14.8.2 Discretionary Activities by amending Clause 1 (General Provisions) to read as follows:

1. General Provisions

Application must be made for a resource consent for a discretionary activity where it is proposed to vary the standards for permitted activities contained in Rule 6.15-3, 6.15-4 and 6.15-5. An application for a discretionary consent may only be granted to vary those standards to the extent permitted in Table 6. 2 and will be assessed in terms of the criteria contained in Rule 6.15.2.

4.13 Delete ARDMORE AERODROME ZONE Rule 6.14.8.3 (Applications).

4.14 Insert in ARDMORE AERODROME ZONE a new Rule 6.14.9 as follows:

6.14.9. ARDMORE AERODROME ZONE SOUND EMISSIONS

6.14.9.1 Sound Emissions – Air Noise Boundary and Outer Control Boundary

The Aerodrome shall be managed to ensure that noise emissions from Aircraft Movement shall not exceed L_{dn} 65 dBA outside the Air Noise Boundary and L_{dn} 55 dBA outside the Outer Control Boundary as shown on ~~Zoning~~ Maps ~~R2 and R3~~C5-C7, D4-D7, E4 and E5 when calculated as stated in NZS 6805:1992 Airport Noise Management and Land Use Planning as a 3 month rolling logarithmic average using the FAA Integrated Noise Model (INM) and records of actual aircraft operations.

The following operations are excluded from compliance with this rule:

(a) Aircraft landing in an emergency;
(b) Emergency flight operations; ~~and~~

(c) *One Airshow per calendar year as defined under Rule 6.14.9.7; and*

(d) *Use of sealed runways 07/25 for maintenance purposes for seven days per calendar year.*

Explanation
Council considers that it is important to ensure that the effects associated with aircraft operational noise are managed, as far as practicable, at the source of these emissions. As described at 6.14.2 above, the noise contours are based on a maximum of 275,000 movements per year inclusive of Ex Military Jet Aircraft movements. This rule places a requirement on aircraft operations associated with ~~Ardmore~~ the Aerodrome to comply with this limit specified at the Air Noise Boundary and Outer Control Boundary.

6.14.9.2 Maximum Noise Level from any Aircraft

~~(a)~~ Except for aircraft listed in (a) and (b) below, ~~T~~the maximum permissible noise level from any aircraft operating from ~~Ardmore~~ the Aerodrome shall not exceed SEL ~~100~~ 115 dBA ~~between the hours of 8 pm and 7 am Monday to Saturday or at any time on Sundays or Public Holidays or SEL 125 dBA at all other times. The SEL shall be~~ at the measurement point specified as: on runway centre line; 1700 metres forward of the commencement of the take-off roll.

(a) *Aircraft based at the Aerodrome on 1 July 2004. The Hawker Hunter aircraft based at the Aerodrome on 1 July 2004 will be permitted up to a maximum of 58 movements per annum out of the limit of 180 movements per annum specified in Rule 6.14.9.4(b).*

(b) *Aircraft brought to the Aerodrome for maintenance/restoration that have the potential to exceed the maximum noise level specified in 6.14.9.2 are permitted to operate for the sole purpose of undertaking essential flight checks and departure from the Aerodrome. Any such operations will not exceed a total of 16 takeoffs per annum. These takeoffs and subsequent landings are included in the total number of 180 Ex-military jet movements per annum specified in paragraph 6.14.9.4(b).*

~~(b)~~ To confirm compliance with this rule~~,~~ ~~the~~Council may request the Airport Authority ~~shall~~ to provide ~~to the Council~~ a certificate from a person with appropriate acoustic qualifications for~~:~~

~~(i)~~ A~~a~~ircraft with noise outputs that have the potential to exceed the maximum permissible noise level~~, in advance of any such aircraft operating from Ardmore Aerodrome. Such certificate shall confirm that the aircraft comply with the requirements of Rule 6.14.9.2(a) above; and~~

~~(ii)~~ ~~For any other aircraft, when requested in writing by Council.~~ Such certificate shall be provided to Council within ~~one month~~6 weeks of the request and shall confirm that the aircraft complies with the requirements of Rule 6.14.9.2~~(a)~~ above.

Explanation

To control the single event noise exposure to the local community, Council considers that it is important to set a maximum permissible noise level for aircraft operating from ~~Ardmore~~ the Aerodrome. ~~to address amenity considerations including the potential for awakenings from very noisy events and the differing public expectations on Sundays and Public Holidays.~~ The maximum SEL noise level is based on noise measurements of existing aircraft at the Aerodrome. However, any new aircraft operated from Ardmore must comply with the maximum SEL noise level.

This provision allows Council to request ~~requires~~ a certificate confirming compliance with the maximum permissible noise level.

6.14.9.3 Restricted Flight Hours

The following restricted flight hours apply to specific aircraft operations from the Ardmore Aerodrome zone:

(a) *Circuit training and scheduled flights are not permitted between the hours of 10.00pm (extended to 10.30pm in daylight savings) and 7.00am New Zealand Local Time (NZLT) Monday-Saturday and between the hours of 8.00pm Sunday night and 7.00am Monday morning.~~on Sundays and Public Holidays circuit training is not permitted between 8.00pm and 7.00am.~~*

(b) *Ex Military Jet Aircraft operations are not permitted between the hours of 8.00pm and 7.00am New Zealand Local Time (NZLT).*

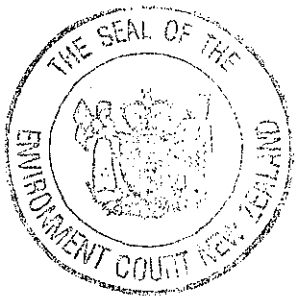
(c) *Jet aircraft that do not meet the International Civil Aviation Organisation noise standard contained in ICAO Annex 16, Volume 1, Chapter 3 or the equivalent 'Stage 3' United States Federation Aviation Administration noise limits contained in CFR 14 Part 36, are not permitted to operate between the hours of 10.00pm and 7.00am New Zealand Local Time (NZLT).*

(~~c~~d) *Except as permitted by Rule 6.14.9.7 Aerobatic Flight over ~~Ardmore~~ the Aerodrome shall be limited to a maximum of 12 hours per annum and shall be conducted between the hours of 9.00am to 4.00pm Monday to Saturday and 9.00am to 12.00 noon on Sunday New Zealand Local Time (NZLT).*

(~~d~~e) *Hover training practice shall only take place between the hours of 8.00am and 7.00pm Monday to Friday and 9.00am and 1.00pm on Saturdays New Zealand Local Time (NZLT), provided that hover training may take place on Saturdays between 1.00pm and 5.00pm NZLT and on Sundays between 9.00am NZLT and 4.00pm NZLT where the activity takes place no closer than 150 metres from any external boundary of the Aerodrome. Notwithstanding the above, no hover training practice shall take place on Public Holidays.*

(ef) *Variations to the restricted hours on night training under clause (a) of this rule may be approved under limited circumstances by the Ardmore Airport Noise Consultative Committee, but in any event, operations will not be permitted after 11.00pm New Zealand Local Time (NZLT).*

Explanation
This rule has been included in order to minimise disturbance during noise sensitive hours. This rule together with Rules 6.14.9.1 and 6.14.9.2 and the Noise Management Plan will have the effect of minimising noise from aircraft during noise sensitive hours.



6.14.9.4 Ex-Military Jet Aircraft Movements

Except as permitted by Rule 6.14.9.7, Ex Military Jet Aircraft movements shall be restricted to:

(a) 170 movements per calendar year averaged over a three year period; and
(b) 180 movements in any one calendar year; and
(c) 10 movements in any one seven day period; and
(d) No simultaneous or parallel take-offs.

Explanation
The purpose of this rule is to safeguard against any potential for significant increases in annual and weekly Ex Military Jet Aircraft movements due to noise emission space becoming available within the Air Noise Boundary in the event of an unlikely significant reduction in General Aviation activity.

6.14.9.5 General Sound Emissions

i)For a period of six (6) months from the date this rule becomes operative sound emissions from sources, other than Aircraft Movement, Aircraft Taxiing, Aircraft Engine Testing, and one Airshow per calendar year as defined under Rule 6.14.9.7, shall be restricted to the following limits set out in Table 1 measured at or within the notional boundary of any residential dwelling existing as at 19 September 2001 (and which is not under the ownership of the Airport Authority).

TABLE 1

Monday to Friday 0700-2200 *Saturday 0700-1700*	*L_{10} 55 dBA except that a level of L_{10} 67 dBA will be permitted for a maximum period of 20 minutes in any one day*
All other times	*L_{10} 45 dBA*
Additionally, every day 2200-0700	*L_{max} 75 dBA*

ii) From the date 6 months after this rule becomes operative, sound emissions from sources other than Aircraft Movement, Aircraft Taxiing, Aircraft Engine Testing, and one Airshow per calendar year as defined under Rule 6.14.9.7 shall be restricted to the following limits set out in Table 2 measured at or within the boundary of any residential zone or at or within the notional boundary of any residential dwelling existing as at 19 September 2001 (and which is not under the ownership of the Airport Authority).

TABLE 2

Monday to Friday 0700-2200 *Saturday 0700-1700*	L_{10} *55 dBA*
All other times	L_{10} *45 dBA*
Additionally, every day 2200-0700	L_{max} *75 dBA*

Notes to Tables 1 and 2

1. *Measurements shall be taken at or within the boundary of any residential zone or at or within the Notional Boundary of any residential dwelling.*
2. *Measurement and assessment of noise shall be in accordance with the standards prescribed in NZS 6801:1991 Measurement of Sound and NZS 6802:1991 Assessment of Environmental Sound.*
3. *The noise shall be measured using a sound level meter complying with the international standards IEC 651 (1979) Sound level meters Type 1 and IEC 804 (1985) Integrating-averaging sound level meters Type 1.*

Explanation

Given the level of activity within the Ardmore Aerodrome Zone associated, for example, with the servicing of aircraft, there is potential for adverse noise effects. The noise limits specified in Table ~~1~~2 take effect 6 months after the provision becomes operative to provide a transitional period for those industries based at the Aerodrome to achieve compliance. The noise limits are based on the guidelines contained in New Zealand Standard 6802:1992 – Assessment of Environmental Noise. The provisions have been included to protect residents within close proximity to the ~~a~~Aerodrome from noise generated by activities other than those exceptions specified in the rule.

6.14.9.6 Engine Testing

i) All aircraft engine testing undertaken within the Ardmore Aerodrome ~~z~~Zone shall be restricted to the following noise limits set out in Table 3 below measured at or within the boundary of any residential zone or at or within the notional boundary of any dwelling existing as at 19 September 2001 (and which is not under the ownership of the Airport Authority):

TABLE 3

7am-10pm (24 hour rolling average)	L_{eq} *55 dBA*
10pm-7am (24 hour rolling average)	L_{eq} *45 dBA and* L_{max} *75 dBA*

ii) ~~From the date 6 months after this rule becomes operative, a~~Aircraft engine testing is required to be undertaken within ~~an~~ the appropriate engine testing enclosure, where it is safe to do so.

iii) Ten testing sessions per year undertaken between 9.00am and 4.00pm Monday to Friday are exempt from the requirements of Rules 6.14.9.6(i) and (ii) (a session being a series of engine test events carried out on the same day with a total duration of no more than 20 minutes).

Explanation
This rule recognises that there is operational necessity for testing aircraft engines as a core function of the Aerodrome, while limiting the potential for adverse effects on the amenity of surrounding residences, particularly at night. The rule ~~provides a grace period of 6 months to allow the Airport Authority to construct and test an appropriate engine testing enclosure while also allowing~~allows up to 10 tests per year during working hours for engines with particularly noisy characteristics.

6.14.9.7 Airshow

Notwithstanding anything to the contrary in Rule 6.14.9.2, one Airshow within the MBZ shall be permitted within any calendar year based on the following limitations:

i) *The flying programme for the Airshow shall be limited to a period of not more than 3 days plus 2 specified days' practice, with alternate days if unable to practice because of poor weather conditions.*

ii) *The hours permitted for the Airshow and practices shall be between the hours as specified in Table 4:*

TABLE 4

Monday to Thursday inclusive	*0700-2000*
Friday and Saturday	*0700-2000 (except that one only of these days may extend to 2200)*
Sunday	*0700-1830*

iii) *Practice for the Airshow shall be permitted only in the 2 weeks preceding the Airshow.*

iv) *The noise and environmental aspects of the flying programme for the Airshow and Airshow practice ("the flying programme") shall be reviewed by Council, which may request changes necessary to avoid unreasonable noise exposure on the community.*

v) *The flying programme shall be submitted to the Council no later than 90 days prior to the Airshow taking place. Both the Council and the Airport Authority are to consult with each other as to the noise issues and proposed changes to the flying programme. Comments are to be provided by Council within 10 working days of receipt of the proposed flying program.*

Explanation
Annual Airshows at ~~Ardmore~~ the Aerodrome are an integral part of the aerodrome operations and provide social and economic benefit to the local and wider community. This rule provides for annual Airshows at Ardmore to continue with limitations on the show duration and practice times and requires the Airport Authority and Council to work together to achieve best practice noise management.

6.14.9.8 Noise Management Plan

As from the date this rule becomes operative, the operation of ~~Ardmore~~ the Aerodrome shall be in accordance with the Ardmore Aerodrome Noise Management Plan. ~~other than that amendments to that Plan are required to be approved by a 55% majority of the Environmental Working Group detailed within the Noise Management Plan.~~ With the exception of those provisions contained in ~~Part Two~~Appendix A of that Plan, the Ardmore Aerodrome Noise Management Plan shall be reviewed on a 12 monthly basis ~~by the Environmental Working Group,~~ or ~~more often~~ as necessary to ensure Best Practicable Options in terms of noise management are achieved, in accordance with the document amendment procedures contained in ~~Section 1.4 of~~ that Plan. ~~The Council shall be the body responsible for calling and administering meetings of the Environmental Working Group and shall call meetings on a three monthly basis or more often as necessary.~~

~~The NMP as a minimum shall contain details relating to:~~

~~☐ Operations and Noise Abatement Procedures to achieve compliance with Designation/District Plan Rules;~~

~~☐ Methods for dealing with Complaints and Non-Compliances; and~~

~~Establishment and operation of an engine testing computer programme providing ongoing information regarding compliance with the engine testing rule;~~

~~☐ Incorporation of a table regarding engine testing to advise residents of sound levels and time periods that would achieve compliance with the engine testing rule;~~

~~☐ Encouraging departing aeroplanes to remain within the flight planes until they reach an altitude of 500 feet;~~

~~☐ Encouraging simulated engine failures within the flight planes only;~~

~~Encouraging helicopters to arrive and depart the Aerodrome at no less than 500 feet above the Aerodrome boundary, where this can be achieved safely.~~

~~The Noise Management Plan shall not be inconsistent with Rule 6.14.9 of the Papakura District Plan, including any subsequent amendments, provided that the Noise Management Plan may impose more stringent requirements on the operation of the Ardmore Aerodrome than those contained in Rule 6.14.9.~~

Explanation

Council recognises that there are many aspects of aerodrome operations which are best controlled through a noise management plan as opposed to specific rules due to potential conflict with other regulations and the need to allow aspects of aerodrome operations to be continually modified and improved in response to industry changes and to achieve best practice noise management. ~~*The Noise Management Plan sets out specific*~~

~~document amendment procedures requiring Council and community input before any changes are made and puts in place a Complaints Committee to act on complaints arising from aerodrome operations. For the sake of clarity and to ensure that the Noise Management Plan can have effective value, it is recognised that the Noise Management Plan may impose more stringent standards on the operation of the Aerodrome than those required by Rule 6.14.9, provided that these are acceptable to the Environmental Working Group.~~ The objectives of the Noise Management Plan are to:

(a) Provide the basis for ongoing noise management and mitigation at the Aerodrome;

(b) Establish the Ardmore Airport Noise Consultative Committee, as set out in the Noise Management Plan, which replaces the Environmental Working Group;

(c) Define roles and responsibilities in relation to airport noise management;

(d) Provide a repository of agreed noise abatement procedures;

(e) Encourage the parties to work together co-operatively, sharing information and reaching decisions by consensus and agreement.

6.14.9.9 Affected Dwellings

The Airport Authority shall, if so required by the owners of the Affected Dwellings defined in (ii) below, pay for any remedial or supplementary works that are considered necessary to ensure that the internal acoustic environment of habitable space in those dwellings does not exceed a maximum of L_{dn} 40 dBA with all external doors and windows closed as the result of aircraft movements represented in the Air Noise Boundary noise contour as shown on District Plan Maps ~~R2~~C5, C6, D5 and D6. Where compliance with the design level relies on doors and windows being closed, alternative approved ventilation in accordance with the Building Code shall be provided. This rule is subject to the following:

i) Notice of such requirement must be given in writing to the Registered Office of the Airport Authority within 3 months of the receipt by the owners of written notice from the Airport Authority advising the owners of the operative date of this rule and the rights conferred by this rule.

ii) *The Affected Dwellings are deemed to be those existing habitable dwellings located ~~both~~ within the L_{dn} ~~63~~ 65 dBA Air Noise Boundary contour ~~and on Lots 1-3 and Lots 21-24 DP 173310, Lot 1 DP 179452, Pt Lot 3 DP 19289, Part Lot 1 DP 50029, Part allotment 30 Parish of Papakura~~ as at 19 September 2001. In any case where any existing habitable dwelling is in the course of completion, extension or repair as at 19 September 2001, then the notice to the Airport Authority referred to above must be given within 3 months following the date on which the dwelling is certified as complete by the Council pursuant to the Building Act 1991, or the date of written notice from the Airport Authority advising the Owners of the operative date of this rule, whichever is the later.*

iii) *For the purposes of this rule engineers with appropriate qualifications appointed by the Airport Authority and engineers with appropriate qualifications appointed by Council shall act as the certifiers for the purpose of determining the nature and extent of the remedial or supplementary works required pursuant to this rule and their determination shall bind the Airport Authority, the Council and the Owners respectively in relation to their various interests pursuant to this rule.*

Subject to the foregoing, the obligations of the Airport Authority under this rule shall not extend to any subsequent structures, alterations or additions to any of the Affected Dwellings commenced after 19 September 2001.

Explanation
This rule has been included to allow those persons living within the ~~Ldn 63 dBA~~Air Noise Boundary ~~contour~~ to seek compensation from the Airport Authority to ensure that the internal acoustic environment of habitable space in those dwellings does not exceed a maximum of L_{dn} 40 dBA with all external doors and windows closed.

6.14.9.10 Monitoring

The Airport Authority shall be responsible for monitoring and reporting of noise (without limiting Council's powers) associated with the Aerodrome and flight activity. Such monitoring shall include:

i) *Calculation of aircraft noise as stated in NZS 6805:1992 (s1.4.2.2) using the FAA Integrated Noise Model (INM) and records of actual aircraft operations and calculated as ~~the~~*

~~busiesta~~ 3 month rolling logarithmic average. ~~for any one year.~~ The results of this calculation together with underlying inputs shall be reported to the Council ~~on a three monthly basis~~annually. The INM Study is to be developed by a recognised user of the INM with strict adherence to the policies and procedures specified in the INM User's Guide. An executable version of the Study shall be provided to Council via CD-ROM or other suitable electronic means. The use of substitution or surrogate aircraft within the model will be notified in the reporting procedure and will be as agreed between the Airport Authority and Council experts. The INM model used to assess compliance is to be the version used to develop the District Plan contours. The contours may be updated with later versions of the INM in future reviews of the District Plan. When the calculated 3 month average reaches L_{dn} 64.5 dBA, physical noise monitoring shall be carried out at reasonable intervals ~~on an on-going basis to confirm~~until such time as compliance with Rule 6.14.9.1 is demonstrated.

ii) Physical noise monitoring shall be undertaken for a period of no less than one month within one year of the date of this rule becoming operative. ~~The results of this further monitoring shall be provided to the Council.~~ Physical noise monitoring shall be undertaken for a period of no less than one month every two years following the initial physical noise monitoring. The results and underlying inputs of this monitoring shall be provided to the Council within 6 weeks of the monitoring being undertaken.~~The results of this further monitoring shall be provided to Council within one month of the monitoring being undertaken.~~

iii) The recording of Ex Military jet aircraft movements on a monthly basis, with any ~~with such~~ records kept to be provided to Council ~~on a quarterly basis or~~in collated form within 48 hours ~~if required~~upon request by Council.

iv) The administration and logging of ~~all~~ engine testing ~~including exempt~~ activity, with ~~such~~ records to be provided to Council ~~on a quarterly basis or~~in collated form within 48 hours ~~if required~~upon request by Council.

v) Further such contingency monitoring as required by the ~~Papakura District~~ Council if the Council becomes aware of significant changes to Aerodrome operations.

Noise from the following Operation shall be excluded from the compliance calculations set out in i) to iii) above:

a. *Aircraft landing in an Emergency;*
b. *Emergency Flight operations; and*
c. *One airshow per year as defined under Rule 6.14.9.7.*

~~***6.14.9.11 Non-complying Activities***~~

~~*For the sake of clarity any activity that does not comply with the above rules in Rule 6.14.9 shall be a non-complying activity in accordance with the definition of Non-Complying Activity set out in Part 10 of Section One (General Papakura) of the District Plan.*~~

4.15 Amend Part 6 General Requirements for Industrial Zones Rule 6.15 by adding immediately after the heading "1. Noise", and before the first paragraph (a) of that subsection the following words:

Except in relation to the Ardmore Aerodrome Zone:

ANNEXURE B

AMENDMENTS TO THE EXISTING DESIGNATIONS CONFIRMED BY ARDMORE AIRPORT LIMITED

DESIGNATION 222 - ARDMORE AERODROME

Designation Notation:	Ardmore Aerodrome
Address:	Ardmore Aerodrome, Papakura.
Legal Description :	DP 190833 Lot 1 DP 107840 Lots 1, 2 DP 171923 Lots 22, 41 DP 173738 Lots 200–209 DP 173739 Lots 300–307 (Leasehold DP 205039 Lots 300,308-310) DP 173740 Lots 1-7, 11, 13 DP 173741 Lots 10, 14-18 (Leasehold DP 199587 Lots 16, 17 and 150) DP 173742 Lots 19-21, 25, 30-38) DP 173743 Lots 26-29, 39, 40, 42-65, 67-70 DP 178388 Lots 71-85 (Leasehold DP 199586 Lots 15, 78 and 149) DP 179798 Lots 86-97, 113-129, 141-148 DP 179799 Lots 98-112, 130-140 DP 192624 Lots 8, 9 DP 171742 Lot 1.
Requiring Authority :	Ardmore Airport Limited
District Plan:	Papakura District Council Operative District Plan 1999
District Plan Reference:	WP47, WP49, ~~WP50, R10, U17~~Ardmore Airport Height Surfaces

ARDMORE AERODROME. SPECIFICATION FOR APPROACH AND, LAND USE AND NOISE CONTROLS

1 INTRODUCTION

The purpose of this specification is to define the approach and land use controls over part of Papakura District in the vicinity of the Ardmore Aerodrome and the controls utilised to manage the adverse effects of noise generated from the Aerodrome.

This specification is designed to ensure the continued safety and efficiency of aircraft operations at the Ardmore Aerodrome while managing the Aerodrome to appropriately manage the effects of noise generated from the Aerodrome.

2 LOCATION OF RUNWAY CENTRELINES

At the outer ends of the approach surfaces, the extended centrelines for the two sealed runways pass through the following co-ordinates:

Runway 03/21	Northeast End (A)	685621.18N 321336.68E
	Southwest End (C) ~~680400~~680459.82~~.42~~N	
	~~315994.05~~316054.82E	
Runway 07/25	East End (B)	683324.14N 322308.29E
	West End (D)	683321.53N 314846.00E

The above c-ordinates are in terms of the Mt Eden Meridional Circuit Grid, Geodetic 1949. (Scale Factor 0.9999)

The co-ordinates for Runways 03/21 and 07/25 are based on surveyed fixes of the threshold centreline markings extended for 3000 metres outward from the two bases.

The centreline for the grass runway 03/21 is parallel to and 150 metres from the centreline of the sealed runway 03/21.

3 LOCATION OF BASES

For Ardmore Aerodrome the bases for the approach surfaces for the sealed runways are each 90 metres long, i.e. extending for 45 metres at each side of the runway centreline. The bases are perpendicular to the runway centrelines, are horizontal, and the elevation of each base is the ~~highest~~ ground level ~~along the~~on the runway centreline ~~between the runway end and the end of the strip~~at the base location.

The centres of the bases are located at the following co-ordinates:

Runway 03/21	Northeast End (R)	683 524.68N 319 191.24N
	Southwest End (S)	~~682 496~~682 556.~~92N~~52N ~~318 139~~318 200.48E
Runway 07/25	East End(P)	683 323.10N 319 308.59E
	West End (Q)	683 322.58N 317 845.70E

The above co-ordinates are in terms of the Mount Eden Meridional Circuit Grid Geodetic 1949. (Scale Factor 0.9999)

Bases P, Q and R coincide with the physical ends of the sealed runways. Base S is inset ~~60~~ 25 metres ~~beyond~~ from the southwest end of the runway.

The level for Base S is R.L. 32.~~12~~ 32 and for Base R is R.L. 32.87 ~~both levels corresponding to the level on the sealed surfaces at the ends of sealed runway 03/21~~.

The level for base Q is R.L. 29.79 and for Base P is R.L. 33.71 ~~both levels corresponding to the level on the sealed surfaces at the ends of sealed runway 07/05~~.

The bases for the grass runway 03/21 lie 30 metres beyond the ends of the runway and are 80 metres long extending for 40 metres at each side of the runway centreline.

4 APPROACH SURFACES

The approach surfaces defined in this specification include take-off/climb requirements. Each approach surface rises from a base.

Approach surfaces for the sealed runways rise from P, Q, R and S respectively at a gradient of 2.5 percent (1 in 40) and continue upwards and outwards for a horizontal distance of 4000 metres from the strip edge. The length of the approach surface is 3000 metres. Each approach surface is symmetrically disposed about the extended centreline and its sides diverge uniformly outwards at a rate of 10 percent.

Approach surfaces for the grass runway rise from bases defined for the runway at a gradient of 2.5 percent (1 in 40) for a horizontal distance of 2600 metres. These approach surfaces are symmetrically disposed about the extended centreline of the runway strip and their sides each diverge uniformly outwards at a rate of 10 percent.

5 SIDE CLEARANCES (TRANSITIONAL SLOPES)

Side clearances rise upwards and outwards from the sides of the approach surfaces for the sealed runways at a gradient of 1 in 7 to intercept the horizontal surface at 80 metres AMSL.

For the grass runway, side clearances rise upwards and outwards from the sides of the approach surfaces at a gradient of 1 in 5 to intercept the horizontal surface at 80 metres AMSL.

6 HORIZONTAL SURFACE

The horizontal surface overlays the aerodrome and extends from above the Aaerodrome for a radius of 4000 metres from bases P and Q. This flat horizontal surface is at 80 metres AMSL. The Aaerodrome level is 35 metres AMSL. This corresponds to a level 1.5 metres above reference mark "J" on S.O. 49594.

7 CONICAL SURFACE

The sloping conical surface rises upwards and outwards from the periphery of the horizontal surface at a gradient of 5 percent (1 in 20) for a further 2100 metres until it reaches a height of 185 metres AMSL.

8 **HEIGHT RESTRICTION**

No building, structure, mast, pole, tree or other object shall penetrate any of the approach surfaces, transitional surfaces, horizontal surface or conical surface as defined in this specification.

Provided that where there is any conflict between these height control limits and the Auckland International Airport height controls, the lower height restriction shall apply.

If developments and land uses within the area below the horizontal surface or conical surface are proposed to penetrate either of these two surfaces, and will also be higher than 9 metres above the terrain, then under Section 176 of the Resource Management Act 1991, the proposal shall be referred for consent to the Airport Authority.

9 **LAND USE RESTRICTION: RURAL AERODROME PROTECTION AREAS (FIXED WING AIRCRAFT OPERATION)**

The Rural Aerodrome Protection Areas are located under each of the flight paths. The areas are shown stippled on plan WP49.

The Rural Aerodrome Protection Area extends from the runway bases P, Q, R and S for a distance of 900 metres.

The land use restriction is essential as aircraft pass over the Rural Aerodrome Protection Areas on landing and take off at low altitudes. These areas are subject to a relatively greater risk of aircraft accident than elsewhere.

Land uses within the Rural Aerodrome Protection Areas which may detrimentally affect the safe operation of aircraft should be avoided.

Within the Rural Aerodrome Protection Areas, any new proposals for buildings or solid structures exceeding 4 metres in height above the ground level shall be referred for consent to the Airport Authority. This specific height restriction overrides the general height restriction in (8) above.

In assessing buildings and structures the Airport Authority will consider the need for the proposal, siting, height and construction materials.

In considering other land uses, the Airport Authority will take into account possible height intrusion, the likelihood of dust, glare, electrical interference and the possibility of the proposal attracting birds to the area or promoting the gathering of people in the area.

In all other respects, the complementary provisions of the District Plan for the area shall apply but subject to the restrictions contained in this specification.

10 ARDMORE AERODROME SOUND EMISSIONS

The Aerodrome shall be operated in compliance with Rule 6.14.9 *Ardmore Aerodrome Zone Sound Emissions* of the Papakura District Plan (Urban Section), including any subsequent amendments.

11 BEST PRACTICABLE OPTION

In administering the conditions of this designation, the Airport Authority shall adopt the best practicable options including, but not limited to, management procedures and Operational Controls to reduce the exposure of the community to noise from Aircraft and Aerodrome activities.

12 NOISE MANAGEMENT PLAN

The operation of Ardmore Aerodrome shall be in accordance with the Ardmore Airport Ltd Noise Management Plan~~, including amendments to that Plan approved by a 60% majority of the Environmental Working Group detailed within the Noise Management Plan~~. With the exception of those provisions contained in ~~Part Two~~Appendix A of that ~~p~~Plan, the Ardmore Airport ~~Ltd~~ Noise Management Plan shall be reviewed on a 12 monthly basis, or as necessary to ensure Best Practicable Options in terms of noise management are achieved, in accordance with the document amendment procedures contained in ~~Section 1.4~~that Plan.

13 MONITORING

The Airport Authority shall be responsible for the monitoring of noise associated with the Aerodrome and flight activity. Such monitoring shall include all matters detailed in Rule 6.14.9.10 of the Papakura District Plan (Urban Section), including any subsequent amendments.

Advice Notes:

~~935637.01 10/09/2004 15:46~~~~935637.04 20/09/2004 15:49~~~~935637.08 1/11/2004 16:05~~935637.08 4/11/2004 12:54

1 This amended Designation is to replace the existing Designation presently contained within the Operative Papakura District Plan.

2 Planning Maps WP47 (the Designated Area), WP49 (Ardmore Airport Protection Areas), ~~WP5O, R1O, U17~~and Ardmore Airport Height Surfaces are to be amended to reflect the alterations to the Approach Surfaces detailed above and as shown on Harrison Grierson Plan 23-6171 Rev ~~A~~ B attached.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA438/2012
[2012] NZCA 601

BETWEEN	CANTERBURY REGIONAL COUNCIL Appellant
AND	INDEPENDENT FISHERIES LIMITED First Respondent
AND	R S PEEBLES Second Respondent
AND	CASTLE ROCK ESTATE LIMITED Third Respondent
AND	G F CASE, M M CASE AND M G M CASE Fourth Respondents
AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Respondent
AND	CLEARWATER LAND HOLDINGS LIMITED Sixth Respondent
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY Seventh Respondent
AND	CHRISTHCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL, SELWYN DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Eighth Respondents

CA505/2012

AND BETWEEN	CHRISTCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Appellants

AND	INDEPENDENT FISHERIES LIMITED First Respondent
AND	R S PEEBLES Second Respondent
AND	CASTLE ROCK ESTATE LIMITED Third Respondent
AND	G F CASE, M M CASE AND M G M CASE Fourth Respondent
AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Respondent
AND	CLEARWATER LAND HOLDINGS LIMITED Sixth Respondent
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY Seventh Respondent
AND	SELWYN DISTRICT COUNCIL Eighth Respondent

CA507/2012

AND BETWEEN	MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY Appellant
AND	INDEPENDENT FISHERIES LIMITED First Respondent
AND	R S PEEBLES Second Respondent
AND	CASTLE ROCK ESTATE LIMITED Third Respondent
AND	G F CASE, M M CASE AND M G M CASE Fourth Respondent

AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Respondent
AND	CLEARWATER LAND HOLDINGS Sixth Respondent
AND	CANTERBURY RESIONAL COUNCIL, CHRISTHCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL, SELWYN DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Seventh Respondents

CA514/2012

AND BETWEEN	SELWYN DISTRICT COUNCIL Appellant
AND	INDEPENDENT FISHERIES LIMITED First Respondent
AND	R S PEEBLES Second Respondent
AND	CASTLE ROCK ESTATE LIMITED Third Respondent
AND	G F CASE, M M CASE AND M G M CASE Fourth Respondent
AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Respondent
AND	CLEARWATER LAND HOLDINGS LIMITED Sixth Respondent
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY Seventh Respondent

	AND	CANTERBURY REGIONAL COUNCIL, CHRISTCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Eighth Respondents

Hearing:	20 and 21 November 2012
Court:	White, Miller and Asher JJ
Counsel:	D J Goddard QC, M S R Palmer and J V Ormsby for Appellants in CA438/2012, CA505/2012 and CA514/2012 M E Casey QC and K G Stephen for Appellant in CA507/2012 F M R Cooke QC, P A Joseph and P A Steven for Respondents J M Appleyard for Christchurch International Airport Ltd as Intervener
Judgment:	20 December 2012 at 10.00am

JUDGMENT OF THE COURT

A **Selwyn District Council is granted an extension of time to appeal.**

B **Christchurch International Airport Ltd is granted intervener status.**

C **The appeals are dismissed.**

D **Costs are reserved.**

REASONS OF THE COURT

(Given by White J)

Table of Contents

Introduction

[1] The principal issue on these appeals is whether the High Court erred in deciding that two decisions of the Minister for Canterbury Earthquake Recovery (the Minister)[1] relating to the use of land in greater Christchurch were unlawful in terms of the Canterbury Earthquake Recovery Act 2011.[2]

[2] The Minister's two decisions, both made in October 2011 under s 27 of the Act, were:

(a) to amend the 1998 Canterbury Regional Policy Statement (RPS) by adding a new chapter (chapter 22) to set in place an airport noise contour around Christchurch International Airport within which noise sensitive activities, including residential activities, were to be avoided (excepting a limited number of households in Kaiapoi); and

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1 Canterbury Earthquake Recovery Act 2011 [the Act], s 4(1), definition of "Minister".

2 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 [the High Court decision].

(b) to revoke Proposed Change 1 (PC1) to the 1998 Canterbury RPS and to insert a new chapter (chapter 12A), which set an urban limit for greater Christchurch and provided for urban development of designated greenfield areas over the next 35–40 years, including space for 47,225 residential properties.

[3] The Minister also made decisions in November 2011 to amend the District Plans of the Christchurch City Council and Waimakariri District Council to give effect to some of the residential zoning anticipated by the new chapters added to the RPS. These decisions were not challenged.

[4] The effect of the Minister's two October 2011 decisions was to bring to an end long-standing issues under the Resource Management Act 1991 (the RMA) relating to the RPS and PC1 and various unresolved appeals to the Environment Court, including appeals by respondents.[3]

[5] The validity of the two October 2011 decisions was challenged in High Court judicial review proceedings by the respondents in their capacity as land owners affected by restrictions on the use of their land resulting from the decisions. The respondents claimed successfully in the High Court that the Minister's decisions were unlawful on the grounds that:

(a) they were made for purposes not authorised by the Act;[4]

(b) they involved the misapplication of the Minister's power under s 27 of the Act;[5]

(c) the exercise of the Minister's power was not "necessary" in terms of s 10(2) of the Act;[6] and

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3 See, for example, the following interlocutory applications in the appeals: *Prestons Road Ltd v Canterbury Regional Council* [2011] NZEnvC 131, [2012] NZRMA 283; and *MHR Group Ltd v Canterbury Regional Council* [2011] NZEnvC 215. The appeals were consolidated and a full list of the appeals and parties is attached as a schedule to *MHR Group Ltd v Canterbury Regional Council*.

4 High Court decision, above n 2, at [64]–[105].

5 High Court decision, above n 2, at [106]–[127].

6 High Court decision, above n 2, at [128]–[150].

(d) the exercise of the Minister's power was fundamentally flawed because it had the effect of denying the respondents access to the Courts, namely the Environment Court.[7]

[6] The effect of the High Court decision was to invalidate the Minister's two decisions to add chapters 12A and 22 to the RPS and to reinstate PC1 and the Environment Court proceedings. An application for a stay of the High Court decision was declined.[8] It is understood that since the High Court decision the Environment Court proceedings have been pursued.

[7] The Minister and the councils responsible for local government in greater Christchurch[9] have appealed to this Court against the High Court decision essentially on the grounds that the Minister's decisions were within the purposes of the Act and that it was necessary for him to proceed as he did. In this Court their principal submissions are, first, that the Minister's decisions achieve planning certainty that is necessary for earthquake recovery for the people of greater Christchurch and their councils; and, secondly, that the decisions avoid council staff distraction in the Environment Court appeals.

[8] These submissions were supported by affidavit evidence from council officers confirming that the addition of chapters 12A and 22 provided planning certainty that assisted earthquake recovery. Council officers deposed that the 1998 Canterbury RPS had provided little specific direction for urban development, which was essentially driven by developers obtaining private plan changes, and that this had led to inefficiencies, uncertainties and a lack of cross-boundary co-ordination. PC1 was an attempt to overcome these difficulties. Council officers also deposed that the need for planning certainty was even greater following the earthquakes because of the need to make decisions for the repairing or rebuilding of

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7 High Court decision, above n 2, at [151]–[182].

8 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1909, [2012] NZAR 785.

9 "Council" is defined in s 4(1) of the Act as meaning the Christchurch City Council, the Canterbury Regional Council (Environment Canterbury), the Selwyn District Council, or the Waimakariri District Council, and "greater Christchurch" is defined as meaning the districts of the Christchurch City Council, the Selwyn District Council and the Waimakariri District Council, including the coastal marine area adjacent to those districts.

infrastructure, prioritising scarce resources, providing replacement housing and investment certainty for developers.

[9] As in the High Court, Christchurch International Airport Ltd was granted intervener status in this Court with the right to file written submissions but not to make oral submissions unless called on by the Court. We also received submissions for the Councils on all aspects of the appeals.[10]

[10] With the assistance of counsel for all parties and as envisaged by s 82 of the Act, this Court has expedited the hearing and determination of the appeals.

[11] As the issues on these judicial review appeals depend largely on the interpretation of the Act,[11] we propose to consider the issues in the context of the relevant provisions of the Act before referring in further detail to the Minister's two decisions and their impact on the respondents' rights.

The Canterbury Earthquake Recovery Act 2011

Overview

[12] In interpreting the relevant provisions of the Act, we are to ascertain their meaning from their text and in light of their purpose.[12] In determining purpose we have regard to both the immediate and general legislative context, as well as the social, commercial and other objectives of the Act.[13] We also recognise that the legislation should be interpreted in a realistic and practical way in order to make it work.[14]

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10 See *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1177.

11 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53]–[54]; and *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [59].

12 Interpretation Act 1999, s 5.

13 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

14 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA); and JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 205.

[13] In the present case the relevant context is obviously the devastation caused to greater Christchurch by the Canterbury earthquakes,[15] the Government's establishment of the Canterbury Earthquake Recovery Authority (CERA)[16] and Parliament's enactment, with cross-party support,[17] of legislation imposing obligations and conferring wide powers on the executive branch of government to make decisions to ensure the expeditious recovery of Christchurch in the wake of both the September 2010 and February 2011 earthquakes.[18] There can be little doubt from the legislation that Parliament considers it to be in the national interest to accord priority to the recovery of Christchurch.

[14] At the same time, as the Act itself recognises, the powers conferred by Parliament on the Executive in this context are not unfettered. Parliament was concerned to ensure that, notwithstanding the need to confer extraordinary powers on the Executive to deal with an extraordinary situation, the rule of law was protected. Hence the powers conferred on the Minister are not untrammelled. The Act contains express provisions constraining the exercise by the Minister of his powers and there is a right to challenge the exercise of the powers by judicial review proceedings, such as the present.

Constraints on the Minister

[15] It is common ground on these appeals that to be valid the Minister's decisions must meet the requirements of s 10(1) and (2) of the Act, which provide:

> **10 Powers to be exercised for purposes of this Act**
>
> (1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.
>
> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.

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15 Defined in s 4(1) of the Act as meaning any earthquake in Canterbury on or after 4 September 2010 and including any aftershock.

16 By the State Sector (Canterbury Earthquake Recovery Authority) Order 2011 and see the definition of "CERA" in s 4(1) of the Act.

17 (14 September 2010) 666 NZPD 13959–13969; and (12 April 2011) 671 NZPD 18224–18238.

18 The current Act replaced the Canterbury Earthquake Response and Recovery Act 2010.

[16] The need for the Minister's decisions to be "in accordance with the purpose of the Act" reflects well established principles of administrative law.[19] But, as Mr Cooke QC for the respondents correctly pointed out, the need here is reinforced and strengthened by the express obligation imposed on the Minister by s 10(1) to "ensure" that he exercises his powers under the Act "in accordance with its purposes".

[17] Before referring to the purposes of the Act, we note that the second important constraint on the exercise by the Minister of his powers is imposed by s 10(2). The Minister may exercise his powers where he "reasonably considers it necessary". We received a range of submissions from the parties to this appeal as to the meaning of this crucial provision, but by the end of the hearing the differences between them had narrowed significantly.

[18] In our view, the meaning of the provision is clear when the focus is on its text and purpose in the context of this Act. In short, two elements are involved:

(a) The Minister must consider the exercise of the power "necessary", that is, it is needed or required in the circumstances, rather than merely desirable or expedient, for the purposes of the Act.

(b) The Minister must consider that to be so "reasonably", when viewed objectively, if necessary by the Court in judicial review proceedings such as these. The Minister must therefore ask and answer the question of necessity for the specific power that he intends to use. This means that where he could achieve the same result in another way, including under another power in the Act, he must take that alternative into account.

[19] Mr Casey QC for the Minister and Mr Goddard QC for the Councils argued, at least initially, that the word "necessary" should be interpreted to mean "expedient

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19 *Unison Networks Ltd v Commerce Commission*, above n 11, at [53]–[55].

or desirable",[20] while Mr Cooke supported "indispensible, vital, essential". We prefer the primary, ordinary meaning of "needed" or "requisite", which in turn is defined as "required by circumstances".[21] It seems to us unlikely that Parliament would have intended either of the more extreme definitions here. If Parliament had intended a different standard, it would have said so expressly.

[20] The expression used is not, as is commonly the case, "reasonably necessary".[22] Here "reasonably" qualifies "consider" not "necessary". The Minister must "reasonably consider" the exercise of the power to be "necessary". The purpose of s 10 is to provide a safeguard against the exercise by the Minister of powers which carry significant consequences,[23] including the overriding of normal processes, procedures and appeals under the RMA.[24] Accordingly, the ordinary meaning of "reasonably", which results in a relatively high threshold, is appropriate in the context of the Act.

[21] While it was common ground that the Court was able to review the exercise of the power objectively, the parties disagreed as to the standard of review involved in the requirement for the Minister "reasonably" to consider the exercise of the power necessary. Mr Goddard submitted that this meant that the Court needed only to be satisfied that the Minister's decision was "reasonably" open to him and that the Court should avoid a review of the merits of the decision. Mr Cooke submitted, however, that the Court had to examine the Minister's decision closely in order to be satisfied that it was one that the Minister could "reasonably" consider was truly necessary.

[22] We agree with Mr Goddard that a review of the merits of the decision, as on an appeal,[25] is to be avoided. We also accept that the decision should not be

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20 On the basis of *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 178; and *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC) at 524.

21 *Oxford English Dictionary* (online edition), definitions of "necessary" and "requisite".

22 See, for example, *Ports of Auckland Ltd v Kensington Swan* CA84/90, 12 April 1990 at 10 and 13; and s 71(1) of the Act itself.

23 (12 April 2011) 671 NZPD 18130, 18140 and 18163.

24 The Act, ss 15, 23–25 and 27.

25 *Austin, Nicholls & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

reviewed on the basis of *Wednesbury* unreasonableness or irrationality because the requirement to consider "reasonably" imports a higher standard. Indeed it was not argued that the decision was so unreasonable that no reasonable person could have made it. The Court must be satisfied that the Minister's consideration of necessity was reasonable. This will involve the Court being satisfied that the Minister did in fact consider that the exercise of the particular power was necessary to achieve a particular purpose or purposes of the Act at the time the power was exercised, taking into account the nature of the particular decision, its consequences and any alternative powers that may have been available. In making this assessment, the Court will give such weight as it thinks appropriate to the Minister's expertise and opinion, while recognising that Parliament has enacted s 10(2) as a constraint on the exercise by the Minister of his powers under the Act.

[23] The first two issues in this case, when refined, are therefore whether the Minister's two decisions were:

(a) "in accordance with the purposes of the Act"; and

(b) "necessary" in the sense of being needed, rather than merely expedient or desirable, when viewed objectively.

The purposes of the Act

[24] The purposes of the Act are prescribed by s 3, which provides:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
>
> (c) to provide for the Minister and CERA to ensure that recovery:

(d) to enable a focused, timely, and expedited recovery:

(e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:

(f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:

(g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:

(h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

(i) to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010.

[25] As already noted,[26] a number of expressions in this provision are separately defined in s 4(1), namely "greater Christchurch", "council", "the Canterbury earthquakes", the "Minister" and "CERA". And so too, significantly, are the expressions "recovery" and "rebuilding":

recovery includes restoration and enhancement

rebuilding includes—

(a) extending, repairing, improving, subdividing, or converting any land, infrastructure, or other property; and

(b) rebuilding communities

[26] Both of these important definitions are inclusive.[27] This means that in the context of this Act Parliament intended to make it clear that the expressions are to be interpreted broadly with extended meanings.

[27] The expression "recovery", which features in the title to the Act and in several of the Act's prescribed purposes, therefore means here "the fact of returning to an improved economic condition",[28] including restoration and enhancement, the latter clearly incorporating the concept of improvement. The scope of the Act is

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26 Above at fns 1, 9, 15 and 16.
27 Burrows and Carter, above n 14, at 417–418.
28 *Oxford English Dictionary*, above n 21.

therefore not limited merely to restoring greater Christchurch to its previous state but extends to enhancing or improving it.

[28] At the same time we accept Mr Cooke's submission that the concept of "recovery" is not, as Mr Goddard submitted, so open ended that almost anything is covered. As the references to "recovery", "restoration", "rebuilding" and "repairing" make clear, the starting point must be to focus on the damage that was done by the earthquakes and then to determine what is needed to "respond" to that damage. But, as the purposes and definitions also make clear, the response is not limited to the earthquake damaged areas. Recovery encompasses the restoration and enhancement of greater Christchurch in all respects. Within the confines of the Act, all action designed, directly or indirectly, to achieve that objective is contemplated.

[29] The expression "rebuilding" is to be given a broad meaning extending well beyond merely restoring physical structures, to cover not only "improving" land, infrastructure and other property, but also rebuilding "communities". The reference to "improving" both links to and reinforces the reference to "enhancement" in the definition of "recovery", and the reference to rebuilding "communities" confirms that the scope of the Act is intended to reach beyond physical restoration and to encompass the people in the communities of greater Christchurch.

[30] We turn then to the first specific purpose, which is:

> ... to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:

[31] This purpose confirms that the Act is designed to achieve the full recovery of greater Christchurch. That this recovery extends beyond restoring physical structures to rebuilding communities is reinforced by the sixth and seventh purposes, which are:

> (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:
>
> (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:

[32] The latter purpose puts beyond doubt Parliament's intention that the focus of the Act is on the recovery of all aspects of the "well-being" of the communities of greater Christchurch. As Mr Cooke realistically acknowledged in the course of argument, this purpose has the effect of broadening the scope of the Act significantly.

[33] The second purpose of the Act reinforces the focus on the communities of greater Christchurch by expressly recognising that there is to be community participation in the planning of the recovery of affected communities. As we shall see, subsequent provisions in the Act provide for community participation and involvement in the recovery process.

[34] At the same time, as the second purpose also recognises, community participation is not intended to impede "a focused, timely, and expedited recovery". The requirement for "a focused, timely and expedited recovery" is then reiterated in the fourth purpose. These references to a timely and expedited recovery are reflected in other provisions of the Act which require a timely recovery process, including the time permitted for the development of a draft Recovery Strategy,[29] obligations on the court and the expiration of the Act after five years.[30]

[35] The third purpose makes it clear that responsibility for ensuring recovery is to be imposed on the Minister and CERA. The imposition of this responsibility on the Executive is significant in the context of this case.

[36] Finally, the eighth purpose makes it clear that Parliament intends to provide "adequate statutory power" in the Act to achieve the preceding seven purposes. These powers are therefore among the "appropriate measures" referred to in the first purpose of the Act.

[37] Applying the relevant definitions to the purposes of the Act, it is clear that Parliament intended a broad, all-encompassing approach to be adopted. We note that the definitions of "recovery" and "rebuilding", their impact on the purposes of the Act and the nature and scope of the purposes when read together, especially the

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[29] Section 12(2).
[30] Sections 82(2) and 93(1).

seventh purpose, do not seem to have been taken into account by Chisholm J in the High Court or by the respondents in their submissions seeking to uphold his decision.[31]

[38] We do not agree with Mr Cooke that a narrower approach to the interpretation of the purposes should be adopted because of the nature of the powers conferred by the Act. The fact that the powers are significant and must be exercised for the purposes of the Act does not mean that the purposes should be interpreted restrictively when Parliament has made it clear that they should be interpreted broadly. The Act is designed to confer adequate powers on the Executive to achieve the full social, economic, cultural and environmental recovery of greater Christchurch in the widest sense.

[39] When the Act is interpreted in this way, we consider that a decision designed to achieve planning certainty may be within its purposes. We do not agree with Mr Cooke that "certainty in RMA planning" is not within the purposes of the Act because it is not referred to explicitly in s 3. In our view the wide nature of the powers in s 3 and the overarching purpose of achieving the full social, economic, cultural and environmental recovery of Christchurch in a timely and expeditious manner do envisage providing the people of Christchurch and their businesses with RMA planning certainty. This conclusion is also reinforced by the specific provisions of the Act that override the RMA[32]. Whether in a particular case such a decision is within the Act's purposes will, however, depend on the nature and consequences of the particular decision considered in the context of both the RMA and this Act.

[40] In the context of the RMA, planning certainty is a relative concept. In a legal sense, RMA documents such as regional policy statements and regional and district plans provide certainty until they are reviewed and amended[33] and a resource consent granted in terms of a district plan will enable the holder to implement the consent.[34] Once an RMA document is reviewed and amended, however, any long-term certainty

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31 High Court decision, above n 2, at [49]–[63] and [86].
32 Sections 15, 23, 24, 25 and 27.
33 Resource Management Act 1991 (RMA), s 79.
34 RMA, s 123.

provided by its predecessor will have ended. In a practical sense, steps taken in accordance with a district plan or a resource consent, such as a subdivision or new construction, will alter the basis for any RMA document review and amendment, but will not otherwise necessarily constrain the review. It is therefore normal for councils and their officers to operate under a degree of uncertainty.

[41] In the context of the present Act, planning certainty is also a relative concept. As we shall see,[35] a decision made under s 27 would be overtaken by the Recovery Strategy, a draft of which had to be developed within nine months after the date on which the Act came into force (19 April 2011).[36] The Act itself therefore contemplates a period of uncertainty during which there is an opportunity for public participation. Decisions made in this period under s 27 are necessarily provisional.

Implementation of purposes

[42] The purposes of the Act are implemented by the subsequent provisions in pt 2, which is headed "Functions and powers to assist recovery and rebuilding" and which contains the following relevant subparts:

> Subpart 1—Input into decision making by community and cross-party forums
>
> Subpart 2—Minister and chief executive of CERA
>
> Subpart 3—Development and implementation of planning instruments

[43] Implementing the second purpose of the Act, subpart 1 contains s 6, which provides:

> **6 Community forum**
>
> (1) The Minister must arrange for a community forum to be held for the purpose of providing him or her with information or advice in relation to the operation of this Act.
>
> (2) The Minister must invite at least 20 persons who are suitably qualified to participate in the forum.
>
> (3) The Minister must ensure that the forum meets at least 6 times a year.

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35 See below at [51], [67], [86]–[87], [111] and [126]–[128].

36 See below at [52].

> (4) The Minister and the chief executive must have regard to any information or advice he or she is given by the forum.

[44] This is an important provision because not only does it impose an obligation on the Minister to arrange a community forum, which must meet at least six times a year, but it also requires him and the chief executive of CERA to have regard to "any information or advice" given by the forum. In this way there is formal recognition of community participation in the recovery process and, potentially, a further constraint on the Minister when exercising his powers under the Act.

[45] Under s 7 there is also provision for a cross-party parliamentary forum. The Minister is under an obligation to arrange for this forum to be held "from time to time", but unlike the community forum he is not required to have regard to its views. The contrast between the provisions relating to the two forums serves to reinforce the importance of the community forum.

[46] Then, implementing the third purpose of the Act, subpart 2 contains the functions of the Minister and the chief executive of CERA as well as s 10 to which reference has already been made.[37]

[47] The functions of the Minister are prescribed by s 8, which provides:

> **8 Functions of Minister**
>
> The Minister has the following functions for the purpose of giving effect to this Act:
>
> (a) establishing a community forum in accordance with section 6 and a cross-party parliamentary forum in accordance with section 7:
>
> (b) recommending for approval a Recovery Strategy for greater Christchurch under section 11:
>
> (c) reviewing the Recovery Strategy and approving any changes to it under section 14:
>
> (d) directing the development of, and matters to be covered by, Recovery Plans for all or part of greater Christchurch under section 16:
>
> (e) approving Recovery Plans and the review and changes to them under sections 21 and 22:

[37] Above at [15]–[22].

(f) suspending, amending, or revoking the whole or parts of RMA documents, resource consents, and other instruments applying in greater Christchurch in accordance with section 27:

(g) giving directions to councils or council organisations under section 48:

(h) directing a council to carry out certain functions of the council within a specified timeframe under section 49:

(i) issuing a call-in notice under section 50 and assuming certain responsibilities, duties, or powers of the council if a timeframe under that section is not complied with:

(j) compulsorily acquiring land in accordance with subpart 4:

(k) determining compensation in accordance with subpart 5:

(l) appointing a Canterbury Earthquake Recovery Review Panel under, and for the purposes outlined in, subpart 7 regarding development of delegated legislation:

(m) reporting to the House of Representatives on the operation of the Act in accordance with sections 88 and 92:

(n) any other functions provided in this Act.

[48] The functions of the chief executive of CERA, prescribed by s 9, are wide ranging, but of no direct relevance to the issues on this appeal.

[49] Subpart 3, headed "Development and implementation of planning instruments", contains a series of detailed provisions elaborating on the functions of the Minister and the chief executive relating to the development of a Recovery Strategy. By s 11(1) the chief executive is required to develop a Recovery Strategy for consideration by the Minister, who is then responsible under s 11(2) for recommending to the Governor-General that it be approved by Order in Council.

[50] The Recovery Strategy is defined in s 11(3):

(3) The Recovery Strategy is an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation) include provisions to address—

(a) the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment:

(b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction:

(c) the nature of the Recovery Plans that may need to be developed and the relationship between the plans:

(d) any additional matters to be addressed in particular Recovery Plans, including who should lead the development of the plans.

[51] It is clear from this definition that the development and approval of the Recovery Strategy is an essential feature of the Act. The definition also serves to confirm the wide approach to the interpretation of the purposes of the Act to which we have already referred. Significantly for the present case, it is clear from s 11(3) that it is the Recovery Strategy that is intended to address the "long-term strategy" for the reconstruction, rebuilding and recovery of greater Christchurch, including the identification of areas for rebuilding and redevelopment, their sequencing and the location of "existing and future infrastructure". These provisions suggest strongly that Parliament intended planning certainty in the long-term to be addressed, at least principally, in the Recovery Strategy.

[52] Notwithstanding the long-term implications of the Recovery Strategy, but reflecting the emphasis in the Act's purposes on a timely and expedited recovery, s 12(2) requires the draft Recovery Strategy to be developed within nine months after the date on which the Act came into force (19 April 2011).[38]

[53] The importance of the Recovery Strategy is also reinforced by the following requirements, which reflect the community participation purpose of the Act:

(a) to develop it in consultation with the councils, Te Runanga o Ngai Tahu, and any other persons or organisations that the Minister considers appropriate: s 11(4);

(b) to publicly notify the draft: s 13;[39] and

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38 Section 2.

39 Public notification requires a notice published in the *Gazette* or in a newspaper circulating in the area to which the notice relates: s 4(1), definition of "public notice or publicly notify".

(c) to have public hearings while developing the draft Recovery Strategy: s 12(1).

[54] A Recovery Strategy may be amended, but, unless the amendments are minor, further consultation will be required.[40]

[55] Once approved by the Minister, a Recovery Strategy will, by virtue of s 15, prevail over any "RMA document" and other relevant instruments under s 26(2).[41]

[56] The expression "RMA document" is defined in s 4(1):

> **RMA document**—
>
> (a) means any of the following under the Resource Management Act 1991:
>
> (i) a regional policy statement:
>
> (ii) a proposed regional policy statement:
>
> (iii) a proposed plan:
>
> (iv) a plan; and
>
> (b) includes a change or variation to any document mentioned in paragraph (a).

[57] As will be seen later, the reference in this definition to "a proposed regional policy statement" is particularly significant for the respondents' claim that they were unlawfully denied access to the Environment Court.[42]

[58] A Recovery Strategy prevails over any RMA document because s 15 provides:

> **15 Effect of Recovery Strategy**
>
> (1) No RMA document or instrument referred to in section 26(2), including any amendment to the document or instrument, that applies to any area within greater Christchurch may be interpreted or applied in a way that is inconsistent with a Recovery Strategy.

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40 Section 14.

41 The instruments referred to in s 26(2) are various local government, land transport and conservation strategies, policies and plans.

42 See below at [136]–[149].

> (2) On and from the commencement of the approval of a Recovery Strategy, the Recovery Strategy—
>
> (a) is to be read together with and forms part of the document or instrument; and
>
> (b) prevails where there is any inconsistency between it and the document or instrument.
>
> (3) No provision of the Recovery Strategy, as incorporated in an RMA document under subsection (2)(a), may be reviewed, changed, or varied under Schedule 1 of the Resource Management Act 1991.

[59] Reflecting the Minister's functions under s 8(d) and (e), the Minister has various obligations and powers under ss 16–22 relating to the development of Recovery Plans. While a Recovery Plan must be consistent with the Recovery Strategy, it may be developed and approved before the Recovery Strategy is approved.[43] Like a Recovery Strategy, a draft Recovery Plan must be publicly notified and available for written comment.[44] And once a Recovery Plan has been publicly notified, any person exercising functions or powers under the RMA must not make a decision or recommendation that is inconsistent with the Recovery Plan on any of the matters prescribed in s 23(1).

[60] A council must also amend its RMA documents if a Recovery Plan so directs, to the extent that the document relates to greater Christchurch.[45] A council must do so as soon as practicable without using the process in sch 1 of the RMA,[46] which therefore excludes the Environment Court, or any other formal public process. The latter restriction reflects the fact that the opportunity for public participation will have occurred during the development of the Recovery Strategy.

Section 27

[61] We then come to s 27 of the Act, which appears under the subheading "Provisions affecting councils and others" and materially provides:

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43 Sections 18(1) and 18(2).
44 Section 20.
45 Section 24(1).
46 The Act, s 24(2).

> **27 Suspension of plan, etc**
>
> (1) The Minister may, by public notice, suspend, amend, or revoke the whole or any part of the following, so far as they relate to any area within greater Christchurch:
>
> (a) an RMA document:
>
> (b) a plan or policy of a council under the Local Government Act 2002, except a funding impact statement in an annual plan or a long-term plan.
>
> ...
>
> (2) The Minister may, by public notice, suspend or cancel, in whole or in part, any of the following for an activity within greater Christchurch:
>
> (a) any resource consent:
>
> (b) any use protected or allowed under section 10, 10A, or 10B of the Resource Management Act 1991:
>
> (c) any certificate of compliance under that Act.
>
> ...

[62] Three issues of interpretation arise in this case in respect of this provision:

(a) Does it confer an independent, stand-alone power on the Minister, or a power that may normally only be exercised after the Recovery Strategy or a Recovery Plan has been developed?

(b) Does the power to "suspend, amend, or revoke" extend to adding new chapters to a proposed RPS as occurred in this case?

(c) Does the exercise of the power override processes and appeals already in progress under the Resource Management Act?

[63] On the first of these issues Chisholm J said:[47]

> Taken in isolation s 27 certainly seems to confer very wide powers in relation to RMA documents, including RPS's. But once it is construed in the wider context of the Act, as it must be, it becomes apparent that its role is not

[47] High Court decision, above n 2, at [114] (emphasis added).

> as wide as first impressions might suggest. *In my view it does not provide an alternative and independent mechanism in situations where the Recovery Strategy or a Recovery Plan should be used*. The policy of the Act is for long term planning strategies which are likely to have far reaching implications to be developed through the public process of the Recovery Strategy or a Recovery Plan, except where quick and discrete action is required for earthquake recovery purposes.

[64] The Judge considered that his view reflected the statutory safeguards that accompany the development of the Recovery Strategy and Recovery Plans, namely the requirements for consultation, public notification and public hearings, which in turn reflected:[48]

> ... first, the potentially far reaching consequences of the Recovery Strategy and, secondly, an underlying philosophy of community participation whenever possible.

[65] It was submitted for the Minister and the Councils that the Judge erred because s 27 conferred a stand-alone power which the Minister was able to exercise independently from the Recovery Strategy or a Recovery Plan. In particular, it was submitted that there is nothing in the text of the provision itself to suggest that the s 27 power may not be exercised instead of the Recovery Strategy or a Recovery Plan. If Parliament had intended to impose such a constraint, it would have done so expressly by providing that the s 27 power was to be exercised only for the purpose of giving effect to a Recovery Strategy or Recovery Plan.

[66] Mr Cooke supported the Judge's approach to the interpretation of s 27, submitting that the provision is not a completely stand-alone power to implement long-term planning. It is an ancillary or additional provision giving the requisite powers to implement the long-term planning contemplated by the Recovery Strategy and Recovery Plans.

[67] For the following reasons, we agree with the approach of Chisholm J:

(a) The primary focus of the Act is on the Recovery Strategy which the chief executive "must" develop as a long-term strategy for the reconstruction, rebuilding and recovery of greater Christchurch and

[48] High Court decision, above n 2, at [115].

which "must" involve council consultation and processes for public notification and hearings.

(b) The Act clearly contemplates the development and approval of the Recovery Strategy as the primary means to implement and achieve the Act's purposes.

(c) The non-mandatory discretionary power conferred on the Minister by s 27 is an ancillary power which may be exercised, if necessary, before, during or after the processes required for the development and approval of the Recovery Strategy.

(d) Whether the exercise of the s 27 power is necessary will depend on the circumstances of the particular case. The power to "suspend, amend, or revoke" an RMA document relating to an area within greater Christchurch may well need to be exercised expeditiously to assist the recovery and in advance of the development of the Recovery Strategy. As Chisholm J recognised, "quick and discrete action [may be] required for earthquake recovery purposes."[49]

(e) The s 27 power is not unfettered. It is constrained by s 10, which requires that it be exercised "in accordance with the purposes of the Act" and only if the Minister "reasonably considers it necessary". In particular, the Minister must consider whether the exercise of the s 27 power, rather than an alternative such as a Recovery Strategy with public consultation, is necessary. These constraints are important safeguards in the context of this legislation.

(f) The existence of the provisions relating to the development of the Recovery Strategy and Recovery Plans, with community participation, does not mean that the Minister should be prevented from exercising the s 27 power in an appropriate case. It is possible that the s 27 power could be used prior to the development of the Recovery

[49] At [114], see above at [63].

> Strategy to meet a particular emergency, but that would have to be done with the primacy of the pending Recovery Stratgey and Recovery Plans firmly in mind. Whether the Minister ought to do so in a particular case is a separate question depending on the facts of the case and whether, objectively, he "reasonably considers it necessary" to do so.[50] We consider this separate question later.

[68] As to the second issue of statutory interpretation in respect of s 27, we are satisfied that in the context of this Act the reference to amending a RMA document such as the RPS included adding the two new chapters. Given the purposes of the Act, the expression "amend" should be interpreted broadly. We accept that there may be some doubt where the line should be drawn, but here the addition of two chapters to the proposed RPS was clearly within the concept of an amendment. We agree with Mr Goddard that "amend" should be given an interpretation similar to that in relation to statutes, which are often amended by adding or inserting new sections or parts.[51] Adding two chapters to the RPS is analogous to amending an Act by deleting a part and inserting a new part.

[69] We address the third issue of statutory interpretation when we consider whether the respondents have been unlawfully denied access to the Environment Court.

Other relevant provisions

[70] For completeness we also note the following relevant provisions:

(a) There is no right of appeal under the Act or the RMA against a decision of the Minister under s 27.[52] An appeal to the Environment Court under the RMA is therefore excluded.

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50 The distinction is between the existence of the power and the legitimacy of its exercise: *New Zealand Kiwifruit Marketing Board v Beaumont* [1997] 3 NZLR 516 (CA) at 520.

51 Burrows and Carter, above n 14, at 638.

52 Sections 68(1), 68(2) and 68(6).

(b) Orders in Council exempting, modifying or extending provisions in a range of statutes that are reasonably necessary or expedient may be made for the purposes of the Act.[53] The Judicature Amendment Act 1972 under which judicial review proceedings such as the present are brought is expressly excluded.[54]

(c) The Minister is required to present a quarterly report to Parliament on the operation of the Act, including a description of the powers exercised.[55]

(d) There are to be annual reviews of the Act and the Act is to expire five years after its commencement.[56]

Summary

[71] We are satisfied from our analysis of the relevant statutory provisions that:

(a) The overarching purpose of the Act is to impose obligations and confer adequate powers on the Executive to achieve in a timely and expeditious manner the full social, economic, cultural and environmental recovery of greater Christchurch.

(b) To implement this overarching purpose, a range of obligations is imposed and powers conferred on the Executive, including the obligation to develop the Recovery Strategy, which is the primary focus of the Act; and the ancillary discretionary power conferred on the Minister by s 27, which may, depending on the circumstances, need to be exercised before, during or after the development of the Recovery Strategy.

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53 Section 71.
54 Section 71(6).
55 Section 88.
56 Sections 92 and 93.

(c) There is also a range of safeguards in the Act relating to these obligations and powers, including in particular: the constraints imposed by s 10; the provisions relating to community participation, which include, in the case of the Recovery Strategy and Recovery Plans, public notification and hearings; the requirements for reporting; and the availability of judicial review proceedings.

(d) The consequences of the valid compliance with the obligations and exercise of the various powers include the removal of RMA processes and council and Environment Court hearings.

[72] In light of our analysis we turn to consider the Minister's two decisions in this case and their validity.

The Minister's two decisions

Background

[73] The undisputed factual background leading up to the Minister's two October 2011 decisions is described in some detail in the High Court decision.[57] We have also been assisted by the chronology provided by the Minister and relevant decisions of the Environment Court. The essential features of the background may be summarised as follows.

[74] Well before the first earthquake occurred in September 2010, the Councils and the New Zealand Transport Agency (NZTA) had developed an urban development strategy to address perceived shortcomings in the 1998 Canterbury RPS. Following public consultation, the strategy had been publicly notified in 2007 as PC1. It included provisions relating to urban limits through to 2041, the sequencing of new greenfield land for residential development, and a long standing policy precluding noise sensitive uses of land within a 50 dBA Ldn contour around Christchurch International Airport.

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[57] High Court decision, above n 2, at [8]–[44].

[75] Relevant territorial authorities were required to have regard to these matters when preparing or changing their district plans[58] and once the change to the RPS was operative would have to give effect to the modified RPS.[59]

[76] Some 700 submissions relating to PC1 were lodged, with submissions from landowners, including the respondents, seeking either to have their land included within the urban limits or the amendment of provisions relating to the sequencing of greenfield land to development. Christchurch International Airport Ltd lodged a submission supporting PC1 and seeking the inclusion of updated air noise contours.

[77] Following settlement of judicial review proceedings,[60] the PC1 submissions were heard by independent Commissioners whose recommendations were adopted by the Regional Council in December 2009. In broad terms the use of urban limits in PC1 was upheld, with some changes resulting from the inclusion of new greenfield areas for residential development, the identification of "Special Treatment Areas" involving land owned by some of the respondents (with the Christchurch City Council directed to investigate zoning) and provision for growth at Kaiapoi within the airport noise contour.

[78] Some 50 appeals against the Regional Council's decision, including appeals by the respondents, the Christchurch City Council, the Waimakariri District Council and Christchurch International Airport, were lodged with the Environment Court. The Court decided to hear the appeals in stages,[61] with the principal question for the first stage being:[62]

> ... whether there should not be an urban growth boundary for the purpose of allocating the location and numbers of new houses in greenfields areas ...

[79] Before the Environment Court was scheduled to hear the appeals, the earthquakes occurred and the Act, which came into force on 19 April 2011, was enacted.

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58 RMA, s 74(2)(a)(i).
59 RMA, s 75(3)(c).
60 *National Investments Ltd v Canterbury Regional Council* HC Christchurch CIV-2009-409-1280.
61 *MHR Group Ltd v Canterbury Regional Council*, above n 3, at [20].
62 Ibid, at [1].

[80] We adopt Chisholm J's descriptions of the sequence of earthquakes that occurred and their impact on RMA issues:

> [18] Although the earthquake in September 2010 caused considerable damage at Kaiapoi, it did not give rise to widespread RMA issues for greater Christchurch. That changed with the earthquake in February 2011 when the need for residential development became urgent, particularly as the result of the creation of residential red zones in the city. This was accentuated by two further significant earthquakes on 13 June 2011.
>
> [19] The Government announced that it was prepared to make offers to purchase properties in the residential red zone, with such offers remaining open for nine months after receipt of the offer. As a result there was significant pressure from people wishing to relocate. Given the timeframe required for preparing bare land for development and erecting houses, land had to be made available for residential development as quickly as possible. Heavy demands were also being made on the time of council officers who were involved in drafting the earthquake Recovery Strategy required under [the Act].

[81] As Chisholm J pointed out later in his judgment,[63] some 7,250 properties in Christchurch City and Waimakariri District were red zoned requiring relocation of householders. A more detailed description of the consequences of the earthquakes is contained in the Environment Court decision in *MHR Group Ltd v Canterbury Regional Council*, where reference is made to evidence that at least 12,000 and possibly as many as 20,000 dwellings had been severely damaged or destroyed, representing six to ten years of pre-earthquake annual residential construction in greater Christchurch, and that 500 to 5,000 dwellings were estimated to be permanently unavailable for residential use as a result of liquefaction problems.[64] After referring to evidence relating to the impact of the earthquakes on employees and businesses,[65] the Environment Court noted:

> [12] As a result of the September 2010 earthquake alone, local authorities initially estimated they had suffered over $500m damage to infrastructure (roads, bridges, footpaths, sewers, pump stations, water supply wells, stormwater drains, parks, reserves, sports grounds etc). That figure more than trebled as a consequence of the 2011 shocks.
>
> (Footnotes omitted)

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63 High Court decision, above n 2, at [70].
64 *MHR Group Ltd v Canterbury Regional Council*, above n 3, at [8].
65 Ibid, at [11].

[82] The 22 February 2011 earthquake delayed the Environment Court hearing of the first stage for a month from May to June 2011,[66] but a subsequent adjournment application by the Councils was declined on 19 May 2011.[67] The Environment Court recognised that proceeding with the hearing might be a waste of time because the Minister could revoke PC1 at any time under s 27(1)(a) of the Act or the Recovery Strategy could head down a different path or a Recovery Plan could direct the Regional Council to amend PC1.[68] But the Court decided that the hearing should not be adjourned because:

(a) the rule of law required the Court to proceed without regard to whether the various powerful over-riding provisions in the Act might be exercised;[69]

(b) the need for a timely and expedited recovery of greater Christchurch strongly favoured an early resolution of PC1;[70] and

(c) the wishes of most of the landowners should prevail despite the uncertainty over what might be in the Recovery Strategy or any Recovery Plan.[71]

[83] During the stage one hearings, which took place in Queenstown in June and early July 2011, the Environment Court was advised that a number of parties, including Prestons Road Ltd, had reached agreements with the Councils.[72] In an interim decision given on 28 July 2011 the Court, however, declined to endorse the agreements because it wished to be satisfied that PC1 did promote the purpose of the RMA in light of the circumstances in greater Christchurch after the earthquakes, uneasiness over the procedure followed by the Canterbury Regional Council and its

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66 *Cashmere Rural Landowners Inc v Canterbury Regional Council* [2011] NZEnvC 90 at [2] and [9]; compare High Court decision, above n 2, at [16].
67 *Prestons Road Ltd v Canterbury Regional Council*, above n 3, at [1].
68 Ibid, at [43].
69 Ibid, at [44].
70 Ibid, at [45]–[47].
71 Ibid, at [49].
72 *MHR Group Ltd v Canterbury Regional Council*, above n 3, at [25]–[28].

fairness to other parties, and a concern not to waste time.[73] The Court therefore itself called a number of witnesses for the Council to give evidence.[74]

[84] The Environment Court decided that in light of the settlement agreements and consequent changes in position by the Canterbury Regional Council it should not give a decision on the stage one issues, but should adjourn the proceedings to the next stages of the hearing to ensure that other parties had an opportunity to be heard.[75] In reaching this interim decision, the Court was critical of the Canterbury Regional Council for changing its position in relation to the Commissioners' decision on PC1 several times.[76] The Environment Court's criticisms of the Regional Council are referred to in the High Court decision.[77] While it is not necessary for us to determine whether the criticisms were justified, we note that the Regional Council was faced with considerable planning pressures following the earthquakes which may explain its changes of position.

[85] At a pre-hearing conference for stage two of the PC1 appeals on 5 August 2011, the Environment Court made a timetable for hearings to begin in Queenstown in November 2011.

[86] In the meantime, as required by the Act,[78] a draft Recovery Strategy had been developed and was publicly notified on 10 September 2011. The draft provided that CERA and various other bodies were to prepare various plans for recovery, including a "Land, Building and Infrastructure recovery plan" that was to identify:

> ... when and how rebuilding can occur; timeframes for making decisions about whether land can be remediated, and a process and timeframe for land remediation; a methodology for reviewing existing national, regional and local strategies and plans; programmes and sequencing of areas for rebuilding and development; a spatial plan for housing and strategic infrastructure and community facilities to maintain the short-term wellbeing of communities, long-term recovery and growth aspirations; a framework for identifying investment priorities and opportunities for horizontal, strategic and community infrastructure; and identification and prioritisation of 'early-win' projects.

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73 Ibid, at [29].
74 Ibid, at [29]–[30].
75 Ibid, at [46].
76 Ibid, at [37]–[45].
77 High Court decision, above n 2, at [21].
78 Sections 11–13.

[87] The land, building and infrastructure plan was clearly intended to overlap with many aspects of PC1. Development of the plan was to be led by CERA and supported by the Councils, NZTA, Ngai Tahu, Infrastructure Alliance, EQC and the Department of Building and Housing. In terms of time frames it provided: "Existing plans and strategies reviewed and spatial plan prepared by December 2011, Draft Recovery Plan prepared by April 2012".

[88] A further request by the Councils for an adjournment of the Environment Court appeals was declined by the Court in September 2011.[79] The grounds for the Councils' adjournment application included the likelihood that the publicly notified draft Recovery Strategy would overrule PC1 and that council resources were required for earthquake recovery purposes.

[89] Urgent judicial review proceedings challenging the Environment Court's adjournment refusal[80] were then overtaken by events, namely the Ministers' two October 2011 decisions. These decisions followed meetings between CERA, the Minister and the Councils in the period after April 2011, when the issues of urban land supply, the role of PC1 and Ministerial intervention under the Act were discussed. A number of the respondents also communicated with the Minister.[81]

[90] The Minister's decisions to insert chapter 22 and to revoke PC1 and insert chapter 12A into the Canterbury RPS were publicly notified on 8 and 17 October 2011. This was roughly a month after the draft recovery strategy had been published and six months before the draft Land, Building and Infrastructure plan was to be prepared under the draft Recovery Strategy.

[91] We now turn to examine CERA's advice and recommendations to the Minister that led to his two decisions and the Minister's reasons for his decisions given in his affidavit filed in this proceeding, which explain why he decided to adopt, with one exception, the CERA recommendations. In doing so we accept, as

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79 *MHR Group Ltd v Canterbury Regional Council (No 6)* [2011] NZEnvC 306.

80 *Canterbury Regional Council v The Environment Court of New Zealand* HC Christchurch CIV-2011-409-1953.

81 See the High Court decision, above n 2, at [25]–[26].

Chisholm J did in the High Court,[82] that in the context of this case it was appropriate for the Minister to provide an affidavit giving his reasons and that his reasons should be given "real weight".[83] At the same time we are not restricted to the Minister's view of what he did.[84] Here CERA's advice, which was contained in formal decision papers, was advice coupled with recommendations. The reasons for the decisions are in the Minister's affidavit. We therefore do not accept Mr Cooke's submission that CERA's advice constituted the decision and that "deficiencies in the formal decision papers" could not be remedied by the Minister.

[92] In examining the Minister's reasons, it is important to emphasise that we are doing so for the purposes of ensuring compliance with s 10(1) and (2) of the Act. A judicial review challenge to the validity of the Minister's decisions is not an appeal against the merits of those decisions. The Minister was not and would not be cross-examined as of right on his affidavit.[85] We must therefore examine the reasons for his decisions taking into account the information before him, the nature of the particular decision and its consequences.

The airport noise contour decision (chapter 22)

[93] On 8 October 2011 the Minister gave public notice that, pursuant to s 27(1)(a) of the 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 of Christchurch through avoiding noise sensitive activities within the 50 dBA Ldn air

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82 Ibid, at [42].

83 *Kellian v Minister of Fisheries* CA150/02, 26 September 2002 at [8]; and see the authorities collected in Matthew Smith *New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at [29.4.3].

84 Ibid.

85 *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA); and see the authorities collected in GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [10.36].

noise contour.

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

- *CERA's advice*

[94] CERA's advice to the Minister that led to this decision is summarised in part in the High Court decision:

> [29] On 30 September 2011 CERA officials provided the Minister with briefing papers in relation to the possibility of residential development at Kaiapoi within the 50 dBA Ldn noise contour. These papers noted that negotiations between the airport company and the greater Christchurch local authorities had resulted in a compromise whereby the airport company had agreed to an exception for residential development in north-eastern Kaiapoi provided the importance of the 50 dBA Ldn contour was recognised in planning documents.
>
> [30] Having discussed the possibility of adding a special chapter to the RPS dealing with the issue of the noise contour, the briefing papers stated:
>
> > 19 It would also be possible to just change the Waimakariri District Plan and enable the subdivisions but this would not achieve the strengthening of the 50 dBA Ldn air noise corridor in the rest of greater Christchurch, and so would be opposed by CIAL [the airport company].
>
> It was recommended to the Minister that a change be made to the RPS by adding a short chapter specifically dealing with the noise contour and supporting this with an amendment to the Waimakariri District plan.

[95] CERA's specific advice in the briefing papers relating to the use of s 27 was:

> 21 The use of section 27 powers to enable land to be made available for residential development is within the purposes of [the Act]. It provides for the Minister to ensure recovery for those whose land has been red zoned. The proposal is focused, timely and will expedite recovery. It will restore social and economic well-being both by assisting residential development in Kaiapoi and strengthening the protection for Christchurch International Airport.

> 22 Use of the section 27 powers has been seen as a bargaining tool with developers to ensure that they bring sections to market quickly and give regard to affordability. Although making this change now without obtaining an understanding from the developer may reduce the subject matter for negotiation with these particular land owners, there are other levers that can be pushed in relation to them. Use of the section 27 power now will illustrate to developers that CERA is serious about making use of the tools within [the Act].

[96] CERA's briefing paper then referred to the Minister's question whether the exemption from the noise contour should apply only to north-eastern Kaiapoi or be extended to cover all of the township. CERA's advice was:

> 25 We think that CIAL will object to allowing the exemption to cover all of the Kaiapoi township. Christchurch City Council does not support this proposal as staff consider it undermines the concept of an exemption. ECan has given qualified support. At this stage no comment has been received from Waimakariri or Selwyn District Councils but earlier conversations would suggest that they would not oppose the extended exemption area.
>
> 26 Our assessment is that exempting either the north-eastern Kaiapoi or all of the Kaiapoi township can be justified on the basis of displacement of residential properties from the Red Zone. However, the larger the area exempted the greater the risk that the air noise contour will be undermined and others will also seek to be exempted from the restriction of noise sensitive activities under the contour.

- *The Minister's reasons*

[97] The Minister's reasons for this decision are set out in his affidavit:

> 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.

> 32. I was aware that the Waimakariri District Council was stretched with the demands following the earthquakes and that my decision would assist to provide certainty and free staff resources to assist with earthquake recovery work instead of arguing over residential development boundaries.
>
> 33. I was advised that if the whole of Kaiapoi was exempted from the effect of the contour line further subdivision in the south-west could be developed, adding more residential sections and, while I understood Christchurch City Council and Christchurch International Airport Ltd would not necessarily be supportive of that decision, although Christchurch International Airport Ltd said they would not object if the decision was made, I considered exempting the whole of Kaiapoi was the right decision.

- *In accordance with the purposes of the Act?*

[98] In our view this decision was clearly made by the Minister "in accordance with the purposes of the Act" as required by s 10(1). Our reasons for reaching this view and disagreeing with the High Court Judge's decision[86] and the submissions for the respondents may be stated shortly.

[99] First, the exception to the restrictions imposed by the noise level contour for residential development in Kaiapoi was clearly designed to assist the recovery of Kaiapoi and was therefore in accordance with the purposes of the Act. Indeed there is no challenge to the validity of the District Plan change implementing this aspect of the Minister's decision.

[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. If the Minister was to permit extra residential development in an area that might be affected by airport operations, it was proper, and arguably important, to consider the airport noise contour. The insertion of chapter 22 in the RPS, which was designed to strengthen the protection for Christchurch International Airport and provide certainty for Christchurch residents by settling the location of the 50 dBA Ldn air noise contour, was therefore in accordance with the overarching purpose of the Act.

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[86] High Court decision, above n 2, at [101]–[102].

[101] Third, the fact that the issue relating to the location of the airport noise contour existed long before the earthquakes and had been the subject of Environment Court decisions[87] does not of itself take the Minister's decision outside the purposes of the Act. On the contrary, the fact that it was an existing issue needing resolution supports the view that, following the earthquakes, continuing uncertainty could well impede the planning certainty required for the full recovery of greater Christchurch.

[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.

[103] This leaves open, however, the separate question of whether it was reasonable for the Minister to consider that the exercise of the power for this authorised purpose was necessary in this case, in particular whether it was reasonable for the Minister to consider that the exercise of the s 27 power by inserting chapter 22 was necessary to achieve the planning certainty sought by the Councils.

- *Reasonably considered necessary?*

[104] There is no dispute that, acting in good faith, the Minister himself considered that the decision was "necessary". But, viewed objectively, was it necessary that the Minister achieve his objective by exercising his ancillary discretionary power under s 27 in October 2011 rather than proceeding by way of the mandatory Recovery Strategy, the draft of which had already been publicly notified on 12 September 2011 and which contemplated a land, building and infrastructure recovery plan by December 2011?

[105] In respect of the airport noise level contour decision, there is no suggestion in CERA's advice or from the Minister in his affidavit that he considered whether the options of using the Recovery Strategy and/or a Recovery Plan might not have

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[87] *Robinsons Bay Trust v Christchurch City Council* EnvC Christchurch C60/2004, 13 May 2004; and *National Investment Trust v Christchurch City Council* EnvC Christchurch C41/2005, 30 March 2005.

achieved the same outcome. In referring to the use of s 27, CERA's advice makes no reference to the necessity requirement or to the other available options. While the Minister in his affidavit does say that he considered it was "necessary" to use his s 27 powers because it was "essential" that people knew what activities were allowed near the airport, he does not say that it was therefore essential that he exercise his s 27 power in October 2011 rather than pursue one of the other options. In particular, the Minister does not explain why the need for planning certainty could not be met by the Recovery Strategy, with its long-term strategy addressing the location of existing and future infrastructure, including the international airport, coupled with a short-term decision such as a change to the Waimakariri District Plan to allow subdivision at Kaiapoi.

[106] In our view the Minister should also have given consideration to the other options because, unlike the power under s 27, the use of the Recovery Strategy and/or a Recovery Plan would have involved public notification and the opportunity for public comment and thus have been in accordance with the public participation purpose of the Act. The Minister needed to consider these options before he could be reasonably satisfied that the exercise of the s 27 power in October 2011 was indeed needed.

[107] As we have already decided,[88] the discretionary power conferred on the Minister by s 27 is an ancillary power that may be exercised, if necessary, before, during or after the processes required for the development and approval of the Recovery Strategy. But the issue is whether the power was exercised legitimately in the circumstances of this case when, in terms of the Act, the Minister had the option of proceeding in a different way. In the absence of any evidence from the Minister justifying his choice of the s 27 option, we cannot be satisfied, objectively, that the exercise of the power was necessary rather than merely expedient or desirable.

[108] It is important in the context of the Act that the Minister should be constrained by the requirements of s 10(2) because the public participation purpose is a significant safeguard in the Act. In the event that the Minister were to decide to proceed by way of the Recovery Strategy (which was already in draft at the time of

[88] Above at [51] and [67].

his decision) or a Recovery Plan, it would be speculation to conclude now that he would necessarily make the same decisions.

[109] We return to the consequence of this finding later in our judgment.[89]

The residential property zoning decision (chapter 12A)

[110] On 17 October 2011 the Minister gave public notice that the RPS was further amended by inserting chapter 12A. The chapter was broadly similar to PC1 except that it reflected agreements the Regional Council had reached with some of the parties to the Environment Court appeals and some of the policies had been updated to reflect the earthquakes. It also reversed the changes arising from the Regional Council's decision, including changes supported by the respondents.

- *CERA's advice*

[111] CERA's advice to the Minister that led to this decision is summarised in part in the High Court decision:

> [31] Further briefing papers dated 7 October 2011 were supplied to the Minister with reference to the proposed chapter 12A. These papers noted that PC1 was developed as a result of the local authorities in Canterbury working together to identify areas for urban growth and that the change was presently before the Environment Court. The papers commented that PC1 did not take into account either agreements reached since the appeals were filed or the Canterbury earthquakes. It recorded that CERA staff had worked with the staff of local authorities to prepare a revised draft chapter 12A which incorporated those matters.
>
> [32] After stating that it was within the Minister's powers under s 27 to add chapter 12A and to suspend or revoke PC1 "so as to avoid any confusion and probably stop the present Environment Court proceedings", the briefing papers continue:
>
> > 5 Exercising your powers under s 27 of [the Act] is in accordance with many of the purposes of [the Act], but there is a risk that arguments could be made that public participation has been curtailed and that the subject matter is focused on growth as opposed to recovery. It is noted, however, that as the RPS can be overridden by a Recovery Plan dealing with land use issues and further changes can be made using section 27 powers, that these concerns can be

[89] Below at [152]–[162].

> addressed. Further to assist with the infrastructure recovery there needs to be long term planning including potential growth.

Later the Minister is given three options: "do nothing"; suspend PC1 "until the High Court has concluded whether the decision not to adjourn was correctly made or not"; or revoke PC1.

[33] With reference to the last alternative of revoking PC1 the Minister was briefed:

> 29 … This would mean that there is no document before the Environment Court and so it should follow that the Environment Court no longer has any jurisdiction to consider the appeals. This will, however, raise concerns about the Executive's involvement in Court proceedings and misuse of power which could in turn result in judicial review of the revocation.

The briefing paper recommended that, given the complicated circumstances, the Minister should suspend PC1 "and see how the Court proceedings play out".

[112] CERA's briefing papers also referred to the confusion, uncertainty and litigation costs arising from the Environment Court appeals relating to PC1 and then continued:

> 18 By giving effect to the contents of a revised PC1, there would be the ability to cut through this uncertainty and provide confidence that development can occur in certain places. That will mean that providers of infrastructure will have greater certainty about need. It will also provide for certainty about what is expected of the district councils and developers in terms of design (including density) of residential and business developments. Some of these matters may need to be translated into district plans to provide the final degree of certainty, but there will be policy that will give guidance.
>
> 19 There will be disadvantages to those that are trying to have their properties included within the urban limit line through the present Environment Court process. Giving effect to the present urban limit does not, however, mean that the limit cannot be changed at a later date. PC1 itself contemplates this if there is a change of circumstances, and there is the ability to use section 27 powers to make further changes if needed. Giving effect will also require planning through outline development plans, but as a quality residential development is still anticipated this should not cause an unnecessary restraint. Meeting minimum density levels will also be required which may disadvantage proposed large section development, but will assist in bringing more sections to market.

[113] On the question of the use of the s 27 powers, the briefing papers say:

> 23 The use of section 27 powers to provide a specific chapter within the RPS to deal with development of greater Christchurch is within the purposes of [the Act]. It provides for the Minister to ensure recovery by providing planning certainty. The proposal is focused, timely and will expedite recovery by allowing territorial authorities, infrastructure providers and developers to have certainty about location of future development and the standards that will apply. It will restore social, economic and environmental well-being of greater Christchurch communities by recognising the impact of the earthquakes on urban development and natural resources and providing a mechanism to avoid risks while providing for those relocated from the red zones.
>
> 24 It does not, however, enable community participation in the planning of the recovery of affected communities in relation to changes to the RPS as a result of the earthquake. ECan did, however, have a very extensive public process to develop the [Urban Development] Strategy and PC1 has been through a hearing process resulting in appeals. The public generally have had significant opportunities to be involved. Those persons who have live appeals and have not yet negotiated a resolution will, however, consider that they have not had an opportunity to participate. They may also consider that some of the substance of PC1 goes beyond the purposes of [the Act] as it is concerned with growth through to 2041, not just immediate recovery.
>
> 25 This is a legitimate perspective, but it is important to consider the changes to the RPS in context. First, just because this proposal will add a new Chapter 12A, there is no reason why further additions to either Chapter 12A or the new Chapter 22 specifically identified for earthquake issues cannot be made under the section 27 process. Second, section 23 of [the Act] provides that any person exercising functions under the RMA must not make a decision or recommendation that is inconsistent with a Recovery Plan. One of the proposed Recovery Plans is the "Greater Christchurch Land-use and Infrastructure Recovery Plan", which is likely to deal with similar issues but updated as more information becomes available. This may, therefore, be able to deal with such concerns. Third, the operative RPS is in the process of being reviewed. Although there is no chapter presently dealing with urban land use matters, it is a possibility that any outstanding issues could be considered. It is also relevant to note that long term planning including growth will be of assistance to the infrastructure recovery planning.
>
> 26 It is, therefore, possible to consider that the change to the RPS by including a new chapter 12A is a temporary remedy to overcome the present uncertainties but that it is subject to change as more information about land and need for urban development becomes available.

[114] On the question of suspension or revocation, the briefing papers say:

> 28 Although [the Act] allows for suspension of PC1 it is not clear what this means in practice. It is assumed that PC1 would have no effect so it need not be had regard to, but it would still exist and so be in front of the

> Courts. If the Environment Court had agreed to the adjournment then this may have been appropriate, but it did not do so. This issue is presently before the High Court on judicial review and so PC1 could be suspended until the High Court has concluded whether the decision not to adjourn was correctly made or not. The status of PC1 can then be reviewed at that point.
>
> 29 Alternatively, PC1 could be revoked which means that it no longer exists. This would mean that there is no document before the Environment Court and so it should follow that the Environment Court no longer has any jurisdiction to consider the appeals. This will, however, raise concerns about the Executive's involvement in Court proceedings and misuse of power which could in turn result in judicial review of the revocation.
>
> 30 Given the complicated circumstances, it is recommended that at this stage you suspend PC1 and see how the Court proceedings play out. Suspending now, still enables revocation at a later date if necessary.

- *The Minister's reasons*

[115] The Minister's reasons for his second decision are set out in his affidavit. In order to fully understand his reasons, it is best to set them out as Chisholm J did. We therefore attach the reasons as an appendix to this judgment and summarise them here.

[116] The Minister deposed that in his view the Environment Court proceedings were creating significant planning uncertainty for developers and the Councils that impeded recovery. The continuation of the proceedings was also delaying the implementation of negotiated agreements between the Councils and some of the parties to the appeals that would have allowed the development to proceed. Although the Minister was aware that using s 27 could be perceived as curtailing public participation, he was also aware that the community had been consulted for some years on the urban limit line and with a few exceptions where people wished to extend the line to include their properties, there was no community opposition to having an urban limit. The inclusion of a new chapter 12A was therefore a "neat solution" to resolve the problems facing Christchurch at that time and a "useful starting point" to provide planning certainty following the earthquakes. Ending the appeals would also allow council officers to focus on recovery planning rather than participating in the appeals. The Minister explained that he decided to reject CERA's recommendation that he suspend PC1 because there was uncertainty about what

suspension would mean in practice and he was keen that there be no doubt that the appeal process and the time commitment required for it had been brought to an end.

[117] Although the Minister was aware that his decision would result in disadvantages to those seeking to have their land included within the urban limit, he considered such disadvantages were outweighed by the need to provide planning certainty to allow residential development to occur. The Minister also noted that chapter 12A might be changed as a result of the Recovery Strategy and recovery plan processes or in individual cases of merit.

- *In accordance with the purposes of the Act?*

[118] In our view to the extent that this decision achieved planning certainty it was clearly made by the Minister "in accordance with the purposes of the Act" as required by s 10(1). Our reasons for reaching this view and disagreeing with the High Court Judge's decision[90] and the submissions for the respondents may be stated shortly.

[119] It is convenient to start with the Judge's principal reasons for his decision on this issue:

> [92] On my analysis of the evidence, particularly the Minister's affidavit, the purposes behind the decision to amend the RPS and revoke PC1 came down to:
>
> (a) freeing up land to enable residential development for those displaced by the earthquakes;
>
> (b) implementing agreements that had resulted in draft orders before the Environment Court;
>
> (c) providing certainty and predictability so that residential development could proceed without delay;
>
> (d) enabling council officers to focus on recovery planning;
>
> (e) bringing the PC1 appeals to an end;

[90] High Court decision, above n 2, at [92]–[100].

> (f) providing a specific chapter within the RPS (chapter 12A) to deal with the development of greater Christchurch, including the extension of the urban limits; and
>
> (g) protecting the airport from "reverse sensitivity" claims by settling where the 50 dBA Ldn contour line is and its effects (chapter 22).
>
> These matters are not in any particular order. Obviously some of them are interlinked and overlap.
>
> [93] There can be little argument that the purposes in (a)–(d) are within the purposes of the Act. To the extent that it freed up council staff for earthquake recovery purposes, I also accept for the purposes of this ground of review that (e) comes within the statutory purposes. But it is difficult to see how, even on the most generous interpretation of the statutory purposes, (f) and (g) could come within those purposes, especially when s 27 is the vehicle.
>
> …
>
> [100] When chapter 12A is read as a whole it is impossible to see how it serves any significant earthquake recovery purpose. To the extent that it addresses urban limits it is addressing issues that existed long before the earthquakes and it provides solutions that are likely to endure well beyond the expiry of [the Act]. It also has a geographic impact well beyond that attributable to earthquakes. In this respect I note that the statistics relied on by the applicants [that while chapter 12A provided for 47,225 properties, only 7,250 properties had been red-zoned] have not been contradicted. Equally importantly, chapter 12A was not necessary to achieve or give effect to the zoning changes that were made by the Minister to provide housing for people displaced by the earthquakes. For reasons that I will give later, I am satisfied that the changes to the district plans were capable of standing on their own feet.

[120] We agree with the Judge that purposes (a) to (e) in [92] are within the purposes of the Act. The respondents did not submit otherwise. For the reasons we have already given,[91] we are also satisfied that purpose (g) is within the purposes of the Act. Once this conclusion is reached, we have little difficulty in concluding for the following reasons that purpose (f) to the extent that it achieved planning certainty is also within the purposes of the Act.

[121] First, to the extent that purpose (f) achieved planning certainty it was the means by which purposes (a) to (e) were implemented. We have already accepted that achieving planning certainty was within the scope of the purposes of the Act. As

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[91] Above at [98]–[102].

such it was an integral part of the steps being taken by the Minister to achieve the full social, economic, cultural and economic recovery of greater Christchurch. The addition of chapter 12A and the revocation of PC1 also ended the Environment Court appeals and freed up council staff to focus on more pressing earthquake recovery matters.

[122] Second, the fact that the insertion of chapter 12A and the revocation of PC1 addressed issues that existed long before the earthquakes did not mean that providing solutions for the issues was necessarily outside the scope of the purposes of the Act. On the contrary, resolving these long standing issues could be seen as a positive step in assisting the recovery of greater Christchurch.

[123] Third, the fact that chapter 12A provided space for 47,225 residential properties when only 7,250 properties in Christchurch City and Waimakariri District had been red zoned did not necessarily mean that it was outside the scope of the purposes of the Act. On the contrary, when the full scale of the impact of the earthquakes is taken into account and the enhancement aspect of recovery is recognised, the benefit of planning certainty in respect of future growth, not only for residential properties but also for infrastructure (as Mr Goddard emphasised), can be seen as falling within the purposes of the Act.

[124] In view of the conclusion we reach on the next question, it is unnecessary for us to identify whether any aspects of chapter 12A did not achieve planning certainty and therefore went beyond the earthquake recovery purposes of the Act.

- *Reasonably considered necessary?*

[125] There is no dispute that, acting in good faith, the Minister himself considered that the decision was "necessary'. But, viewed objectively, was it necessary to exercise his ancillary discretionary power under s 27 in October 2011 to insert chapter 12A, rather than to proceed by way of the mandatory Recovery Strategy and/or a Recovery Plan, to achieve the planning certainty sought by the Councils? In particular, was it necessary to use the s 27 power when, as we have already mentioned, the draft Recovery Strategy, which had been publicly notified on

12 September 2011, contemplated a land, building and infrastructure recovery plan by December 2011?

[126] In respect of this second decision, there is evidence from both CERA's briefing papers and the Minister's affidavit that he was aware of both the draft Recovery Strategy and the proposed recovery plans, which were likely to deal with similar issues.[92] But there is no evidence explaining why the Minister considered that these options were not appropriate alternatives and that it was "necessary" for him to exercise his s 27 power at that time, especially as he recognised that his decision under s 27 was not necessarily going to be final as it was likely that chapter 12A would be reviewed and could change as the Recovery Strategy and future Recovery Plans were developed.

[127] Indeed we note that the Recovery Strategy approved on 31 May 2012 stated:

> When [the Act] was passed in April 2011, it was thought that the Recovery Strategy might address:
>
> 1 the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment;
>
> 2 the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction;
>
> 3 the kind of Recovery Plans that may need to be developed and the relationship between the plans; and
>
> 4 any additional matters to be addressed by Recovery Plans, and who should lead their development.
>
> The Strategy has not been able to address all of these issues, partly because of ongoing seismic activity. It is also a huge and complex task to make decisions about land zoning and the location and timing of rebuilding. Similarly, it is not yet clear where Recovery Plans – which are statutory documents with the power to overwrite a range of planning instruments – will be the most appropriate and effective way to provide direction. The Recovery Strategy therefore focuses on identifying work programmes which will make it easier to see where Recovery Plans are needed.

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92 Appendix at [41] and [53].

[128] The Recovery Strategy also said:

> Strategies that were developed before the earthquakes to guide planning and growth in greater Christchurch will need to be re-evaluated in the light of recovery needs. The most significant of these is the Greater Christchurch Urban Development Strategy (UDS). This non-statutory strategy was developed under the Local Government Act 2002 by Environment Canterbury, the Christchurch City Council, Selwyn and Waimakariri District Councils and the New Zealand Transport Agency. The UDS is implemented primarily through a range of statutory planning processes – in particular, the Canterbury Regional Policy Statement, District Plans, Councils' Long Term Plans, and the Canterbury Regional Land Transport Programme. As all of these are required to be consistent with the Recovery Strategy, the Strategy will also influence any re-evaluation of the UDS.
>
> Using [the Act's] powers, the Minister for Canterbury Earthquake Recovery has fast-tracked changes to the Regional Policy Statement. These changes are set out in chapters 12A and 22 of the Regional Policy Statement. Further changes are possible as a result of any re-evaluation of the UDS.

[129] As these passages from the Recovery Strategy indicate, a level of planning uncertainty was likely to continue regardless of what happened to PC1.

[130] There is also evidence in the affidavits of the council officers that in a number of respects they were in fact able to rely on PC1 prior to the Minister's decisions. In particular, the Councils were able to implement those parts of PC1 that were not in dispute and were having regard to PC1 in a purposeful, positive manner. Indeed in February 2010 the Selwyn District Council had promulgated a plan change that implemented the urban limit and other features of PC1. This evidence, which does not appear to have been taken into account by CERA or the Minister, suggests that the Councils' desire for planning certainty needed to be examined closely. The Minister recognised that most of PC1 was not in dispute, but does not appear to have appreciated the significance of this in the context of his decision to end the Environment Court appeals.

[131] Although the Minister recognised that acting under s 27 would exclude public participation, he considered that the public processes that had already taken place in relation to PC1 meant that there had already been sufficient public involvement in the matters that would be settled by his decisions. We do not agree, however, that consultation processes under the RMA can substitute for the consultation that was

meant to take place under the Act. Unlike consultation under the RMA, consultation under the Act is predicated on the fundamentally different circumstances existing in Christchurch as a result of the earthquakes. The Minister was therefore required to consider whether it was necessary to exclude the public processes involved in proceeding by way of the Recovery Strategy or Recovery Plans and instead use the s 27 power. Moreover, although counsel differed on the level of certainty the obligation provided, they accepted that Councils were obliged to "have regard" to PC1 as a proposed RPS without action from the Minister.

[132] The Minister does not appear to have recognised that the primary focus of the Act was on the mandatory long-term Recovery Strategy and that it would address the identification of areas for rebuilding and redevelopment, their sequencing and the location of existing and future infrastructure. The Minister needed to consider why it was necessary to exercise the discretionary ancillary power under s 27 in October 2011 while the Recovery Strategy was still being developed. Instead the Minister appears to have considered, incorrectly, that the s 27 power was simply an independent, stand-alone power.

[133] We do not overlook the fact that, as a result of the Minister's decisions, the Environment Court appeals were ended and Council officers were able to focus on earthquake recovery matters rather than the appeals. But the Minister does not appear to have considered whether a similar outcome might not have been achieved through the alternative Recovery Strategy and Recovery Plan process.

[134] For reasons similar to those we have given on this issue in respect of the Minister's first decision, we therefore cannot be satisfied that, objectively, the Minister reasonably considered that the exercise of the power in October 2011 was necessary. It is not at all clear from the evidence why a short term "neat solution", which precluded public participation, was necessary, rather than merely expedient or desirable, for a long-term problem which would be addressed in the Recovery Strategy, the draft of which had already been publicly notified.

[135] We return to the consequences of this finding later in our judgment.[93]

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[93] Below at [152]–[162].

Unlawful denial of access to Environment Court?

[136] There is no doubt that the right of access to the Courts is well established as part of the rule of law in New Zealand.[94] We agree with Mr Joseph, who presented the submissions for the respondents on this issue, that access to the Courts for the purpose of seeking justice, especially when decisions of the Government are involved, is a fundamental right.[95]

[137] But, as the High Court Judge recognised,[96] two questions are raised in this case:

(a) whether the respondents have been deprived of access to the courts by the revocation of PC1; and

(b) if so, whether the Act authorised the Minister to take that step.

[138] On the first question, there is no doubt that the revocation of PC1 did deprive the respondents of access to the Environment Court and also the possibility of pursuing any appeals against that Court's decision.[97] There is some force in the submissions for the appellants, however, that the role of the Environment Court relating to an RMA document is essentially a policy-making one, standing in the shoes of the planning authority, rather than adjudicating on the legal rights or obligations of private individuals, so that the right of access to the courts of general jurisdiction is not engaged. But, in our view, where, as here, the rights of the respondents to the private use of their land was in issue before the Environment Court, which is a "Court of record"[98] presided over by judges,[99] it is hard to say that

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94 New Zealand Bill of Rights Act 1990, ss 27(2) and 27(3); Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 1026; and *Turners and Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 13 August 2010 at [93]–[94].

95 *Raymond v Honey* [1983] 1 AC 1 (HL) at 12–13; *R v Secretary of State for the Home Dept, ex parte Leech* [1994] QB 198 (CA) at 210; *R v Lord Chancellor, ex parte Witham* [1998] QB 575 at 581–585 and 586–587; and *Thomas v Baptiste* [2000] 2 AC 1 (PC) at 23.

96 High Court decision, above n 2, at [164].

97 RMA, ss 299 and 308.

98 RMA, s 247.

99 RMA, ss 249(1), 250(1), 258(1) and 261(1).

their right of access to the Courts was not adversely affected by the revocation of PC1.

[139] This means that attention must focus on the second question, which is whether the exercise of the power under s 27 overrides processes and appeals to the Environment Court already in progress under the RMA.

[140] It is reasonably well established that a statute may by clear words expressly or by necessary implication abrogate a fundamental right such as the right of access to the courts.[100] Mr Joseph referred us to decisions that suggested the right of access to the courts could only be excluded by express language.[101] We note, however, that in *Secretary of State for the Home Department, ex parte Simms*, which is widely regarded as the leading decision on the principle of legality, Lord Hoffmann said that legislation should be interpreted consistently with fundamental rights "[i]n the absence of express language *or necessary implication to the contrary*".[102]

[141] In this context exclusion of a fundamental right by "necessary implication" means, as Lord Hobhouse of Woodborough put it in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax*:[103]

> A necessary implication is not the same as a reasonable implication... . A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

This statement has been applied by both the Privy Council in *B v Auckland District Law Society*[104] and the Supreme Court in *Cropp v Judicial Committee*.[105]

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100 *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 (HL) at 286; and Burrows and Carter, above n 14 at 323–324.

101 *R & W Paul Ltd v The Wheat Commission* [1937] AC 139 (HL) at 153–154; *Chester v Bateson* [1920] 1 KB 829 (KB).

102 *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 (emphasis added).

103 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45] (emphasis in the original).

104 *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [58].

105 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26].

[142] Here, as the High Court Judge held,[106] there is no express exclusion in s 27, but was access excluded as a matter of logic by necessary implication from the express provisions of the Act construed in their context?

[143] There is no doubt that under s 27 the Minister has power to revoke the whole or any part of an RMA document, which is defined as including a proposed regional policy statement, that is, a document which under the RMA may be subject to appeal to the Environment Court under the sch 1 process.[107] Consequently, in the event that the Minister were to revoke such a document, the right of appeal to the Environment Court in respect of that document would cease to exist. This consequence occurs as a matter of logic by necessary implication from the express provisions of s 27 and the definition of RMA document construed in its context. The Act therefore contemplates that the Minister's exercise of the s 27 power could end appeals before the Environment Court.

[144] On this basis the respondent's rights of appeal to the Environment Court in respect of PC1 to the Canterbury RPS ceased to exist when the Minister revoked PC1. As already noted,[108] the Environment Court itself recognised that this would be the outcome of a decision by the Minister to revoke PC1 under s 27(1)(a).

[145] Mr Joseph submitted that while it would be lawful for rights of appeal to the Environment Court to be extinguished as a consequence of the exercise of the s 27 power for a legitimate purpose, it was not lawful for the Minister to exercise his powers for the purpose of extinguishing appeals to the Environment Court as he had done here. In particular, he could not exercise his powers to bring the appeals to an end in favour of one side.

[146] We have already decided that insofar as the Minister's decisions promoted planning certainty and allowed Council officers to focus on recovery, they were within the purposes of the Act. The ending of the appeals was therefore simply the consequence of the legitimate exercise of the Minister's powers and was not unlawful.

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106 High Court decision, above n 2, at [172].
107 RMA, sch 1.
108 See above at [82].

[147] We do not agree with the High Court Judge[109] or the respondents that their rights of appeal were retained by s 68 of the Act. There is nothing in s 68, which deals with other appeal rights, to suggest that it was intended to preserve appeal rights which ceased to exist on the exercise of the power under s 27.

[148] Nor do we agree with the High Court Judge[110] that the legislative history or the inclusion of an express provision in the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 alters the position. The logical outcome of exercising the s 27 power was so clear that no further provision was required.

[149] Furthermore, we agree with Mr Goddard for the Councils that it makes no sense to suggest that the s 27 power may be exercised after the conclusion of an appeal to the Environment Court, in a manner that would reverse the result of the appeal, but not while the appeal is on foot. There is no warrant in the statutory language or scheme for such a limit. On the contrary, in the context of this Act an interpretation which results in an outcome that avoids the pursuit of unnecessary appeals makes sense.

Failure to take into account relevant considerations?

[150] In their notice supporting the High Court judgment on alternative grounds, the respondents rely on a claim not addressed by the High Court Judge that the Minister failed to take into account mandatory relevant considerations when he made his decisions. Relying on decisions of this Court that mandatory relevant considerations arise as a matter of statutory interpretation,[111] the respondents submitted that when the requirements of s 10 and the consequences of exercising the s 27 power are taken into account Parliament would expect the Minister to address the actual impact of the exercise of the powers.

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109 High Court decision, above n 2, at [173].
110 High Court decision, above n 2, at [174]–[175].
111 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); and *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [49].

[151] We refer to this ground for completeness, but given the conclusions that we have already reached it is unnecessary to address it further than it has already been dealt with directly and indirectly in this judgment.

Relief

[152] At the conclusion of the hearing we invited the parties to provide memoranda indicating their options for relief in the event that we decided that the High Court was wrong to find that the Minister's decisions were invalid on the improper purpose ground, but that they were nevertheless invalid on the ground that the Minister had failed reasonably to consider whether the exercise of the s 27 power was necessary. We received helpful memoranda from the Councils dated 28 November 2012 and the respondents dated 5 December 2012 suggesting a range of alternative options.

[153] The Councils sought orders allowing the appeal and setting aside the High Court orders on relief, thereby reinstating the introduction of chapters 12A and 22 and the revocation of PC1, and a direction under s 4(5C) of the Judicature Amendment Act that the Minister reconsider his decision. Alternatively, they suggested that instead of directing the Minister to reconsider his decision the question of relief could be adjourned pending formulation and approval of a Land Use Recovery Plan; or that the High Court orders reversing the insertion of chapters 12A and 22 be set aside, but that the High Court order setting aside the revocation of PC1 be upheld, with leave reserved to apply to the Court for further orders or directions. The Councils also sought consequential orders requiring the respondents to pursue their Environment Court appeals on the basis of the version of PCI prepared by the Councils and CERA for the Minister.

[154] The respondents sought orders dismissing the appeal and retaining the High Court decision. They submitted, however, that if this Court did not uphold the High Court judgment on the improper purpose ground, then the Minister's decision to revoke PC1 should be set aside, but the decisions to introduce chapters 12A and 22 need not be set aside, so that those chapters would remain in effect, except to the extent that the subject matter of those chapters was challenged in appeals before the Environment Court. This was on the basis that the challenged provisions would

become operative in the form determined by the Environment Court at the conclusion of the appeals. The respondents opposed the suggestion that the version of PC1 prepared by the Councils and CERA for the Minister should be the basis of their appeals.

[155] We have considered the alternative proposals put forward by the Councils and the respondents, but in the end have decided that we should approach the exercise of our discretion to grant relief in the usual way. The starting point is that the respondents, having demonstrated that the Minister erred in the exercise of his s 27 power, are entitled to relief.[112] We then consider that there are no extremely strong reasons to decline relief.[113]

[156] First, there is no challenge on appeal to the High Court Judge's conclusion that there was no delay by the respondents sufficient to require relief to be declined.[114]

[157] Second, contrary to the submissions for the Councils, there is no evidence of any disruption to the recovery of greater Christchurch as a result of the High Court decision. There was no application by the Councils for leave to adduce further evidence on appeal.

[158] In particular, there was no application for leave to adduce evidence that the practical difficulties identified by council officers in their affidavits in the High Court relating to decisions made in reliance on chapters 12A and 22 have eventuated since the reinstatement of PC1 following the High Court decision. We have nothing before us that supports the submission for the Councils that upholding the Judge's decision on relief will undermine the legislative intent of the Act. Even if there were evidence of some such difficulties, it may well have been outweighed by the prejudice to the respondents as found by the Judge in the High Court.[115]

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112 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [61].
113 Ibid, at [60]; and *Secretary for Justice v Simes*, above n 111, at [117].
114 High Court decision, above n 2, at [188]–[190].
115 High Court decision, above n 2, at [191]–[203].

[159] Furthermore, notwithstanding the High Court decision on 24 July 2012 setting aside chapters 12A and 22, the Minister on 15 November 2012 was able to exercise his power under s 16(4) of the Act to direct the Canterbury Regional Council to develop a Land Use Recovery Plan for Greater Christchurch, which is to provide for:[116]

> the location, type and mix of residential and business activities within specific geographic areas necessary for earthquake recovery, including:
>
> (i) the priority areas to support recovery and rebuilding in the next 10–15 years; and
>
> (ii) enabling and informing the sequencing and timescales for the delivery of infrastructure and transport networks and hubs to support the priority areas ...

[160] This tends to show that the Minister expects the Council to be able to develop this Plan in the absence of the "planning certainty" he sought to achieve through chapters 12A and 22.

[161] While there is some force in the Councils' submission that reactivation of the Environment Court appeals would be likely to divert council officers from earthquake recovery matters, the question whether the Environment Court should continue with the appeals following our judgment will depend on the steps that the Minister and the parties to those appeals decide to take. We therefore do not accept the submission that reactivation of the appeals will necessarily divert Council officers from earthquake recovery matters.

[162] We also agree with the respondents that this is not a case where we should formally direct the Minister to reconsider his decisions under s 4(5)–(5C) of the Judicature Act, either on the basis that his decisions are retained or set aside.[117] It is for the Minister to decide whether he wishes to reconsider his decisions in light of this judgment or to proceed in a different manner.

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116 "Direction to Canterbury Regional Council to Develop a Land Use Recovery Plan for Greater Christchurch" (15 November 2012) 136 *New Zealand Gazette* 3976, cl 2.2.

117 *Air Nelson Ltd v Minister of Transport*, above n 112, at [73]–[75]; and *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA) at 648.

[163] Finally, we do not consider that it is appropriate to accept the submission for the respondents to reinstate PC1 and chapters 12A and 22, except to the extent that the subject matter of those chapters is challenged on appeal. Our decision that the appeal is to be dismissed on the grounds we have identified means that it is unnecessary to consider the complexities which would inevitably be involved in relief of this nature.

Conclusion

[164] For the reasons we have given, we have concluded that to the extent that the Minister's two decisions achieved planning certainty they were made in accordance with the purposes of the Act. But we have also concluded that the two decisions were invalid because, in exercising his power under s 27 of the Act, the Minister failed to consider whether it was necessary to proceed by way of s 27 rather than by way of the Recovery Strategy and/or Recovery Plans. We therefore agree with the result in the High Court, but not with all of the Judge's reasons for reaching that result.

[165] We have accepted the submissions for the Minister and the Councils that decisions designed to achieve planning certainty for greater Christchurch may be in accordance with the purposes of the Act. Our decision, however, is based on the absence of evidence that the Minister reasonably considered the alternatives to proceeding in October 2011 by way of his discretionary power under s 27 rather than by way of the mandatory Recovery Strategy and Recovery Plans, which involved public participation and which were likely to overtake the s 27 decisions in any event. In these circumstances it has not been necessary to decide whether all the content of chapter 12A is in accordance with the purposes of the Act.

[166] Whether the Minister wishes to reconsider his decisions in light of this judgment or proceed in a different manner, such as by way of the proposed Land Use Recovery Plan, is for the Minister to decide.

Result

[167] The appeals are dismissed.

[168] Our preliminary view is that the respondents, as the successful parties, are entitled to their costs on a Band B basis for a complex appeal, together with disbursements in the usual way. But as they have not been successful on all grounds and as we did not hear from the parties on the question, costs are reserved. If the parties are unable to reach agreement, memoranda may be filed: the respondents by 31 January 2013 and the appellants by 14 February 2013.

Solicitors:
Wynn Williams, Christchurch for Appellants in CA438/2012, CA505/2012 and CA514/2012
Crown Law, Wellington for Appellant in CA507/2012
Anthony Harper, Christchurch for Respondents
Chapman Tripp, Christchurch for Intervener

APPENDIX: EXTRACT FROM THE AFFICATIVE OF THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY

38. I wish to highlight several aspects of the [decision] paper. As I have noted, I was aware generally and from the discussions I had with Mr Dormer and with Prof Peter Skelton, one of Environment Canterbury's Commissioners, that Environment Canterbury was seeking a change to its operative RPS by adding a new chapter 12A through PC1.

39. I knew PC1 had been considered by the hearing commissioners who had recommended some changes and that the document had been appealed to the Environment Court by a number of disappointed parties. I also knew that negotiations had resolved a number of issues with developers and consent memoranda had been filed with the Environment Court. In particular, I was aware that the argument about the legality of having an urban limit line at all had been resolved. The parties may not have been in agreement about where the line was to be placed, but I understood that the concept of an urban limit line was accepted as a valid tool. In general I also understood that there was no real disagreement to the area that PC1 proposed to be within the line; the issue was what else should or could be included.

40. I also understood that the UDS Partners had sought adjournments of the Environment Court proceedings which had been unsuccessful and that that decision was the subject of judicial review proceedings.

41. I was surprised and concerned that the Environment Court did not grant adjournments as requested in May and September 2011 because of the level of uncertainty that the on-going litigation caused for developers and the local councils. By then it was apparent there was potentially considerable overlap between PC1 and the draft Recovery Strategy, which I am required to consider and approve. Even if the Recovery Strategy was not going to deal with projected growth, residential density and provision of infrastructure, the proposed Recovery Plans were another vehicle which could do that.

42. I was concerned the Environment Court proceeding was delaying the implementation of the earlier negotiated agreements which had resulted in draft consent orders being filed with the Court and would have allowed development to proceed. This was delaying the planning, rebuilding and recovery of greater Christchurch as sought by [the Act]. I was not at all confident the Environment Court process would result in an overall plan which could be implemented quickly. I could see the appeal processes stretching out for a very long time indeed.

43. I considered it extremely unhelpful that the very council officers who were required to contribute to the Environment Court hearing were the ones that should have been focussed on recovery planning. I knew that the procedural hearings for the appeals were held in Queenstown, as the Environment Court considered that none of the hearing venues available in Christchurch were satisfactory, and that it was uncertain whether the

Environment Court planned to hold further hearings of the appeals in Queenstown as well. Having to travel to Queenstown on a regular basis for these hearings would have further compromised the councils' officers' ability to contribute to the region's recovery.

44. It was obvious, but confirmed from the Case family correspondence and my discussions with Mr Dormer, that as a result of my decision there would be perceived disadvantages to those who were attempting to have their properties included within the urban limit line through the appeal processes.

45. Giving effect to the proposed urban limit in PC1 did not, however, mean the limit could not be changed at a later date. PC1 itself contemplated this if there was a change of circumstances and I understood there was an ability to use the s 27 powers to make further changes if necessary.

46. The October briefing paper contained guidance as to how I could exercise the section 27 powers within the purposes of [the Act]. Specifically, I was referred to the following purpose:

46.1 To enable community participation in the planning of the recovery of affected communities without impeding a focus, timely, and expedited recovery;

46.2 To provide for the Minister and CERA to ensure the recovery;

46.3 To enable a focussed, timely and expedited recovery;

46.4 To facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property;

46.5 To restore the social, economic, cultural, and environmental well-being of greater Christchurch communities.

47. I was aware that the purpose of enabling community participation may have been perceived as being curtailed by using the section 27 process, but I was also aware that the community had been consulted for some years about the urban limit line and that, with a few exceptions where people wished to extend the line to include their property, there was no community opposition to having a line.

48. Having considered the advice I received and for the reasons outlined in this affidavit I was in no doubt that the use of my section 27 powers to provide a specific chapter within the RPS to deal with the development of Greater Christchurch was necessary and was consistent with the relevant purposes of [the Act]. In my view the work already done by the UDS Partners to plan for urban development and the extensive consultation involved in that process were a useful starting point to provide certainty following the earthquakes. I also understood officials at CERA had been working with the UDS Partners staff to incorporate those agreements reached as part of the appeal process relating to developments at Prestons, Hills/Mills, Lincoln Land and Memorial Avenue and to make a number of additions to take into account matters following the earthquakes. What emerged was something beyond the UDS Partners' version of PCl.

49. In many ways, the inclusion of a new Chapter 12A based on the amended PC1 was a neat solution to assist to resolve the problems confronting the greater Christchurch area at that time.

50. I was faced with the prospect of significant numbers of people being unable to find appropriate accommodation in the region. That was not going to assist the recovery. I had to create a situation where there were sufficient opportunities for significant numbers of the local population to move to appropriate housing within the locality. That would not occur if there was rampant land inflation due to a restriction on supply. Along with those economic recovery factors, the social consequences would be terrible if people in the "Residential Red Zone" were not able to move. These were issues I did not feel the local authorities were capable of overcoming without assistance.

51. A further consideration was the obvious fact that CERA and [the Act] will expire in 2016. I was conscious that my decisions would need to be broadly acceptable to the UDS Partners, who will inherit those decisions and I wanted to put in place a document that was consistent with the work already done on infrastructure planning, traffic management and the like. It was, in my view, important that the UDS Partners were able and willing to work with the planning structures they would eventually inherit.

52. Other than in the general terms, I did not take into account any information about the specific circumstances of individual property developers, and others, who might be affected, one way or another, by the inclusion of a new Chapter l2A based on PCl as amended. I was, as I have noted, aware from the correspondence on behalf of the Case family and my discussions with Mr Dormer that my decision would impact to the disadvantage of some. Any concern that some parties may have lost the ability to continue an appeal which might theoretically have resulted in them gaining an ability to improve their position was discounted by the compelling need to provide the Councils, infrastructure providers and developers with certainty so that the pressing need for residential development to occur in appropriate places would not be delayed.

53. I also understood my decision was not necessarily going to be final. As the Recovery Strategy and future Recovery Plans are developed it is likely Chapter 12A will be reviewed and could change. Given the uncertainty about population movements in greater Christchurch I was not too concerned about the accuracy of the population projections in Chapter 12A as I knew these would be looked at again. Although I expected movement out of Christchurch after the earthquakes, and for more people to move into Christchurch during the rebuild, the numbers involved were hard to estimate. It was, therefore, easier to adopt what had already been drafted and consulted on rather than trying to update such figures during a time of great uncertainty.

54. I also made it clear to the UDS Partners that if individual cases of merit were presented to me I could potentially use my section 27 powers to amend the urban limit line to assist with the recovery. This is a point not lost on Mr Dormer, Mr Pebbles, the Case family and the representatives of Clearwater all of whom have approached me and/or CERA officials requesting a rezoning of their respective lands.

55. There was one aspect of the 7 October 2011 paper with which I did not agree. That was the recommendation I use my powers to suspend PCl. In my view suspension was not appropriate. It would still have left the appeal process in a sort of "suspended animation" and that would have been confusing for the various participants. There was also some doubt about what suspension would mean in practice. I was very keen that there be no doubt that the appeal process, and the time commitment by Council staff and others, had been brought to an end.

DOUBLE SIDED

ORIGINAL

Decision No. C 137 /2000

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an under appeal under section 120 of the Act

BETWEEN **B D GARGIULO**

(RMA 1097/98)

Appellant

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson
Environment Commissioner R Grigg
Environment Commissioner R S Tasker

HEARING at CHRISTCHURCH on 3, 4, 5, 6 and 7 April 2000

Final submissions received 5 May 2000

COUNSEL

Ms P A Steven for the appellant
Mr J G Hardie for the Christchurch City Council
Ms J M Appleyard for the Canterbury International Airport Limited
Ms M Perpick for the Canterbury Regional Council

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION

Table of Contents

[A] Introduction

[1] This is an appeal under section 120 of the Resource Management Act 1991 ("the Act" or "the RMA") by Mr B D Gargiulo arising out of a refusal by the Christchurch City Council ("the CCC") to grant Mr Gargiulo a subdivision consent and a land use consent.

[2] Mr Gargiulo is the owner of land at 64 Stanleys Road, Christchurch containing 4.6 hectares (Lot 3 DP 19059 Christchurch Land Registry). The land is surrounded by shelterbelts of poplars and divided into four equal rectangles by two further shelterbelts. Most of the land is covered in raspberry vines except for the southwest quadrant by Stanleys Road on which are located a tomato packhouse, a residence and a granny flat. In 1998 Mr Gargiulo applied to subdivide the land into two 2.3 hectare lots (Lots 1 and 2). Lot 2 would include the existing buildings. A land use consent was also applied for to permit the erection and use of a dwellinghouse on Lot 1.

[3] The CCC refused the resource consents, and Mr Gargiulo appealed to this Court. The proceeding was joined by Christchurch International Airport Limited ("CIAL") as a section 271A party (in respect of the appeal against the subdivision

consent), and by the Canterbury Regional Council ("the CRC") in respect of the appeals against both resource consents under section 274 of the Act.

[4] The CCC has two relevant district plans. The operative plan is the Waimairi Section (called "the transitional plan") of the Christchurch City Plan; and there is a proposed plan under the RMA which was first notified in 1995 and amended, after hearings, in 1998. We shall refer to the plan as revised as "the proposed plan". Under the proposed plan the land is in the Rural 5 (Airport Influences) zone. It is common ground also that the land is within the 50dBA Ldn[1] noise contour of the Christchurch International Airport as that is shown on the CCC's planning maps for the proposed plan (and outside the 55dBA Ldn contour to the west). It is common ground that the resource consents applied for are non-complying activities under both the transitional plan and the proposed plan.

[5] There were three witnesses called in support of the appellant's case: Mr B D Gargiulo himself, Mr A J Rosanowski, an horticultural consultant, and Mr C M Horne, a resource manager. Mr Gargiulo stated that on the 4.6 hectares of land there are two residences (including a granny flat) and over 2 hectares of unprofitable raspberries. The packhouse is a successful and profitable operation. In effect Mr Gargiulo wishes to get rid of half the property on which there are raspberries. He proposes to make it easier to do that by obtaining resource consent to erect a dwelling on a footprint of 500m^2 within Lot 1. He is also prepared to have a condition imposed on any resource consent for the land use of the residence on Lot 1 that it has noise insulation to the City Council's requirements even though that is not a standard outside the 55dBA Ldn contour. Much of the land along Stanleys Road has historically been subdivided into allotments that are less than 4 hectares even though that is the minimum lot size for future subdivision in the Rural 5 zone of the proposed plan. Mr Gargiulo opposed that minimum lot size by submission on the proposed plan as notified, but his submission was not accepted.

[6] Broadly, and oversimply, there are two arguments for opposing the subdivision and increased residential use of the land. They come down to the preservation of

[1] Mr Day defined the acoustic items in an Appendix A which we have annexed to this decision as part of it.

the versatile soils of the region, and the protection of the Christchurch International Airport against potential complaints by the residents in the area. It is Mr Gargiulo's case that the subdivision would not necessarily preclude all the versatile soil on the land being used. Horticultural or other agricultural uses would still be a possibility even if a further house was built on Lot 1. In respect of the reverse sensitivity effect of further development on the airport Mr Gargiulo stated that he had never found that the noise from the airport was a problem. Another aspect of the case strongly put by Mr Gargiulo's counsel, Ms Steven, is that Mr Gargiulo has a sense of unfairness or grievance. The point is that most of the rest of the properties in Stanleys Road have historically been allowed to subdivide down to less than four hectares including a previous subdivision by Mr Gargiulo. Mr Gargiulo is now aggrieved, as his counsel puts it, that he cannot subdivide "this one remaining larger lot in Stanleys Road".

[7] For Mr Gargiulo, Mr Rosanowski gave evidence on versatile soils which we will refer to later. However to keep the case in perspective we recognize here that the area of versatile soils which would be taken out of production if the consents sought were granted and acted on is small – not more than 500m^2. This case is really concerned with the cumulative or precedent effects of granting consent.

[8] The third witness for Mr Gargiulo was Mr Horne. He gave us his opinion that the threshold tests in section 105(2A) of the Act were met because:

(a) any adverse effects including use of versatile soils and reverse sensitivity effects on the International Airport were minor, as were any potential cumulative effects;

(b) the proposals were not inconsistent with the objectives and policies of the district plans.

In his opinion granting the consents would neither create any kind of precedent nor undermine the integrity of either district plan. He also considered the matters in Part II of the Act and concluded that it would be "appropriate to grant consent to this application subject to the original conditions of consent recommended by the

Council Planning Officer." Again we will refer to aspects of his evidence in more detail later.

[9] The respondent, the CCC called one witness, Mr D Douglas, one of its senior resource planners. He was of the opinion that the proposal contravened the objectives and policies of both plans and in addition that its effects were more than minor.

[10] In respect of the other two "parties" we record first that a preliminary issue was raised by Ms Steven in interlocutory proceedings. It was whether the CIAL had any status in respect of the land use consent in respect of which it did not file a submission. In a preliminary decision dated 1 April 1999[2] Judge Skelton decided on a provisional basis that it did. Since, at the hearing before us, CIAL and CRC pursued a joint case Ms Steven for Mr Gargiulo did not take the point any further. However, because it may be relevant on the issue of costs we proceed on the basis that CIAL has status as a section 271A party in respect of the subdivision consent and as an interested person under section 274 of the Act in respect of the land use consent for a further residence on Lot 1. CRC is a section 274 party in respect of both matters.

[11] CIAL is responsible for the administration of the International Airport at Christchurch. It called a number of witnesses opposing the applications. First, Mr R A McAgnerney, the resource manager for CIAL gave evidence of the history of the protection of the airport by earlier district plans including those prepared under the Town and Country Planning Act 1953 and the Town and Country Planning Act 1977. Since 1958 the airport has been given some protection by a line drawn at what is now the 50 dBA LdN noise contour. Inside that line there have been controls over the construction of new residences. However, the transitional plan contains no minimum lot size for subdivision of rural allotments for farming purposes. Consequently developers who put up a case that small allotments, including

allotments under 4 hectares, were "economic units" within the meaning of the plan, obtained subdivisions down to smaller sizes and a consequential right to build a house on them. That is how much of Stanleys Road was subdivided into allotments smaller than four hectares. It was clear that CIAL does not want that pattern to continue.

[12] Next CIAL called Mr R W Batty, a senior resource manager and a town planner with many years experience. He gave evidence as to the relevant planning instruments and we will refer to that later. He also gave evidence as to the difficulties that international airports have with adjacent residential uses. The point of his evidence was that the more people that reside close to an airport the more complaints about noise there will be. Then Mr M G Barber, a planning consultant, gave evidence as to the number of residences around the airport within the 50 dBA LdN contour and also gave an estimate of the potential number of residences if all land was subdivided down to the various limits provided in the zones around the airport. He concluded[3] (relevantly) that if all land which is:

- between the 50 and 55 dBA Ldn contours;
- within the Rural 5 zone; and
- south and east of the Airport

was subdivided into 2 hectare blocks, there would be up to a further 127 lots on that land alone, (and therefore, potentially, dwellings). He also pointed out there are a number of vacant allotments at present which have a right to build a dwelling which could also swell the number of potential complainants about the airport.

[13] Mr T I Marks, a registered valuer, gave rather anecdotal evidence as to the value of land around the airport. In his estimate there was a 10% depreciation for residences within the 50 dBA LdN contour. As to the relationship between neighbours and airports in respect of noise, we then heard noise evidence from an acoustic expert, Mr C W Day. We also heard evidence from a psychologist, Dr S A

[3] M G Barber evidence-in-chief para 16.

Staite relating to the effects of airport noise on residents who are exposed to that noise. We shall refer to the latter two sets of evidence later.

[14] The CRC also called three witnesses on the issue of versatile soils - Mr T H Webb, Mr R A Brooks and Mr L R McCallum and we will refer to their evidence at various points under the relevant headings.

[15] In coming to our decision we will have to consider the matters set out in section 104 of the Act "subject to Part II". It was common ground that there are some relevant Part II matters and we will give those due weight. The relevant matters under section 104(1) of the Act in this case are:

> *(a) Any actual and potential effects on the environment of allowing the activity;*
>
> ...
>
> *(c) [the] regional policy statement;*
>
> *(d) [the] relevant objectives, policies, rules [and] ... other provisions of [the CCC's transitional and proposed] plan[s];*
>
> ...
>
> *(i) Any other matters ...*

We will consider each of those matters in turn in parts [B] to [E] of this decision. In part [F] we will consider section 105 of the Act: first the threshold tests under section 105(2A) of the Act in respect of each plan, then the relevant Part II matters, and finally we will exercise our discretion under section 105(1)(c) of the Act as to whether or not to grant the consents sought.

[B] Actual and potential effects

[16] We accept there will be benefits accruing to Mr Gargiulo if he is permitted to subdivide and a house could be placed on Lot 1; there will also be benefits to the public in having a further smaller allotment on the market.

[17] The alleged adverse effects of granting the subdivision and land use consent (for rural-residential purposes on Lot 1) are:

(a) taking versatile soils out of production

(b) the potential for increased complaints about the operations of the International Airport

(c) the potential cumulative effects of (a) and (b) on the environment.

We consider these in turn.

Versatile soils

[18] It was common ground that the soils on the site in Stanleys Road are classified as class I and class II in the land use capability study[4] and are therefore versatile soils for the purposes of the Canterbury Regional Policy Statement ("the RPS") and the CCC's proposed plan. The case for Mr Gargiulo is that subdivision and the erection of a dwelling on Lot 1 would make the land even more productive as a whole, and therefore the various objectives and policies as to versatile soils would be met.

[19] We do not intend to go into the productivity question in any detail. Mr Rosanowski was called for Mr Gargiulo and gave evidence that in his view Lot 1 could be used productively for a number of crops and produced all sorts of crops, including the usual lilies, trees, hydrangeas, paeonies, olives, water chestnuts and (a new crop to us) – gevuina nuts. However, Mr Rosanowski's credibility was rather undermined in cross-examination by Ms Perpick, counsel for the CRC, when she put

[4] NZ Land Resource Inventory published by Landcare Research NZ Ltd.

to him his evidence in the ***Dear v Waimakariri District Council***[5] case where he had been giving evidence for the Waimakariri District Council. There he gave evidence to the effect that units of less than 4 hectares could not be productive on versatile soils.

[20] For the CRC Ms Perpick submitted that the protection of versatile soils is a fundamental matter of sustainable management under section 5(2)(b) of the Act which refers to:

> *(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems;* (our underlining)

- as a part of sustainable management.

[21] She also referred to the contents of the regional policy statement and its objectives and policies in respect of versatile soils. She pointed out the apparent conflict between the cases. There are many cases where the principle that versatile soils need to be protected under section 5(2)(b) has been upheld and subdivision into small lots has not been allowed: ***Pickmere v Franklin District Council***[6]; ***Peters v Franklin District Council***[7]; ***Houchen v Waikato District Council***[8]; ***Robinson v Ashburton District Council***[9]; ***Armstrong v Waimakariri District Council***[10]; ***Burnett v Tasman District Council***[11]; ***Sutherland v Tasman District Council***[12]; ***Lovegrove v Waikato District Council***[13]; ***Croudis Family Trust v Franklin District Council***[14]; ***Baker v Franklin District Council***[15]; ***Gentry et al v Waikato District Council***[16]. In that last case the Court stated:[17]

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5 C32/00.
6 A46/93.
7 A49/93.
8 A51/94 [1995] NZRMA 26.
9 W92/94.
10 C33/95.
11 [1995] NZRMA 280.
12 W38/95.
13 A17/97.
14 A113/97.
15 A70/98.
16 A118/99.
17 A118/99 at paras [26] and [27].

In our view, fragmentation of this land which is highly versatile farm land of high quality soil in a relatively large holding, would be contrary to sections 5(2)(a) and 5(2)(b) of the Act. Subdivision for rural-residential development would reduce the versatility of the land and prevent the development of productive use of the potential of the soil resource. It would also be failing to safeguard the life-supporting capacity of the soil. Fragmentation of this land will have an adverse effect on the ability of the soil on the site to provide for the needs of future generations. As the plan recognises, the adverse effects of fragmentation on the future utilisation of the soil cannot be remedied or mitigated. Rezoning this site will, in our view, enable the fragmentation of the land and prevent the efficient use and development of the soil resource in the future. Maintaining the land as a rural entity will retain opportunities for future generations to use the soil as they see fit to provide for their needs.

The strategy in the district plan seeks to safeguard the capacity of rural land, and high quality soil in particular, to produce food, fuel and fibre to meet the needs of this and future generations. The Plan does not set out to protect high quality land as an end in itself. Rather the Plan considers high quality soil within the context of all the soil in the district and adopts a policy that seeks to avoid adverse effects of activities causing irreversible changes to that soil resource.

[22] On the other hand Ms Perpick referred us to a number of cases in Canterbury where versatile soils have not been preserved despite the contents of the regional policy statement: ***Canterbury Regional Council v Selwyn District Council***[18]; ***Becmead Investments Ltd v Christchurch City Council***[19]; ***Dear v Waimakariri District Council***[20] and ***Dallison v Waimakariri District Council***[21]. In particular she referred to ***Dear*** where the Environment Court referred to the contents of the RPS but did not give reasons as to why it nevertheless was prepared to allow subdivision. Ms Perpick also submitted that it was inefficient for councils and the Court to allow attacks on the RPS on efficiency grounds when the efficiency of the RPS had been

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18 [1997] NZRMA 25.
19 [1997] NZRMA 1.
20 C32/00.
21 W65/98 (No. 2).

established by the section 32 analysis prior to the RPS coming into force. She also submitted that the CRC's argument is not to dictate that productive use occur on land but to ensure that the land, and especially the versatile soils, have as many options kept open for their future and productive use.

***Paragraph [23] has been deleted and substituted by paragraph [5] of an Erratum dated 21 August 2000**

[23] For the Canterbury Regional Council Mr Brooks, a farm consultant, gave evidence similar to that which Mr Rosanowski gave in the ***Dear*** case. On the face of it Mr Brooks' evidence here should be preferred over that of Mr Rosanowski. However we are aware that in a previous case – ***Dallison v Waimakariri District Council***[22] – Mr Brooks was acting for the successful applicant whose decision was being defended by the Council and he there gave evidence as to the productivity of small allotments which would justify subdivision. Unfortunately that apparent inconsistency was not put to Mr Brooks in this case so his credibility for present purposes exceeds that of Mr Rosanowski. We do remind the witnesses, and this applies to any area of expertise, that while it is proper for a witness to act for different parties in different cases, they should take real care that their professional integrity is not undermined by giving inconsistent evidence i.e. evidence which changes depending on which party they are giving evidence for.

[24] Without dealing definitively with Ms Perpick's arguments (which appear to have some force) it may also assist the CRC if we observe that we have a number of difficulties with the RPS in respect of versatile soils. First as to whether there can always be an attack under section 7(b) on the sufficiency of the RPS: every appellant has a right to raise any matter in Part II of the Act, because section 104(1) is expressly made *subject to Part II.* It seems to us the major effect of the existence of the RPS in respect of the efficiency argument is to put the onus on an appellant to produce the evidence to show that the particular policy in question is inefficient.

[25] Secondly, on the evidence called for the CRC there is a tension between the policy and the value of the land. We had evidence from the CRC's own witness, Mr Brooks, that versatile soils south of Christchurch may be worth ten times as much for rural-residential development as they are for farming. For example, he refers to land

[22] W65/98 (No. 2).

in a development called Parc Provence which may be valued at $10,000 per hectare for farming purposes but sells at $100,000 per hectare for rural-residential use[23]. In such a case would not efficiency require that land be kept for farming and other purposes rather than developed for rural-residential use only if the versatile soils had intangible values (or tangible values not yet ascertained) that exceed $90,000 per hectare?

[26] Thirdly, we were also left uneasy with the apparent conflict between protection of versatile soils and Mr Webb's evidence as to the long term lack of sustainability of modern farming with its heavy demands for nutrients.

[27] For what it is worth, it seems to us that if the versatile soils argument is to be maintained it may be on less direct grounds:

(a) For example, there is an argument against sporadic development in the country, presumably reinforced by the reverse sensitivity arguments for farmers.

(b) Conversely the versatile soils arguments have less force in the vicinity of towns or cities as decisions such as ***Becmead***[24] and ***CRC v Selwyn District Council***[25] demonstrate. Perhaps rural-residential areas in general should expand while avoiding larger areas of versatile soils but not being too fussy to protect pockets of them which for historical and anomalous reasons have not previously been developed.

(c) By looking at the question of whether there are perverse incentives created by transport subsidies and the pollution costs of vehicle use not charged to users.

We hold that the adverse effect of the applications in this case on versatile soils is, by itself, only minor.

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[23] R A Brooks evidence-in-chief para 63.
[24] [1997] NZRMA 1.
[25] [1997] NZRMA 25.

Noise effects

[28] Mr Day, the CRC's noise expert, wrote[26]:

> *The proposed subdivision is located predominantly between the Ldn 53 to 55 dBA airport noise contours in the district plan. It can be seen from Figure 1 that 10 to 13% of the population will be highly annoyed in noise levels of Ldn 53 to 55 dBA. In my opinion, this confirms that this environment is not a sensible location for new residential development.*

The Figure 1 referred to by Mr Day is a graph showing "Community Response to Aircraft Noise" development by a Dr J Bradley in 1996[27]. Ms Steven, in her reply, submitted that Mr Day's evidence was of no probative value because it relied on the survey by Dr Bradley. Thus Mr Day's evidence did not comply with the requirements for survey evidence as stated in ***Shirley Primary School v Christchurch City Council***[28]. However in answer to Ms Steven's question in cross-examination as to the survey techniques used Mr Day stated[29]:

> *... the summary paper* [has] *been carried out by a chap Dr John Bradley who is an extremely well respected researcher in the field internationally and he's collated all these results to provide a useful summary for practitioners to use. ... I greatly respect his opinion in selecting surveys that have been appropriately carried out.*

[29] We do not accept that the cases are comparable at all. In ***Shirley Primary School*** the appellant sought to introduce a survey of people affected by a specific proposal, that survey having been conducted by a lecturer in statistics[30] not an expert on the subject of the survey. Here by contrast Mr Day is himself an expert on noise. He is giving evidence of his opinion based on a review by a Dr J Bradley of yet other statistical studies of community responses to aircraft noise. Mr Day's evidence has

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26 C W Day brief of evidence para 6.4.
27 "Determining Acceptable Limits for Aviation Noise" Internoise 96.
28 [1999] NZRMA 66 at paras 137-139.
29 Notes of cross-examination p.119.
30 [1999] NZRMA 66 at para 88.

to be assessed as a whole having regard to the criteria for expert evidence stated elsewhere in ***Shirley Primary School***[31]. In fact, there was no expert evidence opposing Mr Day on noise issues, nor was there any successful attack on any other aspect of Mr Day's expertise or evidence. Consequently we accept his evidence in its entirety including his opinion that the figure as to community response to noise was accurate and could be relied on because it derived from Mr Bradley.

[30] We give considerable weight to Mr Day's summary of his views when he wrote[32]:

> *The District Plan Policies recognise the concept of reverse sensitivity. The Plan Objectives also include: 'to control rural dwelling densities in recognition of the particular resource limitations, including any need to protect International Airport operations' (Objective 13.1.7). The Plan Rules establish the level of control required (i.e. minimum 4 hectares) to achieve these policies and objectives for this site. In my opinion the proposed increase in density and the land use application, do not meet the Plans Policies and Objectives.*
>
> *The proposed residential development does not represent appropriate land use planning around this significant national resource. When there is no general shortage of land for residential development around Christchurch, why chose* (sic) *to locate new residential activity in areas affected by airport noise.*

[31] Two other answers by Mr Day to cross-examination by Ms Steven were also helpful on aspects of this case. The questions and answers were[33]:

> Q. *Now just going back again to your statement that you are inclined to consider that a level of noise exposure between 53 and 55 is unacceptable for residential activity, can you confirm that please, is that your opinion?*

[1999] NZRMA 66 at para 144.
C W Day brief of evidence-in-chief para 9.
Notes of evidence p.122.

A. *I say it's undesirable; unacceptable implies that every person who moved in there would find it unreasonable. What I'm saying is one out of 10 people that move in there will find it highly annoying so I say it's undesirable to locate residential accommodation there.*

Q. *Now assuming Mr Gargiulo agrees to a condition, and indeed he has said he will, incorporating noise attenuation, is that not going to mitigate some of the noise impacts?*

A. *It will reduce the level of aircraft noise inside his home when the windows are closed but his home, a standard New Zealand home in that environment will already achieve the objectives of the plan and what's termed an acceptable internal noise environment with the standard construction once the windows are closed, providing additional sound insulation will further reduce it but already just a standard home would get to the desirable internal levels. When he opens his windows or when he operates outside then there would be in my opinion an undesirable noise environment.*

We draw two conclusions from this uncontroverted evidence:

(a) There is a 10% chance that whoever lives on Lot 1 of Mr Gargiulo's subdivision will be highly annoyed by noise of aircraft movements (quite apart from other noise from the airport); and

(b) Moving the house on Lot 1 to the back will not change (a); nor will it mitigate the annoyance outside the house.

[32] As to the evidence of the psychologist called by CIAL, Ms Steven stated in her reply:

Dr Staite produced an extensive brief of evidence in which he discussed a number of studies overseas that purport to show a link between chronic exposure to high noise levels and adverse health effects. In my submission that

evidence is of no probative value to the issue that we are here concerned with ... In some of the studies he has given no indication of the sorts of noise exposure levels the participants in the surveys were exposed to. In the studies where he has, he has concluded that children and other persons are likely to suffer health effects when consistently exposed to noise levels in excess of 75 dBA in the case of one study and 95 dBA in the case of another ...The comparisons Dr Staite makes are therefore of no probative value to the issues here.

That was close to our initial opinion of Dr Staite's evidence-in-chief also. However, Ms Steven chose to cross-examine Dr Staite and some of his answers there were rather more helpful.

[33] On the crucial issue as at what level of sound exposure causes adverse effects he answered[34]:

The findings indicate that for most studies overseas dBA levels from as low as 35, 35 – 45, most authorities conclude that that's an acceptable level of noise but that above that level the studies indicate that there are typically a range of adverse health effects.

When Ms Steven then pressed him with this question:

Now that's interesting that you say above 35 – 40, could you point to one of the studies that you discuss that supports the hypothesis that there are health effects above 35 – 40 please, I couldn't find any in your evidence.

He replied:

Yes thank you, to help me answer this question Your Honour I wonder if I could produce some notes that I've already referred to as part of my evidence, on page 10, 14 and page 33 I refer to the Health Council of The Netherlands report prepared in September last.

Notes of evidence p.152.

[34] Dr Staite then produced[35] the "Executive Summary" of a report[36] to the Minister of Health, Welfare and Sport of the Netherlands about the health impact of large airports. In answer to a question from the Court as to whether he regarded the report as sound and objective, he said[37] that it appeared to be non-partisan.

[35] Dr Staite referred to pages 21-23 of the Executive Summary and in particular to a table which listed effects for which the summary stated there was sufficient evidence for a causal relationship with noise exposure.

The effects included:

Response	severity[1]	number affected[2]	observation threshold
...			
...			
annoyance	*	***	outdoors day-night level of 42 dB(A)[3]
sleep disturbance	**	***	depending on effect, indoors SEL of 35-50 dB(A)[4]
...			

1 * = slight, ** = moderate, *** = severe.
2 * = susceptible individuals, ** = specific subgroups, *** = substantial part of exposed population.
3 threshold for 'high annoyance'; the day-night level is the equivalent sound level over 24 hours, with the sound levels during the night (period of 23-07 h) increased by 10 dB(A).
4 SEL is the equivalent sound level during the noise event normalised to a period of one second.

[36] So we are satisfied Dr Staite was considering effects of noise exposure at or below the level which will be applicable to Mr Gargiulo's property (i.e. 53-55 dBA Ldn) over the next ten years. We also accept Dr Staite's evidence that there can be adverse health effects which are not known to the persons affected by them i.e. subconscious effects. As a whole his evidence confirms Mr Day's view that the

35 Dr S A Staite: Exhibit "13.1".
36 Public health impact of large airports
Gezondheidsroad (Health Council of the Netherlands) 2 September 1999.
37 Notes of evidence p.171.

CCC has taken the correct approach in imposing restrictions on development in the Rural 5 zone in the proposed plan.

[37] In one way the evidence of Mr Day and Dr Staite may have been unnecessary since the proposed plan speaks for itself. However, their evidence is consistent with, and gives extra reasons to give weight to the objectives and policies in the RPS and in the proposed plan. Their evidence is also relevant of course to the issue of sustainable management which is at the core of this case. We find that allowing subdivision of any land in the Rural 5 zone tends to dis-enable people from providing for their health and safety[38].

Cumulative effects

[38] We have to consider not only the direct effects of permitting subdivision of Mr Gargiulo's land and (separately) a dwelling on Lot 1, but also the cumulative effects since they are included in the definition of 'effect'[39]. For the CCC Mr D Douglas gave his opinion that the cumulative effects on the airport would be more than minor. Neither Mr Batty (for CIAL) nor Mr Horne (for Mr Gargiulo) agreed and we think they are right. It is hard to see that one extra allotment and one extra dwelling somehow create a cumulative effect by themselves that will affect the International Airport in a more than minor way. Of course that is always precisely the problem with cumulative effects: any one incremental change is insignificant in itself, but at some point in time or space the accumulation of insignificant effects becomes significant.

[39] However, these issues do not have to be resolved just on their own facts on a case-by-case basis without further help: there is guidance in the RPS and in the district plan(s). The CCC (and on appeal this Court) does not have to guess whether the effects of subdivision and a new house will be adverse, the RPS and the proposed district plan both imply (as we shall see when we consider them shortly) that subdivision within the 50 Ldn contour at a density greater than one lot per 4 hectares does have adverse effects. So the real issue in this case is not whether there will be

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38 Section 5(2) of the RMA.
39 See section 3 of the Act.

more than minor (cumulative) effects on the environment but whether granting consent(s) will create a precedent that undermines the integrity of the proposed district plan. We do not want to phrase that too dogmatically, because ultimately those distinctions all revolve around the same set of issues: how to control cumulative effects. Nice legalistic distinctions are not particularly useful in this area.

[40] Subject to the qualifications in the previous paragraph, we find that the cumulative effects of one extra allotment and one extra dwelling in the Rural 5 zone of the proposed plan are minor on the facts of this case. We will consider the precedent (effect) and the effect on the integrity of the plans later - under section 104(1)(i) - since they are not effects on the environment: ***Manos v Waitakere City Council***[40]***, Gardner v Tasman District Council.***[41]

[C] The Canterbury Regional Policy Statement

[41] The Canterbury Regional Policy Statement was made operative on 26 June 1998. The RPS contains a number of relevant objectives and policies.

- ***Soils and Land Use***[42]

Objective 2 in this chapter is to:[43]

> *Minimise the irreversible effect of land use activities on land compromising versatile soils where such use would foreclose future land use options that benefit from being located on those soils, where it is practicable to do so.*

The principal reasons for the soils objective are to safeguard the life-supporting capacity of versatile soils and to sustain the potential of that land to help meet the reasonably foreseeable needs of future generations. A related consequential policy states[44]:

[1994] NZRMA 353 (HC, Blanchard J).
[1994] NZRMA 513 at 519.
Chapter 7 [RPS p 87.]
Chapter 7 [RPS p 87.]
Chapter 7, Policy 6 [RPS p.87].

(a) *Where consideration is being given to the use, development or protection of land comprising versatile soils, in circumstances where such use development or protection is necessary to achieve the purpose of the RM Act, particular regard shall be had, in the circumstances of the case, to any need to protect such land from irreversible effects that may foreclose some future land use options that benefit from being located on such land.*

(b) *Provided that where a proposed activity will irreversibly affect land comprising versatile soils and there is a choice in the locality between such activity occurring on that land or on less versatile land, the preference shall be to protect versatile land from such activity, unless the proposed activity would better achieve the purpose of the RM Act.*

- ***Settlement and the Built Environment***

The objective is to:[45]

Achieve patterns of urban development and settlement that do not adversely affect the efficient operation, use and development of:

(a) *roading infrastructure*

(b) ***Christchurch International Airport*** (emphasis added)

...

(i) *Other network utilities*

The related policy requires that:[46]

The use of land for urban development and the physical expansion of settlements should be discouraged where such use would adversely affect the

[45] Chapter 12 Objective 2 [RPS p.192].]
[46] Chapter 12 policy 4 [RPS p. 193].

operation, efficient use and development of Christchurch International Airport, Timaru Airport, the Ports of Lyttelton and Timaru, other network utilities, telecommunication facilities and military establishments for defence purposes.

We find that the proposal is not consistent with the objective as to versatile soils in the RPS. But it is not repugnant to it either: we are not sure that the versatile soils would be irreversibly lost. As to the second objective Mr Gargiulo's case (as stated in the evidence of Mr Horne[47]) is that the proposal is not urban development. We are inclined to think it is: rural-residential activities of this density have a strong urban component.

[D] The objectives, policies and rules of the district plans

[42] There are many relevant objectives, policies and methods for us to consider under both the transitional plan and the proposed plan. In considering these we remind ourselves that each plan must be read as a whole, that is, as *"a living and coherent social document."*: ***J Rattray & Son Ltd v Christchurch City Council***[48].

Transitional plan

[43] The site is zoned Rural H (Horticulture) in the transitional plan. The purpose of the zone is to give maximum protection to the land for the production of food. Subdivision and erection of a dwellinghouse are therefore contrary to that objective unless they can be seen as serving that purpose. On the evidence of effects described earlier that is not the case.

Proposed plan

[44] The proposed plan is in three volumes containing respectively:

(1) The statement of issues

(2) The objectives, policies and methods

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47 C M Horne evidence in chief paras 8.9 and 8.10 (p.22).
48 (1984) 10 NZTPA 59 at 61 (CA) per Woodhouse J.

(3) The rules

There is also a volume of planning maps.

Volume 2 contains 15 sections setting out the objectives and policies of the proposed plan and introducing its methods of implementation.

[45] The special position of the International Airport is recognised in the following (inter alia) sections of Volume 2 of the proposed plan:

- **Section 4 City Identity**.

After the policies with respect to sound levels[49] the proposed plan explains that:

> *There are other special noise environments, such as those associated ... with the International Airport.*

- **Section 6 Urban Growth**

This contains an important policy on airport operations[50]:

> *6.3.7 To ensure that urban growth does not occur in a manner that could adversely affect the future growth and operations of Christchurch International Airport*

The explanation and reasons as correctly stated[51] also include the following passage which was relied on by Ms Steven as an important part of her case[52]

> *... Between the 55LdN contour and the Air Noise Boundary, new residential development will be discouraged (except for limited development in the Living 1C Zone) and all additions to existing dwellings will be required to be*

Policy 4.2.12 [Vol 2 p.4/12].
Policy 6.3.7 [Vol 2 p.6/11].
See the Court's Decision in ***National Investment Trust v Christchurch City Council*** C67/00.
Policy 6.3.7 [Vol 2 p.6/11] as corrected by Decision C67/00 at paragraph [4].

insulated. Insulation against noise will be required for all new developments between the 55 LdN contour and the Air Noise Boundary. ***This policy is expected to protect airport operations and future residents from adverse noise impacts.*** [Ms Steven's emphasis]

Ms Steven submitted that because insulation against noise was not required of Mr Gargiulo (but he would supply it in his new building anyway) the airport was protected. At least in her opening submissions and cross-examination a very considerable emphasis was laid by Ms Steven on this explanatory passage. It gave us the impression (never really dispelled even by her closing submissions) that Mr Gargiulo's case was based on a very selective reading of the proposed plan. That is not correct as a matter of the CCC's policy approach, as an examination of the other objectives and policies show.

There is a complementary policy with respect to lower density urban development[53]:

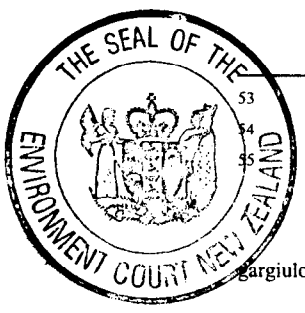
6.3.11 To provide for the establishment of serviced low density rural-residential (lifestyle) housing, particularly where normal residential densities would be inappropriate, but managed and contained in both extent and location, and in a manner consistent with other policies.

While that policy does not expressly refer to the International Airport the accompanying "Explanation and reasons" states[54]:

... Provision within the City for rural lifestyle development will continue to be limited in extent because of constraints on servicing, [and] *the presence of Christchurch International Airport, ...*

- **Section 7 Transport**

This contains an objective providing for[55]:



[53] Policy 6.3.11 [Vol 2 p.6/12].
[54] [Vol 2 p.6/12].
[55] Objective 7.8 [Vol 3 p.7/21].

7.8 Recognition of the need for regional, national and international links with the City and provision for those links.

There are related specific policies which nicely recognise the tension between providing for airport services and protecting the amenities of nearby residents[56]:

Policies: Airport services

7.8.1 To provide for the effective and efficient operation and development of Christchurch International Airport.

7.8.2 To avoid, remedy or mitigate nuisance to nearby residents through provisions to mitigate the adverse noise effects from the operations of the Christchurch International Airport and Wigram Airfield.

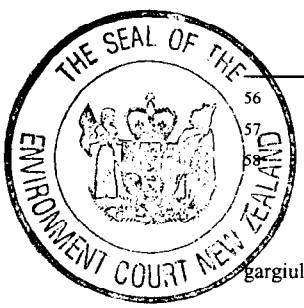
The methods of implementation for that objective and policies include the following four relevant methods[57]:

The identification of a Rural 5 (Airport Influences) Zone. Controls on the density of dwellings in Rural Zones, the extent of expansion of urban uses into the rural area and noise insulation standards for dwellings and noise sensitive uses in proximity of the airport.

- **Section 10 Subdivision and Development**

The operations of the airport are safeguarded in this section by an objective on amenity values which states[58]:

That the amenities of the built environment be maintained or enhanced through the subdivision process, ***and that the operation of physical infrastructure, and the cost of its provision, not be adversely affected by subdivision proposals*** [our emphasis].



56 Policies 7.8.1 and 7.8.2 [Vol 2 p.7/21].
57 Proposed Plan [Vol 2 p.7/23].
58 Objective 10.3 [Vol 3 p.10/7].

The explanation for the related policy confirms that in rural areas the pattern of subdivision needs to reflect such 'constraints' as the International Airport. The anticipated environmental results include[59]:

- *Maintenance of the capacity and efficiency of ... services within the City.*

We do not wish to fall into the same error as we have identified in Ms Steven's argument – of over-emphasising a particular objective (or reason) at the cost of looking at the proposed plan as a whole. However, it seems to us that the objective above (and noting that it is an objective not merely a reason) is of considerable importance in the proposed plan; and should be given proportionate weight.

- **Section 13 Rural**

There are many references in section [13] of Volume 2 of the proposed plan to the International Airport. These include[60]:

Policy: Building development

13.1.1 To provide for a pattern of subdivision and density of building development in the rural area which reflects the character of the locality and potential constraints.

The accompanying explanation and reasons state that[61]:

Within the rural area (and in some cases covered by other sections of the Plan) are a number of activities and features which collectively occupy a significant area and which substantially impact on the surrounding rural area. These include:

...

59 [Vol 3 p.10/9].
60 Policy 13.1.1 and explanation [Vol 2 p.13/5].
61 Proposed plan [p.13/5-13/6].

- *Christchurch International Airport ...*

and continue:

...

A major influence on rural character (and whether land is perceived to be rural) is the density of buildings, particularly for residential use. Accordingly, the Plan contains policies and methods which recognise the special characteristics of particular parts of the rural area. The density and distribution of further dwellings in the rural area will be subject to a degree of control, reflecting a principle that they should be avoided where:

- *the concentration of dwellings approaches that of urban character, (unless as part of urban growth or rural residential development); ...*

- *establishment of rural dwellings would conflict with existing infrastructure and facilities in rural areas and potentially inhibit their operation; ...*

The cumulative effects of subdivision and of rural dwellings are of particular significance. These must be taken into account including the potential and present cumulative effects of increased rural subdivision and dwellings having regard to the matters listed above.

The proposed plan also emphasizes the link in practice between subdivisional land use[62]:

Policy : Land use patterns and expectations

13.1.2 To recognise the strong link between rural subdivision and subsequent land use patterns and expectations.

...

[62] Policy 13.1.2 proposed plan [Vol 2 p.13/6].

And explains that:

> *... Other relevant matters are the subdivisional pattern adjacent to arterial roads and the impact and protection of infrastructure such as the International Airport. These physical resources may have their functioning compromised by adverse development pressures following some forms of subdivision and associated development of land. There is also a need to ensure development avoids areas subject to significant risk from natural hazards.*

There is a specific policy about non-rural activities[63]:

> *Policy: Non-rural activities*
>
> *13.1.4 To ensure that activities not associated with rural resources or the Christchurch International Airport or urban expansion only occur on a scale or extent consistent with avoiding or mitigating adverse effects on rural resources and the character of the rural area.*

The accompanying explanation and reasons state that:

> *In addition, there are many existing infrastructural, institutional and other facilities in the rural area, of which the Christchurch International Airport is the major example.*

[46] There is then a key policy – if only because it more directly concerns the applications in this case – as to rural dwelling densities[64]:

> *13.1.7 To control rural dwelling densities in recognition of the particular resource limitations, including any need to protect ground water quality, International Airport operations, landscape features, flood hazard and retention areas, soil versatility and control potential demand for services.* [Our emphasis].

The important point of this policy is that, by contrast with the tenor of much of Mr Horne's evidence, and the direct statements in Ms Steven's submissions, the

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Policy 13.1.4 proposed plan [Vol 2, p.13/7].
Policy 13.1.7 proposed Plan [Vol 2 p.13/9-13/10].

proposed plan is not only concerned with dwellings resulting from urban development, but also with rural development. It is concerned with all dwellings because they increase the density of residential use close to the International Airport.

The reasons explain:

> *Rural dwellings often occur at reasonably high densities near the urban area and there are some existing operations such as commercial orchards, intensive livestock management, and the International Airport, whose operations could be affected by any individual or cumulative encroachment of rural dwellings. In order to recognise and protect these operations and to protect the amenity values of residents of future rural dwellings in affected locations, segregation or mitigation measures are required.*

Further, the explanation links the other issue in this case – soil versatility – with the main issue of the airport.

> *The Plan does however, contain provisions aimed at limiting the density of dwellings in association with a range of potential uses in rural areas. The policy is aimed at retaining the potential for productivity rather than requiring evidence as to actual productivity expected at the time of approval. Dwelling house density will vary for particular parts of the rural area and has also been set having regard to soil versatility, effluent disposal, location relative to the urban boundary, and the sensitivity of residents to certain operations that can only locate in the rural area, such as Christchurch International Airport. Accordingly, the density limitations on rural dwellings reflect a range of potential effects and acceptable outcomes depending on the location.*

[47] The point is emphasised yet again by the objective for rural infrastructure. This states[65]:

[65] Proposed Plan [Vol 2 p.13/14].

Objective: Rural infrastructure

13.3 That infrastructure in the rural area be:

- *maintained ... to provide for the safe and efficient operation of activities in rural areas; and*

.....

The reasons include[66]:

Public investment in infrastructure in the rural area includes road, air and rail facilities as well as institutions such as hospitals and prisons. A number of these facilities because of their nature, need to locate in a rural area or have been located there for a considerable period of time. ... The International Airport occupies a large land area and services steadily expanding tourist, travel, and transport functions essential to the economy of the region, and the country as a whole. The ability of these facilities to continue to provide services to the City requires that they be sustainably managed in a manner which ensures their efficiency, safety and costs of operation are not unduly impaired. ...

Infrastructure in the rural area represents a very substantial public investment (particularly the International Airport) which cannot be replaced or relocated except at great cost to the community. ...

However, further development, particularly rural dwellings, may have adverse effects on existing infrastructure in the rural areas (such as the roading network or the airport) and measures for protection of these are provided for in the Plan.

[66] Proposed plan [Vol 2 p.13/14].

Infrastructural development in the rural area can generate impacts as well, such as from future roading works and possible long term airport expansion to the west. Any development of infrastructure will need to be subject to processes to address possible impacts, particularly upon rural resources and amenities.

The associated policy states[67]:

13.3.1 To ensure development takes into account the impacts of the operations of the International Airport, particularly noise effects.

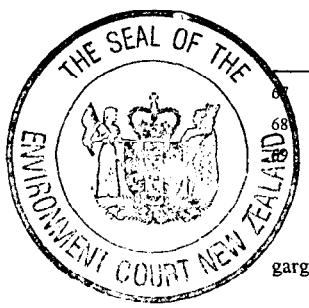
The environmental results anticipated include[68] limitation of the number of potential residents exposed to aircraft noise. Ms Steven in her very long submissions in reply (55 pages), rather explained this policy away by reference to policy 13.1.1. However the later policy is a specific elaboration of that earlier more general policy and thus, if there is any conflict, which we doubt, it should be given more weight.

[48] If it is possible, without being totally simplistic, to summarise the effect of all those objectives and policies in so far as they relate to subdivision and residential use close to the international airport they come down to three sets:[69]

(a) restricting use of buildings for noise sensitive activities close to the airport (not relevant in this case);

(b) requiring noise attenuation measures in certain buildings within the 55dBA Ldn contour (again not relevant in this case);

(c) keeping the density of dwellings within the 50dBA Ldn contour to a level so that the number of people living within the noise affected environment is kept to a reasonable minimum.



Policy 13.3.1 [Vol 2 p.13/14 and p.13/15].
[Vol 2 p.13/16].
See "Explanation and Reasons" Policy 13.3.1 [Proposed Plan Vol 2 p.13/15].

We find that these objectives and policies are a package: all sets are applicable, but if the first two do not apply then the third, more general, set of policies still applies.

[49] The resource managers called for the CCC, the CRC and the CIAL all referred to the third set of objectives and policies, and concluded, in their written evidence-in-chief, that Mr Gargiulo's application was contrary to those objectives and policies. Nor was their evidence shaken in cross-examination by Ms Steven where she focused largely on other matters, including policy 6.1.7. It was not until her reply that she dealt with the objectives and policies in section 13 of the proposed plan.

[50] In her reply Ms Steven said that the density provisions of the proposed plan should not be placed "on a pedestal". That is a metaphor used by the Environment Court in ***Price v Auckland City Council***[70] (referred to by Ms Steven) where the Court stated:

> *... it is not proper for a Council when making decisions in terms of this Act to place its policies objectives and rules on a sacred pedestal but, whilst having regard to those objectives policies and rules to look at a particular non-conforming activity on the basis of its effects ...*

Unfortunately, like most metaphors, it gives limited or mixed assistance when considering other factual situations, including different objectives and policies under different plans. We have quoted the relevant objectives and policies (and reasons) at considerable length in order to show how pervasive the concerns are and thus to weigh them properly.

[51] Another way that Ms Steven put her argument in reply is that the opposing parties were in effect applying the non-complying rule so vigorously as to make subdivision below 4ha in the Rural 5 zone into a prohibited activity. That is always a difficult submission to sustain because we do not know what genuinely unique factual situations might be presented to the CCC justifying grant of resource consents for non-complying subdivision and land uses. All we can say here is that

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(1996) 2 ELRNZ 443 at 448.

different objectives and policies in a district plan should be given different weights. Some should, under some plans, be given so much weight that they come close to prohibited activities (while always leaving it open for exceptional cases). We find that is the position here: the cumulative effect of the objectives and policies we have quoted show that the density provisions of the proposed plan should be given considerable weight.

[52] We hold that Mr Gargiulo's proposal is contrary to the objectives and policies of the plan, especially policy 13.1.7, objective 13.3 and policy 13.3.1.

Rules of the proposed plan

[53] The use of Lot 1 for a residence is a non-complying activity in the Rural 5 zone of the proposed plan because it fails to meet a critical standard in the proposed plan in that it is not contained within a site of minimum net area of 4 hectares[71]. Further, as Mr Day stated[72]:

> *The District Plan general noise rules also confirm that Ldn 53 to 55 dBA is not a suitable residential noise environment. Table 1 on page 11/7 of Volume 3 of the District Plan presents Ldn 50 dBA as the appropriate maximum noise level for an industry in this area. If a new industry set up next to the Gargiulo site it would not be able to establish as of right, unless it complied with Ldn 50 dBA. This is a strong indication that the Council regards Ldn 50 dBA (and below) as a reasonable noise environment for residential activity.*

[E] Section 104(1)(i): Other matters

[54] The other matters we need to consider are whether the case will set a precedent and/or whether it will undermine the integrity of the objectives and policies of the proposed plan. We always bear in mind as Ms Steven submitted, with considerable emphasis, that we are only being asked to consent to one extra allotment and one extra dwelling.

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[71] Rule 2.5.2(c) [Proposed Plan Vol 3 section 4, Rule 2.5.2(c) [p.4/14]].
[72] C W Day evidence-in-chief para 6.5.

[55] A grant of consent – whether for a discretionary activity: ***Coleman v Tasman District Council***[73] or for a non-complying activity: ***Pigeon Bay Aquaculture Ltd v Canterbury Regional Council***[74]; ***Beca v Auckland City Council***[75] can create a precedent. In her submissions in reply Ms Steven accepted that and then submitted that the precedent argument is relevant in two scenarios:

(1) where the application would significantly alter the character of a locality; (as in ***Pigeon Bay***); and

(2) where the proposal is contrary to the objectives and policies of a plan so that issues relating to the integrity of the plan arise.

In support of the second point she referred to two cases: ***Aitken v Waimakariri District Council***[76]; and ***Bruce v Wellington City Council***[77].

[56] We are not sure whether we need to consider potential precedents as of concern in themselves[78] or whether precedents are only important if they undermine the integrity of a plan or confidence in its public administration. We do not need to resolve any of those distinctions here, because Ms Steven made none - perhaps wisely because they look like what Judge Richard Posner, in the trenchant American judicial tradition, has described as "lawyers' classification games".[79]

[57] In her reply Ms Steven submitted:

> *... that cumulative effects may be linked to the precedent effect of a grant of consent in circumstances where there are other applications that are the same in all material respects so that they could equally expect to be considered favourably by the Council. In that situation, there will be a nexus between the*

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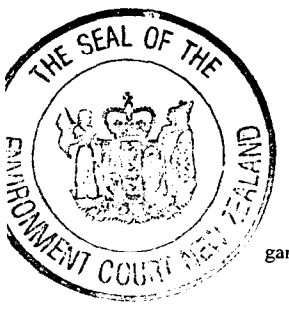
73 [1999] NZRMA 39 (HC, Doogue & Neazor JJ).
74 [1999] NZRMA 209 at paras 51-53.
75 A 102/99.
76 C190/99.
77 W124/99.
78 The answer is probably "yes" for reasons connected with the basic formula of justice that "like should be treated with like" - see ***Pigeon Bay*** at para 51.
Miller v Civil City of South Bend 904 F.2d 1081 at 1100 (7th Circuit of Appeals (1990).

grant of consent to the present application and the cumulative effects that follow in the future.

The cumulative effects that flow from other (similar) development in the future could, it is submitted, only justify declining consent to the application presently before the Council (or the Court) where that nexus is found to exist. In the case of a non-complying activity, each application must consist of the same factual matrix, otherwise, there will be reason to distinguish other applications on the facts. In the present circumstances, a grant of consent to this proposal could not be seen as setting a precedent for an application, for instance, to subdivide a 400ha area of land in the Rural 4 zone into 2.3ha lots where that land is presently open pasture, used for grazing, held in one certificate of title, and that crosses the 50, 55 and 60 noise contours.

It is untenable to think that a Council could consider itself obliged to grant consent to such an application for the reason only that Mr Gargiulo's application was deserving of a grant of consent. Nevertheless, the Airport argues that will be an inevitable consequence of a grant of consent in this case.

[58] We agree with the first paragraph of Ms Steven's submission. However the reference to *"... the same in all material respects"* (our underlining) in the first paragraph is reduced to *"... the same factual matrix ..."* in the second. That shift substantially weakens the proposition Ms Steven is advancing: as she points out there will then be *"reason to distinguish other applications on the facts"*. In our view the difference must be material or relevant ones. To take her example we consider that the CCC might consider itself obliged to consent to some subdivision of a 400ha area of land into 2 hectare lots. The CCC might consider there was no material difference between the Gargiulo land and that part of the 400ha which, on Ms Steven's hypothesis, is outside the 50dBA Ldn contour. Indeed if the land contained less versatile soils, the arguments for subdivision might increase further.



She put this hypothesis, or something similar, to Mr Batty in cross-examination. Ms Steven asked[80]:

> ... *Yes but in terms of your argument you say that this grant of this consent will have an inevitable precedent effect in that other applications that are the same that have to be treated in the same way. Would you consider that an application* [with] *that scenario, would be entitled to be treated in precisely the same way as this particular one, on the merits?*

Mr Batty answered:

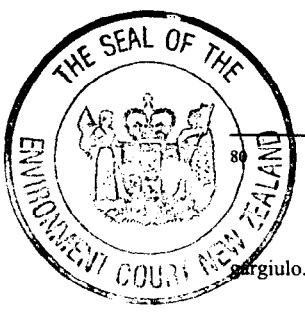
> *On the merits it has to be.*

There was other cross-examination on the same point, but Mr Batty remained firm in his view that granting consents to Mr Gargiulo would be a precedent for other cases.

[59] Further one does not have to look so far as 400ha of Rural 4 land to find where the Gargiulo case might be used as a precedent. Mr Gargiulo's witness, Mr Horne in evidence identified seven other sites in the neighbourhood of Mr Gargiulo's land which are also over 4 hectares and which could all rely on Mr Gargiulo's precedent if resource consents are granted. Mr Horne distinguished the facts, and said that the precedent effect would not be significant because:

(a) there were only a few pieces of land in the Gargiulo locality which were more than 4 hectares in area and they were so different in character that subdivision of Mr Gargiulo's land would not set a precedent;

(b) while accepting there were many titles in the Rural 5 zone with an area of 3.6ha or more, most of it could be differentiated on rural amenity grounds, so again no cumulative effects would be started by granting Mr Gargiulo's applications;



[80] Notes of evidence p.71.

(c) there were other relevant criteria such as visual amenity, versatile soils, and water recharge which could distinguish other land.

[60] As to the first issue - whether there was other land in the locality of Mr Gargiulo's land which was more than 4 hectares in area - Mr Horne identified[81] 7 blocks either side of Harewood Road (into which Stanleys Road runs) which are also between the 50dBA Ldn and 55dBA Ldn contours. His opinion as to why those pieces of land were different was that either the sites were unplanted with road boundary and/or internal shelter planting; or that subdivision would not be completing "the final piece of an existing pattern of development, but creating a new pattern of development." We do not see that either of those reasons is a valid reason for distinguishing Mr Gargiulo's land. There must be relevant differences and those are not relevant here, especially since it is debatable whether Mr Gargiulo's application is the final piece of an existing pattern of less than 4 hectare blocks anyway. Further, the first two sites identified[82] by Mr Horne are very close to Mr Gargiulo's land (one site shares two-thirds of Mr Gargiulo's back boundary).

[61] As for the second reason relevant to the issue of cumulative effects Mr Horne referred to a number of small allotments (identified as the Harewood Orchard, the Yaldhurst Orchard and the Guinness Orchard[83]) which are between the same noise contours and within the Rural 5 zone. He did not consider further subdivision of those blocks (already subdivided into 3.6ha or 3.8ha lots with a right to build) would necessarily follow: that would again be a "new pattern of development"[84] rather than an "existing pattern of development," We disagree with the validity of that reasoning in this context: it smacks of sophistry. All these allotments would have the potential – if lived on – to increase protest pressure about the airport.

[62] While he was careful to state[85] that Mr Gargiulo's proposal was not urban growth; and noting that he took policy 13.3.1 into account[86], we observe that he did

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81 C M Horne Evidence in chief, paragraph 10.4 - 10.7 Appendix 6.
82 D M Horne evidence in chief para 10-12.
84 C M Horne evidence in chief para 10.10 and App 7.
C M Horne evidence in chief para 10-12.
85 C M Horne : Notes of cross-examination p.42.
C M Horne evidence in chief App 5.

not note that the explanation and reasons for policy 13.3.1 included the following:[87]

> *... the density of rural dwellings will be kept to a level consistent with ensuring that the number of people living within the noise affected environment is kept to a reasonable minimum, and noise attenuation measures through insulation of buildings will be required to be undertaken.* (Our emphasis)

[63] Finally we have no evidence that visual amenity or water recharge issues are so important in this area that other subdivision (or land use applications) could be distinguished on these grounds. In fact the proposed plan itself states that the more versatile soils are to the south and east of the airport (i.e. where Mr Gargiulo's land is) rather than to the north and west.[88] In any event on the facts of this case we find that the density of dwellings (which is controlled by subdivision size) is so important around the Christchurch International Airport that it is a dominating factor in terms of weight.

[F] Section 105 Considerations

Section 105(2A) Threshold Tests

[64] We have found that the adverse effects of the proposal - including any cumulative effects - are (probably) minor and therefore the first[89] threshold test in section 105(2A) is met. We do not have to consider the second test[90] once the first is passed[91].

Part II of the Act

[65] Section 5(2) of the RMA defines "sustainable management" as meaning:

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87 Policy 13.3.1 - explanation and reasons [Proposed Plan Vol 2, page 13/15].
88 Proposed plan Vol 3, section 4 Rural Zones, para 1.7 [p.4/5].
89 Section 105(2A)(a).
90 Section 105(2A)(b).
91 ***Hopper Nominees Ltd v Rodney District Council*** [1996] NZRMA 179 at 187.

... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while -

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Parts of that definition affect both the really significant issues in this case:

- the versatile soils issue is governed by section 5(2)(b); and

- the reverse sensitivity of the airport to noise complaints is affected by the first part of the definition and by section 7(b) of the Act which requires us to have particular regard to "the efficient use and development of natural and physical resources."

[66] As to versatile soils, we have insufficient evidence here on all matters that might relate to this issue. So for the reasons stated in part [B] of this decision we hold that the issue of use of versatile soils on Mr Gargiulo's land is neutral in the outcome of this case. However, while we continue to be sceptical about the efficiency of protecting versatile soils everywhere, we do recognise that there may be distortions in the current social and political arrangements which cause greater demand on those soils for residential development than might otherwise be the case. We asked Mr McCallum, the Natural Resources Planning Manager for the CRC about distortions caused by transport subsidies and he asked (rhetorically)[92]:

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[92] Notes of evidence p.207.

... in the absence of Government ... do[ing] *anything about taxation on petrol, or whatever, what can a Regional Council or District Council do on this issue, other than start to get into this whole issue of the relationship of urban form, settlement pattern and land use and transport?*

This question is a sad illustration of how two sets of distortions (subsidised roading and transport pollution externalities) may cause a need for a further set of economic "distortions" in the form of objectives and policies about (inter alia) urban planning and versatile soils.

[67] As to the effects of the proposed subdivision and new dwelling on the airport we heard some interesting economic evidence on that from Mr G V Butcher, the economist called for CIAL. Since it was unopposed by any economic evidence, and since it was not diminished in any significant way by cross-examination we adopt Mr Butcher's summary as a correct statement of the position:

- *Allowing subdivision of land within the Rural 5 (Airport Influences) zone as requested by the Applicant will create a precedent which will have the cumulative effect of an increased level of residential development within the zone compared to what would be the case under the existing zone rules;*

- *It is likely that this level of concentration of residential development will lead to pressure to reduce noise impacts from the operations of Christchurch International Airport (CIAL) particularly at night-time, and curfewed operations are the probable outcome;*

- *The introduction of a curfew on CIAL will impose external economic costs on the airport and its users. In particular, it is likely that the operation of CIAL as the freight "hub" of the South Island would be seriously affected, and alternative, higher cost options could be used. Service quality would also be adversely affected. Night-time export freight operations, particularly CHC-AKL, would also be adversely affected in terms of increased transit times and unit costs and possible reductions in product quality. While in terms of international passenger flights, the main immediate impact would be the midnight CHC-SIN Singapore*

Airlines flight, curfews would similarly reduce travel flexibility and increase costs. Diversion costs for international aircraft into Auckland would also increase.

- *These external costs would appear to be significant. In contrast, the loss of utility experienced by those who could not purchase additional lots in the zone but would need to locate in their "next best alternative", would appear to be small, particularly in present value terms.*

Putting that evidence together with the earlier evidence on adverse effects and reverse sensitivity we find that there is a potentially serious reverse sensitivity effect which suggests the resource consents should not be granted.

Exercise of discretion

[68] Taking into account our various findings in parts [B] - [E] of this decision in relation to the consents applied for under the proposed plan and applying the weighting test described in ***Baker Boys v Christchurch City Council***[93] we consider that the crucial aspects are:

(a) that the proposals are not consistent with the objectives and policies of the proposed plan and the regional policy statement;

(b) that there are insufficient good reasons to distinguish Mr Gargiulo's application as unique;

(c) in fact if we grant the applications then that would constitute a precedent which would undermine the integrity of the proposed plan or public confidence in the administration of the proposed plan: ***Reith v Ashburton District Council***[94] and ***Noel Leeming (No. 2) v North Shore City Council***[95]***;***

[1998] NZLRMA 433 at para (109).
[1994] NZRMA 241 approved by the HC in ***Hopper Nominees Ltd v Rodney District Council*** [1996] NZRMA 179 at 187.
(1993) 2 NZRMA 243 at 255.

(d) that the density requirements of the proposed plan are an important part of the plan (as their repetition in different contexts emphasises);

(e) that both the purpose of the RMA in general, as a matter of law, and the requirements of efficiency, in fact, move against granting resource consent.

[69] Similar considerations apply in respect of the transitional plan although the level of protection of the International Airport in the objectives and policies is considerably lesser.

[70] For the sake of thoroughness we should add that Ms Steven submitted that this case is not about reverse sensitivity. As to what is meant by that term (not used in the RMA) she referred to ***Auckland Regional Council v Auckland City Council***[96] where the Environment Court stated:

> *The term refers to the effects of the existence of sensitive activities on other activities in their vicinity, particularly by leading to restraints in the carrying on of those activities.*

But, as we understood her argument, she then submitted not that reverse sensitivity was not an issue, but that it was not a proper issue under the RMA. Ms Steven referred to and relied on an academic article in her reply: Reverse Sensitivity - the Common Law Giveth, and the RMA Taketh Away.[97] Its themes are summarised in six headings used in the article as the consequences of having regard to reverse sensitivity. They are:

> *(1) [It] defeats the purpose of the common law rule that coming to the nuisance is no defence;*
>
> *(2) [It] allows unreasonable adverse effects to continue;*

[96] [1997] NZRMA 205.
[97] B Pardy and J Kerr (1999) NZJEL 93.

(3) [It] reduces the RMA to a planning statute;

(4) Private property rights become dependent upon public benefit;

(5) ... Owners of vacant land should object to any proposed activity with adverse effects;

(6) Consent applications are more likely to require notification.

[71] On reflection those issues should really be raised on any relevant reference(s) in respect of the relationship of surrounding land uses to those of the airport. They are not so appropriately raised in the context of a section 120 appeal in which it is more difficult to look behind the relevant plans. In this case we heard little or no evidence from the appellant on how the efficient[98] use and development of natural and physical resources might be said to be adversely affected by refusing the consents sought.

[72] It is sufficient here to state that we have no difficulty with private property rights being limited by the public benefit because that is authorised by the RMA if certain preconditions exist. But first we recognize that there are in our law no such things as absolute, divine or natural rights to property. Rather, property rights are themselves creatures of law which create costs (taxes) and can thus be measured against the interests to be protected under the RMA. As Holmes and Sunstein stated in The Cost of Rights[99]

> *"To ignore costs is to leave painful tradeoffs conveniently out of the picture. ... Liberals may hesitate to throw a spotlight on the public burdens attached to civil liberties. Conservatives, for their part, may prefer to keep quiet about – or, as their rhetoric suggests, may be oblivious to – the way that the taxes of the whole community are used to protect the property rights of wealthy individuals. The widespread desire to portray rights in an unqualifiedly positive light may help explain why a cost-blind approach to the subject has proved congenial to all sides. Indeed, we might even speak*

Section 7(b) of the RMA.
S Holmes & C R Sunstein (W W Norton & Co, 1999) pp 24-25.

here of a cultural taboo – grounded in perhaps realistic worries – against the "costing out" of rights enforcement." (our emphasis).

However, given those limitations, property rights are justified precisely because they are usually in the public benefit – either because they maximise wealth, and/or freedoms, and/or because of a systemic scepticism that any guardians (whether legislators or, worse, because not democratically elected, courts) know what is best for everybody in all cases. So there is no inherent conflict between private property rights and the public benefit. Indeed section 9 of the RMA appears to work on the hypothesis, perhaps even the presumption[100], that existing property rights should apply to land uses unless they are shown to be less efficient and effective[101] and are controlled in district (or regional) plans. Only if those property rights are clearly shown to be inefficient and ineffective does the public benefit justify imposing limits on the exercise of private property rights relating to land use. In this case of course we do not have to examine that issue, because the city plans have already resolved the issue.

[73] Whether the applications are considered under the proposed plan or the transitional plan[102] and taking into account all the issues discussed, and the evidence as a whole we judge that the resource consents should be refused. We should add that the contest on the merits is far closer under the transitional plan. It may assist the parties to know that if we were wrong on the facts (or law) and should otherwise grant a resource consent under the transitional plan in the absence of the proposed plan, then the latter[103] would still turn the tables against Mr Gargiulo. We apply the test in ***Hanton v Auckland City Council***[104] where the Planning Tribunal:

> ... *observe*[d] *that the requirements of s 104 for having regard to various matters are related to the exercise of discretions conferred by s 105(1). That indicates that, rather than have a general rule about the cases where a proposed plan is to prevail over inconsistent provisions of an operative plan, or vice versa, each case is to be decided individually according to its own*

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100 Bearing in mind the duties imposed by section 32 of the Act.
101 Section 32(1)(c) of the Act.
102 See ***Stokes v Christchurch City Council*** [1999] NZRMA 409 at 415.
103 Section 104(1)(d): see ***Stokes v Christchurch City Council*** [1999] NZRMA 409 at 417.
104 [1994] NZRMA 289 at 305.

circumstances. The extent (if any) to which the proposed measure may have been exposed to testing and independent decision-making may be relevant; so may circumstances of injustice (though not every case of disappointed aspirations or even expectations would create an injustice); and the extent to which a new measure (or, as in this case, the absence of one) may implement a coherent pattern of objectives and policies in a plan may be relevant too.

[74] In this case the transitional plan is a confusing, inconsistent and out-of-date document. By contrast the proposed plan, while still the subject of some challenges, implements a coherent pattern of objectives and policies which is consistent with the RPS in protecting the airport. We appreciate that Mr Gargiulo has disappointed aspirations, but consider they are outweighed by the public benefit of protecting the airport. In the circumstances since resource consents are refused under the proposed plan they are refused under the transitional plan also.

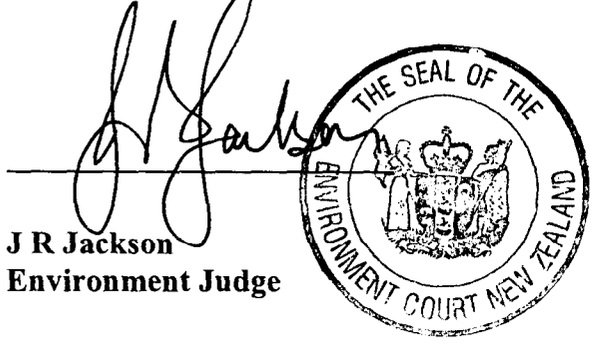
[75] Accordingly we make the following orders:

(1) The appeal fails;

(2) Under section 290(2) of the RMA the decision of the Christchurch City Council is confirmed;

(3) Costs are reserved. If any party wishes to apply for costs they shall do so within 15 working days, and the party against whom costs are claimed shall reply within a further 15 working days. We remind the participants that there appears to be no jurisdiction to award costs to or against any interested person (under s.274).

DATED at CHRISTCHURCH this 17th day of **August** 2000.



J R Jackson
Environment Judge

Appendix A – Terminology

The noise contours produced by this study are contours of equal "Day/Night Sound Level" (L_{dn}) in A-weighted decibel (dBA). A number of these terms and the calculation procedures involved, need to be explained.

dBA The A-weighted sound level (dBA) is generally used for the measurement of environmental sound. It is an attempt to quantify the 'loudness' of a sound by applying an A-weighting to the frequency response of the sound level meter that attempts to simulate the complex response of the human hearing system.

The A-weighted sound level in a typical urban environment will vary from a background noise level of around 45 dBA with short duration peaks of 70 to 90 dBA due to aircraft movements (depending on the location relative to the airport).

Overall Noise Exposure

Overseas research has found the 'average' noise level to correlate well with subjective response to noise or annoyance. It has been found that people are equally annoyed by a high noise level operating for only a short period as they are by a moderate noise level operating for a longer period of time. L_{eq} and L_{dn} are both based on this concept.

L_{eq} The hourly L_{eq} is used in the calculation of the Day/Night Sound Level (L_{dn}) - see below. L_{eq} is the 'average' noise level over the measurement period (in this case 1 hour). Thus the noise from a number of single event aircraft movements is averaged to give an energy 'equivalent' noise level, that is a continuous noise level that has the same noise 'energy' as the total aircraft noise energy for the hour.

L_{dn} The Day/Night Sound Level (L_{dn}) is calculated as the average of the L_{eq} each hour with a 10 dBA penalty applied during night time (10 pm to 7 am).

Single Event Level (SEL)

The SEL is a noise level used to measure the total noise energy in a single event such as the take-off of an aircraft. It is defined as the noise level of one second duration which would have the equivalent noise energy as the actual event. For example is a noise source produced a steady noise level of 75 dBA for 10 seconds, the SEL of that event would be 85 dBA.

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Decision No. C 137 /2000

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to s.120 of the Act

BETWEEN **B D GARGIULO**

(RMA 1097/98)

Appellant

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

ERRATUM

[1] On 17 August 2000 the Court issued a decision (C137/2000) which included a paragraph 23[1] stating

> *For the Canterbury Regional Council Mr Brooks, a farm consultant, gave evidence similar to that which Mr Rosanowski gave in the* ***Dear*** *case. On the face of it Mr Brooks' evidence here should be preferred over that of Mr Rosanowski. However we are aware that in a previous case –* ***Dallison v Waimakariri District Council***[2] *– Mr Brooks was acting for the successful applicant whose decision was being defended by the Council and he there gave evidence as to the productivity of small allotments which would justify subdivision. Unfortunately that apparent inconsistency was not put to Mr Brooks in this case so his credibility for present purposes exceeds that of Mr*

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

C137/2000 p.11.
W65/98 (No. 2).

Rosanowski. We do remind the witnesses, and this applies to any area of expertise, that while it is proper for a witness to act for different parties in different cases, they should take real care that their professional integrity is not undermined by giving inconsistent evidence i.e. evidence which changes depending on which party they are giving evidence for.

[2] I have received and read a memorandum of counsel for the Canterbury Regional Council dated 17 August 2000. She states:

In fact, Mr Brooks gave evidence for the appellant, Mr Dallison, in the previous case. Mr Dallison was appealing against the Council's decision to grant small lot subdivision. Mr Brooks' evidence in the Dallison case was consistent with the evidence he gave in Gargiulo.

[3] It is clear that the Environment Court has misremembered and misread *Dallison's* case, and that Ms Perpick, counsel for the Canterbury Regional Council is correct. That means this division of the Environment Court has committed a serious mistake in attacking the integrity of Mr Brooks. We apologise unreservedly to Mr Brooks for our mistake, and will do what we can to remedy the error by releasing this erratum. We make it quite clear that we no longer question Mr Brooks' integrity on the evidence he gave in this case and *Dallison*.

[4] We should add that nothing in our mistake affects the outcome of the case, nor our comment on expert witnesses generally (although the latter is now less powerfully demonstrated by the findings in the *Gargiulo* case).

[5] Under the powers in Rule 12 of the District Courts Rules 1992 the Court:

(a) deletes paragraph 23 of decision C137/2000; and

(b) substitutes the following:

*[23] For the Canterbury Regional Council Mr Brooks, a farm consultant gave evidence similar to that which Mr Rosanowski gave in the **Dear** case. Because Mr Brooks' evidence was not undermined by cross-examination it should be preferred over that of Mr Rosanowski. We do remind the latter soil expert, but this applies to any area of expertise, that while it is proper for a witness to act for different*

parties in different cases, they should take real care that their professional integrity is not undermined by giving inconsistent evidence i.e. evidence which changes depending on which party they are giving evidence for.

DATED at CHRISTCHURCH this 21 day of **August** 2000.

J R Jackson

Environment Judge