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

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[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

36 Dr S A Staite: Exhibit "13.1".
Public health impact of large airports
Gezondheidsroad (Health Council of the Netherlands) 2 September 1999.
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

[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]:

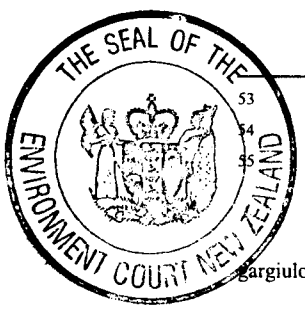
6.3.11 To provide for the establishment of serviced low density rural-residential (lifestyle) housing, particularly where normal residential densities would be inappropriate, but managed and contained in both extent and location, and in a manner consistent with other policies.

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.

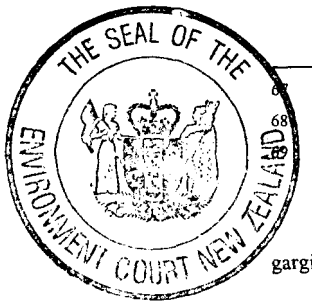
The environmental results anticipated include[68] limitation of the number of potential residents exposed to aircraft noise. Ms Steven in her very long submissions in reply (55 pages), rather explained this policy away by reference to policy 13.1.1. However the later policy is a specific elaboration 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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[70] (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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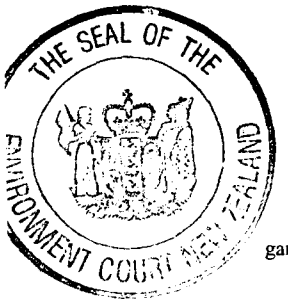
73 [1999] NZRMA 39 (HC, Doogue & Neazor JJ).
74 [1999] NZRMA 209 at paras 51-53.
75 A 102/99.
76 C190/99.
77 W124/99.
78 The answer is probably "yes" for reasons connected with the basic formula of justice that "like should be treated with like" - see ***Pigeon Bay*** at para 51.
79 ***Miller v Civil 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:

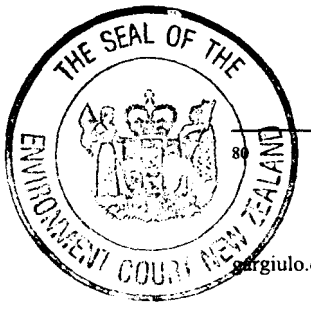
> *On the merits it has to be.*

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.
C M Horne evidence in chief para 10.10 and App 7.
84 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]:

[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

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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*

Bearing in mind the duties imposed by section 32 of the Act.
Section 32(1)(c) of the Act.
See ***Stokes v Christchurch City Council*** [1999] NZRMA 409 at 415.
Section 104(1)(d): see ***Stokes v Christchurch City Council*** [1999] NZRMA 409 at 417.
[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.

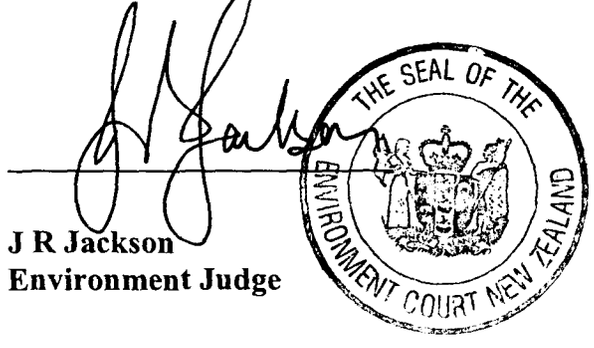
[75] Accordingly we make the following orders:

(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