

Before the Selwyn District Council

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*under:* the Resource Management Act 1991

*in the matter of:* Proposed private plan change 71 to the Operative  
Selwyn District Plan

*between:* **Four Stars Development Limited and Gould  
Developments Limited**  
*Applicant*

*and:* **Christchurch International Airport Limited**  
*Submitter and further submitter (PC71-0004)*

Legal submissions on behalf of Christchurch International Airport  
Limited

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Dated: 10 February 2022

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## **LEGAL SUBMISSIONS ON BEHALF OF CHRISTCHURCH INTERNATIONAL AIRPORT LIMITED**

May it please the Commissioner

### **INTRODUCTION**

- 1 These legal submissions are provided on behalf of Christchurch International Airport Limited (*CIAL*).
- 2 This hearing will determine a request by Four Stars Development Ltd and Gould Developments Ltd (the *Applicant*) to the Selwyn District Council (the *Council*) to change the Operative Selwyn District Plan (*District Plan*) to rezone approximately 54 hectares of land in Rolleston. The land is bounded by Levi and Lincoln Rolleston Roads and Nobeline Drive and is currently zoned Rural Inner Plains (*Site*).
- 3 Plan Change 71 (*PC71*) seeks to enable residential development of the Site by rezoning it to Living zoning. Part of the Site is under the Christchurch International Airport 50 dBA Ldn Air Noise Contour (*Air Noise Contour*).
- 4 The Applicant seeks that the land within the Air Noise Contour adopt a deferred zoning, on the basis that the applicant anticipates the Air Noise Contour will shift off the Site in the near future.
- 5 CIAL made submissions and further submissions on PC71. In its submission CIAL opposed the Plan Change in its entirety, and sought that any decision on the Plan Change be delayed until completion of the remodelling process, and incorporation of updated Air Noise Contours into the planning framework.
- 6 CIAL is calling evidence from:
  - 6.1 **Felicity Blackmore**, CIAL's Environment and Planning Manager; and
  - 6.2 **Matt Bonis** in relation to planning matters.

### **CIAL'S POSITION AND RELIEF**

#### **Opposition to deferred residential zoning within Air Noise Contours**

- 7 The deferred Living zoning which is sought by the Applicant for land within the Air Noise Contour is inappropriate. CIAL remains firmly opposed to either form of the Applicant's relief (deferred zoning or rezoning but with a non-complying or restricted discretionary activity status for residential activities).

- 8 CIAL seeks that the requested rezoning within the Air Noise Contour is rejected.
- 9 A deferred zoning is only appropriate where the event in anticipation of which the zoning is deferred is certain to occur, or is within the power of the Council or applicant to make happen (for example, future planned provision of servicing).<sup>1</sup> That is not the case here.
- 10 A deferred zoning creates a clear expectation that residential land use will be established in the future – it is just a matter of time.<sup>2</sup> It is not the most appropriate way to achieve the purpose of the Act, nor to achieve the objectives of the District Plan nor any higher order planning documents, to create this expectation (and allow people to act in reliance upon that expectation) in a situation where it may not be able to be realised.
- 11 This is not a trivial administrative issue, as **Ms Aston** suggests.<sup>3</sup> She demonstrates the expectation that would be set in her evidence in chief at [17], stating that the deferred zoning or initial non-complying activity status in the land within the Air Noise Contour “... *would enable development planning to begin with greater certainty and facilitate a more integrated approach to future subdivision.*” The Applicant’s intention is demonstrably to set an expectation for future development on the whole of this land, upon which it will immediately begin to rely.
- 12 The Applicant’s second option (establishing a residential zoning now, but with residential activity being non-complying or restricted discretionary until the Air Noise Contour comes off the land) presents even more difficulty. Requiring a resource consent will not

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<sup>1</sup> See for example *Dixon v Invercargill City Council* [2018] NZEnvC 217, [93], [97] and [98], where the Court commented that deferred residential zoning to be triggered by the provision of reticulated wastewater and footpaths by the Council was appropriate. In contrast (an example where the matter triggering a proposed deferred zoning change was outside the Council’s control), in *Boyd v Queenstown Lakes District Council* [2020] NZEnvC 172, [29]: the Court held that a proposed deferred zoning which was contingent upon whether or not a frost fan causing adverse noise effects was disestablished was problematic because it would be open to contention in cases where a fan is repositioned, replaced, upgraded, or kept in situ but not used. The Court considered the deferral proposed was too uncertain and would potentially impede the ability to develop land if the frost fan remained indefinitely in place (when the Council wished to enable urban development on the land). See also *Resource Management* (online ed, Thomson Reuters) at [A76.01(2)].

<sup>2</sup> For example, *Trotman v Tasman DC* [2013] NZEnvC 229 involved land that was the subject of a subdivision consent application (originally declined by Council). The site was zoned rural, with a deferred residential zoning to take effect once a reticulated water supply was provided by Council. In the interim period the land was to be treated as rural, but the Court held that subdivision consent should be granted. The Court found that the deferred zoning indicated the Council’s future intention for the land was for residential development and that arguments about preserving productive land values or rural land use therefore had limited weight in the consideration of applications for that site.

<sup>3</sup> Evidence in Chief of Fiona Aston, [15].

present any real barrier to residential development, particularly not with the Applicant's preferred restricted discretionary activity status.

- 13 What will the Applicant do if the Air Noise Contour does not in fact move off this land? Or if it only moves off part of the land but remains covering a portion? The expectation for residential development will be set. That residential development will establish in an inappropriate location with impacts on residential amenity and Airport operations following (this issue has been demonstrated on the evidence in planning processes for decades).
- 14 If a change in the location of the Air Noise Contours does not eventuate in the way that the Applicant has assumed, but the Applicant's relief is granted, the Council will be left to manage the unrealistic expectations set by this proposed plan change. Pressure for residential development would likely be exerted regardless of the outcome of the Air Noise Contour remodelling if a deferred zoning were put in place. And that pressure would be impossible to resist if the land was alternatively given a residential zoning with a consenting pathway for residential land use.
- 15 The Applicant asserts that there is certainty that the Air Noise Contour will move off the land in question. There is no such certainty, and CIAL has not at any stage represented otherwise. The Applicant has decided to pre-empt the contour remodelling process by bringing the plan change request at this time. That timing issue cannot be overcome through deferred zoning.
- 16 As **Ms Blackmore** explains, the process to remodel the Air Noise Contours (which is required by the CRPS Policy 6.3.11) has commenced, but is at an early stage. There are draft updated contours which have been prepared by CIAL's expert advisers (the required first step in the review, set out in Policy 6.3.11). That draft modelling work now sits with Environment Canterbury. An independent expert panel will be constituted to peer review the work, including all inputs and assumptions. Once the peer review is complete, the final shape, size, and location of the Air Noise Contours will be determined. Following that exercise, there will be a process initiated to incorporate the updated contours into the planning framework.
- 17 Ms Aston was describing the contour modelling as a 'purely technical' process yesterday. She is right that it is a highly technical process involving inputs that planners and lawyers are not qualified to peer review. But that does not make the modelling a black and white issue. There are a great many inputs or assumptions going into the modelling. **Ms Blackmore** will explore a key input further when she presents her summary, which is flight tracks. The flight track assumptions in the draft updated contours were provided to CIAL by Airways, but the members of the independent panel may

disagree with the assumptions that Airways has made and determine that a different assumption should be used. Flight tracks are a key driver of where aircraft actually fly and therefore where noise will be experienced. And importantly, the flight tracks have changed in the past ten years since the operative plan contours were modelled.

- 18 The point is that the draft updated Contours which CIAL's experts have modelled and provided to ECan for expert peer review are not certain. They are *draft*. It would be surprising if a full panel of independent experts did not find a single thing that they considered needed changing.
- 19 Mr Cleary is correct that this plan change must be determined based on the evidence available. Unfortunately, there is no evidence to assist the Commissioner with what the final updated contour will look like. The best available information at the moment is the Air Noise Contour contained in the CRPS and operative and proposed District Plans.
- 20 Ms Aston stated in her presentation that the Applicant would not be satisfied with a decision to approve residential zoning for the land outside of the Air Noise Contour, leaving the rural zoning on land within the Contour. If that is the case, and it is an "all or nothing" situation, CIAL is forced to oppose the entire plan change.
- 21 The remainder of these submissions discuss:
  - 21.1 the evidence which supports the requirement to avoid noise sensitive activities within the Air Noise Contour (quite apart from the policy framework);
  - 21.2 the application of higher order policy documents, particularly the National Policy Statement on Urban Development 2020 (*NPS UD*) and the Canterbury Regional Policy Statement (*CRPS*);
  - 21.3 the Air Noise Contour remodelling process which is currently underway.

#### **EVIDENCE SUPPORTING LAND USE PLANNING REGIME WITHIN THE AIR NOISE CONTOURS**

- 22 It was suggested by Mr Cleary that the planning rules requiring noise sensitive activities to be avoided within the Air Noise Contours are simply a reflection of outdated policy, introduced via earthquake recovery legislation. That is not the case. The Air Noise Contour and associated land use rules have been enshrined in the regional planning framework for many decades. They are supported by a

substantial body of evidence which has been tested numerous times in planning and Environment Court processes.

- 23 The Air Noise Contour is the product of modelling. It indicates the modelled extent of airport noise effects when the airport is operating at capacity (determined by acoustics and aviation experts). The Air Noise Contour takes into account various inputs such as flight paths and procedures, aircraft type, atmospheric conditions, runway usage (alongside many others). The modelling is reviewed approximately every ten years, to stay abreast of any changes that may have occurred to the inputs.
- 24 Residential activities are noise sensitive. It has long been established that residential intensification is inappropriate, and should be avoided, within the 50dB Ldn Air Noise Contour. This has been confirmed by the Environment Court:

24.1 In *Gargiulo v Christchurch CC*:<sup>4</sup>

*...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.*

24.2 In *Robinsons Bay Trust & Ors v Christchurch CC*:<sup>5</sup>

*[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. It was not clear to us what alternative means would produce this outcome.*

...

*[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*

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<sup>4</sup> *BD Gargiulo v Christchurch CC*, C 137/2000, 17 August 2000, Jackson J (EnvC), [63]

<sup>5</sup> *Robinsons Bay Trust & Ors v Christchurch CC*, C 60/2004, 13 May 2004, Smith J (EnvC) (Interim decision)

*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.*

...

*[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*

- 25 The Applicant has not brought any evidence which disproves those findings of successive Environment Courts, nor has it brought evidence which establishes that the long-standing planning approach of avoiding noise sensitive land uses establishing within the Air Noise Contour should be abandoned. It remains the case that a greater number of residential homes within the Air Noise Contour will lead to an increased number of people exposed to undesirable aircraft noise levels. That in turn will have adverse effects on the efficient operation of the Airport. Where there is land available for residential growth in areas that are not covered by the Air Noise Contours, it is more appropriate to locate residential development elsewhere to avoid those negative planning outcomes.

### **HIGHER ORDER PLANNING DOCUMENTS**

- 26 The Airport's status as infrastructure or local, regional, and national importance is recognised in the definition of "nationally significant infrastructure" in the National Policy Statement on Urban Development 2020 (NPS UD), the Canterbury Regional Policy Statement (CRPS) and in the Objectives and Policies chapter of the Selwyn District Plan (in both the operative and proposed versions).

#### **National Policy Statement on Urban Development**

- 27 The NPS UD has recently been amended by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (the *Amendment Act*).<sup>6</sup> The Ministry for the

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<sup>6</sup> Resource Management Act 1991, s77S. NPS UD Policy 3(c) and (d) is amended as set out in that section. The remainder of the NPS UD is unaffected. The Minister of the Environment is empowered in s77S(2) to make any changes required as a result of the enactment of the Amendment Act to remove

Environment website indicates that the NPS UD document itself is in the process of being updated to align with the Amendment Act, but we understand that process is not yet complete. The analysis below refers to the NPS UD, as amended.

- 28 The NPS Urban Development directs that local authority decisions on urban development are integrated with infrastructure planning decisions,<sup>7</sup> and that planning decisions contribute to well-functioning urban environments.<sup>8</sup> Policy 1 lists features of well-functioning urban environments, but that list is expressed as "*a minimum*".
- 29 CIAL submits a well-functioning urban environment is one in which:<sup>9</sup>
  - 29.1 infrastructure – particularly infrastructure such as the Airport – is not adversely affected by incompatible activities; and
  - 29.2 urban growth is planned with infrastructure provisions in mind, recognising that the two run hand in hand.
- 30 The NPS UD requires a balance between the need to provide for urban development capacity and other important countervailing issues such as protection of significant infrastructure.
- 31 NPS UD Policy 4 acts as a caveat on the application of Policy 3, which provides the core direction in the NPSUD.<sup>10</sup>
- 32 Policy 4 requires that:

*regional policy statements and district plans applying to tier 1 urban environments modify the relevant building height or density requirements only to the extent necessary to accommodate a qualifying matter.*
- 33 Qualifying matters include, relevantly:<sup>11</sup>

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inconsistency or potential inconsistency or otherwise clarify the NPS UD in light of the Amendment Act. Counsel is not presently aware of any proposed amendments of this nature.

<sup>7</sup> Objective 6.

<sup>8</sup> Policy 1.

<sup>9</sup> Noting that the definition provided in Policy 1 is expressed as a 'minimum'

<sup>10</sup> Policy 3 directs councils to enable building heights and urban densities within and adjacent to city centres, metropolitan centres zones to release as much development capacity as possible. In all other areas in tier 1 urban environments, Policy 3 directs that building height and density requirements are set commensurate with the level of commercial activity and community services.

<sup>11</sup> Clause 3.32.



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

- 34 The definition of “nationally significant infrastructure” includes:

*any airport (but not its ancillary commercial activities) used for regular air transport services by aeroplanes capable of carrying more than 30 passengers.*

- 35 The provisions in the CRPS and operative & proposed District Plans applicable to the 50dB Ldn Air Noise Contour are in place for the purpose of ensuring safe and efficient operation of the Airport. This squarely meets the definition of a qualifying matter. The NPS UD therefore requires councils to account for the requirement to avoid development of new noise sensitive activities within the Contour when implementing the NPS and identifying areas for urban development.<sup>12</sup>
- 36 This treatment of qualifying matters is reinforced in the new sections of the RMA introduced by the Amendment Act, which takes the same approach to incorporation of qualifying matters into the intensification planning instruments which territorial authorities must now introduce.<sup>13</sup>
- 37 Policy 8 requires councils to “be responsive” to plan changes for unanticipated or out of sequence development that will provide significant development capacity and contribute to well-functioning urban environments. Policy 8 does not require councils to grant a plan change but does provide an avenue for plan changes which are out of sequence or unanticipated to be granted if they meet the requisite criteria. Councils are not able to dismiss such plan changes purely because they propose out of sequence or unplanned development.
- 38 Policy 8 must also, however, as a matter of interpretation, be read in the context of the other policies in the NPS UD (such as policy 4 and the requirement to accommodate qualifying matters).

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<sup>12</sup> See clauses 3.31 and 3.33. If the territorial authority considers that it is necessary to modify the building height or densities in order to provide for a qualifying matter (as permitted under Policy 4), it must identify where the qualifying matter applies and specify the alternate building heights and densities proposed for those areas. If a qualifying matter applies, the s32 report prepared in relation to the amendments to a plan must assess the importance of the qualifying matter and impact that limiting development capacity, building height, or density would have on the provision of development capacity.

<sup>13</sup> Resource Management Act 1991, ss77G to 77L.

- 39 The NPS UD, including Policy 8, does not render the pre-existing planning framework irrelevant. Rather, as the PC67 decision states, it forms part of the relevant planning matrix for consideration.<sup>14</sup>

**Canterbury Regional Policy Statement**

- 40 Allowing noise sensitive activities to establish within the 50dB Ldn Air Noise Contour exposes occupants to an undesirable level of aircraft noise and simultaneously risks exposing CIAL to adverse reverse sensitivity effects. This is recognised in higher-order CRPS policies as well as various objectives and policies in the District Plan.<sup>15</sup>
- 41 The CRPS Policy 6.3.5(4) is unambiguous and highly directive - new noise sensitive activities must be avoided within the 50dB Ldn Air Noise Contour.
- 42 The meaning of the word "avoid" has been well traversed by the Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, which considered the meaning of this term in the context of the NZ Coastal Policy Statement, concluding that:<sup>16</sup>

*[96] In that context, we consider that "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 s5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning.*

- 43 As **Mr Bonis** and the s42A Officer have explained, this CRPS policy direction flows into the objectives and policies of the operative and proposed Selwyn District Plan documents. Rezoning rural land within the Air Noise Contour to a residential zoning is inconsistent with those objectives and policies.

**Interpretation of CRPS and operative District Plan objectives and policies in light of NPS UD**

- 44 Mr Cleary argues that the NPS UD trumps or significantly alters the weight to be given to the CRPS Policy direction, including Policy 6.3.4(5), and the district plan objectives and policies.
- 45 While the NPS UD was prepared later in time, it does not trump all other planning documents. The policies of the NPS UD, including the

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<sup>14</sup> Plan Change 67 Decision, 10 January 2022, [167].

<sup>15</sup> CRPS Policy 6.3.5; District Plan provisions include: Strategic Objective 3.3.12 and 3.3.14; Policy 6.1.2.1.5; Objective 14.2.3 and Policy 14.2.3.1; Policy 17.2.2.10.

<sup>16</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [96]

responsiveness provisions can, and must, be read *together* with the CRPS policies. It is a well-established principle of statutory interpretation that where there is any apparent inconsistency or tension between or within statutory instruments, the approach is to read both together and prefer an interpretation which reconciles any apparent inconsistency, allowing the two to stand together.<sup>17</sup>

- 46 When considering a plan change to rezone a particular area of land in a district plan, a territorial authority is required to ensure it will give effect to both the NPSUD and the CRPS.<sup>18</sup> Policy 6.3.5(4) CRPS is plainly highly relevant to land falling within the Air Noise Contour.
- 47 The proposed plan change seeks to provide for urban development in an unplanned way or in a way that was out of step with the provision in planning documents. Hence NPS UD Policy 8 requires the Commissioner to have particular regard to the significance of the development capacity provided, and whether it contributed to a well-functioning urban environment (and other relevant matters required by NPS UD).
- 48 As noted above, CIAL submits that a plan change which proposed urban development or intensification in an area within the 50dB Ldn Air Noise Contour would not contribute to a well-functioning urban environment.

### **NOISE CONTOUR REMODELLING PROCESS**

- 49 Policy 6.3.11(3) of the CRPS requires certain processes with respect to remodelling the noise contours as part of any review of Chapter 6 of the CRPS. As **Ms Blackmore** explains, this process has commenced but is only part-way through.
- 50 For the Panel's information **Ms Blackmore's** evidence attaches the draft remodelled contours that were submitted to the Environment Canterbury. However, the current Air Noise Contours in the District Plan and as shown of Map A of the CRPS remain in the planning framework.
- 51 Environment Canterbury is in the process of appointing the independent expert panel that will peer review the modelling of the updated Contours. That independent panel will confirm the final updated Contours. They have not yet commenced this work. Only after the expert panel has determined the final contours can they be incorporated into a review of the CRPS and introduced into the planning framework.

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<sup>17</sup> *Burrows and Carter Statute Law in New Zealand* (6ed 2021), online edition, chapter 14.

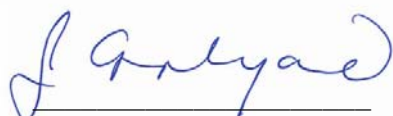
<sup>18</sup> Resource Management Act 1991, s75.

- 52 Furthermore, it is only once the final shape, size, form and extent of the contours has been set by the independent expert panel that they can be reliably used as a matter of evidence. It is possible that the independent panel will identify changes to the inputs or assumptions which would result in the shape or extent of the updated Contours changing compared to what was modelled by CIAL's experts. Ms Blackmore will explain this when she gives her summary, using the flight track assumptions as an example.
- 53 If planning decisions which allow for residential development are made before the final updated contours are determined, there is a real risk that development may be enabled which is subsequently shown to be inappropriately located. The better course of action is to wait until the updated contours are finalised before attempting to make planning decisions in reliance upon them (particularly decisions that would enable high density residential development). Any development enabled in this interim period cannot be unwound.

### **CONCLUSION**

- 54 Until the independent review panel has reviewed and finalised the revised contours, it would be inappropriate for a private plan change to pre-empt any outcome of a process still in its early stages. Doing so would inevitably create an expectation within the public that residential development on the Site will be enabled in the future.
- 55 At this time, the current Air Noise Contour remains applicable, as shown on Map A in the CRPS.
- 56 CIAL therefore seeks that the Commissioner rejects the aspect of PC71 that applies to land under the contour.

Dated: 10 February 2022

A handwritten signature in blue ink, appearing to read 'J Appleyard', written over a horizontal line.

J M Appleyard / A Hill

Counsel for Christchurch International Airport Limited