

Before an Independent Hearings Panel
at Christchurch

under: the Resource Management Act 1991

in the matter of: Proposed Plan Change 4 to the Christchurch District
Plan

and: **Christchurch International Airport Limited**
Submitter 101 / Further Submitter 8

Legal submissions on behalf of Christchurch International Airport
Limited

Dated:

8 October 2021

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OPENING LEGAL SUBMISSIONS ON BEHALF OF CHRISTCHURCH INTERNATIONAL AIRPORT LIMITED

May it please the Panel

INTRODUCTION

- 1 This written submission is made on behalf of Christchurch International Airport Limited (*CIAL*). *CIAL* made a submission and further submission on proposed Plan Change 4 (*PC4*).
- 2 *CIAL* has lodged company evidence from Felicity Blackmore in support of its submission.

CIAL'S POSITION AS AT DATE OF HEARING

- 3 *CIAL's* core concern with respect to this plan change is to ensure that any potential reverse sensitivity effects on the safe and efficient operation of Christchurch International Airport will be avoided. *CIAL* seeks to ensure that *PC4* is consistent with Canterbury Regional Policy Statement (*RPS*) Policy 6.3.5(4) and 6.3.9(5)(a), Christchurch District Plan Strategic Objective 3.3.12, and associated objectives and policies in the Christchurch District Plan which address reverse sensitivity issues.
- 4 To that end, *CIAL* seeks to retain the status quo in the District Plan so that *PC4* does not inadvertently enable any increased development or intensification of noise sensitive activities within the 50dB Ldn Air Noise Contour. The change in terminology and complexity of the provisions proposed in *PC4* introduces risk for confusion and unintended consequences.
- 5 To be clear, *CIAL* does not seek to change the rules proposed to introduce planning rules which are stricter than those currently in place.
- 6 *CIAL's* submission sought to suggest drafting which it considered clarified the position and maintained the status quo for activities captured by the proposed definitions of "hosted" and "unhosted" "visitor accommodation in a residential unit" within the 50dB Ldn Air Noise Contour. *CIAL* would be happy to work further with Council planning staff on any drafting should that be of assistance.
- 7 In addition to the above, *CIAL's* submission responded to comments in the Section 32 report related to the omission of equivalent rules regulating short term rental accommodation in the Specific Purpose (Golf Resort) Zone.
- 8 These submissions deal first with the general substantive matters and then turn to addressing *CIAL's* submission points with respect to the Specific Purpose (Golf Resort) Zone.

CIAL'S POSITION ON SUBSTANTIVE MATTERS

Overview

- 9 CIAL wishes to emphasise that it considers visitor accommodation is a key part of the Christchurch visitor economy and it supports enablement of a broad range of visitor accommodation types across the District.
- 10 In order to support Christchurch's visitor economy, the applicable rules should be clear, simple, and should reduce transaction costs (as required by Strategic Objective 3.3.2). Clear rules will also assist CIAL to engage with parties who undertake this activity within the 50dB Ldn Air Noise Contours.
- 11 Residential activities fall within the definition of "noise sensitive activities" in the District Plan.
- 12 CIAL's position is that short term visitor accommodation in residential units is inherently residential (and therefore, by definition, noise-sensitive) in nature and should be regulated accordingly. From a reverse sensitivity perspective, it does not make any difference whether the accommodation is hosted or unhosted.
- 13 This is supported by the *Archibald v CCC* case.¹ In *Archibald* the Environment Court found that the use of a large residential dwelling for "unhosted" home-sharing via Airbnb for six months of the year, and for up to 12 guests was residential in nature:²
- 13.1 The Court rejected the argument that un-hosted home-sharing is commercial in nature. The Court found that:³
"Having regard to the ordinary usage of the term "residential", in substance the activity is residential in nature albeit that the proposal is for transient accommodation. The occupation of a residential dwelling by fee paying guests is no different in substance to bed and breakfast, farm stays or boarding houses."
- 13.2 The Court commented further that:⁴ *"It is not particularly insightful to say because the appellant is carrying on a business supplying guest accommodation at a tariff therefore the activity is commercial in nature. The same can be said for bed and breakfast, farm stays and boarding houses and yet these activities are defined in the District Plan as "residential activities"..."*
- 14 Allowing noise sensitive activities to establish within the 50dB Ldn Air Noise Contour exposes occupants to an undesirable level of

¹ *Archibald v Christchurch City Council* [2019] NZEnvC 207.

² *Archibald v Christchurch City Council* [2019] NZEnvC 207 at [42]-[44].

³ At [42].

⁴ At [37].

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.⁵

- 15 There are exemptions to the strict 'avoid' policy – including when the activity is within an existing residentially zoned urban area. Various other provisions apply to residential development within the 50dB Ldn Air Noise Contour in existing residentially zoned areas to manage reverse sensitivity matters in those locations.
- 16 Traditional visitor accommodation such as hotels, motels, hostels is not considered noise sensitive, provided those activities take place in buildings that are designed, constructed and operated to a standard that mitigates the effects of aircraft noise on occupants. However if visitor accommodation activity does not take place in buildings which meet those acoustic standards, it is by definition a sensitive activity and must be avoided within the Noise Contours.
- 17 Farm Stays and Bed and Breakfasts are commonly-understood concepts for types of visitor accommodation typically associated with a residential unit and already addressed in the Plan rules. Those activities are subject to specific rules within the 50dB Ldn Air Noise Contour (for example, in the Rural Urban Fringe Zone, Farm Stay activities are permitted within the Noise Contour for up to four guests, as long as guests are accommodated in an existing residential unit).⁶ This reflects the hybrid nature of that sort of activity.
- 18 PC4 changes the definitions and reworks rules applicable to Farm Stay and Bed and Breakfast activities. CIAL seeks that, in the course of any changes or re-working, the status quo in respect of how those activities are regulated within the 50dB Ldn Air Noise Contour is not lost.
- 19 CIAL considers that its concerns related to reverse sensitivity can be resolved via appropriate drafting and further clarification of the proposed provisions.
- 20 **Ms Blackmore** elaborates on the reasons for CIAL's position in her evidence.

Proposed approach to regulation of hosted and unhosted visitor accommodation in a residential unit

- 21 The Council reporting officer has confirmed in the s42A Report that the Council generally supports CIAL's position to ensure that hosted/unhosted visitor accommodation in a residential unit is

⁵ 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.

⁶ Rule 17.5.1.1 P11.

regulated as a noise sensitive activity or is otherwise subjected to noise insulation requirements applicable to more formal / traditional visitor accommodation. CIAL welcomes this confirmation.

- 22 The s42A Addendum report suggests further work is required to address the bundle of definitions associated with this plan change and CIAL supports that recommendation.

Definitions

- 23 CIAL maintains its position that the definitions in the plan should make it clear that hosted/unhosted visitor accommodation in a residential unit is a noise sensitive activity.

- 24 The Council has proposed to partially grant CIAL's relief relating to the definition of "sensitive activities", as follows:

Sensitive activities

means:

- a. residential activities, unless specified below;
- b. care facilities;
- c. education activities and preschools, unless specified below;
- d. guest visitor accommodation, unless specified below;
- e. health care facilities which include accommodation for overnight care;
- f. hospitals; and
- g. custodial and/or supervised living accommodation where the residents are detained on the site;
but excludes in relation to airport noise:
- h. any residential activities, in conjunction with rural activities that comply with the rules in the relevant district plans as at 23 August 2008;
- i. flight training or other trade and industry training activities located on land zoned or legally used for commercial activities or industrial activities, including the Specific Purpose (Airport) Zone; and
- j. guest visitor accommodation (~~except hosted visitor accommodation in a residential unit or unhosted visitor accommodation in a residential unit~~) which is designed, constructed and operated to a standard to mitigate the effects of aircraft noise on occupants.

- 25 That drafting amendment is supported, but still leaves ambiguity as to which category home-sharing falls into. CIAL sought that "hosted visitor accommodation in a residential unit or unhosted accommodation in a residential unit" is inserted into the list of sensitive activities as a new item (h). CIAL maintains that this insertion would ensure that the definition clearly classifies this type of activity as a 'sensitive activity'. This is particularly important given the Plan will contain distinct definitions of "visitor accommodation", "unhosted visitor accommodation in a residential unit" and "hosted accommodation in a residential unit". Future plan users may therefore treat the omission of the latter two categories from the list of sensitive activities as an indication that they are not included in this classification.

- 26 CIAL seeks that the drafting sought in its original submission below is adopted:

Sensitive Activities

means:

- a. residential activities, unless specified below;

- b. care facilities;
- c. education activities and preschools, unless specified below;
- d. ~~guest visitor~~ accommodation, unless specified below;
- e. health care facilities which include accommodation for overnight care;
- f. hospitals; and
- g. custodial and/or supervised living accommodation where the residents are detained on the site;
- h. hosted visitor accommodation in a residential unit or unhosted visitor accommodation in a residential unit

but excludes in relation to airport noise:

- h. any residential activities, in conjunction with rural activities that comply with the rules in the relevant district plans as at 23 August 2008;
- i. flight training or other trade and industry training activities located on land zoned or legally used for commercial activities or industrial activities, including the Specific Purpose (Airport) Zone; and
- j. ~~guest visitor~~ accommodation (except hosted visitor accommodation in a residential unit or unhosted visitor accommodation in a residential unit) which is designed, constructed and operated to a standard to mitigate the effects of aircraft noise on occupants.

Residential rules - 14.4.1.3 RD34 and 14.12.1.3 RD26

- 27 CIAL sought that the new activity categories introduced by PC4 be included in the list of activities to which rules 14.4.1.3 RD34 and 14.12.1.3 RD26 apply. These rules require that sensitive activities (including residential activities) in residential new neighbourhood and residential suburban / residential suburban density transition zones which do not meet permitted activity thresholds within the 50dB Ldn Air Noise Contour also trigger RD activity status so that the Council can consider the extent to which those activities will have an adverse reverse sensitivity effect on the Airport.
- 28 The s42A Report recommends that CIAL's relief is not granted. Given the Council accepts that hosted / unhosted visitor accommodation in a residential unit is considered a sensitive activity, this recommendation is hard to understand.
- 29 The reasons provided by the s42A Report at 7.22.25 are that the underlying residential activity in the residential unit may not trigger any consenting requirements, with only the visitor accommodation component requiring consent, and in that case there is no need to trigger a consenting requirement.
- 30 The Council's position appears to assume that any new "hosted/unhosted visitor accommodation in a residential unit" would occur in a residential unit that was already established. However that may not always be the case. The reporting officer's approach in declining to include these new activities in the list of residential activities creates a gap by which a newly-constructed residential unit for visitor accommodation could be in breach of the various site density / minimum lot size / etc rules but would not be classified as a "residential activity" and so would not be captured by RD34 or RD26 when that exact same building would be caught by those rules

if it were being constructed to house long-term residential occupants.

- 31 CIAL is concerned that such a development could then transition into long-term residential use and thereby result in intensification of sensitive activities, without triggering the relevant planning provisions.
- 32 An appropriate alternative to listing these activities out in RD34/26 is to include hosted/unhosted visitor accommodation in a residential unit in the definition of residential activities.
- 33 The Officer's report identifies further consequential amendments to address gaps at 7.15.6. CIAL confirms for clarity that it supports the proposed amendment to rule 13.3.4.1.1 P6 in the Specific Purpose (Airport) Zone.
- 34 The s42A Addendum recommends additional amendments to Rule 6.1.7.2.2 relating to acoustic insulation requirements for new buildings and additions to existing buildings within the 55dB Ldn Air Noise Contour. CIAL supports the recommended amendments.

Activities in rural zones

- 35 CIAL supports the overall approach in the s42A Addendum drafting to rules in the rural zone applicable to hosted and unhosted visitor accommodation, and "visitor accommodation accessory to farming" and "visitor accommodation accessory to a conservation activity or rural tourism activity."
- 36 CIAL seeks that the drafting for PC4 ensure that the status quo remains in place with respect to activities such as farm stays. CIAL does not seek more onerous provisions, but would be opposed to drafting which inadvertently enables more development of sensitive activities (i.e. if construction or use of a minor residential unit, or a higher number of guests were permitted for this purpose where that was not previously permitted).
- 37 Therefore CIAL supports the restrictions on the above activities within the 50dB Ldn Air Noise Contour and 50dB Ldn Engine Testing Contour – that is, no more than four guests permitted, and the accommodation must not be offered within a vehicle, trailer, tent, marquee, shipping container, caravan, or boat. The types of accommodation listed do not provide any insulation to aircraft noise and, in a noise environment of 50dB Ldn aircraft noise / engine testing noise it is inappropriate to allow people to occupy those types of structures.
- 38 CIAL seeks further clarification regarding the references to the contours in the draft provisions:

38.1 CIAL considers that (as set out in its submission) saying "within the 50, 55, or 65dB Ldn Air Noise Contour or the 50,

55 and 65dB Ldn Engine Testing Contour” is redundant. Reference to the area “within the 50dB Ldn Air Noise Contour” by definition includes the land which is also covered by the 55 and Air Noise Boundary as those contours overlap as one moves closer to the Airport. CIAL seeks that the drafting be amended to refer simply to “within the 50dB Ldn Air Noise Contour or the 50dB Ldn Engine Testing Contour”;

38.2 If the Council seeks to retain the reference to the Contours as drafted, there is no “65dB Ldn Air Noise Contour” – this reference should be to the Air Noise Boundary, which is the name of that line on the planning maps (and is a composite line formed by the 65dB Ldn noise contour and the 95dB Lae noise contour – as set out in the relevant definition).

Visitor accommodation accessory to farming

- 39 At present, Farm Stay activities are permitted within the 50dB Ldn Air Noise Contour and 50dB Engine Testing Contour provided that they accommodate a maximum of four guests at any time and provided that “guests shall only be accommodated in an existing residential unit”. Outside of the contours, guests can be accommodated in either an existing residential unit or a minor residential unit, and up to 10 guests can be accommodated.
- 40 The wording proposed in the s42A Addendum for rules relating to “visitor accommodation accessory to farming” (for example, new 17.5.1.1 P22 and 17.6.1.1 P20) within the 50dB Ldn Air Noise Contour is generally supported.
- 41 CIAL considers that this drafting would benefit from bringing through similar wording to that in the current Farm Stay rule to confirm that minor residential units cannot be used for this activity. That would improve clarity and maintain the status quo for the regulation of these activities within the noise contours.⁷
- 42 With respect to the drafting proposed for visitor accommodation accessory to farming, Ms Blackmore’s evidence also proposes an additional drafting change relating to the reference to campgrounds – see her paragraph [40].
- 43 As a more general point, CIAL considers that the three separate categories introduced for the rural zones in addition to the unhosted and hosted visitor accommodation activities add confusion and complexity. CIAL supports the s42A Officer’s suggestion that this could be rationalised further.

⁷ Noting that the rule applicable to new minor residential units within the 50dB Ldn Air Noise Contour requires that those units are only used for family flats. See for example 17.5.1.1 P7. CIAL acknowledges that this rule will not be changed by PC4 but seeks the relief above for the avoidance of doubt.

Temporary Emergency Housing

- 44 For completeness, CIAL notes that it made a further submission on the MBIE Temporary Accommodation Services (TAS) submission seeking relief related to temporary emergency housing.
- 45 CIAL notes that the s42A Report recommends rejecting the TAS relief. CIAL supports that recommendation.

EXEMPTION FOR SPECIFIC PURPOSE (GOLF RESORT) ZONE

- 46 CIAL seeks that the provisions of the Specific Purpose (Golf Resort) Zone (SPGRZ) be amended to align with the regulations proposed for visitor accommodation in the rest of the district.⁸
- 47 There are residential units in this zone which are used for short-term guest accommodation. Accordingly, it appears at odds with the intention of the proposed plan change to exempt this zone from rules that are to be rolled out across the District.
- 48 As Ms Blackmore discusses, the rationale put forward by the Council for this exemption is also of concern to CIAL.
- 49 The s32 report states at paragraph 2.5.3 that: *"The proposed Plan Change does not include changes to the provisions related to visitor accommodation in the Specific Purpose (Golf Resort) Zone. These will be subject to the outcome of a review of the airport noise contours and can be reassessed in light of that review and the outcomes of this Plan Change."*
- 50 The s42A Report repeats those comments at 7.21.2 and says further: *"The purpose of restricting the establishment of new residential activities at Clearwater Golf Resort is to manage reverse sensitivity risks to the airport. Those risks need to be understood within the context of the most up-to-date airport noise modelling possible and as that modelling has not been updated since the last District Plan Review, in my view it would be premature to revisit the provisions for this zone."*
- 51 Those justifications to omit the SPGRZ from PC4 are unprincipled and entirely disconnected to the Council's stated purpose for PC4. If the Council considers that there are rules and regulations which should apply to visitor accommodation in residential units then this must be applied equally and consistently across all zones in which residential activity takes place.
- 52 This plan change has no relationship to a review of the airport noise contours, nor do the rules in the SPGRZ. There is no basis for waiting to reassess the provisions applicable to the SPGRZ until the outcome of a review of the noise contours.

⁸ Submission points S101.13,

Scope issue

- 53 Counsel for Clearwater Land Holdings Limited & Clearwater Projects Limited (*Clearwater*) has raised an issue as to whether that submission point is “on” the plan change. Counsel for Clearwater suggests there is no scope for the relief that CIAL seeks.
- 54 The Panel’s Minute 1 dated 29 March 2021 declined to strike out this submission point or hold a preliminary hearing on the scope issue and instead directed that this matter be determined after having the benefit of the Council’s s42A Report and the parties’ evidence and legal submissions.

Legal test

- 55 The jurisdiction of the Council in making a decision to accept an amendment to a proposed plan change as notified is bounded by the provisions in the notified plan change and matters raised in submissions.⁹ Submissions must be “on” the proposed plan change.¹⁰
- 56 The test has two stages:¹¹
- 56.1 a submission can only fairly be “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo;
- 56.2 but if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly “on” the variation.

First limb

- 57 The first limb serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the plan.¹² It is the dominant consideration. It involves itself two aspects:¹³
- 57.1 the breadth of alteration to the status quo entailed in the proposed plan change; and

⁹ Resource Management Act 1991, Schedule 1, cl 10; *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

¹⁰ Resource Management Act 1991, Schedule 1, cl 6.

¹¹ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003, at [66]; affirmed and adopted in *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519, at [48]-[57]. More recently confirmed by the High Court in *Albany North Landowners v Auckland Council* [2017] NZHC 138.

¹² *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519, at [80].

¹³ *Ibid.*

57.2 whether the submission then addresses that alteration.

58 One way of analysing whether the submission falls within the ambit of the plan change is to ask whether it raises matters that should have been addressed in the s32 report.¹⁴ If so, the submission is unlikely to fall within the ambit of the plan change. Another approach is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If not then a submission seeking a new management regime for that resource is unlikely to be “on” the plan change.¹⁵

Second limb

59 The second limb of the test serves as a check and examination of natural justice considerations to address the risk that persons directly or potentially directly affected by the additional changes proposed in the submission are denied an effective response. If a submission comes “out of left field” or proposes something completely novel then this will be a strong factor against finding the submission to be on the variation.¹⁶ There is less risk of offending the second limb if the changes requested in the submission are consequential or incidental, and assessed in the existing s32 analysis.¹⁷

Analysis

60 CIAL’s submission point is “on” the plan change and therefore within scope:

60.1 The bare statement in the s32 report that the SPGRZ is not in scope is not determinative. In order to determine whether this matter is truly out of scope, an assessment of the substance of the proposed plan change and the rest of the contents of the s32 report is required.

60.2 The matter raised in CIAL’s submission was addressed in the s32 report:

(a) The s32 report identifies rules in the SPGRZ and applicable definitions as “relevant provisions” in the context of the plan change;¹⁸

¹⁴ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519, at [81].

¹⁵ *Ibid.*

¹⁶ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519, at [55], affirming *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

¹⁷ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519, at [83].

¹⁸ Plan Change 4 Section 32 Evaluation, TRIM 20/1084439, Appendix 2: Summary of Relevant District Plan Provisions (in which the definitions of ‘resort hotel’ and ‘resort apartment’ are included, and rules in the Specific Purpose (Golf Resort) Zone are identified at 2B(ii) as ‘relevant rules’), pp 135 and 137.

- (b) The Council expressly considered whether the proposed rules for guest accommodation in a residential unit should extend to the SPGRZ, determined that they should not, provided reasons, and proposed that the status quo be retained in that zone instead. This proposal was contained in the summary at the beginning of the s32 report as well as in the main body of the report;¹⁹
- (c) The s32 report notes further in its discussion of option 5 (one of the options considered for changes to the plan objectives) that:

"residential activities occur, and are enabled in, a number of different zones in the District Plan besides the residential zones. These include... the Specific Purpose (Golf Resort) Zone, ... Instead of proposing a change only to the objective for residential zones to recognise visitor accommodation in a residential dwelling, the Plan could include a new Strategic Directions Objective or amendments to an existing Strategic Directions Objective such as Strategic Directions Objective 3.3.10 to give a clearer direction of the anticipated outcome for the distribution of visitor accommodation across the District"

This demonstrates a deliberate determination and proposal as to the extent to which PC4 should change the pre-existing status quo in the SPGRZ. That is distinct from a situation in which the substance of the plan change is simply not relevant or where the SPGRZ was not discussed;

- (d) This is not a situation in which the plan change was silent on the issue or where the matter of the submission is entirely unconnected with the substance of PC4. The omission of amendments to the SPGRZ has been the subject of s32 analysis.

60.3 The management regime in the plan which is altered by PC4 is the regime applicable to short term accommodation provided in residential units throughout the district. CIAL's submission directly relates to that regime where it applies in the SPGRZ. CIAL's submission does not seek a new, unrelated, management regime for something else, nor does it relate to a resource that is not the subject of PC4 (for example, an industrial unit);

60.4 CIAL is not advancing a new variation, it is reacting to the Council's proposal not to insert the same provisions into the SPGRZ as are proposed for other zones where residential

¹⁹ Plan Change 4 Section 32 Evaluation, TRIM 20/1084439, pp 2, 60 and 72.

activity takes place to regulate short term accommodation in a residential unit. CIAL's opposition to the proposed exclusion for the SPGRZ can hardly be called "left field";

60.5 The effect of regarding the submission as "on" PC4 here does not deprive those potentially affected from participating. The proposed exclusion of the SPGRZ from amendment via the plan change was clearly signalled in the publicly notified materials. The owners of Clearwater resort and any other interested parties had the opportunity to submit in support of the exclusion proposed for the SPGRZ but elected not to. They did, however, lodge further submissions on CIAL's submission and are participating actively in this hearing process. No prejudice to the reasonable interests of people and communities has occurred in this case.

61 CIAL opposes the omission of the SPGRZ from the proposed rules related to visitor accommodation in residential units and seeks that consistent rules are put in place across all zones. The substantive reasons for this position are elaborated below.

CONCLUSION

62 In conclusion, CIAL considers that further refinements are necessary to the drafting to ensure that PC4 does not inadvertently enable increased development of noise sensitive activities within the contours. CIAL seeks that the status quo is retained in this regard.

Dated: 8 October 2021



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