

IN THE MATTER OF section 71 of the Canterbury Earthquake Recovery Act 2011 and the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014

AND

IN THE MATTER OF proposals notified for incorporation into a Christchurch Replacement District Plan

Date of hearing: 11–18, 22 and 23 March, 24 May and 4 August 2016

Date of decision: 2 December 2016

Hearing Panel: Environment Judge Hassan (Chair), Ms Sarah Dawson, Mr Stephen Daysh, Ms Jane Huria

DECISION 59

**Supplementary Decision to Chapter 6: General Rules and Procedures (Part) –
Noise, Airport matters and Hagley Park – Strategic Objective 3.3.12**

Outcomes: Proposals changed as per Schedule 1

COUNSEL APPEARANCES

Refer to page 2 of Decision 57

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INTRODUCTION

[1] This supplementary decision¹ follows Decision 57 (Chapter 6: General Rules and Procedures (Part) – Noise, Airport matters and Hagley Park). It concerns aspects of the wording of Strategic Objective 3.3.12, an objective which Decision 1 (Strategic Directions) signalled would be reconsidered.

[2] Decision 1 worded Strategic Objective 3.3.12 as follows:

3.3.12 Objective — Infrastructure

[The requirement for alternative strategic direction in respect of Objectives 3.3.12 (b) (iii) and (iv) will be reconsidered by the Panel as part of its further hearing of relevant proposals.]

- (a) The social, economic, environmental and cultural benefits of infrastructure, including strategic infrastructure, are recognised and provided for, and its safe, efficient and effective development, upgrade, maintenance and operation is enabled; and
- (b) Strategic infrastructure, including its role and function, is protected by avoiding adverse effects from incompatible activities, including reverse sensitivity effects, by, amongst other things:
 - (i) avoiding noise sensitive activities within the Lyttelton Port Influences Overlay area; and
 - (ii) managing activities to avoid adverse effects on the National Grid, including by identifying a buffer corridor within which sensitive activities will generally not be provided for; and
 - (iii) avoiding noise sensitive activities within the 50dBA Ldn noise contour for Christchurch International Airport, except:
 - within an existing residentially zoned urban area; or
 - within a Residential Greenfield Priority Area identified in the Canterbury Regional Policy Statement Chapter 6, Map A; or
 - for permitted activities within the Open Space 3D (Clearwater) Zone of the Christchurch City Plan, or activities authorised by a resource consent granted on or before 6 December 2013; and
 - (iv) managing the risk of bird strike to aircraft using Christchurch International Airport; and

¹ For completeness, there are no conflicts of interest matters arising for this decision.

- (c) The adverse effects of infrastructure on the surrounding environment are managed, having regard to the economic benefits and technical and operational needs of infrastructure.

[3] One issue concerns an ambiguity, identified in Decision 57, in 3.3.12(b)(iii). This is in particular in the combination of the words ‘incompatible activities’ and ‘amongst other things’. Decision 57 records:²

We are concerned that this combination of words could be open to being read to the effect that established residences are rendered ‘incompatible activities’ when they become exposed to unreasonable levels of engine testing noise. It can be observed that such a reading does not sit well with the explicit exception given to noise sensitive activities within an existing residentially zoned urban area (subcl. iii.A.). Further, such a reading would appear to offend what the CRPS (particularly in Policy 6.3.5(4)) intends concerning existing residentially zoned urban areas. Our findings on the proper interpretation of that policy are at [178] of Decision 10 (on the Residential Stage 1 proposal), and those findings were not appealed.

Our preliminary view is that this could be rectified by replacing the words ‘incompatible activities’ with ‘incompatible development’. However, we do not make any definitive finding on this at this time as it is appropriate that we allow relevant parties opportunity to submit on what, if anything, should be done. We make appropriate directions for this, with a view to determining this as part of our remaining Definitions decision.

[4] Decision 57 made related directions to the Council to file a memorandum on these matters. It allowed for the Crown, the Regional Council, Christchurch International Airport Limited (‘CIAL’), Transpower, Orion, and any other party who made a relevant submission to respond.

[5] On 21 November 2016, the Council filed a memorandum³ recording that it agreed that the present wording was potentially ambiguous and that the objective “should not inadvertently render established uses ‘incompatible activities’”.⁴ The Council seeks that we revise the introductory wording of cl b. as follows (leaving subclauses i – iii unchanged):

Strategic infrastructure, including its role and function, is protected from incompatible new development and activities by avoiding adverse effects from them incompatible activities, including reverse sensitivity effects, by, amongst other things. This includes:

² At [337] and [338].

³ Memorandum of counsel for Christchurch City Council in relation to Strategic Objective 3.3.12 and the definition of ‘Mass Assembly of People’, dated 21 November 2016 (‘Council memorandum’).

⁴ Council memorandum, at para 3.

[6] Memoranda in response were received from the following parties:

- (a) Transpower New Zealand Limited (2218) ('Transpower') which, the reasons we shortly explain, sought that we change the Council's suggested drafting of 3.3.12(b) as follows:⁵

Strategic infrastructure, including its role and function, is protected from incompatible new development and activities by avoiding adverse effects from them, including reverse sensitivity effects. This includes:

- i avoiding noise sensitive activities within the Lyttelton Port Influences Overlay area; and
- ii managing activities to avoid adverse effects on the National Grid, including by identifying a buffer corridor within which sensitive activities will generally not be provided for; and
- iii avoiding new noise sensitive activities within the 50dBA Ldn noise contour for Christchurch International Airport, except:

- (b) Air New Zealand Limited ('Air NZ') which supported the Council's drafting but, for the reasons we shortly explain, sought that we amend 3.3.12(b)(iii) in either of the following ways:⁶

Air NZ option A	avoiding noise sensitive activities within the 50dBA Ldn noise contour _s for Christchurch International Airport;
Air NZ option B	avoiding noise sensitive activities within the 50dBA Ldn <u>air</u> noise contour <u>and the 50Ldn Engine Testing Contour</u> for Christchurch International Airport;

- (c) Mr David Lawry and the Submitter Group⁷ opposing Air NZ's above request, for reasons we shortly traverse.

⁵ Memorandum of counsel on behalf of Transpower New Zealand Limited in relation to Decisions 56 and 57 Chapter 6: General Rules and Procedures (Part), dated 25 November 2016.

⁶ Memorandum of Counsel for Air New Zealand Limited in relation to amendments to Objective 3.3.12 proposed by Christchurch City Council, dated 28 November 2016.

⁷ Memorandum of submitter group in relation [to] amendments to Objective 3.3.12 proposed by Christchurch City Council, dated 29 November 2016. The members of the Submitter Group named are David Lawry (2514), Bruce Campbell (2489), Mike Marra (2054), Vanessa Payne (2191), John Sugrue (2567), Gerrit Venema (2091).

[7] We did not receive any response from any other party, including CIAL.

[8] On 1 December 2016, at our invitation, the Council filed a memorandum responding to the various memoranda noted (‘Council reply memorandum’).⁸

[9] Another issue concerns the present lack of provision for relevant aspects of Orion’s network. This matter was initially identified in Decision 40 (on Chapter 11, Utilities, Energy and Infrastructure).⁹ In Decision 57 we deferred determination of this pending the Panel’s recent Decision 58 on Chapter 2 Definitions.¹⁰ Decision 58 records the following related finding on this matter, which we adopt in this decision:¹¹

The findings in Decisions 10 and 40 satisfy us that Orion’s 66kV, 33kV and Heathcote to Lyttelton 11kV lines are of sufficient strategic importance to be given clear recognition in Strategic Objective 3.3.12. That is because those findings identify those identified parts of the distribution network as having sufficient s 5 RMA importance, on the evidence and in light of the Higher Order Documents. Therefore, we find it will achieve greater clarity and coherence across the CRDP to make the combination of amendments we have above-described, as modified by the agreed position of Orion and the Council.¹² We have provided for this accordingly, in the definition of ‘Strategic infrastructure’, and in the consequential amendment to Policy 11.2.2.2 b. We have accepted the change to Strategic Objective 3.3.12 and we will make the change to the objective in our Supplementary Decision to Decision 57 dealing with Objective 3.3.12 in due course.

[10] The observation that we “have accepted the change to Strategic Objective 3.3.12” was to the submissions that Orion had made as recorded in Decision 40, and which are discussed at [155] of Decision 58. This matter is not contentious and we return to it at [33].

[11] For the reasons we give at [13] – [33], we have decided to change Strategic Objective 3.3.12 as shown in Schedule 1 to this decision.

⁸ Memorandum of counsel for Christchurch City Council regarding Strategic Objective 3.3.12 and the definition of “Mass Assembly of People”, Decision 57, dated 1 December 2016.

⁹ Decision 40: Chapter 11 Utilities, Energy and Infrastructure including Stage 3 Rule 11.3.4.1 P1 and relevant definitions, dated 5 September 2016.

¹⁰ See Decision 57, at [339].

¹¹ Decision 58, at [158].

¹² Decision 58, n 76.

Effect of this decision and rights of appeal

[12] The Decision Version will become operative as part of the CRDP, as soon as reasonably practicable, upon release of this decision and the expiry of the appeal period.¹³ Under the OIC, the following persons may appeal our decision to the High Court (within the 20 working day time limit specified in the Order), but only on questions of law (and, for a submitter, only in relation to matters raised in the submission):¹⁴

- (a) Any person who made a submission (and/or further submission) on the relevant provisions of the Notified Version;
- (b) The Council; and
- (c) The Ministers.¹⁵

REASONS

Decision 57 findings, reasoning and other aspects applicable to this decision

[13] As this is a supplementary decision to Decision 57 on the narrow issues we have identified, we adopt all relevant findings and reasoning of Decision 57, including as to the statutory framework (including s 32AA of the Resource Management Act 1991 ('RMA'), the Higher Order Documents, and the related evidence. We also refer to and apply what Decision 57 says in relation to Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 ('OIC').

[14] Under ss 32 and 32AA, RMA, we must examine the different available alternative expressions of Objective 3.3.12 in terms of the extent to which they are 'the most appropriate way to achieve' the RMA's sustainable management purpose.

¹³ We refer to and adopt Strategic Directions decision at [5]–[9] on this matter.

¹⁴ OIC, cl 19.

¹⁵ The Minister for Canterbury Earthquake Recovery and the Minister for the Environment, acting jointly.

Consideration of submissions and Council s 32 report

[15] Decision 57 records that we have considered relevant submissions and the Council's s 32 report. There is nothing material to add to that for the purposes of this decision, as the issues we raise are issues of drafting clarity not specifically further traversed in submissions or in that report.

Most appropriate expression of 3.3.12(b) concerning existing sensitive activities

[16] The issue is a narrow one of drafting clarity, namely as to which approach to the expression of this objective is the most appropriate given the related findings in Decisions 1 and 57, including as to the Higher Order Documents and the evidence. As this is a supplementary decision that does not revisit the findings of those decisions but, instead focusses on whether the wording of Objective 3.3.12 is sufficiently clear and certain, the OIC Statement of Expectations (to which we must have particular regard) is of particular relevance. In particular, one of its stated expectations is:

... that the plan ... contains objectives and policies that clearly state the outcomes that are intended for the Christchurch district.

[17] Related to that, OIC cl 13(5) specifies that:

While the hearings panel is considering a proposal, it may reconsider any decision it has already made on another proposal if it considers it is necessary or desirable to do so to ensure that the replacement district plan is coherent and consistent.

[18] The available options include:

- (a) Leaving Objective 3.3.12(b) unchanged (but removing the italicised text as to reconsideration);
- (b) Amending it along the lines proposed by the Council, with or without the modifications proposed by Transpower and/or Air NZ; or
- (c) Some variation of the above that we find to better achieve the RMA's purpose (in particular by drafting that is clearer and hence better responds to OIC Statement of Expectations).

[19] The Council explained that its purpose in referring to ‘new’ was to make clear the objective did not apply to existing uses. It submitted that ‘activities’ should be included, together with ‘development’ to ensure the objective was comprehensive in covering all situations in which new sensitive uses were established near strategic infrastructure. Related to that, it submitted that it was important that the objective also capture a change of use of a site and this was not clearly encompassed in the word ‘development’. It agreed with the Panel’s preliminary observation as to the ambiguity of the words ‘amongst other things’. It prefaced the subclause with the words ‘This includes’, as this maintains the approach that the list of matters is inclusive.¹⁶ We find this appropriate.

[20] Transpower submitted that the issues of ambiguity as pertaining to airport noise, as identified by Decision 57, do not justify changes that have other implications for Transpower’s network. Related to that, Transpower noted Policies 10 and 11 of the National Policy Statement on Electricity Transmission (‘NPSET’), to which the CRDP must give effect and which are as follows:

Policy 10

In achieving the purpose of the Act, decision-makers must to the extent reasonably possible manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading, and development of the electricity transmission network is not compromised.

Policy 11

Local authorities must consult with the operator of the national grid, to identify an appropriate buffer corridor within which it can be expected that sensitive activities will generally not be provided for in plans and/or given resource consent. To assist local authorities to identify these corridors, they may request the operator of the national grid to provide local authorities with its medium to long-term plans for the alteration or upgrading of each affected section of the national grid (so as to facilitate the long-term strategic planning of the grid).

[21] NPSET applies in addition to the CRPS and the CRDP must give effect to it. It defines ‘sensitive activities’ broadly as:

Sensitive activities includes schools, residential buildings and hospitals.

¹⁶ Council memorandum, at paras 2 – 7.

[22] In reply to Transpower, the Council noted that it “disagrees with the deletion of the word ‘new’ from the base of the objective, so that the development of existing activities would be covered”. Specifically, it expressed concern that the objective was about ‘avoidance’, whereas issues associated with the expansion of existing activities may be able to be mitigated. However, it recorded that it understood the issues Transpower raised as to the upgrading of existing National Grid transmission lines and offered to undertake further discussion with Transpower and/or a phone conference with interested parties.¹⁷

[23] On these matters of difference, we are mindful that the issue of clarification concerning Objective 3.3.12(b) arose specifically in the context of Decision 57, which on this matter did not concern the National Grid. In addition, we agree with Transpower that NPSET Policies 10 and 11 are not confined just to ‘new’ development and activities. Rather, they simply refer to ‘manage activities’ and ‘sensitive activities’.

[24] Given those matters, we find that Transpower’s proposed modifications to what the Council has proposed are appropriate and would better respond to the relevant Higher Order Documents.

[25] We return to matters pertaining to Orion’s distribution network, and the wording of 3.3.12(b)(ii), at [33].

[26] We now turn to the matter in contention between Air NZ and the Submitter Group. They appear to concur that the present wording is unclear.¹⁸ Their difference appears to be on whether it would be appropriate to provide clarification, and how this may best be done. On this, the Submitter Group refers to its understanding of the evidence in effect to return to the theme Mr Lawry emphasised in his arguments to us as to the lack of “sound reasons to create activity exclusions, of any type, at the very low 50 dBA Ldn level”.¹⁹ It is not appropriate for us to revisit these evidential matters as we have already made our findings on them. For completeness, we do not accept the Submitter Group’s submission that the word ‘except’, in Objective 3.3.12, provides any support for its position that we ought to revisit the controls our decisions have imposed on noise sensitive activities within the 50 dBA Ldn contours. In

¹⁷ Council reply memorandum, Appendix A.

¹⁸ Air NZ’s memorandum, at para 5; Submitter Group’s memorandum, at the first unnumbered page, unnumbered para 4.

¹⁹ Submitter Group’s memorandum, at first unnumbered page, unnumbered para 5.

essence, the word ‘except’ simply prefaces the specified following exceptions to what the objective specifies as being the intended target for avoidance.

[27] The proper focus at this stage is on ensuring proper clarity of the expression of Objective 3.3.12. As the Submitter Group correctly acknowledges, it is for the Panel “to provide that clarity” (to which we add, subject to the submissions parties make on this).

[28] In support of its argument for change to this aspect of the objective, Air NZ points out the fact that the CRDP now has two 50 dBA Ldn noise contours. It also points out that Decision 57 (in the discussion of Objective 3.3.12 at [337]) treats the objective as applicable to engine testing noise.

[29] Turning to the Council’s reply memorandum, the Council submits that, as the Panel (in Decision 57) expressly rejected the reverse sensitivity argument made in relation to engine testing, Air NZ’s proposed changes are unnecessary and inappropriate. On this matter, we refer to our findings at [90] – [91] of Decision 57. There, we say why we found “artificial and invalid” CIAL’s characterisation of its engine testing as a “classic reverse sensitivity scenario” (with reference to the evidence concerning the lack of analysis of the noise implications of the move to the present engine testing location, and the evidence we heard from residents as to the impacts of that engine testing). We also say why we found it contrary to RMA principles and inappropriate to water down CIAL’s stewardship role by an “artificial ‘reverse sensitivity’ construct”. Those findings and other findings in Decision 57 do not reject the relevance of reverse sensitivity to engine testing noise altogether. Rather, Decision 57 rejects the validity of relying on reverse sensitivity arguments to justify engine testing noise impacts on existing residents. The position is different when what is being considered is new noise-sensitive developments or activities.

[30] Now that the CRDP defines two 50 dBA Ldn noise contours, we find it would better give effect to the CRPS and provide greater plan-user clarity and certainty to reflect that in the expression of Objective 3.3.12. Therefore, we accept Air NZ’s submissions on these matters. Returning briefly to the Submitter Group’s response to Air NZ, we do not find that Air NZ is being opportunist in this regard. It is simply endeavouring to assist us in our task, as identified in the OIC Statement of Expectations, of ensuring clarity and certainty in the CRDP provisions.

For the reasons we have given, nor do we accept the Submitter Group's submissions based on its interpretation of evidence in that we have already made our evidential findings.

[31] As for the alternative drafting preferences offered by Air NZ, we prefer the second as being more precise and accurate in its use of terms.

[32] For all those reasons, we now express 3.3.12.b relevantly as follows:

- b. Strategic infrastructure, including its role and function, is protected from incompatible development and activities by avoiding adverse effects from them, including reverse sensitivity effects. This includes:
 - ...
 - iii. avoiding noise sensitive activities within the 50dBA Ldn Air Noise Contour and the 50Ldn Engine Testing Contour for Christchurch International Airport, except:

Most appropriate reference to strategic aspects of Orion network

[33] For the reasons we have given in our related decisions (to which we refer at [8] and [9]), we amend Strategic Objective 3.3.12.b, by adding a new v. as follows:

- v. managing activities to avoid adverse effects on the identified 66kV and 33kV electricity distribution lines and the Heathcote to Lyttelton 11kV electricity distribution line, including by identifying a buffer corridor within which buildings, excavations and sensitive activities will generally not be provided for; and

[34] We have made a minor consequential change to 3.3.12.b.ii (adding the words 'buildings, excavations and') so that it aligns with the expression of the above addition. Minor consequential changes to related policies will be made as part of the supplementary Chapter 2 Definitions decision.

CONCLUSION

[35] For those reasons, we have amended the expression of Objective 3.3.12, as set out in the Schedule.

For the Hearings Panel:



Environment Judge John Hassan
Chair



Ms Sarah Dawson
Panel Member



Mr Stephen Daysh
Panel Member



Ms Jane Huria
Panel Member

SCHEDULE 1**3.3.12 Objective — Infrastructure**

- a. The social, economic, environmental and cultural benefits of infrastructure, including strategic infrastructure, are recognised and provided for, and its safe, efficient and effective development, upgrade, maintenance and operation is enabled; and
- b. Strategic infrastructure, including its role and function, is protected from incompatible development and activities by avoiding adverse effects from them, including reverse sensitivity effects. This includes:
 - i. avoiding noise sensitive activities within the Lyttelton Port Influences Overlay area; and
 - ii. managing activities to avoid adverse effects on the National Grid, including by identifying a buffer corridor within which buildings, excavations sensitive activities will generally not be provided for; and
 - iii. avoiding new noise sensitive activities within the 50dBA Ldn Air Noise Contour and the 50Ldn Engine Testing Contour for Christchurch International Airport, except:
 - within an existing residentially zoned urban area; or
 - within a Residential Greenfield Priority Area identified in the Canterbury Regional Policy Statement Chapter 6, Map A; or
 - for permitted activities within the Open Space 3D (Clearwater) Zone of the Christchurch City Plan, or activities authorised by a resource consent granted on or before 6 December 2013; and
 - iv. managing the risk of bird strike to aircraft using Christchurch International Airport; and
 - v. managing activities to avoid adverse effects on the identified 66kV and 33kV electricity distribution lines and the Heathcote to Lyttelton 11kV electricity distribution line, including by identifying a buffer corridor within which buildings, excavations and sensitive activities will generally not be provided for; and
- c. The adverse effects of infrastructure on the surrounding environment are managed, having regard to the economic benefits and technical and operational needs of infrastructure.