

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 9

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to clause 14 of the
First Schedule of the Act
BETWEEN INVERCARGILL AIRPORT LIMITED
(ENV-2016-CHC-95)
Appellant
AND INVERCARGILL CITY COUNCIL
Respondent

Court: Environment Judge J J M Hassan

Hearing: In Chambers at Christchurch

Date of Decision: 8 February 2018

Date of Issue: 8 February 2018

DETERMINATION

- A: Under s 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that the appeal is allowed to the extent that the Invercargill City Council is directed to amend the proposed Invercargill City Council District Plan in accordance with Annexure A, attached to and forming part of this determination.
- B: Under ss 279(1)(b) and 293, the Environment Court, by consent, orders that the appeal is allowed to the extent that the Invercargill City Council is directed to amend the proposed Invercargill City Council District Plan in accordance with Annexure B, attached to and forming part of this determination.
- C: Under s 285 of the Resource Management Act 1991, there is no order as to costs.



REASONS

Introduction

[1] In general terms this proceeding concerns an appeal against provisions of the proposed Invercargill City District Plan ('the Proposed Plan') as it relates to the operation of Invercargill Airport ('the Airport').

[2] The court has now read and considered:

- (a) the consent memorandum of the parties dated 12 December 2017;
- (b) the joint memorandum of counsel dated 12 December 2017 (on exercise of s 293 of RMA);
- (c) the evidence of Ms K E O'Sullivan; and
- (d) the evidence of Mr S S Roberts

– which propose to resolve the appeal.

[3] There are two aspects to this Determination:

- (a) amendments to the Proposed Plan that are within the scope of the appeal (concerning sections 2, 3 and 4 of the Plan); and
- (b) amendments to the Proposed Plan that are not within the scope of the appeal (concerning Appendix VI) and so are subject to a joint application under s 293 of the Resource Management Act ('the RMA' or 'the Act').

[4] The parties have engaged in mediation and agreed that the relief sought by Invercargill Airport Limited ('IAL') in its notice of appeal was appropriate and should be granted. Through the course of mediation, it became apparent that the requirements of Appendix VI – Noise Sensitive Insulation Requirements – of the Proposed Plan were not the most appropriate for the Invercargill context. However, neither IAL's submission nor its appeal provides scope to amend Appendix VI as recommended by Mr S S Roberts (Building Services Engineer) and Ms K E O'Sullivan (Planner). Consequently, the parties ask that the court use its powers under s 293 to make the amendments sought.

[5] Southland Regional Council has given notice of an intention to become a party under s 274 of the Act and has signed the memorandum setting out the relief sought. The Regional Council has advised that its interest in IAL's appeal is limited to the objectives and policies set out in its s 274 notice and so it takes no position on the s 293



application.¹

Changes within scope

[6] The parties have reached an agreement on the following parts of this appeal (which are set out in Annexure A), proposing to:

- (a) amend 2.9;
- (b) amend 2.19.2 Objective 1, seeking to recognise the benefits of the Airport to the region;
- (c) prohibit certain activities within the Business, Industrial, Residential, Otatara and Rural zones;
- (d) add assessment matters in 3.18 and amend 3.18.6, prohibiting subdivision within the Airports noise boundaries in the Residential and Otatara zones; and
- (e) amend 3.21.1 and Definition, allowing a Conference Facility in the Airport Zone.²

[7] In respect of the amendments set out in Annexure A, the court is making the order under s 279(1) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to s 297. The court understands for present purposes that:

- (a) all parties to the proceedings have executed the memorandum requesting this order; and
- (b) all parties are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

Section 293 application – Appendix VI

Appendix VI

[8] The requirements in Appendix VI apply to properties that are located within the noise boundaries for Invercargill Airport which may in the future be affected by moderate levels of aircraft noise associated with the operation of the Airport. These property owners

¹ Joint memorandum of counsel dated 12 December 2017 at [2]; Email from SRC to Alexandra Whyte, 13 December 2017.

² The remaining appeal points are dealt with in the infrastructure consent memorandum dated and lodged with the court on 27 October 2017.



may be required to close their windows and doors in order to reduce aircraft noise to a reasonable level. The purpose of Appendix VI is to describe the requirements to provide a mechanical ventilation system to provide fresh air to the dwelling to achieve a comfort amenity that is similar to that which could be experienced if the home owner was free to open their windows and doors.³

[9] Appendix VI stipulates (by way of summary) outdoor air ventilation rates for bedrooms and other habitable areas and requirements that:⁴

- (a) ventilation rates are to be achieved by ventilation systems that produce fairly low noise levels;
- (b) each system must be capable of being switched on and controlled to a minimum of three airflow speeds;
- (c) when operating in the low setting the system must also be capable of raising the incoming air temperature by 18°C and be provided with at least three equal heating stages; and
- (d) if air conditioning is provided to any space then the high setting ventilation requirements for that space is not required.

Scope

[10] In general terms, IAL's submission on the Proposed Plan and its related notice of appeal are concerned with ensuring that the Airport is appropriately protected from reverse sensitivity effects and that people living near the Airport have an appropriate level of internal amenity.⁵

[11] IAL's submission supported Appendix VI as notified as at that time IAL believed the requirements to be in accordance with best practice. The Council's decision was to largely accept IAL's submission and to generally confirm the Appendix as notified. IAL did not appeal this decision (and nor could it) and so neither its submissions nor its appeal provides scope to amend Appendix VI.

[12] The parties have agreed that, within the Residential and Otatara Zones, new buildings and alterations and additions to existing buildings containing noise sensitive activities ought to be prohibited where they do not incorporate appropriate acoustic

³ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [10].

⁴ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [11].

⁵ Joint memorandum of counsel (s 293), dated 12 December 2017, at [7].



treatment. The Proposed Plan indicates that 'appropriate' acoustic treatment is achieved by complying with the requirements stated in Appendix VI of the Proposed Plan. The parties consider it important to ensure that the requirements of Appendix VI are appropriate to the Invercargill context, can be readily understood and are achievable by users of the Proposed Plan.⁶

[13] The parties consider that Mr Roberts' and Ms O'Sullivan's recommended amendments to Appendix VI fall within the ambit of s 293 of the Act and the court's jurisdiction. They seek that the court exercise its powers under that section to make the amendments sought.

Evidence

[14] The parties have filed two statements of evidence in support of the s 293 application. As the hearing is on the papers and the experts will not have the opportunity to either swear or affirm their evidence, it would have been preferable for the evidence to be filed as affidavits. However, I accept the evidence on the basis that the application is a joint one and that the court has the ability to receive anything in evidence that it considers appropriate to receive.⁷

Engineering evidence

[15] Mr Roberts is a professional Building Services Engineer and an employee and director of Jackson Engineering Advisers Limited. He was engaged by IAL and the Council to review the mechanical ventilation requirements contained within Appendix VI, Table 2 of the proposed District Plan.⁸

[16] Mr Roberts has previously undertaken work for Queenstown Airport where the same mechanical ventilation requirement applies to properties within that Airport's noise boundaries. It became apparent that there were a number of practical difficulties with implementing the mechanical system in accordance with Appendix VI and there were associated financial implications.⁹ He says that in a climate such as Queenstown (and, similarly, Invercargill) strict compliance with the requirements stated in Appendix VI requires the installation of large ventilation systems with multiple fans and heating systems, which is inefficient when compared with modern systems that are more readily

⁶ Joint memorandum of counsel (s 293), dated 12 December 2017, at [13]-[16].

⁷ Section 276(1) Resource Management Act 1991.

⁸ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [2].

⁹ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [11].



available and more easily installed and efficient to operate.¹⁰

[17] The current requirements of Appendix VI give rise to the following potential inefficiencies:¹¹

- (a) the range in airflow rates of 115 air changes per hour cannot be achieved by a single fan, so multiple fans would be required;
- (b) to comply with the Appendix, separate systems would be required for bedrooms and other habitable areas;
- (c) the Appendix indicates a requirement to heat the air supplied by 18°C above the prevailing outdoor air temperature. The specified heating may not warm the incoming air sufficiently in winter;
- (d) the high setting airflow requirement of 15 air changes per hour in other habitable areas may result in large, noisy fans with similar large ductwork and grills;
- (e) supply air only (with no balanced exhaust air requirement) may pressurise the house;
- (f) the requirements of the Appendix mean that a bespoke system is required for every home to which it applies, ideally from persons more qualified than typical contractors, which may result in additional cost;
- (g) the need for 15 air changes is unnecessary in a cooler climate such as Invercargill.

[18] Mr Roberts goes on to make the following findings:¹²

- (a) the requirements of Appendix VI appear to be designed for warmer climatic conditions than are experienced in and around Invercargill. The air change rates are relatively high and may result in a draughty, cool internal environment in certain conditions. Strict compliance with the Appendix requires separate ventilation systems to be installed for bedrooms and other habitable areas which are potentially large, complex and inefficient, when modern and more efficient systems are readily available;
- (b) to address the issues outlined in (a), he considers that the Council ought to:
 - (i) amend the minimum and maximum air change requirements (to avoid the requirement for multiple systems);

¹⁰ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [13].

¹¹ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [14].

¹² Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [7].



- (ii) amend the heating and cooling requirements of the system (to ensure the ventilation system cools as well as heats);
 - (iii) include a requirement for an air relief path (to ensure the dwelling does not become pressurised); and
 - (iv) clarify that existing plant may be used to achieve compliance with the Appendix.
- (c) there are savings in both capital and (depending on the existence of a suitable heat pump) operational costs associated with his proposed revisions to Appendix VI. Indoor comfort level and amenity would be improved for persons occupying buildings required to comply with the Appendix.¹³

[19] The revised Appendix, incorporating the changes proposed by Mr Roberts, is produced in the evidence of Ms O’Sullivan and is accepted by Mr Roberts.¹⁴

Planning evidence

[20] Ms O’Sullivan is a senior resource management planner, who has had regular input into Airport related projects in Queenstown, Wanaka, Invercargill and Wellington. Her evidence examines whether the mechanical ventilation requirements described in the Appendix are appropriate for the Invercargill context and are efficient and effective, while ensuring any changes are clear and concise for Plan users.

[21] The New Zealand Standard for Airport Noise Management and Land Use Planning (NZS 6805:1992 – ‘NZS’) is recognised as the key guiding document for managing aircraft noise at New Zealand airports and is the basis for the objectives, policies and methods adopted by the Proposed Plan for managing land use around Invercargill Airport. The NZS imposes air-noise boundary controls as a “mechanism for local authorities to establish compatible land use planning and to set limits for the management of aircraft noise at airports where noise control measures are needed to protect community health and amenity value.”¹⁵

[22] Consistent with this approach, the Proposed Plan contains three air-noise boundaries for Invercargill Airport:



¹³ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [25].

¹⁴ Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [21].

¹⁵ NZS 6805: 1992, Section 1.1.2, p 5.

- (a) Air Noise Boundary ('ANB');
- (b) Outer Control Boundary ('OCB');
- (c) Single Event Sound Exposure Boundary ('SESEB').

[23] Ms O'Sullivan prepared the submission on behalf of Queenstown Airport Corporation Limited when it sought to rectify the issues that had arisen in respect of similar mechanical ventilation requirements contained in the Queenstown Lakes District Plan. The Council and IAL then asked Ms O'Sullivan and Mr Roberts to advise whether similar issues would arise in the context of Invercargill.¹⁶ With reference to the evidence of Mr Roberts', Ms O'Sullivan finds it is likely that similar issues will arise in the Invercargill context.¹⁷

[24] As a result of these issues, Ms O'Sullivan considers that Appendix VI contains an unduly onerous set of specifications which are (given the evidence of Mr Roberts) unwarranted and unnecessary.

Proposed changes

[25] Ms O'Sullivan proposes the following changes to Appendix VI to rectify the issues outlined:

- (a) Acoustic treatment applies to 'buildings' not 'activities'
As currently drafted, Appendix VI requires the insulation of new noise sensitive activities to ensure aircraft noise does not exceed the specified noise environment. It would be more effective and more readily understood if the method were to make it clear that it relates to new buildings or additions or alterations to existing buildings containing noise sensitive activities and not the noise sensitive activity itself.¹⁸
- (b) Relationship between the required noise environment and Tables 1 and 2
Appendix VI specifies the internal noise environment to be achieved within habitable rooms (including bedrooms) within the SESEB and the OCB. The Appendix then provides a set of 'guidelines for insulation' (Tables 1 and 2).

Table 1 describes the sound insulation requirements for bedrooms inside the SESEB. There is no equivalent table for insulation of other habitable rooms within the SESEB or the OCB. Based on advice from Marshall Day

¹⁶ Statement of evidence of K E O'Sullivan, dated 28 November 2017, at [59].

¹⁷ See Statement of evidence of Sheridan Scott Roberts, dated 28 November 2017, at [14].

¹⁸ Statement of evidence of K E O'Sullivan, dated 28 November 2017, at [65].



Acoustics, Ms O'Sullivan understand that modern construction methods and typical dwelling designs will achieve the L_{dn} internal noise criterion within the OCB and SESEB, provided windows remain closed (although alternative ventilation would need to be provided).

Appendix VI should be amended to clarify that:

- (i) Table 1 only applies to bedrooms within the SESEB; and
- (ii) Table 2 applies to all new and/or additions or alterations to existing buildings containing ASAN.

(c) Guidelines

Appendix VI refers to 'guidelines' for insulation although, due to the mandatory nature of their application, they are akin to rules. It is recommended that to ensure clarity the word 'specifications' be used instead of 'guidelines'.¹⁹

(d) Achieving compliance

Appendix VI and the methods which trigger its implementation do not provide any direction or guidance around how to demonstrate compliance with the requirements set out in the Appendix. This creates uncertainty for the Council and the resource users. Ms O'Sullivan suggests it would be appropriate to allow compliance with the requirements of the Appendix to be demonstrated by way of compliance certificate provided by a person suitably qualified in acoustics stating that the proposed construction will achieve the specified internal noise environment.

(e) Ventilation specifications

Ms O'Sullivan proposes changes to Table 2, based on the evidence of Mr Roberts, to ensure the mechanical ventilation specifications are achievable, appropriate for Invercargill and account for recent advances in technology.²⁰

[26] Ms O'Sullivan considers²¹ that the proposed amendments achieve the relevant objectives²² and policies²³ of the Proposed Plan as the specified noise mitigation

¹⁹ Statement of evidence of K E O'Sullivan, dated 28 November 2017, at [72].

²⁰ Statement of evidence of K E O'Sullivan, dated 28 November 2017, at [79]-[81].

²¹ Statement of evidence of K E O'Sullivan, dated 28 November 2017, at [84].

²² Objective 3 of Section 2.9.2; Objective 1 of Section 2.17.2.

²³ Policy 3 of Section 2.9.3; Policy 4 of Section 2.19.3; Policy 3 of Section 2.20.3; Policy 6 of Section 2.24.3; Policy 6 of 2.26A.3; Policy 5 of Section 2.34; Policy 10 of Section 2.36; Policy 10 of Section 2.40; Policy "x" of Sections 2.22.3 and 2.31.3 (as set out in consent memorandum).



treatments will ensure that an appropriate internal design sound level of 40dB L_{dn} is achieved within habitable rooms and SEL 65dB L_{AE} within bedrooms within the SESEB. This will maintain the amenity of persons residing in these areas while at the same time reducing the potential for adverse reverse sensitivity effects on IAL. The changes to the mechanical ventilation provisions will also enable residents within the SESEB and/or OCB to keep their windows closed to reduce the effects of aircraft noise, while still maintaining an appropriate level of outdoor air exchange and while utilising readily available equipment that is more cost efficient to install and operate.

[27] In addition, the other changes proposed clarify the application of and compliance with Tables 1 and 2, there will be reduced implementation costs (referring to evidence of Mr Roberts), and the design of any future mechanical ventilation systems will be able to be undertaken by contractor which will reduce potential costs.

[28] Overall, the proposed changes are efficient and ensure that the requirements of Appendix VI are effective and provide greater certainty for Plan users and the consent authority and will better achieve the purpose of the Act.

The law

[29] The effect of s 293 of the RMA is to give the court the ability to make changes to a Proposed Plan which are not otherwise in jurisdiction as they are outside the scope of the appeal before it.

[30] Much of the existing case law on s 293 relates to the section as it existed prior to the 2005 and 2009 amendments to the Act. However, the court has confirmed that these amendments were largely procedural as opposed to substantive, so that the earlier case law remains relevant.²⁴

[31] Section 293 provides (relevantly):

- 293 Environment Court may order change to proposed policy statements and plans
- (1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to –
- (a) prepare changes to the proposed policy statement or plan to address any matters identified by the court;

²⁴ See *Remarkables Park Limited v Queenstown Lakes District Council* C127/06 at [20]; *Johns Road Horticulture Limited v Christchurch City Council* [2011] NZEnvC 185 at [10].



- (b) consult the parties and other persons that the court directs about the changes;
 - (c) submit the changes to the court for confirmation.
- (2) The court –
- (a) must state its reasons for giving a direction under subsection (1); and
 - (b) may give directions under subsection 1 relating to a matter that it direct to be addressed.

[32] While the power conferred upon the Environment Court under s 293 of the Act may appear to be very broad, the relief sought must relate to the subject matter of the Proposed Plan.²⁵ There must be a nexus (or a 'rational connection') between the appeal itself and the changed relief sought.²⁶

[33] There is no definitive list of factors as to circumstances in which the court might be influenced to exercise its discretion under s 293. However, some factors have been considered as contributing positively toward directions under s 293. These include:²⁷

- (a) where the application has been jointly made, particularly where it involves many or most of the main parties or the main landowner;²⁸
- (b) where there has already been a Council hearing, along with a submission process, and where the proposed changes address issues already raised at the Council hearing or in the Environment Court process and where it is unlikely there are interested parties who are not already involved in the proceedings;²⁹
- (c) where the amendments proposed relate to a discrete piece of land and not to rules affecting the whole district or district wide policies and objectives;³⁰
- (d) where there has already been consultation over what is being proposed;
- (e) where the amendments proposed are supported by evidence from witnesses for more than one set of parties, particularly where that evidence shows that the amendments may achieve the purpose of the Act or the objectives of the relevant plan;³¹ and

²⁵ *Auckland Council v Byerley Park Limited* [2013] NZHC 3402, [2014] NZRMA 124 at [42].

²⁶ *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616 (HC) at [145], citing *Hamilton City Council v New Zealand Historic Places Trust/Pouhere* [2005] NZRMA 145 (HC) at [25].

²⁷ Joint memorandum of counsel (s 293), dated 12 December 2017, at [32].

²⁸ *Gardez Investments Ltd v Queenstown Lakes District Council* C111/04 at [31].

²⁹ *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249, at [170].

³⁰ *Gardez Investments Ltd v Queenstown Lakes District Council* C111/04 at [31].

³¹ *Gardez Investments Ltd v Queenstown Lakes District Council* C111/04 at [31].



- (f) particularly where the delay has already been considerable, to avoid further delay.³²

[34] Some of the factors that might count against the court exercising its jurisdiction under s 293 include:

- (a) where two separate parties are the proponents of an application but they cannot agree on a fundamental issue;³³
- (b) where the application would result in an ad-hoc development which goes against a policy on comprehensive development;³⁴
- (c) where prejudice to a party exists;³⁵ and
- (d) where there are potentially a large number of persons affected greater than the public generally.³⁶

Also, broadly speaking, the larger scale and more complex the proposed amendments are the less likelihood the court will exercise its discretion.³⁷

'After a hearing'

[35] Section 293(1) commences with the words: "after hearing an appeal against...". At first blush, it seems that a hearing is required before the court is able to invoke its powers under s 293.

[36] However, it has been held that this requirement is able to be satisfied by way of a hearing on the papers, so long as the court has been provided with sufficient information to allow it to consider the amendments sought.³⁸ The parties submit, and the court agrees, that the court has before it all the information and evidence it requires to make a decision and approve the amendments to Appendix VI as sought by the parties.

Consideration

[37] The parties submit that in the present case none of the factors that might count against the court invoking its powers under s 293 arise. Instead a number of the positive

³² *Thacker v Christchurch City Council* C026/09 at [92].

³³ *Thacker v Christchurch City Council* C026/09 at [103].

³⁴ *Thacker v Christchurch City Council* C026/9 at [102].

³⁵ *Apple Fields Limited v Christchurch City Council* [2003] NZRMA 1 at [40].

³⁶ *Apple Fields Limited v Christchurch City Council* [2003] NZRMA 1 at [40].

³⁷ *Apple Fields Limited v Christchurch City Council* [2003] NZRMA 1 at [40].

³⁸ See *Kahuranaki Station Limited v Hastings District Council* [2016] NZEnvC 111 at [9].



factors are satisfied. I accept those submissions and they inform my reasons, which follow, in deciding to invoke the powers.

The amendments sought to Appendix VI arise from and are 'on' the Proposed Plan

[38] Appendix VI was included in and notified as part of the Proposed Plan in 2013. The notified Appendix contained material differences to the operative Appendix (as discussed by Ms O'Sullivan).

[39] Any amendments made to the Appendix are clearly 'on' the Proposed Plan.³⁹

There is a nexus between the amendments sought and IAL's appeal

[40] IAL seeks that non-compliance with the acoustic insulation and mechanical ventilation requirements stated in Appendix VI is a prohibited activity. The Council's position, as stated in its decision on submissions, was that non-compliance with Appendix VI should trigger non-complying activity status, not prohibited activity status.

[41] The parties have agreed that prohibited activity status is appropriate where compliance with the requirements of the Appendix is not achieved. It is submitted that the changed activity status gives rise to a clear nexus or rational connection between IAL's appeal and the requirements of the Appendix. The changed activity status for non-compliance with the Appendix makes it imperative that the requirements of the Appendix are appropriate for the Invercargill climate and are readily understood and achievable by persons using and administering the Proposed Plan.⁴⁰

[42] IAL's notice of appeal also seeks the following relief:

For zones affected by the Airport's noise boundaries where there is an existing expectation of residential development (eg the Residential and Otatara Zones), the establishment of new noise sensitive activities within either the OCB or the SESEB shall be permitted, subject to a requirement for appropriate acoustic insulation.

[43] It is submitted that the reference to 'appropriate acoustic insulation' further demonstrates that there is a nexus between IAL's appeal and the amendments to Appendix VI now jointly sought.⁴¹

³⁹ Joint memorandum of counsel (s 293), dated 12 December 2017, at [38].

⁴⁰ Joint memorandum of counsel (s 293), dated 12 December 2017, at [43].

⁴¹ Joint memorandum of counsel (s 293), dated 12 December 2017, at [46].



[44] Given the need for the Appendix to be workable since non-compliance triggers a prohibited activity status and the reference in IAL's appeal to 'appropriate acoustic insulation', I find that there is a sufficient nexus and rational connection between the appeal and the changes sought to Appendix VI.

The request is made jointly

[45] The s 293 application is jointly made and supported by the parties to IAL's appeal. I accept the parties agreed position that the amendments to the Appendix are both necessary and appropriate in terms of s 32 and in order to achieve the purpose of the Act.⁴²

There has already been a Council hearing

[46] Appendix VI was included in the Proposed Plan as notified. Other than IAL, the only submitter on Appendix VI was the Southern District Health Board ('SDHB'). No other person made a submission or further submission on the Appendix even though the requirements of the Appendix were substantially different from those contained in the Operative District Plan.

[47] I accept the parties' submission that it is unlikely that there are interested parties who are not already involved in the proceedings or who have not been consulted by the parties.⁴³

The changes sought affect a discrete number of properties

[48] The amendments sought concern a discrete area and not the whole district. Appendix VI only relates to new buildings and alterations and additions to existing buildings containing noise sensitive activities that are located within the noise boundaries for Invercargill. This geographically discrete area is identified on the District Planning Maps.⁴⁴

[49] By way of example, the Council's analysis shows that the Appendix has the potential to impact on 251 properties (four currently vacant) within the Residential 1 Zone and 86 properties (eight currently vacant) within the Otatara Zone, but only at the time they wish to build a new building or extend/alter an existing building containing a noise sensitive



⁴² Joint memorandum of counsel (s 293), dated 12 December 2017, at [47].

⁴³ Joint memorandum of counsel (s 293), dated 12 December 2017, at [48].

⁴⁴ Joint memorandum of counsel (s 293), dated 12 December 2017, at [50].

activity.⁴⁵

Relevant parties have been consulted

[50] The only party to have made a submission, SDHB, has been consulted, as has its acoustic expert, Mr Vern Goodwin. The SDHB and its expert agree that the amendments are appropriate and should be made.⁴⁶

[51] I accept the submission that wider consultation on the proposed amendments to Appendix VI is not required because no person has previously indicated an interest in the Appendix and nor will anyone be prejudiced by amendments to the proposed Appendix.

[52] Further, I am satisfied the proposed amendments will not result in any additional cost for persons required to comply with the Appendix but will instead result in gains in efficiency and an improved internal amenity.⁴⁷

Amendments supported by evidence

[53] The application is supported by the comprehensive engineering evidence of Mr Roberts and the equally thorough planning evidence of Ms O'Sullivan (outlined earlier in this decision).

No prejudice

[54] As Mr Roberts explained, the amendments sought to Appendix VI will result in efficiencies in terms of the capital and operational costs associated with meeting the requirement stated in the Appendix. The amendments will also result in an improved internal amenity for occupiers of dwellings required to comply with the Appendix.⁴⁸ Overall, the amendments to the Appendix will result in a significant improvement on the status quo.⁴⁹

[55] Given that there has already been a Council hearing, that there is a discrete number of properties that will be affected by the changes, and only one person made a submission in relation to Appendix VI and they have been consulted, it appears unlikely

⁴⁵ Statement of evidence of K E O'Sullivan, dated 28 November 2017, at [52].

⁴⁶ Joint memorandum of counsel (s 293), dated 12 December 2017, at [53].

⁴⁷ Joint memorandum of counsel (s 293), dated 12 December 2017, at [70].

⁴⁸ Joint memorandum of counsel (s 293), dated 12 December 2017, at [57]-[58].

⁴⁹ Joint memorandum of counsel (s 293), dated 12 December 2017, at [59].



that anyone would be prejudiced if there was no further consultation and so the court will not make any directions that this be undertaken.

Outcome

[56] The court orders, by consent, that the appeal is allowed to the extent that the Invercargill City Council is directed to amend the proposed Invercargill City Council District Plan in accordance with Annexure A (changes within scope) and Annexure B (changes made subject to s 293), attached to and forming part of this Determination.

[57] There is no order as to costs.



J J M Hassan
Environment Judge



SECTION TWO – ISSUES OBJECTIVES AND POLICIES

DISTRICT WIDE

2.9 INFRASTRUCTURE

The infrastructure of the Invercargill City District is an important physical resource. Infrastructure includes a range of facilities, services and installations that enable a community to function including:

- (D) ~~Land~~ Transport networks including rail, port and airport facilities and installations.

ZONE SPECIFIC

2.19 AIRPORT OPERATIONS ZONE

2.19.2 Objectives

Objective 1: Invercargill Airport meets the varied needs of the Southland region for Airport facilities and services and is enabled to carry out its functions, operations, and ancillary activities. ~~These include Airport Activities and Airport Service and Commercial Activities.~~

2.22 BUSINESS 1 (CENTRAL BUSINESS DISTRICT) ZONE

2.22.3 Policies

Policy x Noise: To recognise that some parts of the Zone are subject to higher levels of noise generated by Invercargill Airport and to avoid, or mitigate reverse sensitivity effects arising from noise sensitive activities establishing within these areas.

Explanation: Invercargill Airport has operational requirements involving generation of varying levels of noise and it is important the functioning of this infrastructure is not compromised by reverse sensitivity issues involving noise. The location, design and operation of noise sensitive activities should involve the consideration of these existing noise sources.

2.31 INDUSTRIAL 2 (URBAN) ZONE

2.31.3 Policies

Policy x Noise: To recognise that some parts of the Zone are subject to higher levels of noise generated by Invercargill Airport and to avoid, or mitigate reverse sensitivity effects arising from noise sensitive activities establishing within these areas.

Explanation: Invercargill Airport has operational requirements involving generation of varying levels of noise and it is important the functioning of this infrastructure is not compromised by reverse sensitivity issues involving noise.



The location, design and operation of noise sensitive activities should involve the consideration of these existing noise sources.



SECTION THREE RULES

3.13 NOISE

3.13.17 Invercargill Airport Operations

- (A) Noise from aircraft operations, including take offs and landings, flight operations, routine engine testing or ground running, and the running of auxiliary power units (being the subject of designations by Invercargill Airport Limited) are exempt from the noise limits detailed in Rule 3.13.2 above.
- ~~(B) Acoustic insulation — Within those areas identified on the District Planning Maps as being within the Single Event Sound Exposure Boundary and/or the Outer Control Boundary, new Noise Sensitive Activities and/or alterations and additions to existing buildings containing Noise Sensitive Activity, which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements, are a non-complying activity.~~

3.18 SUBDIVISION

3.18.4 Applications under Rule 3.18.3 above shall address the following matters which will be among those taken into account by the Council:

- (W) In addition to the matters specified in 3.18.4(A) – (T) above, applications made under Rule 3.18.3 above for sites located inside the Outer Control Boundary or Single Event Sound Exposure Boundary shall also address the following matters:
- (a) The extent to which evidence has been provided of a legally binding commitment (acceptable to the relevant Airport Authority) on behalf of the applicant and any successors in title not to complain as to current or potential effects associated with the operation of the airport resource and/or to waiver all rights of action under the Resource Management Act 1991 or otherwise at law against the Airport. A legally binding commitment may take the form of a restrictive non-compliant covenant or memorandum of encumbrance entered against the title to the property.

Note: Applications under Rule 3.18.3 will be notified to Invercargill Airport Limited as an affected party where the subdivision is located, in part or in full, within the Invercargill Airport Outer Control Boundary or the Single Event Sound Exposure Boundary.

Protected Areas and Minimum Lot Sizes

3.18.6 Subdivision is a non-complying activity where it would create lots as follows:

- (F) Within the Otatara Zone: Allotments of less than one hectare (if not connected to the Council's reticulated sewerage system) or 4,000 square metres (if connected to the Council's sewerage system).



And-Or

Allotments of less than one hectare and within the Outer Control Boundary and/or the Single Event Sound Exposure Boundary.

- (G) Within the Residential 1 Zone: Allotments of less than 350 square metres.

And-Or

Allotments of less than 500 square metres and within the Outer Control Boundary and/or the Single Event Sound Exposure Boundary.

Note: Applications under Rule 3.18.6(F) and (G) will be notified to Invercargill Airport Limited as an affected party where the subdivision is located, in part or in full, within the Invercargill Airport Outer Control Boundary or the Single Event Sound Exposure Boundary.

3.21 AIRPORT OPERATIONS ZONE

3.21.1 **Permitted Activities:** The following are permitted activities in the Airport Operations Zone:

- (E) Conference Facilities, subject to:
- (a) Use of any single facility to a maximum of 100 persons at any time
 - ~~(b) Hours of use being restricted to periods of regular scheduled services.~~

3.22 AIRPORT PROTECTION ZONE

3.22.2 **Discretionary Activities:** The following are discretionary activities in the Airport Protection Zone:

- (A) Airport activities.
- (B) Alterations or additions to existing buildings or parts of buildings used ~~or able to be used~~ for ~~n~~Noise ~~s~~Sensitive ~~a~~Activities, provided that the work complies with the ~~insulation requirements of~~ specifications in Appendix VI Noise Sensitive Insulation Requirements.
- (C) Home occupations within existing residences.

3.22.4 **Prohibited Activity:** The following are prohibited activities in the Airport Protection Zone.

- (A) Noise Sensitive Activities not in existence as at 29 October 2016.
- ~~(B) Additions or alterations to existing buildings containing Noise Sensitive Activities, which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.~~



3.23 BUSINESS 1 (CENTRAL BUSINESS DISTRICT) ZONE

3.23.2 **Discretionary activities:** The following are discretionary activities in the Business 1 Zone:

- (A) Any activity not listed as permitted or prohibited (other than heavy industry) up to 5,000 square metres total floor space; or

3.23.3 **Non-complying activities:** The following are non-complying activities in the Business 1 Zone:

- (A) Heavy industry and any activity not listed as permitted with a total floor space exceeding 5,000 square metres, other than activities listed as prohibited.

3.23.4 **Prohibited Activities:** The following are prohibited in the Business 1 Zone:

- (A) New Noise Sensitive Activities within the Outer Control Boundary or the Single Event Sound Exposure Boundary.

- (B) Additions or alterations to existing buildings containing Noise Sensitive Activity within the Outer Control Boundary or the Single Event Sound Exposure Boundary, which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.

3.25 BUSINESS 3 (SPECIALIST COMMERCIAL) ZONE

3.25.3 **Non-complying activities:** The following are non-complying activities in the Business 3 Zone:

- (A) Heavy industry.
- (B) Shopping mall.
- (C) Noise sensitive activity, other than early childhood education and care centre and those listed as a prohibited activity.

3.25.4 **Prohibited Activities:** The following are prohibited in the Business 3 Zone:

- (A) New Noise Sensitive Activities within the Outer Control Boundary or the Single Event Sound Exposure Boundary.

- (B) Additions or alterations to existing buildings containing Noise Sensitive Activity within the Outer Control Boundary or the Single Event Sound Exposure Boundary which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.

BUSINESS 6 (BUSINESS PARK) ZONE



3.27A.2 Discretionary activities: The following are discretionary activities within the Business 6 Zone:

- (A) Any activity not listed as permitted, ~~or~~ non-complying or prohibited.

3.27A.3 Non-complying activities: The following are non-complying activities within the Business 6 Zone:

- (A) Heavy industry
- (B) Shopping mall
- (C) Any noise sensitive activity ~~not~~ other than those provided for as a permitted activity, or those listed as a prohibited activity.

3.27A.4 Prohibited Activities: The following are prohibited in the Business 6 Zone:

- (A) New Noise Sensitive Activities within the Outer Control Boundary or the Single Event Sound Exposure Boundary.
- (B) Additions or alterations to existing buildings containing Noise Sensitive Activity within the Outer Control Boundary or the Single Event Sound Exposure Boundary which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.

3.30 INDUSTRIAL 2 (URBAN) ZONE

3.30.2 Discretionary Activities: The following are discretionary activities in the Industrial 2 Zone:

- (A) Any activity other than those listed as permitted ~~or~~ non-complying, or prohibited.

3.30.3 Non-complying Activities: The following are non-complying activities in the Industrial 2 Zone:

- (A) Noise-sensitive activity other than those listed as a prohibited activity.

3.30.4 Prohibited Activities: The following are prohibited in the Industrial 2 Zone:

- (A) New Noise Sensitive Activities within the Outer Control Boundary or the Single Event Sound Exposure Boundary.
- (B) Additions or alterations to existing buildings containing Noise Sensitive Activity within the Outer Control Boundary or the Single Event Sound Exposure Boundary which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.

3.33 OTATARA ZONE

Non-complying Activities: The following are non-complying activities in the Otatara Zone:



- (A) Any other activity not listed as permitted, or discretionary or prohibited.

3.33.4 Prohibited Activities: The following are prohibited in the Otatarā Zone:

- (A) Within those areas identified on the District Planning Maps as being within the Outer Control Boundary or the Single Event Sound Exposure Boundary, new Noise Sensitive Activities or alterations or additions to existing buildings containing Noise Sensitive Activity which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.

Note: For those areas of the Otatarā Zone located within the Invercargill Airport Outer Control Boundary or Single Event Sound Exposure Boundary, attention is drawn to the relevant objectives, policies and rules relating to the management of potential reverse sensitivity effects on Invercargill Airport.

3.34 RESIDENTIAL 1 ZONE

3.34.3 Non-complying activities: The following are non-complying activities in the Residential 1 Zone:

- (A) Any activity not listed as permitted, or discretionary or prohibited.

3.33.4 Prohibited Activities: The following are prohibited in the Residential 1 Zone:

- (A) Within those areas identified on the District Planning Maps as being within the Outer Control Boundary or the Single Event Sound Exposure Boundary, new Noise Sensitive Activities or alterations or additions to existing buildings containing Noise Sensitive Activity which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.

Note: For those areas of the Residential 1 Zone located within the Invercargill Airport Outer Control Boundary or Single Event Sound Exposure Boundary, attention is drawn to the relevant objectives, policies and rules relating to the management of potential reverse sensitivity effects on Invercargill Airport.

3.38 RURAL ZONE

3.38.1 Permitted Activities: The following are permitted activities in the Rural Zone:

- (L) On the land legally described on 8 November 2017 as 187 Curran Road, Lot 11 DP 8743, one residence is permitted where that residence complies with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.

3.38.3 Non-complying Activities: The following are non-complying activities in the Rural Zone:

- (A) Any activity not listed as either permitted, or discretionary or prohibited.

3.38.4 Prohibited activities: The following are prohibited activities in the Rural Zone:



- (A) Except as provided for in Rule 3.38.1(L), new Noise Sensitive Activities within the Outer Control Boundary or the Single Event Sound Exposure Boundary.
- (B) Additions or alterations to existing buildings containing Noise Sensitive Activity within the Outer Control Boundary or the Single Event Sound Exposure Boundary which do not comply with the specifications contained in Appendix VI Noise Sensitive Insulation Requirements.



SECTION FOUR DEFINITIONS

Conference Facilities: Means ~~the use of land, or buildings and rooms for~~ ~~in relation to the Airport Operations Zone,~~ the gathering of people for meetings, presentations, training and promotions, ~~public or community events, conferences and~~ ~~but excludes stand alone standalone~~ social events such as weddings and parties.



APPENDIX I

Recommended amendments to Appendix VI

The following sets out the key policies and methods relating to the management of aircraft noise effects.

Underlined text shows additions and strike outs show deletions recommended by Kirsty O'Sullivan as of 28 November 2017.

APPENDIX VI – NOISE SENSITIVE INSULATION REQUIREMENTS

All applications for new buildings containing noise sensitive activities and/or additions to existing buildings containing noise sensitive activities within the Single Event Sound Exposure Boundary (SESEB) or Outer Control Boundary (OCB) as shown on the District Planning Maps, shall be insulated from aircraft noise so that the internal noise environment shall not exceed:

OCB

All habitable Rooms 40dB L_{dn}

SESEB

Bedrooms: 65dB L_{AE}

All Habitable Rooms (including bedrooms) 40dB L_{dn}

The following guidelines specifications for insulation have been developed to achieve the required internal noise environment.:

- Table 1 describes the construction materials required to achieve appropriate sound insulation for bedrooms inside the SESEB to ensure the internal noise environment does not exceed 65dB L_{AE}.
- Table 2 describes the ventilation requirements for all buildings containing noise sensitive activities within the OCB and SESEB.

Compliance with the specified internal noise levels will be demonstrated as follows:

- Compliance with the internal noise level for bedrooms within the SESEB may be demonstrated by either adhering to the sound insulation requirements in Table 1 and the mechanical ventilation requirements in Table 2 or by submitting a certificate to Council from a person suitably qualified in acoustics stating that the proposed construction will achieve an internal noise environment of 65dB L_{AE} within bedrooms.
- Compliance with the internal noise level for all habitable rooms within the OCB and the SESEB of 40dB L_{dn} may be demonstrated by either adhering to the requirements in Table 2 or by submitting a certificate to Council from a person suitably qualified in acoustics stating that the proposed construction will achieve an internal noise environment of 40dB L_{dn} within all habitable rooms.



TABLE 1: SOUND INSULATION REQUIREMENTS – ACCEPTABLE CONSTRUCTIONS – BEDROOMS INSIDE SESEB

The following table sets out the construction materials required to achieve appropriate sound insulation within bedrooms within the SESEB, as shown on the District Planning Maps.

BUILDING ELEMENT		MINIMUM CONSTRUCTION	
External Walls	Exterior Lining	Brick or concrete block or concrete, or 20mm timber or 6mm fibre cement	
	Insulation	75mm thermal insulation blanket/batts	
	Frame	Two layers of 9mm gypsum or plasterboard (or an equivalent combination of exterior and interior wall mass)	
Windows/Glazed Doors	6mm glazing with effective compression seals or for double glazing 8mm-12mm airgap-6mm		
Pitched roof	Cladding	0.5mm profiled steel or masonry tiles or 6mm corrugated fibre cement	
	Insulation	100mm thermal insulation blanket/batts	
	Ceiling	2 layers 9mm gypsum or plasterboard	
Skillion Roof		Skillion Roof Option 1	Skillion Roof Option 2
	Cladding	0.5mm profiled steel or 6mm fibre cement	0.5mm profiled steel or 6mm fibre cement
	Sarking	200mm particle board or plywood	None Required
	Insulation	100mm thermal insulation blanket/batts	100mm thermal insulation blanket/batts
BUILDING ELEMENT		MINIMUM CONSTRUCTION	
	Ceiling	1 layer 9mm gypsum or plasterboard	2 layers 9mm gypsum or plasterboard
External Door	Solid Core door (min 24kg/m ²) with weather seals		

Note 1: The specified constructions in this table are the minimum required to meet the acoustic standards. Alternatives with greater mass or larger thicknesses of insulation will be acceptable. Any additional construction requirements to meet other applicable standards not covered by this rule (e.g. fire, Building Code etc) would also need to be implemented.



TABLE 2: VENTILATION REQUIREMENT

The following applies to the ventilation requirements within the SESEB and OCB as shown on the District Planning Maps.

Habitable rooms must have a system(s) designed, constructed and maintained to achieve the following:

- (a) An outdoor air ventilation system. The ventilation rate must be able to be controlled by the occupant in increments as follows:
 - (iii) a low air flow setting that provides air at a rate of of between 0.35 and 0.5 air changes per hour. The sound of the system on this setting must not exceed 30 dB L_{Aeq} (30s) when measured 2m away from any grille or diffuser;
 - (iv) a high air flow setting that provides at least 5 air changes per hour. The sound of the system on this setting must not exceed 35 dB L_{Aeq} (30s) when measured 2m away from any grille or diffuser.

- (b) The system must provide, either by outdoor air alone, combined outdoor air and heating / cooling system or by direct room heating / cooling:
 - (iv) cooling that is controllable by the occupant and can maintain the temperature within the habitable room at no greater than 25°C; and
 - (v) heating that is controllable by the occupant and can maintain the temperature within the Critical Listening Environment at no less than 18°C; and
 - (vi) the sound of the system when in heating or cooling mode must not exceed 35 dB L_{Aeq} (30s) when measured 2m away from any grille or diffuser.

- (c) A relief air path must be provided to ensure the pressure difference between the habitable room and outside is never greater than 30Pa.

- (d) If cooling is provided by a heat pump then the requirements of (a)(ii) and (c) do not apply.

Note: Where there is an existing ventilation, heating and/or cooling system, and/or relief air path within a habitable room that meets the criteria stated in the rule, the existing system may be utilised to demonstrate compliance with the rule.



All noise sensitive activity applications within the Outer Control Boundary (OCB) and Single Event Sound Exposure Boundary (SESEB) as shown on the District Planning Maps.

Room Type—Outdoor Air Ventilation Rate (Air Changes per Hour, ac/hr)

	Low Setting	High Setting
Bedrooms	1-2ac/h	Min 5ac/hr
Other habitable areas	1-2 ac/hr	Min 15ac/hr

Noise from ventilation systems shall not exceed 35dB LAeq(1min) on High Setting and 30 dB LAeq(1min) on Low Setting. Noise levels shall be measured at a distance of 1m to 2m from any diffuser.

Each system must be able to be individually switched on and off and when on, be controlled across the range of ventilation rates by the occupant with a minimum of three stages.

Each system providing the low setting flow rates is to be provided with a heating system which, at any time required by the occupant, is able to provide the incoming air with an 18°C heat rise when the airflow is set to the low setting. Each heating system is to have a minimum of three equal heating stages.

If air conditioning is provided to any space then the high setting ventilation requirements for that space is not required.

