

BEFORE AN INDEPENDENT HEARINGS PANEL

UNDER the Resource Management Act 1991
IN THE MATTER of proposed Plan Change 14: Housing and Business
Choice to the Christchurch District Plan

**LEGAL SUBMISSIONS ON BEHALF OF THE
THE MINISTRY OF JUSTICE (Submitter 910)**

18 October 2023

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MAY IT PLEASE THE HEARINGS COMMISSIONERS

Introduction

- 1 These submissions are made on behalf of the Ministry of Justice, Te Tāhū o te Ture (Submitter 910) (the **Ministry**). The Ministry and the following parties made the same submissions on Plan Change 14:
 - (a) Fire and Emergency New Zealand (Submitter 842, in respect of Submission points 842.1-10 only);
 - (b) New Zealand Police (Submitter 2005);
 - (c) Hato Hone St John (Submitter 909); and
 - (d) Canterbury Civil Defence and Emergency Management Group (Submitter 912).
- 2 In these submissions I refer to these submitters together as the Agencies.
- 3 The Agencies support Plan Change 14, in particular, sub-chapter 6.12 Radiocommunication Pathway Protection Corridors, the definition of height and Planning Map 39. Sub-chapter 6.12 seeks to protect the radiocommunication pathways from the Christchurch Emergency Services Precinct (**CJSEP**) to three key radiocommunication sites in Christchurch. Sub-chapter 6.12 is a qualifying matter reducing building heights in PC14 on certain sites in the central city and is required for the purpose of ensuring safe or efficient operation of nationally significant infrastructure.
- 4 The Agencies have filed the following evidence in support of their submissions:
 - (a) Ms Fiona Small (planning); and
 - (b) Mr Richard Smart (telecommunications engineering).
- 5 Ms Small and Mr Smart will be present at the hearing to answer any questions that the Hearing Commissioners may have.

Structure of submissions

- 6 These submissions have been structured to address the following matters:
 - (a) The relief sought by the Agencies;

- (b) The key reasons for the relief sought by the Agencies; and
- (c) The key aspects of the relevant statutory framework.

Relief sought by the Agencies

- 7 The Agencies seek the following:
- (a) That the provisions in sub-chapter 6.12 Radiocommunication Pathway Protection Corridors are retained as notified, except for:
 - (i) the deletion of the references to Appendices 6.12.17.1 – 6.12.17.3¹; and
 - (ii) minor additions to the tables in section 6.12.4.2 to clarify the calculation of the height of the pathways; and
 - (b) That the definition of height and Planning Map 39 are retained as notified.
- 8 The evidence of Ms Small for the Agencies explains these minor amendments to the notified provisions and sets out the specific relief in Annexure 1 to her evidence.
- 9 The Statement of Rebuttal Evidence of Holly Gardiner on behalf of the Christchurch City Council (**Council**) recommends the relief set out in Ms Small's evidence is accepted, but also notes one further minor amendment.² Ms Gardiner refers to the Statement of Evidence of Marcus Langman for the Council as submitter³ and notes that Mr Langman requests replacement of the references to Appendices 6.12.17.1 – 6.12.17.3 in sub-chapter 6.12 with reference to the planning maps. Ms Gardiner recommends accepting the relief sought by Mr Langman.
- 10 The Ministry and the Agencies support this further minor amendment. Replacing the references to Appendices 6.12.17.1 – 6.12.17.3 with references to the Planning Maps ensures plan users know where to look in the District Plan to see where the radiocommunication pathways are

¹ Specifically, at Section 6.12.1(f), Objective 6.12.2, Rule 6.12.4.1.1, Rule 6.12.4.1.5 and section 6.12.4.2.

² Statement of Rebuttal Evidence of Holly Gardiner on behalf of the Christchurch City Council dated 9 October 2023 at [20] – [23].

³ Statement of Primary Evidence of Marcus Hayden Langman on behalf of the Christchurch City Council as submitter dated 20 September 2023.

located. The Hearing Commissioners will hear from Ms Small at the hearing that she supports the position of the Council as set out in the evidence of Ms Gardiner on this matter.

Reasons for relief sought

Importance of protecting radiocommunications pathways

- 11 The provisions of sub-chapter 6.12 seek to protect radiocommunications pathways from the CJESP to three key radiocommunication sites (Cashmere/Victoria Park, Sugarloaf and Mt Pleasant) in Christchurch. These radiocommunication pathways are important for the effective functioning of emergency and day-to-day services provided by the Agencies.
- 12 The evidence of Mr Smart for the Agencies outlines the importance of protecting these radiocommunication pathways, namely:
- (a) Any intrusion into a radiocommunication pathway, including by a building, can cause the signal to be reduced in strength or completely blocked.⁴
 - (b) The risk of an intrusion completely blocking a radio signal is greater at either end of the signal path as the signal is smallest at these two points. This means that any intrusions into the radiocommunication pathways near the CJESP are likely to completely block the pathway and severely disrupt communications.⁵
 - (c) Other options to mitigate the effects of intrusions on radiocommunication pathways were considered but were not found to be realistic or feasible.⁶

Policy reasons

- 13 Sub-chapter 6.12 gives effect to the Canterbury Regional Policy Statement (**CRPS**) and achieves the purpose of the Resource Management Act 1991 (**RMA**).

⁴ Statement of Evidence of Richard Smart on behalf of the Agencies dated 19 September 2023 at [12].

⁵ Statement of Evidence of Richard Smart on behalf of the Agencies dated 19 September 2023 at [13].

⁶ Statement of Evidence of Richard Smart on behalf of the Agencies dated 19 September 2023 at [15]-[21].

- 14 The evidence of Ms Small for the Agencies confirms that the provisions give effect to the CRPS, specifically:
- (a) Telecommunications facilities (including radiocommunication facilities) fall under the definition of “strategic infrastructure” and, therefore, Objective 6.2.1 and Policy 6.3.5 apply.
 - (b) Objective 6.2.1 of the CRPS directs that development is enabled through a framework where it does not adversely affect the efficient operation, use, development, appropriate upgrade and future planning of strategic infrastructure and optimised use of existing infrastructure. Policy 6.3.5 of the CRPS directs that land use development and infrastructure is integrated by managing the effects of land use activities on infrastructure, including avoiding activities that have the potential to limit the efficient and effective provision, operation, maintenance or upgrade of strategic infrastructure.⁷
 - (c) The provisions give effect to Objective 6.2.1 and Policy 6.3.5 of the CRPS as there are currently no provisions in the District Plan to protect airspace to ensure that radiocommunication pathways are protected and maintained.⁸
 - (d) The CJESP (being an emergency co-ordination facility) and telecommunications installations and networks are also “critical infrastructure” under CRPS and therefore Objective 11.2.1 and Policy 11.3.4 apply.⁹ These provisions require new critical infrastructure to be located outside high hazard areas unless there is no reasonable alternative so as to maintain its integrity and function during natural hazard events.
 - (e) The provisions in sub-chapter 6.12 recognise the importance of the pathways from the CJESP to the key hill sites and the need to maintain radiocommunications for emergency (including during

⁷ Statement of Evidence of Fiona Small on behalf of the Agencies dated 19 September 2023 at [18].

⁸ Statement of Evidence of Fiona Small on behalf of the Agencies dated 19 September 2023 at [19].

⁹ Statement of Evidence of Fiona Small on behalf of the Agencies dated 19 September 2023 at [18] and [20].

natural hazard events) and day-to-day operations of emergency services.¹⁰

- 15 Sub-chapter 6.12 achieves the purpose of the RMA by ensuring the use and development of physical resources in a way which enables people and communities to provide for their health and safety.

Relevant legal framework

- 16 The opening legal submissions for the Council set out the relevant legal framework for the scope of an intensification planning instrument (**IPI**), such as Plan Change 14, and I adopt these submissions as follows:
- (a) Under section 80G of the RMA a specified territorial authority must not use the IPI process for any purpose other than the uses specified in section 80E;¹¹
 - (b) Under section 80E of the RMA, the legally permissible purposes of an IPI include:
 - (i) the mandatory requirements to incorporate the medium density residential standards (**MDRS**) and give effect to policies 3 and 4 of the National Policy Statement on Urban Development (**NPS-UD**);¹² and
 - (ii) the discretionary ability to include “related provisions” under sections 80E(1)(b)(iii) and (2).¹³
 - (c) “Related provisions” are those that support or are consequential on the MDRS or the relevant policies of the NPS-UD.¹⁴ As long as “related provisions” support or are consequential on the MDRS or the relevant policies of the NPS-UD, they would be within the scope of the NPS-UD.¹⁵

¹⁰ Statement of Evidence of Fiona Small on behalf of the Agencies dated 19 September 2023 at [20].

¹¹ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.48].

¹² Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.48(a)].

¹³ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.48(b)].

¹⁴ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.49].

¹⁵ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.52].

- (d) The range of lawfully acceptable “related provisions” is likely to be extensive and can include changes to the status of an activity to accommodate a qualifying matter.¹⁶
- (e) “Support” means that the provisions assist or enable the MDRS or policies 3 or 4 being incorporated.¹⁷ “Consequential on” means that the provision follows or is required by the Council’s obligation to incorporate the MDRS and give effect to Policy 3.¹⁸

17 It is submitted that the provisions within sub-chapter 6.12 are within the scope of an IPI, and therefore Plan Change 14, as they are “related provisions” that “support or are consequential” to the Council’s obligation to give effect to Policy 3 and 4 of the NPS-UD.

Waikanae decision

- 18 The opening legal submissions for the Council also discuss the Environment Court’s decision in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Tāonga*,¹⁹ which deals further with the scope of provisions in an IPI under section 80E.
- 19 The Environment Court in *Waikanae* found that there was an inherent limitation in section 80E(1)(b)(iii) that related provisions must “support or be consequential on” the MDRS or policies 3, 4 or 5 as applicable.²⁰
- 20 The IPI provisions in *Waikanae* that extended a qualifying matter onto new land were not consequential on the MDRS as they disabled or removed rights of landowners, rather than simply making building height or density requirements less enabling as permitted under s 771.²¹ The Court found this extension of the qualifying matter was ultra vires.²²

¹⁶ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.52].

¹⁷ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.54(b)].

¹⁸ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.54(c)].

¹⁹ *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 56.

²⁰ *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 56 at [28].

²¹ *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 56 at [31].

²² *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 56 at [32].

- 21 The Council's position in relation to the *Waikanae* case is that:²³
- (a) The Environment Court has taken a very narrow reading of section 80E;
 - (b) Qualifying matters that amend the status quo can and do fall for consideration under section 80E, including where existing development rights are constrained; and
 - (c) The Panel is not bound to follow the Environment Court decision.
- 22 The Agencies support the position of the Council in relation to the *Waikanae* decision.
- 23 However, in the event the Panel wish to apply *Waikanae*, the Agencies submit that the decision does not prevent the radiocommunication pathways qualifying matter (and therefore sub-chapter 6.12) from being included within the scope of the IPI for the following reasons:
- (a) The situation considered by the Court in *Waikanae* does not arise as a result of the provisions within sub-chapter 6.12. In other words, the maximum permitted height limits proposed under sub-chapter 6.12 are not less enabling nor more restrictive than the status quo under the Operative Plan.
 - (b) The Table included in **Appendix A** shows that the maximum permitted height limits proposed under sub-chapter 6.12 in relation to radiocommunication pathways are higher than the maximum height limits under the Operative Christchurch District Plan.
- 24 The Council's s42A authors support this position. Ms Oliver noted that for the purposes of the section 42A report, she and the other section 42A report writers would identify any provisions in Plan Change 14 that the report writer considers impose additional controls or restrictions that affect status quo / pre-existing development rights in light of the decision in *Waikanae*.²⁴ The provisions in sub-chapter 6.12 were not identified by Ms Oliver, nor by Mr Willis who deals with radiocommunications

²³ Opening Legal Submissions for Christchurch City Council – Strategic Overview Hearing dated 3 October 2023 at [2.64].

²⁴ Planning Officer's Report of Sarah-Jane Oliver under Section 42A of the Resource Management Act 1991 dated 11 August 2023 at [7.13].

pathways, as provisions that would impose these additions controls or restrictions.

Conclusion

- 25 The provisions of sub-chapter 6.12 protect radiocommunications pathways from the CJESP and these radiocommunications pathways are vital for the effective functioning of emergency and day-to-day services provided by the Agencies.
- 26 Accordingly, the Agencies ask that the Panel recommends that the provisions in sub-chapter 6.12, the definition of height and Planning Map 39 are retained as notified, subject to the minor amendments set out above.
- 27 Given that no submissions in opposition have been made in relation to the provisions of sub-chapter 6.12, and that the Council's s42A officers are in agreement with the relief sought by the Agencies, it is submitted that the Agencies' submissions should be accepted by the Panel.



K H Woods
Legal counsel for the Ministry of Justice

APPENDIX A

Height Limit Comparisons

Area	Operative District Plan Height Limits	Plan Change 14 sub-chapter 6.12, Radio Communications Pathways Height Limits ²⁵
Central City Mixed Use Zone (South Frame) (between Tuam Street and St Asaph Street)	17m above existing ground level	28m or higher above existing ground level
Central City Mixed Use Zone (between St Asaph Street and Moorhouse Avenue)	17m above existing ground level	32m or higher above existing ground level

²⁵

The Radio Communications Pathways Height Limits figures in this column are provided in metres above existing ground level for ease of comparison with the Operative District Plan Height Limits (rather than metres A.M.S.L as they are referred to in sub-chapter 6.12). These figures are based on a GIS map prepared by Council staff and have been taken from the Statement of Evidence of Fiona Small on behalf of the Agencies dated 19 September 2023 at [33]-[34]. These figures are approximations.