



# Legal Advice

**Nick Whittington**

BARRISTER

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<b>TO</b>	Wellington City Council
<b>FROM</b>	Nick Whittington
<b>DATE</b>	2 May 2022
<b>SUBJECT</b>	Notice of Motion – Wellington Airport Expansion

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## Summary of advice

- 1 You have asked me to provide advice on the legal issues and risks that arise from a notice of motion proposed by Councillor Pannett for a forthcoming meeting of Pūroro Āmua – the Planning and Environment Committee. The proposed motion is:

The Pūroro Āmua Committee agrees that:

In light of the climate and ecological emergencies that were declared by Wellington City Council in 2019, we do not support this plan until and unless the airport and airlines reduce their carbon emissions and that measures are put in place to improve air quality, reduce private vehicles to and from the airport and to reduce air traffic noise around the Eastern suburbs.

- 2 It is arguably unlawful for the Council to agree a notice of motion removing support for a regulatory decision lawfully made by a delegated decision-maker of the Council. Whether or not it is unlawful, the notice of motion would require the Council to change its position before the Environment Court. Realistically, the Council would have to abide the Court's decision and make witnesses available for other parties to subpoena. A risk of criticism by the Court would remain for political interference in a regulatory process, and if the Council's change of position disadvantaged any party there would be a risk of an adverse costs award against the Council.
- 3 There is a risk of predetermination/bias issues being created for downstream district plan decision-making, though this is likely to be manageable. Nonetheless any councillors who wish to be appointed to the hearings panel for the District Plan process should approach the proposed notice of motion with caution.



### **Proposed notice of motion**

- 4 The notice of motion states that the Committee does not support the WLG 2040 masterplan until and unless a number of actions have occurred, including reductions in carbon emissions, vehicle movements and airport noise, and an improvement in air quality. Because the changes are not quantified, the effect is that until any alternative future motion is agreed the Council's position will be that it "does not support" the WLG 2040 masterplan. As I read the motion it will govern the Council's position in the existing designation appeals because the designations are the principal way WIAL is implementing the WLG 2040 master plan.

### **Possible unlawfulness and effect on Council position in Environment Court appeals about Airport designations**

- 5 The most immediate issue that arises is that the motion may affect the Council's position in existing Environment Court litigation about two designations lodged by the Airport as part of implementing the WLG 2040 masterplan.
- 6 The two notices of requirement were lodged by the Airport in late 2020 and publicly notified by the Council. The Council appointed an experienced panel of independent hearings commissioners to hear submissions and make recommendations on the notices of requirement. The panel recommended that WIAL confirm the designations with conditions, and WIAL did so. The designations have been appealed by Guardians of the Bay Inc and International Climate-Safe Travel Institute, among others, to the Environment Court. The Council is a party to the appeals. Mediation commences later this month and there is a November 2022 hearing date.
- 7 Usually, a territorial authority will support its own quasi-judicial decision before the Court. How actively it does so may depend on the circumstances, such as the existence of other counterparties. In this case, the decision under appeal was made by independent hearing commissioners appointed because of their particular expertise in resource management. The usual approach is appropriate, but because it is for WIAL to demonstrate to the Court that the designation is appropriate the Council's role is intended to be limited to calling two witnesses and assisting the Court on any issues of law that arise. A focus will be on the conditions, since if the designation is confirmed the Council will be responsible for enforcement.
- 8 The Environment Court will only permit decision-makers to change position and oppose a decision it made in certain circumstances, weighing four relevant considerations: fairness, reasons for the change, public confidence in the process,

and integrity of administration of the RMA. I consider it unlikely the Court will be prepared to allow the Council to change its position. First, it is not clear what is motivating the notice of motion given that the decision was made by duly delegated independent hearings commissioners who heard evidence and submissions from the public. Councillors will not be in the same position. Some of the cases in this area refer to the importance of transparency in the process by which the Council determines its position on an appeal. An unexplained notice of motion risks exposing the Council to criticism for a lack of transparency. Second, there is no change in circumstances sufficient to justify a change of position in the Environment Court. There is no new information to suggest that the commissioners' recommendation is no longer appropriate. Third, allowing the Council to change its position would not promote public confidence in the process or integrity in the administration of the RMA.

9 The situation is similar to *Staufenberg Family Trust No 2 v Queenstown Lakes District Council*. In that case, a Council committee passed a similar notice of motion to that proposed by Councillor Pannett – stating that the Council did not support a resource consent decision that had been made by delegated hearings commissioners. The Council sought to call evidence before the Environment Court attacking the decision its commissioners had made.

10 The Environment Court questioned whether passing such a motion was lawful under the RMA or LGA. The concern was no doubt that it amounts to interfering in the outcome of a regulatory decision made on behalf of the Council by a duly delegated decision-maker.

11 The Court declined to allow the Council to call evidence attacking its decision. It said:

Public confidence in the process would be better maintained if the council does not call evidence but instead supports its decision (reached by independent commissioners) or abides the decision of the court. Support would be enhanced if the council briefs counsel to make submissions supporting the decision and cross-examines witnesses, but that is totally for the council.

12 Like the Environment Court in *Staufenberg*, I consider that there is a risk that passing the notice of motion is unlawful. Duly appointed and delegated decision-makers have made a regulatory decision within a particular statutory framework. The notice of motion is a non-regulatory decision because its source is political, not a regulatory responsibility, duty or power. Nonetheless it interferes with the regulatory decision.

It seeks to publicly pull the Council's support for its own decision via a decision being made at a political level without reference to the relevant statutory framework. This infringes the governance principle in s 39 of the LGA requiring, so far as practicable, responsibility and processes for regulatory decisions to be separated from responsibility and processes for non-regulatory decision.

- 13 The motion, if agreed, will therefore affect the Council's conduct of the litigation and this may be questioned or challenged by parties in the process. It would also be open to a party to challenge the decision directly by way of judicial review in the High Court. The most likely grounds would be error of law or taking into account irrelevant considerations.
- 14 Within the Environment Court proceeding, if the Council's change of position disadvantages another party, there is the possibility that the Council would face an adverse costs award. That would be a matter of discretion for the Court. As for the timing, the date of the Committee meeting is two working days before the commencement of arbitration, so it is feasible that a party may be disadvantaged to some degree.
- 15 I see two additional risks to the possible decision:
  - (a) First, the Council will not be able to assist the Court to the same degree on questions of law. The appeals identify a reasonably significant question of law about whether the approach of the independent hearings commissioners to the relevance and significance of climate change was correct. And assuming the Court again confirmed the designations, the Council will not be able to influence the Court's thinking about conditions to any great degree.
  - (b) Second, such a decision may affect the Council's ability to attract good hearings commissioners to make decisions on its behalf. Who would wish to be a delegated decision-maker for the Council and have decisions being publicly criticised in this way?

#### **Effect on District Plan decision-making**

- 16 There may also be downstream effects on district plan decision-making.
- 17 Councillor involvement with the district plan review will occur in four main ways:

- (a) Councillors will very soon be asked to agree the content of the proposed district plan for public notification.
- (b) I understand that several councillors wish to be appointed to hear submissions and make recommendations and decisions on the proposed district plan.
- (c) For the part of the proposed district plan to be progressed through the intensification streamlined planning process, the Council will be asked to accept or reject the recommendations of a panel of hearings commissioners (cl 101 of Sch 1 RMA).
- (d) For the part of the proposed district plan to be progressed through the usual Schedule 1 process, the Council will be asked to make decisions on submissions again, following recommendations from a hearings panel (cl 10 of Sch 1 RMA).

18 These decisions are regulatory in nature. Questions of bias, predetermination, and natural justice have a greater significance for regulatory decisions than non-regulatory decisions.

19 I consider that the first of these decisions is sufficiently early in the process that no issue of bias or predetermination would arise in relation to any plan provisions that engage with the Airport's proposed expansion.

20 Also, I do not see the fact that the designations themselves (assuming they are confirmed by the Environment Court) will be in the district plan as being problematic because they will be included in the plan as a matter of course if the Environment Court confirms them. In other words, the Council does not have a choice.

21 However, it is possible that the later decisions will involve Councillors making decisions on plan provisions that engage the issue of the Airport's expansion. For example, in addition to the designations, the plan will provide for underlying zoning and associated land use rules applying to the Airport land. Also, WIAL may make submissions on other proposed plan provisions, or further submissions on others' submissions, which raise similar issues.

22 Any risks of predetermination or bias are likely to be manageable, by councillors involved not being part of hearings panels considering issues related to the notice of motion, including issues relating to the Airport, noise, or traffic. But, nonetheless,

because the Council will be asked to accept or reject recommendations of any hearings panels, councillors should approach debate about the notice of motion with caution.

