

**BEFORE AN INDEPENDENT HEARINGS PANEL OF
WELLINGTON CITY COUNCIL**

IN THE MATTER

of the Resource
Management Act
1991 (the **Act**)

AND

IN THE MATTER

of hearing of
submissions and
further submissions
on the Proposed
District Wellington
City District Plan
(**PDP**)

**MEMORANDUM OF COUNSEL ON BEHALF OF WELLINGTON
INTERNATIONAL AIRPORT LIMITED**

DATED: 30 January 2023

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 This memorandum is filed on behalf of Wellington International Airport Limited (**WIAL**), a submitter on the Wellington City Council (**WCC**) Proposed District Plan (**PDP**).

1.2 The purpose of this memorandum is to respond to Minute 1 of the Hearings Panel (Hearing Procedures), which was issued on 9 December 2022 (**Minute 1**). More specifically, this memorandum responds to paragraph 28 of Minute 1, which provided opportunities for submitters to address the allocation of topics to the ISPP in the following terms:

...If any submitter wishes to dispute the allocation of topics to the ISPP (or not), as the case may be, they should file a detailed memorandum explaining the basis for their view on or before 30 January 2023. The Hearing Panel will then make further directions for the resolution of any issues raised.

1.3 This memorandum addresses the following matters in the context of outlining WIAL's concern about the allocation of topics:

- (a) An overview of the two plan-making processes that the PDP is progressing through;
- (b) The key provisions in the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**), in terms of what may be included in an IPI, and progressed through the Intensification Streamlined Planning Process (**ISPP**); and
- (c) WIAL's position on WCC's use of the ISPP for components of the PDP.

2. BACKGROUND

2.1 Wellington International Airport Limited (**WIAL**) filed submissions on the PDP on 12 September 2022, and further submissions on 1 December 2022.

2.2 WIAL filed submissions on a range of topics in the PDP. For the purpose of this memorandum, we have focused on the Natural Hazards chapter, and the natural hazard overlays that form part of that chapter, which is progressing through the ISPP. However we have identified other provisions where WIAL is a submitter that are also of concern. In the time available we have been unable to prepare a full list of these for this memorandum, but intend to prepare a full list of these provisions, and file them as part of the legal submissions in advance of Hearing Stream 1.

3. THE ISPP AND SCHEDULE 1 PROCESS

3.1 As the Panel is aware the PDP is progressing in reliance on two different plan making processes: the orthodox Schedule 1 process, and the ISPP under Part 6 of Schedule 1 to the RMA. The Schedule 1 and ISPP provisions were notified at the same time, and sit within the same document. In order to show which process is being relied on, each chapter / provision of the PDP includes notations which indicate the relevant plan-making process.

3.2 The dual processes in play creates additional complexities, in terms of procedure, timing and the matter of scope. This is because the Panel is tasked with considering both sets of provisions but within the statutory powers of each process. This is acknowledged in Minute 1, as follows:

28. The division between ISPP topics and the balance of PDP topics is important, firstly because, as discussed further below, the hearing procedures for the ISPP are different to the normal First Schedule process followed for the non-ISPP topics, and secondly because the ISPP is on a much tighter timeline, with Council decisions required to be released by 20 November 2023. The division from the two shown in the attached schedule is the Council's view of the matter, as determined at a Council meeting on 31 March 2022.

3.3 A further significant procedural distinction, particularly for submitters, is that the ISPP provides no automatic merits right of appeal. This means

that submitters have only one opportunity to make their case on matters notified as part of the IPI.

- 3.4** It is because of this context that WIAL raises concerns with the Council's use of the ISPP and in particular the allocation of topics.

4. THE RESOURCE MANAGEMENT (ENABLING HOUSING SUPPLY AND OTHER MATTERS) AMENDMENT ACT 2021

- 4.1** The Amendment Act spatially limits the use of an IPI to the urban environment.¹ Section 80E (1)(a) of the Amendment Act prescribes mandatory matters that must be included in an IPI. Those are to:²

- (a) incorporate the medium density residential standards, which are set out in Schedule 3A (**MDRS**); and
- (b) to give effect to Policies 3 and 4 of the National Policy Statement for Urban Development 2020 (**NPS-UD**), within Wellington's urban environment

(the **mandatory outcomes**)

- 4.2** In addition, section 80E (1)(b) allows the Council, at its discretion, to include provisions relating to papakāinga housing, financial contributions, and "related provisions ... that support or are consequential on" the MDRS or Policies 3 and 4.³ For a provision to be a "related provision", it must either support or be consequential to achieving either of the two mandatory outcomes in section 80E(1)(a).

- 4.3** As discussed in the Overview Section 42A Report prepared for the WCC, it elected to *not* rely on this 'related provisions' option, and so purported to only used the ISPP to implement the mandatory outcomes in section 80E(1)(a).

1 Sections 77G and 77N prescribe where the MDRS and policy 3 or 5 of the NPS-UD must be implemented - and both those provisions are qualified by "urban environment". Urban environment is defined in section 77F as "any area of land (regardless of size, and irrespective of territorial authority or statistical boundaries) that— (a) is, or is intended by the specified territorial authority to be, predominantly urban in character; and (b) is, or is intended by the specified territorial authority to be, part of a housing and labour market of at least 10,000 people.

2 Section 80E(1)(a).

3 Section 80E(1)(b).

4.4 It is these provisions that act to limit the scope of an IPI, and consequentially what can progress through the ISPP. If a matter does not fall within the scope of an IPI, then it must progress through the usual Schedule 1 process. We note, for completeness, that the Panel may only make recommendations *on* an IPI.⁴ As a result, the same provisions will guide the Panel’s exercise of its power to make recommendations, and we discuss this further below.

4.5 WIAL is concerned that WCC’s approach to the allocation of topics will create difficulties for the Panel, because it has notified provisions including the District wide Natural Hazards chapter as part of its IPI that do not fit within the scope of what can be included in an IPI. This is because some of the notified provisions do not have an association with either of the mandatory outcomes, or fall within the ambit of a “related provision”.

4.6 Section 80G states that a territorial authority must not “*use the IPI for any other purpose other than the uses specified in section 80E*”. It is WIAL’s position that WCC has notified provisions in a manner that runs counter to this restriction, which in turn means that;

- (a) the Panel does not have the power to make recommendations on those provisions through the ISPP; and
- (b) those provisions are ultra vires the IPI.

5. THE COUNCILS APPROACH TO THE ISPP

5.1 As noted above, the Council elected to *not* exercise its discretion under section 80E (1)(b) or (2), and decided to include mandatory matters in its IPI only under section 80E(1). In this regard the Overview section 42A Report⁵ states (emphasis added):

- 80. Council’s Planning and Environment Committee resolved on 12 May 2022 to take a strict interpretation of section 80E of the Act so that **only plan content required to follow the ISPP under s80E(1)(a) be included in that process.**

4 Clause 99, Part 6, Schedule 1.
5 Published on the WCC website 19.02.23

81. In that way it **opted not to utilize its discretion under section 80E(1)(b) and 80E(2) of the Act** to include provisions that may be included, including those that support or are consequential to those provisions required to follow the ISPP or relate to 'qualifying matters'. **Qualifying matter provisions that do not engage Policy 4 of the NPS-UD by varying building height and/or density were generally not included.**

82. Accordingly, a focused interpretation of the legislation was adopted. Definition, schedules, mapping and appendices required to interpret or apply those provisions included in the ISPP were also included as per that Committee decision.

5.2 However this does not appear to be the case – for example the entire Natural Hazards chapter, including all hazard overlays, has been notified and identified as part of the ISPP. WIAL understands that this is on the basis of section 80E(1)(a)(ii), as the Officers Recommendation, set out in the 12 May 2022 Environment and Planning Committee Agenda (and accepted by Council)⁶ states (emphasis added):⁷

22. Policy 4 of the NPS-UD enables district plans to include lower building heights and densities than those required by policy 3 (or the MDRS) when qualifying matters apply, and alternative heights or densities are specified.

23. Accordingly, the following provisions **must be part of the ISPP**:

a) Character precincts

- They do not enable 6 storey development and rely on Policy 4 to justify that;

b) **Natural hazards**

- **Provisions managing flooding, fault lines and coastal hazards do not enable the MDRS or intensification;**

...

5.3 WIAL's view is that this statement appears to miss a key requirement; the MDRS and Policy 3 and 4 of the NPS-UD must only be implemented or given effect to in certain areas as identified in the MDRS and the NPS-UD policies – not the entire district.

6 See item 2.3 (page 11) of 12 May 2022 Minutes of the Planning and Environment Committee, available here <https://wellington.govt.nz/-/media/your-council/meetings/committees/puororo-aamua---planning-and-environment-committee/2022-05-12-minutes-papec.pdf>

7 Page 105 of the Planning and Environment Committee Agenda, Thursday 12 May 2022, available here: <https://wellington.govt.nz/-/media/your-council/meetings/committees/puororo-aamua---planning-and-environment-committee/2022-05-12-agenda-papec.pdf>

5.4 Policy 3 and 4 of the NPS-UD state:

Policy 3: In relation to tier 1 urban environments, regional policy statements and district plans enable:

- (a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and
- (b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and
- (c) building heights of at least 6 storeys within at least a walkable catchment of the following:
 - (i) existing and planned rapid transit stops
 - (ii) the edge of city centre zones
 - (iii) the edge of metropolitan centre zones; and
- (d) within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services.

Policy 4: Regional policy statements and district plans applying to tier 1 urban environments modify the relevant building height or density requirements under Policy 3 only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area.

5.5 Similarly the MDRS only applies to relevant residential zones.⁸ “Relevant residential zone” is defined in section 2 as;

Relevant residential zone –

- (a) Means all residential zones; but
- (b) Does not include –
 - (i) A large lot residential zone:
 - (ii) an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment:
 - (iii) an offshore island:
 - (iv) to avoid doubt, a settlement zone

8 See section 77G(1).

- 5.6** The Amendment Act therefore does not direct the MDRS to be incorporated in commercial zones (except to the extent provided by the NPS-UD policies), Rural, Industrial, Open Space and Recreational, and Special Purpose zones.
- 5.7** Policy 3 of the NPS-UD applies to only those areas of the urban environment that are listed. Further, policy 4 only applies to the areas subject to Policy 3, as demonstrated by the use of the phrase “...*in that area*”. The effect of this is that Policy 4 can only be engaged to accommodate qualifying matters in areas subject to Policy 3.
- 5.8** It follows that, while correct to say that Policy 4 of the NPS-UD enables district plans to include lower building heights and densities than those required by Policy 3, this only applies to areas subject to Policy 3.
- 5.9** The entire district is not subject to the requirements of Policy 3 or the MDRS, which calls into question the correctness of notifying the entire Natural Hazards chapter (as an example) through the ISPP.⁹

6. WIAL’S POSITION ON THE ALLOCATION OF CERTAIN TOPICS BETWEEN THE ISPP AND SCHEDULE 1 PROCESS

- 6.1** The purpose of the Amendment Act was to enable greater residential intensification within certain parts of urban environments. It achieves that by prescribing density standards and building heights and other matters that must be implemented in relevant residential zones (unless a qualifying matter applies), and fast tracking implementation of certain policies of the NPS-UD.
- 6.2** The WCC approach, which notifies entire district-wide chapters to be progressed through the ISPP, is a departure from the Amendment Act’s requirements. There are other provisions within chapters that apply across the entire district that are also progressing through the ISPP. Most notably for WIAL, this includes the Natural Hazards chapter.

⁹ Further, the MDRS must only be implemented in "relevant residential zones", see section 77G(1). For the purpose of this memorandum, we have focused on the second mandatory outcomes, being giving effect to policy 3 of the NPS-UD, given that that is the basis upon which the Council has justified progressing the entire Natural Hazards chapter through the ISPP.

- 6.3** Despite the indication from WCC that it did not rely on the “related provision” clauses, WIAL acknowledges that reliance on those provision is technically available to the Council. However, even if those provisions had been relied on, it is still not clear how the Council’s approach of notifying the entire Natural Hazards chapter achieves one of the mandatory outcomes, or “supports or is consequential on” achieving one of those outcomes¹⁰ – and therefore falls within the ambit of section 80E.
- 6.4** In WIAL’s submission, only those parts of the Natural Hazards chapter that apply to areas where the MDRS must be incorporated, or where Policy 3 of the NPS-UD must be implemented, can be included in the IPI and progressed through the ISPP. For example neither the MDRS, nor Policy 3 of the NPS-UD, are required to be implemented on WIAL’s landholdings, or much of the area surrounding.
- 6.5** It is acknowledged that section 80E(2)(a) provides for “district-wide matters” to be included in an IPI (such as Natural Hazards) – but such provisions must satisfy the “support or consequential to” requirement of subsection (b)(iii). Therefore, it is only where it can be demonstrated that the district-wide matter is clearly linked to one of the mandatory outcomes that it may be included in an IPI.
- 6.6** Therefore, while WIAL does not dispute the Council’s ability to include *some* district-wide matters in its IPI, there is no clear or obvious basis for including the entire Natural Hazards chapter in the IPI. Where the Natural Hazard provisions have no bearing on intensification in relevant areas or other areas not subject to Section 80E(1), they should not be included.
- 6.7** Notably, other matters listed in section 80E(2) (such as infrastructure and subdivision) have been split in the PDP between Schedule 1 and ISPP, which appears to acknowledge the distinct requirements that attach to matters that can progress through the ISPP.

¹⁰ See section 80E(1)(b)(iii) – a “related provision” must “support or be consequential on” one of the mandatory outcomes in order to fall within the scope of section 80E and therefore the scope of an IPI.

- 6.8** It is also noted that a partial Schedule 1 / partial ISPP approach has been taken with other district-wide chapters of the PDP, such as the Historic Heritage and Coastal Environment chapter. For those chapters, there are provisions within that chapter progressing through Schedule 1, and others through the ISPP. It is not clear why this approach was not adopted for the Natural Hazards chapter.
- 6.9** WIAL is therefore concerned, for example, with both the notification, and allocation, of the entire Natural Hazards chapter. WIAL considers that it is only those provisions of the Natural Hazards chapter that can be linked to the section 80E requirements that can be progressed through the ISPP.
- 6.10** As noted above, the key legal issue with the current approach is that the Panel's powers in the ISPP are limited to making recommendations "on" an IPI. In relation to the Natural Hazards chapter, those provisions that do not fall within the scope of section 80E are not "in scope", and the Panel cannot make recommendations on them through the ISPP process.
- 6.11** This raises a procedural issue, as any provisions that cannot be said to form part of the IPI should be a part of the PDP progressing through Schedule 1. Such provisions should properly be removed from the¹¹ IPI, re-notified and progressed through the Schedule 1 process.
- 6.12** There are other practical issues that will arise as a result of this misallocation of topics, in particular in relation to any provisions which have been notified as having immediate legal effect through the ISPP, but which fall outside the scope of an IPI (and subsequent processing of resource consents in reliance on those provisions).

7. RELIEF SOUGHT

- 7.1** In response to WIAL's submission that raised concern with the Council's approach to the allocation of topics between the ISPP/Schedule 1, the section 42A Report for Hearing Stream 1 states (emphasis added):

¹¹ Section 80G(1)(c) provides that the Council must not "withdraw" the IPI. However, the Council may initiate variations to the IPI according to clause 16A of Schedule 1 (refer to clause 95 of Schedule 1, which prescribes which of the Standard Schedule 1 procedures apply to the ISPP).

[81] My view of all these matters, informed by the legal advice of Mr Nick Whittington, is that the plan making process through which provisions were notified on 18 July 2022, **cannot be changed post notification by the Council, not does the independent hearings panel have the power or authority to do this.** This is my response to WIAL [406.1] and Sarah Cutten and Matthew Keir [415.15].

7.2 While that is technically correct it unfortunately does not resolve the problem for the Panel that will be unable to make any recommendations on submissions on ultra vires provisions.

7.3 The Council needs to remedy the incorrect use of the ISPP as quickly as possible. This could include removing the ultra vires provisions from the IPI, and re-notifying them through Schedule 1 and/or seeking an urgent declaration from the Environment Court to properly establish the allocation of topics.

Dated 30 January 2023



A Dewar/E Neilson

Counsel for Wellington International Airport
Limited