Legal submissions on behalf of Kāinga Ora
Counsel's notes - 4 August 2023

- **Correction of relief sought**
  - No further intensification opportunity is requested for within the Inner Noise Area Overlay (ie the 65 dBA contour) beyond that suggested by WCC (ie 1 unit per site permitted).[1]
- **Planning principles**
  - Words are important and shades of meaning matter.
  - Planning regulation should be least restrictive provision that achieves the desired environmental outcome: *Royal Forest and Bird Protection Society of NZ v Whakatane District Council* [2017] NZEnvC 051 at [59]:

    > [59] In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, we consider that notwithstanding the amendments that have been made to that section in the meantime, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* **that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted.** Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by enabling people to provide for their well-being while addressing the effects of their activities.

- **Regulatory and factual environment**
  - Context is everything.
  - The context here are two very well established land use activities, with competing drivers (importance of urban intensification/importance of the Airport).
  - NPS-UD specifically acknowledges that concepts of "Amenity" will change; as experienced both by those within intensified developments; and those living in proximity to such developments.
  - It is not 1992 – while acousticians consider NZS6805 to be "fit for purpose", its "policies" (the broader commentary beyond the technical measurement specifications) do not reflect the reality of here (Wgn) and now (2023).
- **What a 'reverse sensitivity effect' is and is not**:
  - Reverse sensitivity cannot be equated to "annoyance" or even "complaint" – the reverse sensitivity effect only occurs when that annoyance or complaints results in a material effect on viability/safety/efficiency of an existing land use.
  - In this context (ie here and now), a claim "reverse sensitivity" arising from a well-established existing sensitive use, and where the proposed rules only provide for intensification of that existing use (subject to appropriate acoustic insultation controls), faces a high hurdle.
  - Adverse effects on public health (eg from sleep disturbance and unrelenting noise) will be addressed through the acoustic insultation and associated ventilation requirements, which will allow a quiet house. The existence of a complaint or incident of annoyance is not, I submit, a public health effect. (Presumably WIAL is comfortable that there is no public health effect from

[1] Summary statement of Mr Lindenberg, dated 4 August 2023

existing activities within IANO, let alone within the OANO, otherwise WIAL would have purchased these properties.)

- While the amenity of an outdoor area might be affected by aircraft noise, that is the case with all external noise sources and in an urban environment there will be many noise sources. As mentioned, the NPS-UD acknowledges that previous concepts of amenity will need to change in our future, intensified, cities.
- The irony of WIAL opposing redevelopment and intensification around the Airport is that:
  - Existing houses are generally old, poorly insulated, with large outdoor areas.
  - New replacement houses are warm, dry, acoustically insulated and ventilated, with much smaller outdoor areas (ie less area that is exposed to noise that cannot be "insulated away").
  - The more new houses within the ONOA (60 dBA contour) that are built and insulated, the less there will be for WIAL to retrofit acoustic insultation into.[2]
  - If noise from the Airport is going to increase into the future[3], the more new, insulated houses there are around the Airport, the better.

- **Where is the evidential basis for the reverse sensitivity effect**
  - It is inappropriate to "blame" the curfew on reverse sensitivity: the Airport has corresponding duties under the RMA, including s 16, RMA, which was no doubt a strong basis for the imposition of the curfew. There is therefore no "risk" of a curfew at Wgn, because one already exists (unless WIAL is intending to try and remove the curfew). A curfew and other noise abatement processes are also examples of "activities internalising their effects whenever practicable".[4]
  - Surrounding residents are entitled to carefully watch the Airport's performance against its noise limits, and to ask whether the Airport is acting consistently with its s 16 duties. This is not evidence of a "reverse sensitivity" effect.
  - While people "might" complain, there is no certainty that that will translate into a material effect on the Airport. There are many steps in the planning process that might lead to some sort of material impact, and the Airport has a strong protection in the planning instruments. Yes, that might come at some cost to WIAL, in terms of participating in these planning processes, but that is "the price" of an airport that has "grown up" in the midst of a residential neighbourhood, and an airport that has the benefit of such close proximity to a city centre.
  - In that regard I do not agree with the BARNZ submission, para [4.5], that "There is no requirement in case law or plan definitions of reverse sensitivity for the established use to show that there are actual effects on the lawfully established activity; the <u>potential</u> for effects is enough." If that were correct, all it would take is an existing user to "raise the sceptre" of a potential future complaint, and then the surrounding landuse would be restricted. In the context of today, and here, that would be completely inappropriate. There

[2] Para [8.5], WIAL legal submissions – re WIAL intention to acoustically insulate houses out to 60 dBA "in the future"
[3] Para [8.8], WIAL
[4] Para [8.5], WIAL legal submissions

needs to be a sound evidential basis to justify the restriction on land use, which is otherwise directed by the NPS-UD. Note also the clear direction in the explanation to Policy 8, WRPS: "Protecting regionally significant infrastructure does not mean that all land uses or activities under, over, or adjacent are prevented … Competing considerations need to be weighed on a case by case basis to determine what is appropriate in the circumstances." That process requires a clear evidential basis; beyond a mere assertion of effect.

- Where is the record of complaints from residents surrounding the Airport complainingly, particularly, about the effects on their outdoor amenity? Given that WIAL will have this information if it exists, why wasn't it before this Panel in support of its concerns about outdoor amenity effects?

- **Equity / fairness as between the noise maker and noise receiver**
  - For virtually everyone, their house is their single largest financial asset and is their "home". The ability for people to be able to be maintain, upgrade, develop and utilise their home cannot be under-estimated.[5] Should they be discouraged (effectively prevented) from developing their home because WIAL is worried that someone in future might complain?
  - Likewise, in the context of vibration, should a person developing their land need to spend (a lot) more money on base isolation, controlling vibration, caused by a poorly maintained railway line or road in the immediate vicinity? Or should someone That doesn't seem very equitable.

- **"Equity and fairness irrelevant and not part of RMA consideration for plan provisions." Really?**
  - The suggestion at 6.14, WIAL submissions, that nothing in s 32 or s 5 of the RMA requires an "equitable" approach to planning provisions is, with respect, an extraordinary submission. "Social" effects in s 5; "cost and benefits" in s 32? One case from earlier this year illustrates that this submission is wrong (emphasis added):
    - *Swap Stockfoods Ltd v Bay of Plenty Regional Council* [2023] EnvC 1

      E4 Ensuring an equitable approach to managing PM10 emissions from different sources in the Mount Maunganui Airshed

      [161] The air quality experts estimated that around 65% of the annual PM10 emissions can be controlled under the RMA but note that this does not represent the manageable component of exceedances of the PM10 Standard. The estimate is subject to the uncertainty limitations referred to in section E2.

      [162] BSM and log handling activities account for just over half of the 65%. These are the only activities the Council proposed to manage under PC13 and it is appropriate that they are effectively managed. It is equally appropriate that fugitive emissions from exposed areas are effectively managed, which the Council proposed to introduce through PC18 but which, in our view, would not result in effective integrated management of the MMA.

      [163] PM10 emissions from other industrial sources account for more than 25% of the total estimated by the air quality experts to be generated by anthropogenic activities in the MMA. **If PC13 is to be equitable and to be seen as such**, a review of emissions from all sources, including already consented industrial sources, must be undertaken.

      [164] At the Strategy and Policy Committee workshop on 29 September 2020, Councillors stated a "… desire for provisions that were equitable for all members of the

[5] Cf, 6.12 – 6.14, WIAL legal submissions: this is what I say the "equity issue" is. Such a concern is based in the balance of costs and benefits.

> community within the airshed, based on the following approach" and "New provisions must provide fairness for the community, businesses and workers." **It is clear that the Council and the Court agree that an equitable approach must be adopted.** …
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> **[333] Consideration also needs to be given to the appropriateness of the matters of discretion for application to other PM10 emission sources that will be subject to control under the Regional Air Plan to ensure consistency and equity**. We remain concerned to ensure that the matters of discretion are necessary, directly applicable to the unique circumstances of the MMA and unambiguous, with minimum potential for different interpretations by applicants and Council consent processing officers. …
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> **[429]** There are many matters in relation to which emitters within the MMA will require guidance from the Council to ensure efficiency of process. **Careful thought needs to be given to equitable methods of reducing PM10 emissions further if the proposed modified BPO process alone is insufficient or if lower PM10 concentrations are necessary to protect human health.** The many different but inter-related issues identified through the development of PC13 need to be coordinated and integrated through a structured process undertaken with those affected. In our view an Airshed Management Plan is needed to achieve effective and efficient outcomes. …
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> **[432] The amended draft provisions are based on our assessment of all the proposals suggested by the parties and their experts and represent what we consider to be the most practical, certain and equitable way forward**.

- I simply do not agree with BARNZ's legal submission at [4.5] that "The imposition of operational restrictions to mitigate reverse sensitivity effects is not a strict requirement." The caselaw cited by WIAL makes it clear that the emitter of noise, ie WIAL in this case, is required to undertake a "reasonable internalisation of noise effects". In the context of an airport, that simply must include consideration of operational restrictions (ie curfews, flight paths, engine testing restrictions etc).

- **A "qualifying matter" is not a carte blanche to restrict activity**
  - The reference at WIAL submissions, para [8.9], to Kāinga Ora "ignoring" certain matters is simply incorrect. Kāinga Ora is not ignoring those aspects – it is asking that the Committee interrogate the evidence to ensure that any restriction is "justified". The existence of a "qualifying matter" is not a carte blanche to restrict development. And under the *Waikanae* decision, a Hearing Panel cannot use the IPI process to restrict the development potential of land beyond that existing in the operative District Plan.

- ***Whenupai* decision**
  - The Neil Construction case, para 4.7, was put forward as a "timely example of how an airport once largely surrounded by greenfield land can be constrained by enabling urban development nearby." (BARNZ submissions, para [4.7])
  - This was not a reverse sensitivity case. It was a case about whether a designation rule limiting noise from aircraft operations also acted to cap noise from engine testing.

Bal Matheson

4 August 2023