

**Before an Independent Hearings Panel of Wellington District
Council**

Under the Resource Management Act 1991

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

And

In the matter of Hearing Stream 10

SUBMISSIONS ON BEHALF OF WELLINGTON INTERNATIONAL AIRPORT LIMITED

Hearing Stream 10 – Designations

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INTRODUCTION

1. These legal submissions are filed on behalf of Wellington International Airport Limited (**WIAL**), a submitter on the Wellington City Council (**WCC**) Proposed District Plan (**PDP**) in relation to Hearing Stream 10 – Designations.
2. While these submissions focus on WIAL’s obstacle limitation surfaces (**OLS**) Designation Notice (**WIAL1**), the legal principles outlined below also apply to the WIAL2 Designation where there are no areas of disagreement.
3. WIAL has filed evidence from:
 - (a) Jo Lester, Planning Manager, WIAL;
 - (b) Lachlan Thurston, Head of Operational Readiness, WIAL;
 - (c) Natalie Hampson, Director, Savvy Consulting Ltd;
 - (d) John Kyle, Partner, Mitchell Daysh Limited.
4. The Council’s s42A Report and the WIAL evidence are largely aligned save for some suggested additional information requested by Mr Sirl in his supplementary evidence which I discuss in more detail below.

WIAL AND AIRPORT - STATUTORY FRAMEWORK

5. This has been outlined in part in WIAL’s evidence and can be summarised as follows (acknowledging that my aviation related framework is necessarily simplified given the complexity and technical nature of the aviation legislation and associated instruments):
 - (a) WIAL is an Airport Authority under the Airport Authorities Act 1966 and therefore a network utility operator pursuant to Section 166 of the RMA;
 - (b) WIAL is also a requiring authority pursuant to Section 166 having been approved as such pursuant to Section 167 of the RMA¹;
 - (c) Accordingly, WIAL is able to utilise the designation provisions in Part 8 and Schedule 1 of the RMA in relation to:
 - (i) public works; or
 - (ii) in relation to land, water, subsoil or airspace *where a restriction is necessary for the safe or efficient functioning or operation of the*

¹ Resource Management (Approval of Wellington International Airport Limited as Requiring Authority) order 1992

public work. [my emphasis]

- (d) As an airport with scheduled services, WIAL is required to have an aerodrome operator certificate under Civil Aviation Rules Part 139 *Aerodromes Certification, Operation and Use*² (**CAR Part 139**);
- (e) CAR Part 139, along with many other matters, places an obligation on WIAL to have and manage OLS;
- (f) The New Zealand Civil Aviation Authority (**CAA**) Advisory Circulars set out standards, practices and procedures that the CAA considers to be acceptable means of compliance with the associated Civil Aviation Rules;
- (g) Advisory Circular AC139-6 *Aerodrome Design Requirements* sets out how OLS can be achieved and is based on International ICAO-SARPs³. Section 4 of AC139-6 provides descriptions and specifications for the geometry of OLS in New Zealand with the introduction stating:

The obstacle limitation surfaces of an aerodrome are defined surfaces in the airspace above and adjacent to the aerodrome. These obstacle limitation surfaces are necessary to enable aircraft to maintain a satisfactory level of safety while manoeuvring at low altitude in the vicinity of the aerodrome.

These surfaces should be free of obstacles and subject to control such as the establishment of zones, where the erection of buildings, masts and so on, are prohibited. Where obstructions infringe these surfaces they may, subject to the conduct of an aeronautical study, be removed, reduced in height, marked and lit...
- (h) In the context of Wellington's runway, WIAL is required to have take-off, approach, conical, transitional and inner horizontal surfaces and given the surrounding terrain an outer horizontal surface was considered necessary;
- (i) Advisory Circular AC139-10 *Control of Obstacles*, Clauses 2.3 and 2.4 refer to working with the relevant Council to establish an airport's design OLS to effectively control obstacles.

² Under the Civil Aviation Act 1990 and 2023 Act (when implemented in 2025)

³ These are explained in Mr Thurston's evidence

DESIGNATIONS – STATUTORY PROCESS

6. Given the statutory process for recommendations and decision making is different to other provisions of the Proposed District Plan under Schedule 1 to the RMA I briefly outline it now for the assistance of the Panel:
- (a) Clauses 4 (1A) and (1B) of Schedule 1 require a territorial authority to invite requiring authorities that have existing designations in the operative plan to give notice as to whether they should be included in the proposed plan (“rolled over”) with or without modifications;
 - (b) Following this, the territorial authority “shall include in its proposed plan” any designation it receives notice of under clause 4(5);
 - (c) Public notices, submissions and further submissions are made in the usual manner;
 - (d) Clause 9(1) provides that a territorial authority shall make and notify its recommendation in respect of clause 4(5) designations to the requiring authority in accordance with (relevantly) Section 171;
 - (e) In accordance with Section 171(2) and (3) a territorial authority may, giving reasons, recommend to the requiring authority that it confirm or modify the notice, impose conditions or withdraw the notice;
 - (f) Clause 9(3) provides that if an existing designation is included in a proposed plan without modification, and no submissions are received in respect of it, the territorial authority has no jurisdiction to make a recommendation in respect of it;
 - (g) Clause 13(1) provides that the requiring authority must notify the territorial authority whether it accepts or rejects its recommendation in whole or in part within 30 working days;
 - (h) Clause 13(2) provides that the requiring authority may only modify the requirement if that modification is recommended by the territorial authority or is not inconsistent with the requirement as notified;
 - (i) Clause 13(3) requires the territorial authority to alter the proposed district plan to show the modification or delete the requirement in accordance with the requiring authority’s notice;
 - (j) Clause 13(4) requires the territorial authority to serve notice of the decision

and state the due date for any appeals;

- (k) Clause 14 provides for appeals for the territorial authority and any person who made a submission on the requirement.

SECTION 171 ANALYSIS

7. As outlined above, clause 9 of Schedule 1 provides that Section 171 forms the basis for your consideration of the Notice for WIAL1 with the main focus of this consideration provided by subsection (1) as follows:

- (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
 - (a) any relevant provisions of—
 - (i) a national policy statement:
 - (ii) a New Zealand coastal policy statement:
 - (iii) a regional policy statement or proposed regional policy statement:
 - (iv) a plan or proposed plan; and
 - (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
 - (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
 - (ii) it is likely that the work will have a significant adverse effect on the environment; and
 - (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
 - (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

8. The WIAL1 Notice does not bring into play subsections (1A) (trade competition) or (1B) (offsets and compensation) so I do not consider them further.

9. Two key qualifiers in section 171(1)(a) are the phrases “*having particular regard to*” and “*subject to Part 2*”. These two phrases have been considered in case law and I set out a summary of their treatment below.

10. I have **attached** as **Appendix A** my suggested approach to making a recommendation bearing in mind the relevant case law and analysis below.

Meaning of “having particular regard to”

11. Section 171(1) uses the phrase “*having particular regard to*” unlike section 104(1) where the “lessor” obligation of “*have regard to*” is used.
12. The Courts have held that “*have particular regard to*” does not mean “give effect to” but means:
 - (a) the decision maker may not ignore the matter referred to;
 - (b) It must give genuine thought and such weight as the decision maker considers appropriate;
 - (c) but having done so, the decision maker can conclude the matter is not of such significance either alone or together with other matters to outweigh other contrary considerations which it must also take into account in accordance with the decision maker’s statutory functions⁴;
13. The phrase “having particular regard to” does not mean extra weight is placed on the matters to be considered but rather is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion⁵.

Subject to Part 2

14. In *NZTA v Architectural Centre Inc. [2015] NZHC 1991 (Basin Bridge Decision)*, the High Court cited with approval a passage from *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council [2013] NZHC 2347* which noted that:
 - (a) the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters;
 - (b) the purpose, policies and directions in Part 2 set the frame for the consideration of effects on the environment of allowing the requirement;
 - (c) in the event of conflict with the directions in s 171, Part 2 matters override them.

⁴ Basin Bridge following Privy Council decision *McGuire v Hastings District Council* [2002] NZLR 577.

⁵ Basin Bridge.

15. So, unlike a resource consent where it may be more appropriate to refer to Part 2, or a plan change where it is not appropriate to refer back to Part 2 unless one of the three “King Salmon” caveats are present, for designations, it is mandatory to do so.
16. This reflects the language of Section 171 but also the fact that designations often by their very nature may not fit neatly into a district plan and require a broader assessment beyond the relevant statutory planning documents.
17. The range of matters that can be considered under the Part 2 umbrella is important here particularly in view of the aviation safety issues and obligations that form the basis for WIAL1.

RELEVANT STATUTORY PLANNING DOCUMENTS

18. While a careful assessment of the relevant statutory planning documents is required there is however no particular requirement for a designation or a modified designation to conform with all of the relevant statutory planning documents listed in section 171(1)(a).
19. By its nature, a designation is a planning mechanism used for certain types of activity or purposes which may not ordinarily be provided for by the usual district plan methods in the location(s) sought. That is why designations have separate and distinct processes within the Act.
20. Mr Kyle provides an analysis of the Notice for WIAL1 in light of the NPS-UD, RPS, Operative and Proposed District Plans and the Council’s IPI which reflects the NPS-UD.
21. His conclusion is that the modified designation is consistent with the relevant provisions of these statutory documents given the Airport’s status as nationally and regionally significant infrastructure noting the RPS seeks to protect the airport and promote its safe and efficient operations; that the OLS is a critical contributing tool to achieving this; and referring to Ms Hampson’s economic evidence that any potential reductions in development opportunities under WIAL’s 8m height restrictions are minor in the context of the IPI.
22. I note that I agree with Mr Whittington’s view that the consideration of WIAL1 does not require analysis as a qualifying matter as suggested in the evidence of Kainga Ora in terms of decisions on the IPI. Quite apart from Mr Whittington’s analysis:

- (a) Kainga Ora did not raise this issue in its submission; and

- (b) the Council did not include the OLS as a qualifying matter in the Proposed Plan (which required a particular analysis) and therefore it was not a consideration in ultimately deciding the IPI.

23. In my submission WIAL1 Notice meets the intention of the relevant statutory planning documents.

OTHER RELEVANT DOCUMENTS

24. In terms of other statutory documents to consider under Section 171(1)(d), the WIAL evidence has referred to the international guidelines found in ICAO Annex 14 which form the basis of the New Zealand's CAA Rules and in this instance CAR Part 139 and the associated Advisory Circulars.

25. New Zealand is a party to the Convention on International Civil Aviation 1944 (known as the Chicago Convention, where it was signed). ICAO was formed as result of the Convention. The role of the Convention and ICAO is to secure the highest practicable degree of international uniformity in regulations, standards and procedures in relation to aviation practices so as to facilitate and improve air navigation globally.

26. The Civil Aviation Act 1990 (**CAA1990**) purposes are to establish (inter alia) rules in order to promote aviation safety and to ensure that New Zealand's international obligations are implemented.

27. Rulemaking under the CAA1990 also undergoes a rigorous process including a range of considerations as follows:

33 Matters to be taken into account in making rules

- (1) The ordinary rules made by the Minister and the emergency rules made by the Director shall not be inconsistent with the following:
 - (a) the standards of ICAO relating to aviation safety and security, to the extent adopted by New Zealand;
 - (b) New Zealand's international obligations relating to aviation safety and security.
- (2) In making, or recommending the making of, a rule the Minister or the Director, as the case may be, shall have regard to, and shall give such weight as he or she considers appropriate in each case to, the following:
 - (a) the recommended practices of ICAO relating to aviation safety and security, to the extent adopted by New Zealand;
 - (b) the level of risk existing to aviation safety in each proposed activity or service;
 - (c) the nature of the particular activity or service for which the rule is being established;
 - (d) the level of risk existing to aviation safety and security in New Zealand in general;
 - (e) the need to maintain and improve aviation safety and security, including (but not limited to) personal security;
 - (f) whether the proposed rule—
 - (i) assists economic development;
 - (ii) improves access and mobility;
 - (iii) protects and promotes public health;
 - (iv) ensures environmental sustainability;
 - (fa) the costs of implementing measures for which the rule is being proposed;
 - (g) the international circumstances in respect of—
 - (i) aviation safety and security; and
 - (ii) mutual recognition of safety certifications in accordance with the ANZA mutual recognition agreements;
 - (h) such other matters as the Minister or the Director considers appropriate in the circumstances.

28. In *Wellington International Airport Ltd v Director of Civil Aviation 2017-NZSC-199*, the Supreme Court in assessing compliance with other rules in CAR Part 139 stressed the importance of air safety and NZ's obligations as a signatory to the Chicago Convention.

29. I also note the National Airspace Policy 2012 and National Airspace and Air Navigation Plan 2014 both expressly refer to the need to protect obstacle limitation surfaces surrounding airports with the Policy stating⁶:

To avoid or mitigate incompatible land uses or activities and potential obstacles or hazards that will impact, or have the potential to impact on the safe and efficient operation of aircraft, regional and district plans should have regard to applicable Civil Aviation Rules.

Airport authorities and local authorities should work together in a strategic, cooperative and integrated way to ensure that planning documents (including those under the Resource Management Act) appropriately reflect the required noise contours and/or controls and approach and departure paths that take account of current and projected traffic flows.

Resource Management Act planning tools (including plan rules and designations) should as far as practicable seek to avoid the establishment of land uses or activities and potential obstacles or hazards that are incompatible with aerodrome operations or create adverse effects.

30. In my submission the Aviation legislation and guidelines which require and provide for OLS are critical components for your consideration of the Notice.

CONSIDERATION OF ALTERNATIVE SITES, ROUTES, METHODS

31. The adequacy of consideration of alternatives is only obligatory under section 171(1)(b) if:

(i) *the requiring authority does not have an interest in the land sufficient for undertaking the work; or*

(ii) *it is likely that the work will have a significant adverse effect on the environment.*

32. The Courts have held that the term "adequate" means sufficient or satisfactory⁷, that

⁶ Page 5

sufficiency of this assessment will depend on the significance of the adverse effects involved⁸ and the requiring authority must not to act in an arbitrary or cursory way in relation to the consideration of alternatives⁹.

33. The point here is whether adequate consideration has been given by the requiring authority to alternatives rather than whether there are alternatives which you or any other person might prefer. It is not for a “decision maker” to substitute its own policy (or that of another person) for any policy consideration of the requiring authority.¹⁰
34. In addition the consideration concerns the adequacy of the process, not the decisions of the requiring authority to discard or advance particular sites, routes, or methods¹¹.
35. Nor it is appropriate to determine whether the site, route or method is the most suitable or best of the available alternatives, but rather to ensure that the requiring authority has carefully considered the possibilities, taking into account relevant matters, and come to a reasoned decision.¹²
36. The Notice and Mr Kyle’s evidence set out the consideration of alternatives and the reasons for WIAL’s selection. Ms Hampson’s evidence adds to this assessment.
37. In my submission given that the basis of the designation is in fact to avoid significant adverse effects and development capacity is not affected in any significant way, the alternatives assessment is adequate in the context of 171(1)(b).

SECTION 171 (1)(C) - REASONABLY NECESSARY

38. The statutory consideration here is in terms of achieving the requiring authority’s objectives. It does not involve what may be reasonable in a broader or popular sense, or in terms of any other persons’ goals or theories¹³.
39. The Court has held the test for establishing what is “reasonably necessary” falls between the subjective test of expediency or desirability, at one end, and absolute necessity, at the other, allowing some tolerance but not permitting the decision maker to judge the merits of the objectives.¹⁴

⁷ Basin Bridge.

⁸ Basin Bridge.

⁹ *Villages of NZ (Mt Wellington) Ltd v Auckland City Council EnvC A023/09*.

¹⁰ See *Minhinnick v Minister of Corrections* Decision A043/04 at paras [234 - 235] and the cases cited there.

¹¹ *Ibid*, at [237].

¹² *Kett v The Minister for Land Information* (HC, Auckland, AP404/151/00, 28 June 2001, Paterson J).

¹³ *Gavin Wallace v Auckland Council* [2012] NZEnvC 120.

¹⁴ *Bungalo Holdings v North Shore City Council A052/01*, para [94], following the approach taken by the High Court in *Fugle v Cowie*

40. WIAL's objectives for WIAL1 were set out in its Notice and are outlined in Mr Kyle's evidence.
41. As an airspace designation there is no work involved and so in my submission the test here relates back to the necessity for the restrictions in terms of the safe and efficient functioning or operation of a public work, in this case the Airport (Section 168(1)(b)). There should also be a nexus between the designation sought and the WIAL's objectives as well as justification for the spatial extent of the restrictions¹⁵.
42. In my submission there is an obvious direct connection between the modified WIAL1 and WIAL's objectives. Furthermore, the spatial extent of the OLS, even without the allowable penetrations of 8m and 30m, can be justified on aircraft safety grounds alone as they are required elements for an airport with scheduled traffic and in the particular context of Wellington Airport.
43. WIAL has included conditions which allow additional penetrations before written approval needs to be sought, to recognise existing development patterns and the terrain surrounding the airport (which in turn will reduce the administration and cost associated with the designation for WIAL and the community).
44. It is also important to consider that just because approval may be required from WIAL does not mean a proposal cannot proceed. As is clear from Ms Lester's evidence all requests have been granted to date and WIAL has put in place an efficient and quick process for considering such requests. In my submission Mr Whittington's comment about costs in his legal submissions are unfounded and to the extent that there are costs they are completely justified.
45. WIAL has responded to the Council's submissions and further submissions in support asserting an adverse impact on development capacity and seeking an increased allowable penetration of 11m for the relevant surfaces. Ms Hampson's evidence concludes that WIAL's 8m and 30m proposal results in minimal development capacity effects¹⁶.
46. The submitters seeking the additional allowable penetration of 11m have not provided any evidence of significant adverse effects and have not addressed the importance of

[1997] NZRMA 395. Gavin Wallace v Auckland Council [2012] NZEnvC 120.

¹⁵ Bearing in mind re Queenstown Airport Corporation Limited [2017] NZEnvC46 at [9]

¹⁶ I note there are no submissions relating to the outer Transitional Surface which provides a 30m allowable height penetration

OLS in the context of Wellington Airport. Furthermore, other than Kianga Ora, no individual landowner has submitted in opposition to the OLS or sought to increase the allowable penetration of 8m that applies to all but one of the surfaces.

47. Mr Sirl in his supplementary evidence has asked WIAL to address safety concerns that would result from an increased 11m allowance. While in my submission, there is no need to justify the concessions to the mandated OLS, Mr Thurston can provide additional information at the hearing confirming the increase to 11m would reduce the level of safety at the Airport that would result in operational changes which would have an adverse impact of the efficient functioning of the Airport's operations.
48. As a result of the above in my submission the designation as modified can properly be said to reasonably necessary for WIAL to achieve its objectives for WIAL1.

PART 2 ASSESSMENT

49. As outlined above, all of your considerations in terms of s171 are subject to Part 2 of the Act.
50. In terms of Section 5, Wellington Airport is a significant resource that provides for the social and economic wellbeing of the district, region and nation through direct and indirect employment opportunities, and through its role in facilitating the movement of people and goods. WIAL has provided evidence to this effect over a number of Hearing Streams.
51. There are no relevant Section 6 matters or in respect of the various tangata whenua aspects of Part 2, including sections 6(e), 7(a), 7(aa) and 8.
52. In terms of the relevant subsections of Section 7, as Mr Kyle concludes that WIAL1 represents an efficient use and development of natural and physical resources - *By ensuring that appropriate obstacle limitation surfaces are applied to the airspace around Wellington International Airport, the operational safety of aircraft is assisted, with flow on benefits to social and economic wellbeing.*
53. It is self-evident that in order for the Airport to continue to contribute in such a significant way, it has to be safe and furthermore New Zealand has international obligations in relation to aviation safety as discussed above.

54. Wellington Airport already faces challenges due to its constrained site, surrounding terrain, urban development patterns and closeness of residential communities, weather patterns and its location on an isthmus with the sea at either end.
55. In my submission it makes no sense to recommend further constraints that will affect the safety of the Airport and result in adverse effects in terms of the efficient functioning of the Airport's operations. This is especially so in circumstances where the designation will not have a major impact on development capacity under the IPI.

OTHER MATTERS RAISED BY SUBMISSIONS

56. The submissions sought amendments to conditions to provide greater clarity and information to assist with calculating the OLS and associated maximum building heights and Mr Whittington has mentioned in his legal submissions that there is little information within the District Plan itself about how to obtain permission.
57. In my submission there is sufficient information in the District Plan with the OLS GIS system now available as part of the planning maps. However, WIAL is open to a more detailed advice note in the Designation providing information about the permission process.

CONCLUSION

58. In my submission the modified designation WIAL1 achieves the purpose of the Act when considered in light of the various factors required to be considered pursuant to Section 171 and discussed above.
59. Accordingly it is worthy of your positive recommendation with the additional modifications to the conditions contained in Mr Kyle's evidence and adopted by Mr Sirl in his supplementary evidence.

Amanda Dewar
Counsel for Wellington International Airport Ltd

APPENDIX A - SUGGESTED APPROACH TO MAKING RECOMMENDATIONS

- a. identify the relevant provisions of the relevant statutory planning documents that you must have particular regard to under section 171(1)(a), as well as relevant provisions of any documents or any other matter you consider reasonably necessary to make your recommendations under Section 171(1)(d);
- b. consider and evaluate the adverse and beneficial effects on the environment informed by the Notice and submissions; relevant provisions of Part 2; relevant statutory instruments; and other relevant matters being the proposed conditions and any non-statutory documents; and in doing so consider whether the adverse effects on the environment are significant for the Notice;
- c. if you find there are significant adverse effects, consider and evaluate the directions given in Section 171(1)(b) as to whether adequate consideration has been given to alternative sites, routes, or methods;
- d. consider and evaluate the directions given in Section 171(1)(c) as to whether the modified designation is reasonably necessary for achieving the stated objectives of WIAL for the modified designation; and
- e. consider your evaluations above through the lens of Part 2 to determine whether the modified designation achieves the RMA's purpose, with Part 2 matters prevailing in the event of any conflicts with the matters for consideration in Section 171.