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 Wellington City District Plan (**PDP**)

LEGAL SUBMISSIONS ON BEHALF OF WELLINGTON INTERNATIONAL AIRPORT LIMITED IN RESPONSE TO MINUTE 7

DATED: 15 February 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 7 issued by the Hearings Panel (**Panel**), which was issued on 8 February 2023 (**Minute 7**).

1.3 Minute 7 directed that any submitter that wished to take a position on whether the Panel has jurisdiction to alter the classification of provisions to either the ISPP or Schedule 1 process, file submissions on 15 February 2022. This memorandum is therefore focused on that issue.

1.4 WIAL notes that the Council's legal submissions address matters raised in Minute 6 and 7 – including substantive arguments regarding the scope of an IPI referred to in the Panel's Minute as the argument on the merits of the classification challenges (**Merits Argument**).

1.5 WIAL disagrees with Council's legal submissions on the Merits Argument which boils down to what is the correct interpretation of section 80E, including what "district-wide matters" means in this context.[1] If the Panel is inclined to agree with Council's legal submissions on that point, WIAL requests the opportunity to fully respond to the Merits Argument which appears to be what the Panel proposes as indicated in Minute 7's paragraph 18.

2. INITIAL COMMENT

2.1 With reference to the legal submissions for the Council, and Mr McCutcheon's supplementary evidence, WIAL acknowledges the difficult situation the Council found itself in when the Amendment Act was passed, triggering specific requirements for Tier 1 local authorities. Preparing an Intensification Planning Instrument (**IPI**) and initiating an

1 Refer to paragraphs 3.2 to 3.11 of Council's legal submissions.

ISPP process at the same time was and is unchartered territory, and adds significant complexity to the PDP review process.

2.2 WIAL is sympathetic to the challenges that the Council has faced in preparing an integrated plan in these circumstances. For the record, WIAL agrees with the Council decision to notify its IPI on the same day, and as part of the same "document" as the balance of the Proposed Wellington District Plan (**PDP**), was the right decision. It also agrees that seeking to identify whether each provision was being notified as part of the IPI or PDP, to progress through the ISPP or Schedule 1 process respectively, was the right approach.

2.3 Putting aside the benefits of integration, the key concern for WIAL remains the consequences of notifying provisions as part of the IPI that should properly have been notified as Part 1 Schedule 1 provisions.

3. RESPONSE TO MINUTE 7

Council's allocation decision

3.1 WIAL agrees with the Council's legal submissions that the decision to allocate provisions to either the IPI / ISPP or PDP / Schedule 1 for the purposes of notification was one for the Council to make.

3.2 However it is important to note at the outset that the Council's powers in this regard are circumscribed by the Amendment Act and in particular sections 80E which limits the content of an IPI, and section 80G which *inter alia* provides that a Council must not use the IPI for any other purpose other than what is provided for in section 80E. We refer to this in more detail below.

3.3 WIAL also agrees the allocation decision is one that is amenable to judicial review. As discussed further below, a declaration from the Environment Court as to the *vires* of the Councils allocation of topics including the potential to include procedural directions is also an available option.

3.4 The Council's legal submissions assert that, in the context of the significance of the removal of appeal rights (see paragraph 4.10), parties may not put their best foot forward at Council level hearings. It is very clear that the Courts have always recognised that the removal of appeal rights is a serious and significant matter. And more importantly, WIAL intends on fully engaging in both RMA planning processes, as should be clear from its submissions and its engagement to date. To that extent, it will be a submitter that seeks to constructively inform the Panel's work.

The Panel's powers

3.5 As set out in Council's legal submissions, the Panel has been delegated the power to make decisions on the district plan review with "*any necessary delegation to hear submissions and make recommendations to the Council on the Proposed District Plan*".[2] As acknowledged in Minute 1, the Panel's powers in relation to provisions progressing through the ISPP include some key differences from those progressing through Part 5 of Schedule 1.

3.6 Clause 99 of Part 6 of Schedule 1 of the RMA prescribes the Panel's powers in relation to the IPI, and requires the Panel to make recommendations on an IPI. It states:

> **99 Independent hearings panel must make recommendations to territorial authority on intensification planning instrument**
>
> (1) An independent hearings panel must make recommendations to a specified territorial authority on the IPI.
>
> (2) The recommendations made by the independent hearings panel—
>
> (a) must be related to a matter identified by the panel or any other person during the hearing; but
>
> (b) are not limited to being within the scope of submissions made on the IPI
>
> …

3.7 Clause 99 engages two considerations:

(a) First, the Panel's recommendations must be "on" the IPI; and

2 Council's legal submissions at paragraph 4.2.

(b) Second, it has the power to make recommendations on matters identified during the hearings, and its recommendations are not limited to being within the scope of *submissions* made on the IPI.

3.8 In this context, it is submitted that "on" must be interpreted as "within the scope of" the IPI. The scope of an IPI is determined by section 80E, with any provisions or matters beyond the scope of the section 80E requirements falling outside what is "on" the IPI. In this regard the Council's legal submissions seem to conflate these two quite different powers of recommendation available to the Panel.

3.9 The High Court's decision in *Albany North Landowners v Auckland Council*[3] provides some assistance. In that decision, Whata J considered an analogous provision[4] which reads:

> *(1) The Hearings Panel must make recommendations on the proposed plan, including any recommended changes to the proposed plan.*
>
> …

3.10 The High Court stated the following on the meaning of the provision (our emphasis added):

> *[104] (a) The IHP must make recommendations "on" the proposed plan. Proposed plan is defined as the proposed combined plan prepared by the Auckland Council in accordance with ss 121-126; that is the notified PAUP.* ***The significance of this is that the IHP's jurisdiction to make recommendations is circumscribed by the ambit of the notified PAUP.***
>
> *…*

3.11 The distinction between the Proposed Auckland Unitary Plan (**PAUP**) process and the IPI is that the PAUP was a full plan review which afforded significant scope for change.

3.12 The IPI is instead a change required by the Amendment Act, and for specific reasons. The purpose of the IPI, and required use of the ISPP, is deliberate – it is to be a plan change focussed on achieving certain

3 [2017] NZHC 138.
4 Local Government (Auckland Transitional Provisions) Act 2010, section 144(1).

intensification outcomes, and is to be completed within an abbreviated timeframe with limited rights of appeal.

3.13 In this way, and in particular because of section 80E and in turn by 80G(1)(b) and (2), the Panel's jurisdiction is circumscribed, by what is able to be "on" the IPI rather than what was in fact notified by the Council. The Panel's powers to make recommendations are constrained by this feature of the Amendment Act, and it would be allowing the ISPP to be used inappropriately if provisions that were not "on" the IPI could be the subject of Panel recommendations.

3.14 In short, this is the key issue: what is the Panel to do if, before or after the hearing, it finds that a provision, or set of provisions, is not "on" the IPI? The indication from *Albany North* is that the Panel would not have the power to make a recommendation on that provision(s), based on the passage cited above that the recommendations are "*circumscribed by the ambit*" of the notified plan change, here being the IPI.

3.15 The Council is suggesting there is an ability to make *out of scope* recommendations relying on clause 99(2) of Schedule 1. However, WIAL's position on that power is that it is limited as discussed above, and not intended to provide a curative power for incorrectly allocated provisions that are not "on" the IPI.

3.16 WIAL considers that clause 99(2) provides necessary room for recommendations on matters raised during the hearings (and which were not raised by any submitter), but that it does not allow the Panel to make recommendations that would remedy any incorrect notification of a provision, or allow other provisions (not "on" an IPI) to be addressed through an ISPP. If clause 99(2) were interpreted and applied in this way, then it would amount to a removal (by stealth) of the circumscribed features of the Amendment Act, and allow any provisions to be considered by the Panel through an ISPP.

3.17 The High Court recently considered the scope of another form of specific RMA planning instrument in *Otago Regional Council v Royal Forest And Bird Protection Society Of New Zealand Incorporated.*[5] In

5 [2022] NZHC 1777.

that decision, the Court considered whether the Otago Regional Council had correctly notified its entire Proposed Otago Regional Policy Statement (June 2021) as a freshwater planning instrument, subject to the freshwater planning process.

3.18 Section 80A of the RMA defines "freshwater planning instrument", and states:

…

(2) A **freshwater planning instrument** means—

(a) a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management:

(b) a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):

(c) a change or variation to a proposed regional plan or regional policy statement if the change or variation—

(i) is for the purpose described in paragraph (a); or

(ii) otherwise relates to freshwater.

(3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—

(a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and

(b) prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or, if applicable, subpart 5 of this Part.

…

3.19 In considering this section, the High Court took legislative history into account, and noted that if Parliament intended that a broad approach could be taken, then the qualification in section 80A(3) would not have been necessary.[6] Notably, the Court stated: "*Nevertheless, I agree that Parliament contemplated the focus of the freshwater planning process would be narrower than the purpose of the RMA generally*."[7]

3.20 The High Court held:

6 Refer to paragraph [151].
7 At [155].

[161] It will be only those parts of a proposed regional policy statement that relate to freshwater that can be part of a freshwater planning instrument. All other parts of a regional policy statement will remain subject to the normal planning process set out in pt 1 of sch 1 of the RMA.

3.21 WIAL submits that analogies can be drawn between section 80A and section 80E (re the scope of an IPI), particularly in terms of the qualifications in those sections and the constraining effect of the same on scope.

3.22 WIAL raises these points as it does not agree that it is open to the Panel to simply record its reservations about whether a provision satisfies section 80E, and continue to make recommendations on that provision, as suggested by the Council's legal submissions.[8] The power to make *beyond scope of submissions* recommendations cannot lawfully extend to making recommendations that are beyond the scope of the IPI itself (in section 80E terms), as that would be extending what was deliberately circumscribed by the Amendment Act.

3.23 So in summary while WIAL agrees with the Council that the Panel does not have jurisdiction to reconsider the allocation from that shown on the face of the notified PDP, it disagrees with the Council's submissions about what the Panel ought to do as a result of that lack of jurisdiction and the impact on the plan process, as well as the effect on submitters.

The key concern for WIAL relates to jurisdiction, and its potential impact on the process and vires of provisions

3.24 As outlined in WIAL's earlier memorandum, the key concern is that certain provisions (including the entire Natural Hazards chapter) have been notified as IPI provisions, when they should have been identified as part of the PDP. The consequence of this is that the Panel will not have jurisdiction to make recommendations on those provisions, which could leave them in a stalled position when the hearings have concluded.

3.25 The Council's legal submissions appear to acknowledge that this situation could arise (at paragraph 4.6), stating:

8 At 4.6.

> *Such a panel would not decline to make recommendations on any IPI provisions that it considered not to fit within either s80E because if that assessment was wrong, then there would be no recommendation that the Council could accept or not under cl 101(1) of Schedule 1. The appropriate course would be to record reservations about whether the relevant provision fits within s80E, but nonetheless to make recommendations on the provision under cl 99.*

3.26 The Council's legal submissions go on to suggest that, rather than correcting any misallocation of provisions between the ISPP and Schedule 1, parties should "*let the process play out and see whether any party does not like the outcome on the merits...*".[9]

3.27 WIAL disagrees, and does not consider the resulting scenario to be either expedient, or appropriate. The Panel, aware of its jurisdictional constraints, should simply not entertain the making of recommendations on provisions or matters that are not "on" the IPI. If (as now) concerns have been raised with the allocation of provisions to the two processes, WIAL considers that they should be resolved as early as is possible.

3.28 While the Panel may not have any ability or power to re-allocate provisions, it can raise with the Council the procedural / legal difficulties created by an incorrect allocation, and work with the Council to reallocate the provisions via an appropriate process such as seeking a Declaration from the Environment Court and/or renotification of the incorrectly allocated provisions.

3.29 As of now, the Council accepts that two policies have been incorrectly allocated.[10] WIALs concerns about the entire natural hazards chapter also remain as well as a number of individual provisions. If these issues are not resolved as soon as possible, then there is the potential that the Council and the community will be left with a raft of provisions that are in a kind of "lacuna" post the IPI hearings (with no ability to make recommendations on those provisions under clause 99). The Council would then need to decide what to do with such provisions, which could result in significant confusion and cost for plan users.[11]

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9 At 4.9.

10 Being two of the policies identified by Kainga Ora. Refer to paragraphs 3.12(e) and 5.1(b) of the Council's legal submissions, and Mr McCutcheon's supplementary evidence at paragraph 63.

11 For example, any resource consents granted in reliance on provisions that are subject to concern about *ultra vires* issues would be vulnerable to challenge. Further, on the basis of the doctrine of severance, those parts of the District Plan that are subject to concern could be

4. SUGGESTED NEXT STEPS

4.1 WIAL considers it is appropriate that the Panel raise these issues with the Council, and recommend that it reconsiders its approach to the allocation of topics, with the correct legal framework. The Panel can provide guidance to the Council, and in this case could set out its preliminary view on some "test scenarios" to the Council, to highlight the issues that have been raised after fully hearing the Merits Argument.

4.2 One option for ensuring that a lawful approach is taken would be for the Panel to suggest to the Council that it seek an urgent declaration from the Environment Court to properly establish and/or guide the allocation of topics as well as any procedural directions that may assist the process.[12]

4.3 Although this may require some additional work to be completed at this stage, because the hearings have not yet commenced there is the opportunity to rectify any incorrect allocation. Attempting to do so after the hearings, or when the Panel is deliberating, will be more complex, confusing and inefficient.

4.4 Procedurally, what is potentially useful is that the Council notified the PDP as one single document annotating which provision was progressing through the two processes. As a result, there is no question that notification of all provisions has occurred, what is left is the progress of those provisions through the relevant process.

4.5 There is no substantial variation between the ISPP and Schedule 1 in terms of technical process as clause 95 of Schedule 1 of the RMA applies the majority of the orthodox Part 1 Schedule 1 provisions and requirements to the ISPP. What is different are the decision-making requirements, in clause 99 and appeal rights.

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severed by way of a Court order, again creating a lacuna for the matters that those provisions would otherwise govern.

12 As provided for in section 311 of the RMA. Alternatively, the Council could seek a declaration from the High Court under the Declaratory Judgments Act 1908, as was sought in *Otago Regional Council v Royal Forest And Bird Protection Society Of New Zealand Incorporated* [2022] NZHC 1777.

4.6 WIAL, respectfully, considers that the Panel should commence this exercise after hearing legal submissions about the Merits Argument, and then report to the Council (and submitters) with a position/ recommendations on these issues. The Council could then take appropriate steps which might include:

(a) providing new delegations to the Panel to reconsider and make recommendations for the Council to renotify incorrectly classified provisions; and/or

(b) seeking appropriate declarations and directions from the Environment Court.

4.7 WIAL makes these submissions with a view to ensuring that the correct process is followed for all PDP and IPI provisions. These provisions will govern the use of land for at least the life of the PDP, which is why the standard Schedule 1 process prescribes (and protects) public participation rights. This is also why the scope of an IPI, and the Panel's powers in relation to it, are narrower – to reflect the Parliament's intentions in terms of what the Amendment Act enabled.

4.8 While there is some potential to cause delays to the hearing schedule, WIAL considers this acceptable, particularly because of the natural justice/ public participation impacts if appeal rights are removed through unintentional but nonetheless incorrect allocation, but more importantly the consequences of not doing so as highlighted in these submissions.[13]

Dated 15 February 2023

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13 At 4.10, Council's legal submissions indicate that the parties have suggested that the Panel is less able that the Environment Court. There was clearly no such suggestion in WIAL's submissions, and the assertion is unfounded.