

IN THE MATTER of the Resource Management Act 1991
 (“Act”)

AND

IN THE MATTER of the Wellington City Council Proposed
 District Plan

AND

IN THE MATTER of further submissions by the BOARD OF
 AIRLINE REPRESENTATIVES NEW
 ZEALAND INC (“BARNZ”)

**LEGAL SUBMISSIONS ON BEHALF OF
 THE BOARD OF AIRLINE REPRESENTATIVES OF NEW ZEALAND INC
 IN RELATION TO STAGE 5 - NOISE**

7 AUGUST 2023

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1. INTRODUCTION

- 1.1 The Board of Airline Representatives of New Zealand Inc (“BARNZ”) is an incorporated society representing the airlines that operate scheduled international and domestic services utilising airports throughout New Zealand. BARNZ works with the airports and local and regional councils to address matters that have the potential to impact on the safe and efficient operation of the airlines.
- 1.2 BARNZ has a history of active participation in planning matters at the major airports in New Zealand. BARNZ considers that it is important that the provisions in district plans appropriately provide for airport infrastructure as a major contributor to the regional and national economies.
- 1.3 BARNZ will call evidence from Ms Cath O’Brien, Executive Director of BARNZ and will otherwise rely on and adopt the evidence of Wellington International Airport Limited (“WIAL”) as indicated.

2. SUMMARY OF BARNZ’S KEY SUBMISSIONS

- 2.1 BARNZ made further submissions in support of a number of submissions made by WIAL. Through evidence WIAL has refined its submissions, in a manner supported by BARNZ, by:
 - (a) Providing for one residential unit on each site as a permitted activity within the Medium Density Residential, Local Centre and Neighbourhood Zones where overlaid by the Air Noise Overlay;
 - (b) Requiring proposals that provide for two or more residential units and/or any other noise sensitive activity within Medium Density Residential, Local Centre and Neighbourhood Zones where overlaid by the Air Noise Overlay as a restricted discretionary activity, with four matters of discretion specifically targeted at avoiding or minimising reverse sensitivity effects on Wellington International Airport.

- (c) Classifying all other new noise sensitive activities within the General Industrial, Open Space, Airport and Mixed Use Zones as a non-complying activity.
- (d) Requiring all subdivision within the Air Noise Overlay to obtain resource consent to ensure consideration can be given to the potential for such activities to enable further intensification of noise sensitive activities within the Air Noise Overlays.
- (e) Identifying WIAL as an affected party for resource consent applications within the entire Air Noise Overlay.

2.2 The key issue in contention relating to intensification - and as raised by the above submissions and narrowed by the evidence - is:

- In adopting appropriate planning controls in relation to the management of residential properties in the Air Noise Overlay, where does the balance lie having regard to:
 - o The significant effects (relating to amenity, health, well-being as well as issues of land use compatibility) caused by aircraft noise on external amenity that are not able to be mitigated by acoustic insulation and ventilation;
 - o the need to enable and provide for future urban growth opportunities.

2.3 The following factors are considered relevant to the determination of appropriateness:

- (a) Amenity effects on future residents;
- (b) Reverse sensitivity effects on the airport and its users;
- (c) The need for residential growth and the potential impact of constraints on future residential development;
- (d) The desirability of retaining existing development opportunities for the existing land owners;

- (e) The relief sought by the parties including the extent to which different limitations should be applied as between the inner and outer air noise overlays.

2.4 BARNZ says that allowing increased intensification, especially within the inner air noise overlay:

- (a) puts at risk the future growth and development of the airport and the efficient operation of the Airport as Nationally Significant Infrastructure; and
- (b) creates amenity effects on future residents which are not fully mitigated by acoustic and ventilation controls;

in exchange for

- (c) a limited number of new dwellings where there is evidence of sufficient development capacity throughout the city¹; and
- (d) the future development opportunities of a limited number of land owners.

2.5 When potential costs are weighed against potential benefits, it is clear that the risks in (a) and (b) are significantly greater than (c) and (d). Accordingly, the plan rules should avoid residential intensification in the inner air noise overlay, and control / limit intensification in the residential zone in the outer air noise overlay, as identified in para 2.1 above.

2.6 BARNZ also maintains an interest in the planning approach to the Obstacle Limitation Surface (“OLS”) given its importance in ensuring the safe operation of aircraft approaching and departing the airport and concurs with the WIAL evidence.²

2.7 Additionally, BARNZ adopts the legal submissions and evidence of WIAL in relation to questions arising in relation to the Air Noise Overlay and OLS as qualifying matters.

¹ EIC K O’Sullivan at 5.60

² EIC K O’Sullivan at section 8; EIC L Thurston and EIC C O’Brien at 4.8

3. STATUTORY FRAMEWORK

3.1 It is not proposed to repeat the full statutory framework, which has been set out for the Panel in the legal submissions of other parties.³

3.2 Notwithstanding, within the statutory framework and relevant to Wellington Airport, it is drawn to the Panel's attention that the Council has, by virtue of s31 of the Act, the functions, for the purpose of giving effect to the Act of:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

(b) ...

(d) the control of the emission of noise and the mitigation of the effects of noise:...

(f) any other functions specified in this Act.

3.3 Section 3 of the Act provides that the meaning of effect includes, *inter alia*, future effects as well as positive effects.⁴

3.4 When preparing its District Plan the local authority must also "have regard to" any proposed regional policy statement ("RPS") as well as management plans and strategies prepared under other Acts (s74(2)(b)).⁵ This extends to the National Airspace Policy prepared under the Civil Aviation Act 1990 and New Zealand Standard 6805:1992 "Airport Noise Management and Land Use Planning" ("**NZS 6805:1992**") prepared under the Standards Act 1988. Both of these documents contain guidance for land use planning that can be appropriately described as a type of "management plan" or "strategy" for managing issues associated with airports.

Role of the National Airspace Policy of New Zealand

3.5 The National Airspace Policy creates a framework to guide the aviation sector (airports, airlines, and Airways NZ) towards integrating

³ For example, see WIAL legal submissions

⁴ RMA s3

⁵ The words "shall have regard to" indicate that such matters must be considered, but not necessarily followed. These words are not synonymous with "shall take into account". If the appropriate matters had to be taken into account, they must necessarily affect the discretion of the decision-maker. See *Haddon v Auckland RC* (1993) 1B ELRNZ 8, [1994] NZRMA 49.

future airspace design and emerging technologies to be employed in communications, navigation and surveillance/air traffic management. The objective is to provide certainty for the nation and for the aviation sector's future investments in air navigation and Air Traffic Management equipment.

- 3.6 The “integrated” section of the National Airspace Policy observes the important interface between airspace and land use planning and recognises that:

“Airport Authorities and local authorities should work together in a strategic, co-operative and integrated way to ensure that planning documents (including those under the Resource Management Act) appropriately reflect 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.” (emphasis added)

Role of NZS 6805:1992

- 3.7 The Airspace Policy approach to airport planning - with its two distinct elements - is endorsed by NZS 6805:1992. This standard is for use by all local authorities and airports around New Zealand to address the resource management issue of aircraft noise.
- 3.8 While it is recognised that the NZS 6805: 1992 is a guideline only⁶, it is also a document to which the Panel is required to “have regard” under s74(2)(b). Despite its age it has stood the test of time.
- 3.9 NZS 6805:1992 adopts a two pronged approach to the issue of noise, being controls on airport noise as well as controls on land use.

The Regional Policy Statement

- 3.10 The District Plan must “give effect to” the Greater Wellington Regional Council RPS.⁷ The RPS provides a clear higher order framework for the management of regionally significant infrastructure throughout the Wellington Region. Specifically the RPS “protects regional significant

⁶ *Wellington International Airport Ltd v Wellington City Council* [1997] NZEnvC W102/97 at page 52

⁷ Section 75(3)(c)

infrastructure from incompatible subdivision, use and development.⁸ As noted by Ms O'Sullivan, with reference to the Explanation in Policy 8,⁹ as well as providing a definition of reverse sensitivity, the concept of reverse sensitivity is also encapsulated by the RPS.¹⁰

Application of policies to BARNZ's submissions

3.11 It is submitted that there is a crucial difference between the recommended planning approach in NZS 6805:1992 as between noise sensitive uses inside the ANB (above 65 dB L_{dn}) and noise sensitive activities in the area between the ANB and the outer control boundary (60 dB L_{dn} and 65 dB L_{dn}). In the ANB, new residential use is to be prohibited (with no caveat). This contrasts with the approach to new residential use within the OCB for which the NZS recommends the prohibition of such uses with the caveat "unless a district plan permits such uses, subject to a requirement to incorporate appropriate acoustic insulation to ensure a satisfactory noise environment...".

3.12 Within the context of controls on land use, Ms O'Brien points out that:¹¹

It is important to recognise that NZS 6805:1992 does not recommend acoustic treatment as a default position for new noise sensitive activities inside the ANB. If that was the case then all that the Standard would require was a given internal sound level (e.g. 40 dB L_{dn}) for all new activities. In recognition that nothing can be done about aircraft noise in the external environment and the amenity issues that arise as a result, it recommends a land use planning approach.

3.13 In his evidence Mr Hunt considers the acoustic and ventilation controls notified in the Proposed Plan as being "likely to be effective in minimising reverse sensitivity noise effects on airport operations".¹² Although the question of outdoor amenity is a key consideration for reverse sensitivity effects,¹³ other than Mr Humpheson for WIAL, none

⁸ Refer to EIC J Kyle for WIAL dated 7 February 2023 at paras 54 -57; Policy 8 of the RPS.

⁹ "Incompatible subdivisions, land uses or activities are those which adversely affect the efficient operation of infrastructure, its ability to give full effect to any consent or other authorisation, restrict its ability to be maintained, or restrict the ability to upgrade where the effects of the upgrade are the same or similar in character, intensity, and scale. It may also include new land uses that are sensitive to activities associated with infrastructure.

¹⁰ Rebuttal K O'Sullivan at 1.12

¹¹ EIC C O'Brien at 7.8

¹² EIC M Hunt (Noise & Acoustics) at 45

¹³ Rebuttal Evidence D Humpheson (for WIAL) at 5.4

of the noise experts directly address outdoor amenity.¹⁴ And nowhere do the Council experts reach any conclusions as to whether the proposed plan's approach is generally in accordance with NZS:6805: it being evident that it is not.

3.14 In assessing the appropriate planning approach to the Air Noise Overlay the Panel is accordingly asked to consider what the Council's noise evidence omits.

4. MANAGEMENT OF EFFECTS INCLUDING REVERSE SENSITIVITY

4.1 There are two types of effects associated with aircraft noise that need to be avoided or mitigated:

- (a) Effects of aircraft noise on people; and
- (b) Reverse sensitivity effects on airport operations.

4.2 The effects of aircraft noise on people are managed through mitigation including ventilation and acoustic insulation of buildings. However, as this mitigation does not address the adverse effects of aircraft noise in the outdoor environment or when windows and doors are open, this is not a complete answer to the management of effects. Mitigation of reverse sensitivity effects is therefore generally achieved through land use limitations on certain types of development¹⁵ within the air noise contours (per NZS 6805:1992).

4.3 It is settled law that the adverse effects of potentially incompatible uses should be avoided, remedied or mitigated where they would be likely to place restrictions on, or inevitably come into conflict with, the use of other resources.¹⁶ The concept of reverse sensitivity has been described as:¹⁷

[T]he legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity"

¹⁴ Rebuttal Evidence D Humpheson (for WIAL) at 5.4.

¹⁵ The restrictions are usually placed on activities that are sensitive to aircraft noise, such as residential dwellings, education facilities and the like.

¹⁶ Nolan, Environmental and Resource Management Law, 5th ed, p 858

¹⁷ *Affco New Zealand v Napier City Council* [2004] NZEnvC W 082/04 at [29].

is this: if the new use is permitted, the established use **may be required** to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

[emphasis added]

- 4.4 This is consistent with the definition of reverse sensitivity in the RPS and the proposed plan.¹⁸
- 4.5 The imposition of operational restrictions to mitigate reverse sensitivity effects is not a strict requirement. Rather, the Environment Court has made it clear that the established use "may be required to" restrict its operations. There is no requirement in the case law or plan definitions of reverse sensitivity for the established use to show that there are actual effects on the lawfully existing activity; the potential for effects is enough. The definition of "effect" includes existing effects, future effects and potential effects.¹⁹ It is important to be clear that noise from the airport is predicted to increase over time.²⁰
- 4.6 Reverse sensitivity effects can manifest in many ways but the effects of most concern ultimately culminate in curfews and other noise restrictions that directly impact on the ability of the Airport and airlines to efficiently operate. In addition to direct restrictions as identified in the evidence of Ms O'Brien, such costs can also result in consequential impacts for airlines through reduced capacity and increased landing charges.²¹ Ms O'Brien explains how, as seen at other airports, if noise issues are not well managed there is the very real potential that there will be ever increasing calls from the community for more restrictive operational controls.²² Such restrictions would inevitably have a significant economic and social impact.
- 4.7 A recent Environment Court decision relating to aircraft engine testing at Whenuapai Airport is a timely example of how an airport once

¹⁸ Refer to the EIC of J Kyle for WIAL dated 7 February 2023 at pars 33-34.

¹⁹ RMA Section 3

²⁰ EIC Stage 5 of J Lester dated 18 July 2023 at 5.20

²¹ EIC C O'Brien at 6.6

²² EIC of C O'Brien at section 8

largely surrounded by greenfield land can be constrained by enabling urban development nearby.²³

- 4.8 Although existing use rights for present land use in the aircraft noise areas cannot be altered, the revised district plan is a further opportunity to focus on appropriate land use planning provisions for the future. In the inner air noise overlay the plan can prevent more people from being inappropriately exposed to noise, and in the outer air noise overlay, it can ensure that a limited number of people will come to the noise and that if they do, there are controls in place to mitigate the noise.

5. IS THERE AN ENTITLEMENT TO DEVELOPMENT OPPORTUNITIES?

- 5.1 In the determination of a proposed plan the proceedings are in the nature of an enquiry to ascertain the extent to which land use controls are necessary, whether the controls are the most appropriate approach and to ensure that the controls achieve the objectives and policies of the plan.²⁴
- 5.2 The proposition by other submitters and the Council is that owners of residential land within the ANB are entitled to or should be “grandparented” existing, yet unfulfilled development opportunities for use of that land.²⁵
- 5.3 In response to this, it is submitted that it is a long-standing principle of planning law that existing private property rights may be diminished or affected by environmental regulation. The RMA enables constraints to be placed on the existing rights of private landowners to advance the greater good of the community and the environment.²⁶ The question is not whether such regulation can be imposed but whether it should be imposed having regard to the greater good of the community and the environment.

²³ *Neil Construction Ltd v Auckland Council* [2019] NZEnvC 154. Refer also to the Rebuttal Evidence of D Humpheson at 5.7

²⁴ *Kerr Trusts v Whangarei District Council* [2004] NZEnvC A060/04 at [15]

²⁵ For example, EIC B Ligget at 3.3(b)

²⁶ Berry J, Vella J. RMLA Property Rights Roadshow 2010, Planning controls and property rights – striking the balance. July 2010

5.4 In the landmark Falkner case the High Court held that the concept of sustainable management takes priority over private property rights.²⁷ Following this line of argument the Environment Court, in the *New Zealand Suncern Construction Ltd v Auckland City Council* case said:²⁸

“It is inherent in the nature of district plans that they impose some restraint, without compensation, on the freedom to use and develop land as the owners and occupiers might prefer.”

5.5 That is not to say that planning law does not continue to recognise that there may be situations where plan provisions may be onerous. As such section 85 of the RMA, instead of providing for compensation, provides a remedy for landowners to challenge plan provisions through a submission on a plan, where they consider that the provisions of the plan would render their land incapable of reasonable use. The argument by applicants under a section 85 claim would need to establish that, for example, the aircraft noise overlay provisions made their land incapable of reasonable use. In this regard case law has established that "reasonable use is not synonymous with optimum financial return", and that "a landowner's wish to use the land in a way that maximises its value [does not] make that use alone reasonable, and others unreasonable".²⁹ I am not aware of any submitters having made an application under section 85, and in my submission no such claim would be successful given the proposed WIAL amendments to the plan do not limit existing uses or prevent development on a vacant site.³⁰

5.6 Further, unlike at other airports where new development is prohibited in the inner air noise overlay, the WIAL proposal is for a restricted discretionary activity status for two or more residential units and/or any other noise sensitive activity within the Medium Density Residential,

²⁷ *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at p632, [1995] NZRMA 462 "The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources".

²⁸ [1996] NZRMA 411 at p24 (appeal dismissed in the High Court: [1997] NZRMA 419)

²⁹ *Fore World Developments Ltd v Napier CC* [2006] NZEnvC W029/06 at paras 122 and 125.

³⁰ Under section 9 and 10 of the RMA existing activities are allowed to continue in breach of a plan in certain circumstances, including where the use has been lawfully established before the rule became operative or the proposed plan was notified; and where the effects of the use are the same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified.

Local Centre and Neighbourhood Zones subject to the Air Noise Overlay.³¹

- 5.7 To allow for intensification of sites within the air noise overlay as a permitted activity, on the basis that a development opportunity to intensify currently exists, could result in the very reverse sensitivity effects that the location of the air noise overlay is designed to manage.

6. AFFECTED PARTY STATUS

- 6.1 WIAL (406), supported by BARNZ, requested a new provision to specify that, as the airport operator, it should be considered an affected party for all consent applications for noise sensitive activities within the Air Noise Overlay.

- 6.2 The s42A report recommends accepting this submission in relation to the Inner Noise Overlay but considers that affected party notification in the Outer Noise Overlay (in total covering 1,778 current sites) is an unnecessary requirement given the effectiveness of acoustic insulation and ventilation standards.³² This position overlooks the inability to mitigate adverse effects on outdoor amenity and the provisions of the NZS which require a land use planning approach which includes restricting the numbers of people exposed to aircraft noise.³³

- 6.3 The evidence of Ms O'Brien attests to situations where planners have omitted to consider reverse sensitivity effects on an airport when determining whether to notify an application.³⁴ It is submitted that it is important in achieving integrated management to ensure that a case-by-case assessment does not inadvertently overlook airport considerations, and that there is more to gain than lose by incorporating a clear and specific requirement. Some of the matters

³¹ with four matters of discretion specifically targeted at avoiding or minimising reverse sensitivity effects on Wellington International Airport.

³² Page 48

³³ EIC C O'Brien at 7.8

³⁴ Ibid 8.9(f) and 9.2

the airport may consider are traversed in the evidence of Mr Humpheson,³⁵ while the process is described by Ms Lester.³⁶

7. CONCLUSION

- 7.1 As established by Ms O'Brien, Ms O'Sullivan, Mr Humpheson and Ms Lester, reverse sensitivity effects are real and may have potentially significant long-term implications for airports, and the wider community. In this case the development expectations of a few must be weighed against the wider expectations of the community which relies on airports as significant infrastructure for their social and economic well-being. Put simply, there is no entitlement to realise development potential of a property, or for a particular activity status.
- 7.2 BARNZ considers that the review of the District Plan is an opportunity to better align the plan provisions with other plans and NZS:6805, though it supports WIAL's modified approach in recognition of the historic development of Wellington Airport.
- 7.3 Overall, responsible and sound decision-making requires the prudent safeguarding of the Airport for present and future New Zealanders to ensure that it can serve the existing and future needs of the city and wider region.

Gill Chappell

Counsel for BARNZ

³⁵ At 6.13-6.16

³⁶ EIC J Lester at 5.29