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")**

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

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MAY IT PLEASE THE COMMISSIONERS

These speaking notes briefly respond to the key points raised in the legal submissions for Kainga Ora ("KO") and include reference to additional case law.

NZS 6805

- The guiding document developed over many years
- It specifically addresses airport noise and land use in its proximity.
- Designed to guide councils in a consistent way so that there was not always a need to "reinvent the wheel".
- But - the context of each airport should be taken into account.
- This is acknowledged by WIAL and BARNZ – eg dwellings are not proposed to be prohibited in the Inner airport overlay.
- It is regularly reviewed
- It has stood the test of time.
- The Officer's recommendations refer to NZS6805 as support for rejecting those submissions seeking stronger controls on the airport.[1]

With reference to Policy 8

- KO says intensification is not an incompatible land use, though this is contrary to what NZS says.
- It says that not being able to intensify is a significant restriction on private property and that requiring consent as an RDA is a strong discouragement.
- BARNZ legal submissions address the long standing principle of planning law that existing private property rights may be diminished by regulation.
- It is noted that an RD status applies to many residential provisions – eg where there is historic heritage etc.

Reverse sensitivity – burden of proof and actual vs potential effects

- It is clear from the case law and definition of reverse sensitivity in the RPS that it is a potential and future effect.

[1] Eg see Submission 319.15

- The High Court in the RJ Davidson case notes difficulties in addressing potential / future effects. It addressed the issue of standard of proof needed to demonstrate a potential future risk.

> [118]… the future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof.

- The Court noted that there is no standard approach to what the level of risk needs to be proven, although it definitely does not need to be proven to the civil standard of "the balance of probabilities"[2]:

> "[129] Determining actual effects on the environment is relatively straightforward, because it concerns existing factual circumstances that can be proved on the balance of probabilities. However, the authority must also take into account the potential effects on the environment. The word "potential" denotes something other than proof, and cannot be assessed on the balance of probabilities. Instead, it was appropriate to assess risks that carry less than a 50 percent chance of eventuating. In particular, the risk of species extinction is much less than 50 percent and it cannot be proved that extinction is more likely than not to occur. Instead, it is appropriate to assess existing facts on the balance of probabilities, and consider whether any particular evidence is proved to that standard. The assessment of potential effects then depends on an evaluation of all of the evidence but does not depend on proving that potential effect will more likely than not occur."

- Cited with approval by the High Court in Clearwater Mussels[3].
- The appropriate standard for asserting a fact is the balance of probabilities, but the basic minimum required for the hypothesis of a high impact risk to be taken into account is "a scintilla" (a tiny spark) of evidence to support it.[4] This not the "high hurdle" referred to by KO.

Health effects and reverse sensitivity effects

- Where there are health effects (eg annoyance associated with noise), this is likely to result in complaints, which may translate into constraints on the airport.

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[2] *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.
[3] *Clearwater Mussels Ltd v Marlborough District Council* [2019] NZHC 961.
[4] *Shirley Primary School v Telecom Mobile Communications Ltd* (EC) C 136/98 at [142, applied by the High Court in *Ngati Maru Iwi Authority v Auckland City Council* (HC), AP 18/02 at [68].

Evidential basis for RS

- Some of BARNZ's examples may be strictly speaking about conflicts of use, but they are illustrative of the sorts of conflicts that arise in relation to airports and proximate uses within the air noise boundaries.
- Evidence shows airports – and by corollary, airlines – can and do have constraints imposed on them as a result of pressure from the community.
- For example, at Wellington Airport which was built in 1959, it was international jets arriving in the late evening from Australia and early departures that led to the current curfew introduced through the 1994 plan process.
- These hearings themselves provide evidence of reverse sensitivity effects through those submitters who seek stronger noise restrictions on aircraft and limits on the numbers of flights.[5]
- That is not to say that the communities' participation in the planning process is unreasonable, simply that communities will continue to make demands representing their own interests.
- The question for the panel is what is the most appropriate way to achieve the purpose of the Act.

Changing amenity vs well-functioning environments

- The NPSUD acknowledges that previous concepts of amenity will need to change in our future, intensified cities.
- However, the first objective of the NPSUD is that NZ has "well-functioning urban environment that enable all people and communities to provide for their social, economic, and cultural well-being, and for their health and safety, now and into the future." Planning decisions must contribute to well-functioning urban environments, not detract from them.[6]
- The NPSUD also recognises that amenity values for some may decrease, while increasing for others.

[5] Eg see Submission 319.15. Also see the various resident association submissions.
[6] Policy 1

Cases referred to by Kainga Ora

- The SWAP case:[7] an interim decision of the Environment Court. It did not refer to "equity" as between the port and surrounding users, but as between a multitude of different types of polluters all contributing to the poor air quality in the airshed and how their responsibilities should be collectively managed.
- The Whenuapai Decision:[8] the context of that case was that the applicants owned land in the vicinity of the airport which it wanted to develop for residential purposes and had lodged a submission on the plan seeking the deletion of noise boundaries from its land. The case did concern a declaration in relation to the designation but was borne out of the desire for residential development within the noise boundaries that the developer wished to overturn.

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[7] Swap Stockfoods v Bay of Plenty Regional Council [2023] EnvC 1
[8] *Neil Construction Ltd v Auckland Council*, [2019] NZEnvC 154, [2020] NZRMA 134, 2019 WL 4686479