

Before the Independent Hearings Panel

In the Matter of the Resource Management Act 1991

And

In the Matter of the Proposed Natural Resources Plan for the Greater
Wellington Region

And

In the Matter of Hearing Stream 1

Legal Submissions for Wellington International Airport Limited [Submitter Number 282 and Further Submitter Number 69]

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INTRODUCTION

1. These legal submissions are presented on behalf of Wellington International Airport Limited (**WIAL**).
2. WIAL lodged a submission on the Proposed Natural Resources Plan (**Proposed Plan**) with the Greater Wellington Regional Council (**Council**) on 25 September 2015 (Submission Number 282) and a further submission (Further Submission Number 69) on 29 March 2016 (**Submissions**).
3. These legal submissions address matters raised in WIAL's Submissions relevant to Hearing Stream 1 - Overall Policy Framework and Beneficial Use and Development.
4. Planning evidence will be presented in support of WIAL's Submissions by Mr John Kyle of Mitchell Daysh.

WELLINGTON INTERNATIONAL AIRPORT OPERATIONS

5. Wellington International Airport Limited operates Wellington International Airport (**Airport**).
6. The role of the Airport in the Wellington Region and the impact it has on the region's economy is discussed in detail by Mr Kyle in his evidence.¹
7. In summary it is critical that the Airport's operations and for that matter other regionally significant infrastructure (**RSI**) in the Region are appropriately recognised and provided for in the Proposed Plan given they largely responsible for the social and economic wellbeing as well as the health and safety of the community.

STATUTORY FRAMEWORK

8. As the Independent Hearings Panel (**Panel**) has already received legal submissions on the statutory requirements associated with a regional plan review² I do not propose to repeat these here.

¹ Evidence of John Kyle – Hearing Stream 1, 5 May 2017 at [2.1]-[3.9]

² Legal submissions on behalf of Wellington Regional Council: Hearing Stream 1, 20 April 2017

9. However I do briefly address recent case law developments that relate to the Panel's consideration of higher order planning documents and the application of Part 2 of the Resource Management Act 1991 (**Act**) in respect of the Proposed Plan.
10. As the Panel will no doubt be aware the release of the Supreme Court's decision in *King Salmon*³ has altered the considerations to be undertaken in accordance with section 32 of the Act when a higher order planning document is required to be given effect to in a lower order planning document.
11. The Supreme Court has determined this is a mandatory requirement and it is inappropriate to refer to Part 2 when giving effect to a higher order planning document. It held there are four situations where Part 2 can be referred to when implementing higher order planning documents:
 - (a) in the case of a true conflict between provisions;
 - (b) in the case of invalidity;
 - (c) where there is incomplete coverage; or
 - (d) when there is uncertainty as to meaning.
12. Relevant to the Panel's considerations of the Proposed Plan is that the Regional Policy Statement for the Wellington Region (**RPS**) may not give effect to the New Zealand Coastal Policy Statement 2010 which came into effect on 3 December 2010 (**NZCPS**). This is because the RPS was developed prior to the NZCPS coming into effect and although the RPS did not become operative until 24 April 2013, the Council's decision on the RPS was publicly notified on 22 May 2010 and was subject to appeals.
13. The High Court has opined that if a higher level document is promulgated after a relevant plan is made operative, in this case the RPS, there can be a deficiency as identified by the Supreme Court and reference to Part 2 of the Act may be appropriate.⁴

³ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38

⁴ *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 as discussed in *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 139

14. As you are aware the Proposed Plan must give effect to both the NZCPS and the RPS. In my submission, where these two planning documents differ in respect of the coastal environment the NZCPS must take priority as a regional policy statement must give effect to a NZCPS.
15. The High Court⁵ recently noted *King Salmon* does not suggest that Part 2 is an irrelevant consideration where decision-makers have a choice as to which provisions are more appropriate when there is no constraint by a higher order planning document. In that case the High Court was considering a plan change to the Far North District Plan and the appeal involved consideration of amendments to rules and whether these amendments were the most appropriate method to implement the policies of the plan change.
16. In that case there was no relevant constraint in a higher order planning document the Council was required to give effect to and the Court considered the “*Supreme Court did not suggest that Part 2 would be an irrelevant consideration in such a case as the present where decision-makers have a choice.*”⁶ The High Court held the objectives and policies left considerable room for choice as to the methods or rules most appropriate to implement them and considered it would be extraordinary to suggest a decision maker should disregard the purpose and principles of the Act when considering that choice.

THE PROPOSED PLAN – WIAL’S SUBMISSIONS

17. Overall WIAL supports the consolidation of land, water and coastal activities into the Proposed Plan as it will enable a more cohesive approach for the Council to perform its functions under section 30 of the Act.
18. However WIAL seeks some amendments to specific provisions and rules to ensure consistency throughout the Proposed Plan, to prevent inconsistencies and duplication between these rules and better meet the higher order documents and/or the purpose of the Act. Most of these submissions will be addressed in later hearing streams.

⁵ *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764 at [46]

⁶ *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764 at [46]

19. The particular matters WIAL seeks to be addressed in Hearing Stream 1 relate to:
- (a) amendments to Objectives O9 and O10;
 - (b) a new objective to provide for the development and growth of regionally significant infrastructure; and
 - (c) Policy P4 and the use of the term 'minimisation'.
20. For completeness, I record the Officer Report rejects all of the relief sought by WIAL.

BENEFICIAL USE AND DEVELOPMENT

21. WIAL seeks a more balanced approach towards the development of RSI in the Proposed Plan.
22. In particular it seeks:
- (a) a new objective be included in the Proposed Plan that provides for the development of regionally significant infrastructure; and
 - (b) amendments to both Objectives O9 and O10 which address beneficial use and development in the context of recreational values and public access to the coastal marine area, rivers and lakes.

Development of Regionally Significant Infrastructure

23. In order to ensure the Proposed Plan properly acknowledges the importance of RSI to the Region and addresses not only their continuation but their potential development, WIAL seeks the introduction of the following objective:

"Provide for and enable the development and growth of regionally significant infrastructure."

24. In addition Mr Kyle considers Objectives O12⁷ and O13⁸ do not go far enough as they do not recognise the benefits of regionally significant

⁷ Objective O12 – the social, economic, cultural and environmental benefits of regionally significant infrastructure and renewable energy generation activities are recognised.

infrastructure only come to fruition if the Proposed Plan explicitly provides for the development, operation, maintenance and upgrading of new and existing RSI activities.⁹ WIAL proposes amendments to both Objectives O12 and O13 to address this concern. This approach has been supported by a number of submitters including PowerCo Ltd¹⁰ and the Oil Companies.¹¹

25. In my submission, it is more appropriate for a new objective to be included within the Proposed Plan to ensure:
- (a) the potential future development of RSI, such as the Airport, can be provided for in appropriate circumstances; and
 - (b) an origin for the policies that provide for RSI in the Proposed Plan; and
 - (c) better alignment with Objective 4 and Policy 6 of the NZCPS.
26. The relief sought by WIAL and others relief is even more appropriate now that the objectives and policies of a planning document have assumed a greater role following the High Court's¹² confirmation that *King Salmon* applies to resource consent applications.
27. In practice, this means once the Proposed Plan becomes operative when considering an application for resource consent a decision-maker cannot go beyond the objectives and policies and refer to Part 2 unless one of the Supreme Court exceptions applies. Accordingly the importance of ensuring the objectives and policies appropriately provide for the continued use and development of RSI cannot be understated.
28. I am aware that other RSI providers have suggested alternatives for a new objective and amendments to O12 and O13. WIAL is happy to liaise with them to see whether a consensus can be reached if that would assist the Panel.

⁸ Objective O13 – the use and ongoing operation of regionally significant infrastructure and renewable energy generation activities in the coastal marine area are protected from new incompatible use and development occurring under, over, or adjacent to such infrastructure of activity.

⁹ Evidence of John Kyle – Hearing Stream 1, 5 May 2017 at [8.4]

¹⁰ Further submission FS56

¹¹ Further submission FS57

¹² *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52

Recreational Values and Public Access

29. WIAL supports (in part) the objectives to achieve better alignment with the New Zealand Coastal Policy Statement 2010 regarding maintenance and enhancement of recreational values and public access to the coastal marine area, rivers and lakes.

Objective O9 - Recreational Values

30. WIAL seeks amendments to Objective O9 to recognise that enhancement of recreational values may not be attainable in all circumstances.
31. Objective O9 is drafted bluntly and does not give effect to the NZCPS where the articulation of the objective is more balanced.
32. Mr Kyle considers the term 'values' in Objective O9 should also be replaced with 'opportunities' to better align with the NZCPS. WIAL considers this amendment is more appropriate than the currently worded Objective O9 as it *"may enable adverse effects on recreational activities to be mitigated through the development of alternative opportunities"*¹³
33. In my submission Objective O9 has the potential to unnecessarily constrain appropriate development in the CMA (including the Airport) that cannot maintain and enhance recreational values. Accordingly, the relief sought by WIAL is more appropriate as it would not potentially stymie an appropriate development that could provide other recreational opportunities in the vicinity but not maintain and enhance recreational opportunities at the development site.

Objective O10 - Public Access

34. WIAL seeks an amendment to Objective O10 to recognise that activities may not be able to maintain and enhance public access to and along the coastal marine area, rivers and lakes in all circumstances. As an example it may not be appropriate to provide public access for health and safety reasons.
35. WIAL proposes the inclusion of the following wording at the end of Objective O10:

¹³ Submission of WIAL on Proposed Natural Resources Plan for the Wellington Region, 25 September 2015, Annexure A, Page 9.

“except where it is appropriate and necessary to impose a restriction.”

36. In my submission while Policy P9 provides for public access restrictions it is more appropriate for these restrictions to originate from and be provided for in the objectives.
37. The Proposed Plan supports this approach as it states *“the policies are the course of action intended to achieve the objectives.”*¹⁴ If the Objective does not state exceptions can apply to then arguably Policy P9 is not appropriate as it cannot ensure the achievement of Objective O10.
38. Mr Kyle considers WIAL’s proposed amendment will *“improve the structural coherence of the Proposed Plan and gives effect to the higher order NZCPS and RPS provisions, which both recognise that there may be reasons which mean it is not appropriate to maintain public access.”*¹⁵

POLICY P4 MINIMISATION OF ADVERSE EFFECTS

39. Policy P4 of the Proposed Plan provides:

“When minimisation of adverse effects is required by policies in the Plan, minimisation means reducing adverse effects of the activities to the smallest amount practicable and shall include:...”

40. WIAL seeks the deletion of Policy P4 and the removal of the term ‘minimise’¹⁶ from the rest of the Proposed Plan as it considers it is generally inappropriate.
41. The role of a policy as discussed above is to achieve the objectives. A policy *“may be either flexible or inflexible, broad or narrow”*¹⁷ but should not go beyond what is being sought by the objective.

¹⁴ Proposed Natural Resources Plan for the Wellington Region, Chapter 2 – Interpretation at [2.12]

¹⁵ Evidence of John Kyle – Hearing Stream 1, 5 May 2017 at [9.7]

¹⁶ Legal submissions on behalf of Greater Wellington Regional Council: Hearing Stream 1, 20 April 2017 at [91] adopt the definition of minimise from the New Zealand Oxford Dictionary as follows: *“to minimise is to reduce (something, especially something undesirable) to the smallest possible amount or degree.”*

¹⁷ *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, [1995] NZRMA 424 (CA) and *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380

42. In my submission the general objectives from which Policy P4 stem have not been drafted with 'minimisation' of adverse effects in mind, and accordingly no foundation is provided for Policy P4 in the Proposed Plan.
43. Despite the Council's best intentions WIAL considers "*Policy P4 establishes a regime which is much more directive and narrow*"¹⁸ than the statutory test provided in the Act. This is because Policy P4 broadly applies to a number of circumstances in the Proposed Plan but does not provide any flexibility in how adverse effects are to be managed other than the limited criteria specified in Policy P4 for 'minimisation'.
44. WIAL's concern is:

*"The available known means might be a requirement to install state of the art mitigation technology, to use an alternative location, or adopt an alternative design, or any or all of these methods, regardless of the sensitivity of the values impacted by a given proposal, without consideration of the costs associated with the known means or the benefits that would otherwise derive from the project."*¹⁹

45. In my submission WIAL's relief is more appropriate than retaining Policy P4 as the use of statutory phrase to avoid, remedy or mitigate adverse effects on the environment²⁰ provides a more flexible cascading approach to ensure adverse effects are addressed based on the scale of effects following a full consideration of a proposal.

Use of 'minimise' in higher order planning documents

46. The Officer Report justifies the use of the term 'minimise' in the Proposed Plan on the basis that it appears in higher order planning documents such as the NZCPS, National Policy Statement for Freshwater Management and the RPS.
47. Mr Kyle considers the policies which refer to the term 'minimise' in these higher order planning documents relate to specific effects in certain environments.²¹ For example: Policy 23(1)(f) of the NZCPS requires:

¹⁸ Evidence of John Kyle – Hearing Stream 1, 5 May 2017 at [7.15]

¹⁹ Evidence of John Kyle – Hearing Stream 1, 5 May 2017 at [7.20]

²⁰ Section 5(2)(c) of the Resource Management Act 1991

²¹ Evidence of John Kyle – Hearing Stream 1, 5 May 2017 at [7.11] and [7.13]

"In managing discharges to water in the coastal environment, have particular regard to:...

(f) minimise adverse effects on the life supporting capacity of water within a mixing zone,"

as one of a number of matters to consider.

48. In my submission this is quite different to Policy P4 which broadly applies to adverse effects that do not require avoidance to give effect to the higher order planning documents. In my submission these documents can still be given effect to using different terminology, such as the 'avoid, remedy or mitigate' cascade provided by the Act.

Consistent decision-making

49. The Officer Report describes how the Proposed Plan contains two objectives and 40 policies which require a user of the Proposed Plan to refer to Policy P4 for guidance on how to minimise adverse effects to assist the Council in making consistent decisions.
50. With respect, in my submission, there are other resources and methods, including higher order planning documents that provide sufficient policy direction to decision-makers under the Act. This is what should guide consistent decision-making not the number of times the term 'minimise' appears in the Proposed Plan.

Suggested alternative relief

51. If the Panel is not minded to delete Policy P4, in my submission, it should amend the Policy to better state what 'minimisation' means in the context of the relevant policies.
52. As Mr Kyle has stated WIAL has concerns the Court of Appeal's consideration of the word 'practicable' does not allow the decision-maker to consider the costs of implementing certain measures.²²
53. The Environment Court has also considered the meaning of the word 'practicable' and acknowledged the Act's definition of 'best practicable

²² *New Zealand Airline Pilots Association v Director of Civil Aviation* [2017] NZCA 27

option' is helpful to understand what "*practicable*" may mean in the context of the Act and how the practicability of an option should be analysed.²³

54. The Court considered:

*"Practicable has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible," being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience."*²⁴

55. The Officer Report suggests that 'smallest amount practicable' in conjunction with consideration of the matters listed in Policy P4 actually means a reduction of the adverse effects to the "*smallest amount reasonably practicable*." The Officer considers Policy P4 does not need to be amended to expressly refer to 'smallest amount reasonably practicable' as this can be inferred from the list of considerations provided in the Policy.

56. In my submission a user of the Proposed Plan should not have to read in words to Policy P4 to understand the Council's intention.

57. Further the Supreme Court²⁵ considers the language used to express policies does matter. This requires careful drafting to ensure that objectives and policies say what they mean and is especially so when a term or phrase is used frequently in differing circumstances or concerning different resources.

58. It is evident there are differing opinions by our Courts as to what is meant by 'practicable'. Therefore, if the Council's intention is to reduce adverse effects to the 'smallest amount reasonably practicable' and this is to include other matters such as a consideration of costs then the Policy should clearly state this. The Environment Court has endorsed the definition of 'best practicable option' and in my submission the matters to have regard to in that definition can be usefully incorporated into Policy.

²³ *Royal Forest & Bird Protection Society of New Zealand Incorporated v Whakatane District Council* [2017] NZEnvC 051 at [47]

²⁴ *Royal Forest & Bird Protection Society of New Zealand Incorporated v Whakatane District Council* [2017] NZEnvC 051 at [51]

²⁵ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [128]

59. Given WIAL's submission sought the deletion of Policy P4 and the removal of the term 'minimise' from the Proposed Plan any lesser relief is clearly within the scope of its Submissions.
60. Accordingly, WIAL suggests the following lesser relief²⁶ if the Panel is not minded to delete Policy P4 and remove the term 'minimise' from the Proposed Plan (additions underlined and deletions ~~struck through~~) as follows:

Policy P4: Minimising adverse effects

Where minimisation of adverse effects is required by policies in the Plan, minimisation means reducing adverse effects of the activity to the smallest amount reasonably practicable and shall include:

- (a) the sensitivity of the receiving environment to adverse effects, and
- (b) *consideration of alternative locations and methods for undertaking the activity that would have less adverse effects, and*
- (c) the financial implications, and the effects on the environment, of that option when compared with other options, and
- (d) the current state of technical knowledge and the likelihood that the option can be successfully applied, and
- ~~(e) *locating the activity away from areas identified in Schedule A (outstanding water bodies), Schedule C (mana whenua), Schedule E (historic heritage), Schedule F (indigenous biodiversity), and*~~
- (f) *timing the activity, or the adverse effects of the activity, to avoid times of the year where adverse effects may be more severe, or times when receiving environments are more sensitive to adverse effects, and*
- (g) *using **good management practices** for reducing the adverse effects of the activity, and*
- (h) *designing the activity so that the scale or footprint of the activity is as small as practicable*
- (i) accounting for the benefits that accrue from the project or work

²⁶ But without prejudice to WIAL original relief

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