

**IN THE ENVIRONMENT COURT
AT WELLINGTON**

**I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA**

Decision No. [2021] NZEnvC 201

IN THE MATTER OF

appeals under s 174 of the Resource
Management Act 1991

BETWEEN

GUARDIANS OF THE BAY INC

(ENV-2021-WLG-000035 & 37)

INTERNATIONAL CLIMATE-SAFE
TRAVEL INSTITUTE

(ENV-2021-WLG-0000036)

Appellants

AND

WELLINGTON INTERNATIONAL
AIRPORT LIMITED

Respondent

Court: Environment Judge B P Dwyer sitting alone under s 279 of the
Act

Hearing: In chambers at Wellington (on the papers)
Last case event: Submissions in reply received on 15 November 2021

Date of Decision: 23 December 2021

Date of Issue: 23 December 2021

DECISION OF THE ENVIRONMENT COURT

A: Application by WIAL to strike out the part of appeal ENV-2021-WLG-000036 which relates to the Main Site Area Notice of Requirement decision is granted.

B: Application for waiver by Guardians of the Bay Inc for late lodgement of appeal ENV-2021-WLG-000037 is granted.

GUARDIANS OF THE BAY INC v WELLINGTON INTERNATIONAL AIRPORT
LTD



C: Costs reserved.

REASONS

Introduction

[1] The International Climate-Safe Travel Institute (the Institute) appealed a decision of Wellington International Airport Ltd (WIAL) to confirm Wellington City Council's (the Council's) recommendations in relation to two Notices of Requirement (NORs) for designations over areas at or in the vicinity of Wellington Airport described as "the Main Site Area" and "East Side Area".

[2] WIAL has applied to:

Strike out part of an appeal by the **International Climate-Safe Travel Institute (ICSTI)** (ENV-2021-WLG-36), in particular that part which relates to the Main Site Area Notice of Requirement decision (**MSA Decision**) by the Applicant (the Respondent in the appeal proceeding and related appeals).

[3] WIAL says that the Institute was not a submitter on the Main Site Area NOR and therefore it does not have standing to appeal the Main Site Area decision. In these circumstances WIAL submits that it would be legally frivolous and/ or an abuse of the Court's process for that part of the appeal to stand.

[4] The Institute replies that it is incorrect to say that its submission did not relate to the Main Site Area. It was interested in both NORs.

[5] Guardians of the Bay Inc (Guardians) lodged an appeal (in time) on WIAL's NOR for the East Side Area.¹ It lodged a second appeal, relating to WIAL's NOR for the Main Site Area about six days late. It applies for a waiver of time to lodge that appeal. WIAL does not oppose the waiver application and accepts there is a little

¹ Appeal number ENV-2021-WLG-000035.

prejudice. However, if its application to strike out part of the Institute's appeal is unsuccessful it considers the Court should not grant Guardians' waiver application.

[6] I will deal with the strike out application first, and then consider Guardians' application for waiver.

The strike-out application

WIAL's evidence

[7] WIAL lodged an affidavit of Joanne Maree Lester (WIAL's Planning Manager) in support of its application for strike out. Ms Lester explained that on 5 December 2019 WIAL gave notice to the Council of its first requirement for a designation over its existing landholding for airport purposes. This is the Main Site Area NOR.

[8] On 25 February 2020 WIAL gave notice to the Council of its second requirement for a designation for airport purposes, the majority of which was over the southern half of the Miramar Golf Course. This is the East Side Area NOR.

[9] Further information requests from the Council and discussion between WIAL and the Council concerning notification of the NORs followed. Both NORs were publicly notified on 10 December 2020 but each had a separate public notice. Ms Lester says that each of these public notices was clear in its description as to what NOR it related to and each had its own reference number and separate site descriptions, including a map showing the extent of the respective NOR boundaries. Ms Lester explained that the Council's webpage devoted to the NORs also separated each NOR with accompanying documents. In her opinion it was very clear there were two NORs.

[10] Ms Lester deposed that the Institute's submission did not follow the relevant statutory form but rather was set out like a brief of evidence or statement and included a formal heading that specifically referred to the Council's reference number for the East Side Area's NOR, namely SR 462159. The description of the NOR (including an address) was a direct copy of the description from the East Side Area NOR public notice.

[11] Ms Lester said that the Institute submission referred to the “NOR”, “application” or “proposal” (in the singular) and there were references to the “growth of the airport”, “extended area”, “an extension the airport” and “expansion of the airport”. Unlike the East Side Area NOR, the Main Site Area NOR is not an expansion of the airport.

[12] Ms Lester deposed that the submission also referred to the removal of the golf course and the golf course zone. The Main Site Area NOR does not relate to the golf course precinct zone but rather the existing airport precinct zone.

[13] Ms Lester opined that from her reading of the submission there is only one indirect reference to the Main Site Area NOR site – which refers to the height of buildings in the Terminal Precinct and also includes reference to “the proposed wall”. Whilst the Terminal Precinct is in the Main Site Area NOR, a retaining wall is proposed as part of the East Side Area NOR.

[14] Both NORs were heard together. Ms Lester considered that in their questioning of submitters the hearing commissioners did not appear to differentiate whether a particular submitter made their submissions on a particular NOR or both. Ms Lester said that the Institute’s presentation included references to “this designation” and the specific area of the East Side Area NOR.

The Institute’s evidence

[15] The Institute lodged an affidavit from Christopher Guy Watson in support of its opposition to the strike out. Mr Watson is an architect by profession and is the co-convenor of the Institute. He was involved in preparation of the Institute’s submission. Mr Watson deposed that the Institute’s main focus was the proposed expansion into the eastern area but that the Institute was also concerned about airport operations generally and that it was very unclear how the existing airport was being dealt with by the designations and the relationship between them. Mr Watson contended that the NORs overlapped and that trying to marry the notices to the details of the designations was confusing. The locations given were also confusing.

[16] Mr Watson contended that the Institute’s reference in its submission to “height

of buildings in the Terminal precinct ... including the proposed wall” was central to its submission. He said that this was in reference to height changes to the existing buildings and was not a “slip”.

Discussion

[17] WIAL applies under s 279(4) RMA for a partial strike-out of the appeal insofar as it purports to be an appeal against the Main Site Area NOR. WIAL refers to *Federated Farmers of New Zealand Inc v Queenstown Lakes District Council* in which case the Court held that:²

The discretion to strike out a proceeding under s279(4) is generally used sparingly. However, where there is an issue that concerns a want of jurisdiction to bring an appeal, the discretionary element falls away. As the court said in *Federated Farmers (Wairarapa Division) v Wellington Regional Council*,³ “... if those [jurisdictional] boundaries are exceeded ... then there is no discretion to be exercised “sparingly”. The case must simply be struck out as legally frivolous or vexatious.”

[18] I concur with that statement. The jurisdictional question in this case revolves around whether or not the Institute’s submission was “about”⁴ or “on”⁵ the Main Site Area NOR such as to found an appeal under s 174 RMA:

174 Appeals

- (1) Any 1 or more of the following persons may appeal to the Environment Court in accordance with this section against the whole or any part of a decision of a requiring authority under section 172:
 - (a) the territorial authority concerned;
 - (b) any person who made a submission on the requirement.

[19] The Council’s public notice for the NOR for the Main Site Area begins:

Public Notice to Requirement for Designation

² *Federated Farmers of New Zealand Inc v Queenstown Lakes District Council* [2018] NZEnvC 145 at [5].

³ *Federated Farmers (Wairarapa Division) v Wellington Regional Council* C 192/99 at [17]. See also *Atkinson v Wellington Regional Council* W 13/99 at [16].

⁴ RMA, s 96.

⁵ RMA, s 174.

Section 169(1A), Resource Management Act 1991

Wellington City Council has received notice of a requirement for a designation from Wellington International Airport Limited (**Requiring Authority**) under Section 168 of the Resource Management Act 1991.

Site Address: Approximately 28 Stewart Duff Drive, Rongotai, (**Main Site Area**) the location shown in Figure 1 below.

Type of activity: Notice of Requirement for new designated land for Airport Purposes).

Description of proposal: The Notice of Requirement is sought by Wellington International Airport Limited to establish a more efficient and flexible planning framework to enable existing and future airport activities and development within the Airport's existing land holdings (including the Requiring Authority's leased or other land interests). The designation is primarily over the area of land that is already zoned as Airport Precinct in the District Plan.

Service request number: 455891



Figure 1: Extent of proposed Airport Purposes Designation Boundary.

[20] The Council's public notice for the NOR for the East Side Area begins:

Public Notice of Notice of Requirement for Designation

Section 169(1A), Resource Management Act 1991

The Wellington City Council has received notice of a requirement for a designation from Wellington International Airport Limited (**Requiring Authority**) under Section 168 of the Resource Management Act 1991.

Site Address:	Approximately 1 Stewart Duff Drive, the majority of which is the Southern Portion (15.6 ha) of the existing Miramar Golf Course (East Side Area). The location shown in Figure 1 below
Type of activity:	Notice of Requirement for new designated land for airport purposes
Description of proposal:	The East Side Area Notice of Requirement is sought to designate land to the east of the existing Airport.
Service request number:	462159



Figure 1: Extent of proposed designation over the Miramar Golf Course and adjacent WIAL Land.

[21] The Institute's submission was headed:

To: Wellington City Council

And To: Wellington International Airport Limited

Service Request no: 462159

Concerning Notice of Requirement for new designated land for airport purposes. Approximately 1 Stewart Duff Drive, the majority of which is the Southern Portion (15.6 ha) of the existing Miramar Golf Course (East Side Area).

Submission on Wellington International Airport extension

[22] The Institute argues that the heading of its submission is not decisive and that the contents of the submission must also be taken into account. I accept that as a general proposition a submission should be read as a whole to properly ascertain its subject matter. In my view, when the submission is read as a whole (including its heading and contents), its subject matter could not be clearer. The header contains the following relevant information:

- It says that it is a submission on “**Wellington International Airport extension**” (my emphasis). The extension referred to is the proposal for new designated land to the east of the existing airport, being the East Side Area;
- It refers to the Council's service request number for the East Side Area NOR;
- It gives the land description contained in the East Side Area NOR which describes “new designated land for airport purposes.” (my emphasis) being land outside the existing airport, namely the East Side Area.

It is difficult to see in light of that information, how it can be sensibly contended that the submission was on anything other than just the NOR for the East Side Area.

[23] The Institute's case in that regard revolves around the contents of para [32] of

its submission which refers to the height of buildings in the Terminal precinct (being part of the Main Site Area NOR). However that contention also needs to be considered in context and read in conjunction with para [33] of the submission. These paras provide as follows:

Other effects – amenity

32. The additional 20% height of buildings in the Terminal precinct (30m versus 25m), including the proposed wall, will increase the overall scale of visual effects significantly. This effect would be especially evident to hillside residents east of the Airport.
33. The significant increase in tarmac, which will be seen by thousands of households in the surrounding suburbs, will dramatically and adversely change the perception of the size and impact of the airport to those residents. The current perception of the airport as somewhat contained, with a large green area beside it will be gone. This is not covered in visual assessments.

[24] Para [32] contains a statement of contended fact, namely that there will be an increase of height in terminal buildings (part of the Main Site Area NOR) which will increase the scale of visual effects and be visible to hillside residents to the east of the Airport. The submission does not say whether that increase in height is opposed. It merely records that is to occur. Para [33] then goes onto contend that the significant increase in tarmac (part of the East Side Area NOR) will “dramatically and adversely change the perception of the size and impact of the airport” to residents to the east. When paras [32] and [33] are read together they suggest that the adverse effects of the tarmac extension should be considered in conjunction with the increase in height of terminal buildings which is also to take place.

[25] I acknowledge that there is some (minor) spatial overlap between the two NORs and that might have caused some confusion. I also accept there is a fair amount of repetition in the NORs. Both were notified on the same day. However, it is clear from Mr Watson’s evidence that the Institute was aware of both NORs – he says that while the “main focus” was the expansion into the eastern area, the Institute was interested in both NORs. In light of the matters set out in para [22](above), I do not

consider it to be credible to argue that the submission was on both NORs, notwithstanding the content of para [32]. Whichever NOR the Institute thought it was submitting on, it is the submission itself and what it says rather than what the Institute thought it said or may have intended to say, that is decisive.

[26] The partial strike out application is granted accordingly, on the basis that the Institute was not a submitter on the Main Site Area NOR.

The waiver application

[27] Guardians (which had submitted on the Main Site Area NOR) lodged an appeal against the Main Site NOR about six days late. WIAL acknowledged there was “little” prejudice occasioned by the late filing of the appeal. It appears that Guardians lodged its appeal late because it accepted the Institute’s assertion that it had appeal rights against the Main Site Area NOR and Guardians was content to be a s 274 party to the Institute’s appeal against the Main Site Area (rather than lodge its own appeal). When Guardians discovered that the Institute might not have a right to appeal the Main Site Area NOR it then lodged its own appeal.

[28] If the strike out application was not successful, WIAL considered that the Court should not exercise its discretion to grant the waiver on the basis it would not be in the interests of justice to allow the late appeal in the circumstances where the appeal was deliberately lodged out of time and where another appeal on the same subject matter remained to which Guardians could be a s 274 party. In light of the preceding determination on the partial strike out it is not necessary for the Court to make a determination on that point.

[29] In light of the acknowledged absence of prejudice to WIAL it is appropriate to grant Guardians’ waiver application.

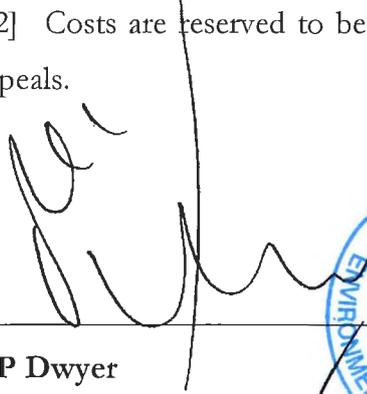
Outcome

[30] The application to strike out that part of the Institute’s appeal which relates to the Main Site Area Notice of Requirement decision is granted.

[31] The application for waiver by Guardians for late lodgement of appeal ENV-

2021-WLG-000037 is granted.

[32] Costs are reserved to be determined (if necessary) at the conclusion of these appeals.



B P Dwyer
Environment Judge

