ENV-2016-WLG-000058

IN THE ENVIRONMENT COURT
WELLINGTON REGISTRY

UNDER	section 274 of the Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	a Notice of Motion under section 87G requesting the granting of resource consents to **WELLINGTON INTERNATIONAL AIRPORT LIMITED** for the Wellington International Airport Extension of Runway: Construction, Operation and Maintenance
BETWEEN	**GUARDIANS OF THE BAYS** and **HUE TE TAKA** Applicants for strike out / section 274 parties
AND	**WELLINGTON INTERNATIONAL AIRPORT LIMITED** Respondent to strike out / applicant for consents

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SYNOPSIS OF SUBMISSIONS IN SUPPORT OF NOTICE OF APPLICATION TO STRIKE OUT

3 DECEMBER 2018

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MAY IT PLEASE THE COURT:

INTRODUCTION

1. Guardians of the Bays Incorporated ("**GotB**") and Hue te Taka ("**HtT**") seek to strike out Wellington International Airport Limited's ("**WIAL**") direct referred consent application as an abuse of process, given WIAL's ongoing failure to pursue its application.

2. Jumpjet Holdings Limited ("**Jumpjet**") has also made an application to strike out WIAL's application. GotB and HtT support Jumpjet's application.

3. GotB and HtT are supported in their action by the Surfbreak Protection Society ("**SPS**"). The Board of Airline Representatives New Zealand Incorporated ("**BARNZ**") and Air New Zealand Limited ("**ANZL**") have also expressed concerns at the continuing delay.

4. In short, it is now an abuse of process for WIAL to:

   (a) continue to seek to maintain its application as "live";

   (b) but fail to pursue it and advance towards hearing; and

   (c) therefore keep the community on tenterhooks and subject to the prejudice of having WIAL's application hanging over their heads;

   (d) while the information provided by WIAL in support of its application becomes increasingly out of date and fails to respond in a holistic way to the changes in circumstances since the information was originally obtained (potentially some five years before WIAL's application will ever be heard).

5. The only fair and just outcome is for the Court to strike out WIAL's application, since WIAL has refused to abandon it.

SECTION 279(4)(c)

6. Section 279(4)(c) of the RMA provides the Court with wide jurisdiction to strike out for abuse of process:

> An Environment Judge sitting alone may, at any stage of the proceeding and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers—
>
> (c) that it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

7. There are no fixed categories or circumstances that amount to "abuse of process".

8. GotB relies on its previous memorandum and submissions (dated 16 March 2018 and 13 April 2018 respectively) filed in advance of WIAL's last request for an adjournment of its proceedings in respect of the legal position in respect of strike out (**attached** to these submissions for convenience). In summary, the legal considerations are:[1]

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[1] *Lovie v Medical Assurance Society of New Zealand Ltd* [1992] NZLR 244; *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475.

(a) whether the delay is "inordinate";

(b) whether the delay is "inexcusable" and/or whether conduct has been "contumelious"; and

(c) the extent of prejudice.

9. In the context of a resource consent application, I would also add the extent to which the information relied on by an applicant has become out of date because of its delays, and the need to update any information in a thorough, integrated way through a fresh application (if a proposal is to be pursued again).

10. No one matter is necessarily determinative, the overall question being whether the interests of justice support a strike-out.

11. At the time of the last adjournment, GotB and HtT were responding to the Court's request for submissions on the relevance of section 279(4)(c); rather than proactively seeking that WIAL's proceeding be stuck out. However, GotB and HtT have now reached the point where they are firmly of the view that WIAL's proceedings are an abuse of process and should be struck out, and have made an application accordingly.

DELAY – INORDINATE AND INEXCUSABLE

Timing

12. WIAL lodged its application on 28 April 2016. It should have had certainty of its approval from the Director of the Civil Aviation Authority ("**CAA**") for a reduced runway safety extension area ("**RESA**") prior to putting the parties to a direct referral process, but it did not.

13. It is now November 2018, **over two and a half years later**. There is still no certainty of CAA's approval.

14. WIAL wants to keep the proceedings for a further update in "mid-March 2019" when it might have a decision from CAA. CAA however puts its decision as more likely to be made in mid-April or mid-May 2019.

15. Even if WIAL is successful in its attempt to obtain CAA's approval to its reduced RESA, and CAA's decision is not challenged – ie, the best-case scenario for WIAL – its application is now not likely to be heard until late 2019. In other words, **some three and a half years since lodgment**.

16. This follows from the Court's previous indication that it will direct a further notification and call for s274 notices, and will allow a "generous time" for section 274 parties to respond to any updated evidence by WIAL in support of its proposal. A possible best-case scenario with that in mind might be:

(a) mid-April 2019 – CAA decision;

(b) early-May 2019 – notification of intention to proceed and call for s274 notices;

(c) end of May 2019 – new s274 parties confirmed;

(d) June 2019 – WIAL evidence;

(e) September 2019 – other parties' evidence (a "generous time" to review, and respond to new and updated WIAL information);

(f) October 2019 – WIAL's reply evidence;

(g) November 2019 – Hearing.

17. If there is a challenge to CAA's decision, or other 'slippage' in the timetable, then the substantive hearing could well be much later.

18. It is hard to say that a delay of some three and a half years from lodgment to hearing is anything other than "inordinate". It is also inexcusable, in the sense that the delays were all foreseeable, and WIAL does not appear to have done all it can to hurry matters along, or support its further application for an extension. WIAL should have waited until it had all necessary CAA authorisations secure. WIAL has filed no evidence in support of its application, which is in itself telling. It also leaves its position to be inferred from the evidence available.

WIAL's approach to further extensions / CAA's process

19. WIAL's previous RESA approval was set aside by the Supreme Court on 21 December 2017. That followed a hearing in August 2017. In other words, WIAL had four months between the hearing and the decision to plan for the contingency that it would no longer have a RESA approval.

20. Notwithstanding this, it took WIAL until the end of February 2018 to decide (or at least indicate[2]) that it would re-apply to CAA for another RESA approval. At that time its stated intention was to apply by "the end of March 2018".

21. As it turns out, WIAL only applied to CAA on 30 April 2018 (ie a month later than it had originally stated).

22. CAA requested further information on 12 June 2018, and WIAL intended to provide that information by "mid-July" 2018[3]. This was only provided to CAA on 8 August 2018.[4] Further information was requested by CAA, and it was apparently only satisfied with the information provided on 17 October 2018.[5]

23. What is apparent is that:

(a) WIAL's original re-application to CAA was not complete, and a number of information requests had to be made by CAA;

(b) WIAL was consistently "late" in providing requested information to CAA (beyond WIAL's stated intentions);

(c) by August, or at least September 2018, WIAL would have had a clear understanding that it would not have CAA approval by 31 October 2018, when its previous adjournment was due to expire;

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2 Memorandum of Counsel for WIAL, 26 February 2018 at [3].
3 Memorandum of Counsel for WIAL, 27 June 2018 at [4].
4 Memorandum of Counsel for WIAL, 29 August 2018 at [3].
5 Memorandum of Counsel for WIAL, 31 October 2018 at [2].

(d) however, WIAL left its request for a further extension to 30 October 2018, just one day before the adjournment was to explore;

(e) WIAL has again provided no evidence in support of its application for an extension. For example:

(i) There is no evidence to explain the delays in providing information to CAA. While CAA's process is separate to the direct referral, the direct referral has been put on hold to allow the CAA process to progress. It is reasonable for the parties to understand why the CAA process has taken so long, and whether WIAL could have advanced it more quickly.

(ii) There is no evidence to explain whether the proposal remains viable, and something that WIAL has a genuine intention to progress if consents are ultimately granted. There is a significant amount of public opposition to the proposal, and previous funding support for WIAL from the Council or government may no longer be assured. While funding matters are largely for the "boardroom table" rather than the Environment Court, in the context of a strike-out, the viability of the proposal in question is a relevant consideration.

24. All of the above supports a finding that the delay, in addition to now being inordinate, is inexcusable. In approaching matters in the way it has, WIAL has failed to excuse its delay. It has certainly not put its best foot forward when asking the Court for a further indulgence.

Wider context – purpose of direct referral: time saving

25. The process for direct referral was introduced as part of the "Simplifying and Streamlining" 2009 reforms. The policy intent was to "save time and cost for both applicants and submitters".[6]

26. In that context, it could not have been envisaged by Parliament when enacting the direct referral process that an applicant could circumvent the statutory timeframes applying at the council-level (which now require an application to be returned to an applicant if not advanced after 120 days, ie just four months), and have the application before the Environment Court for **three years or more** before hearing.

27. If WIAL had asked for a three year wait immediately after making its direct referral to the Court, it would have been declined as an abuse of process. Simply because its application has limped along to this point (at the Court's indulgence), does not make a further adjournment to get to the same three-plus year delay acceptable.

Estoppel / WIAL had a final warning

28. The affidavit evidence of Mr Shanks raises another matter relevant to the exercise of the Court's discretion to refuse a further adjournment and strike out the application. At paragraph [8], Mr Shanks records what his notes

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[6] Refer current MfE guidance: https://www.mfe.govt.nz/sites/default/files/media/RMA/direct-referral-guide-for-applicants.pdf

from the judicial conference of 18 April 2018 stated in respect of WIAL's intention not to make a further application for adjournment:

> ... Dewar for WIAL "This is the final time we will ask for an extension of this application"

29. It has not been possible (yet) to double check the sound recording, or obtain a transcript, but Mr Shanks appears confident of his recollection stating at [9] in respect of the above sentence:

> ... I am confident that the sentence I have emphasized above is accurate, as I recall thinking at the time that is was of some comfort - in that if the extension was granted, it would be the last one that could be sought so we would by this time have certainty as to whether the application was going to proceed, or not.

30. His notes also appear to have been made contemporaneously or put into an email shortly after the judicial conference.

31. Whether or not Ms Dewar spoke those exact words, or, if she did, whether she meant to bind WIAL, may not be determinative, or operate as an effective "estoppel" against WIAL seeking a further adjournment. However, the "gist" of the discussion with the Court, as I recall, suggested that WIAL was already on a fine line because of its delays to that point, and that a subsequent application for a further adjournment would not be favourably received. In other words, WIAL has already had its "final warning".

32. This history is relevant to the Court's exercise of its decision in respect of the current applications to strike-out. It will be no surprise to WIAL that strike-outs have been sought; and, are at serious risk of being granted.

PREJUDICE

33. GotB and HtT have filed two affidavits in support of their application to strike-out, which illustrate the prejudice they and their members – real people, not faceless corporations – have to endure as a consequence of the ongoing delays.

34. Ms Weeber gives evidence as to the emotional burden she has been, and continues to be subject to at [8]:

> For the past two years since writing my submission opposing the WIAL airport extension I have been on a roller coaster waiting to hear when the 'due date' of the Environment Court proceedings would take place. As a full time worker I would have to book time off work to attend any hearing. I would also have to commit time to preparing my own evidence in advance and assimilating a potentially huge new volume of updated information by WIAL, potentially in a short period of time. This has meant delaying holidays, and generally putting major parts of my life on hold each time a new date for the Environment Court proceedings is being considered. While that might sound "extreme", I care passionately about the issues, and would not want to have committed to a holiday or the like if it would mean missing the hearing, or important dates in the lead-up to the hearing.

35. No doubt Ms Weeber is not alone in how the ongoing delays sought by WIAL are affecting her.

36. Dr Rotmann also explains the very real "existential" threat to the Moa Point community, at [9]:

> Directly related to the proposed extension, we have endured:
>
> (a) emotional hardship due to the ongoing existential threat hanging over our heads (for almost 10 years now),
>
> (b) financial hardship due to the inability to invest in or extend our properties for fear the airport will force us to sell,
>
> (c) physical hardship in terms of the health impacts both the continued bullying by the airport, noise and stress has on our lives. Several of the Hue ta Taka members are in their late 70s and 80s and these stresses have taken a very serious toll on them, and their relationships. We have lost several people from the neighbourhood who loved it with all their heart, but who could not endure the continued (financial) threat to their lifestyles.

37. The "existential" threat cannot be underestimated – an entire, unique, community is at risk. Every cut contributes exponentially to its decline.

38. Dr Rotmann goes on to explain more of the personal impacts of the proposal on her, stating at [11]-[13]:

> There is also a significant emotional and physical toll the continued stress and harassment (e.g. in the Media and in social media comments by airport supporters) has taken on me and my relationships. I cannot look at what can simply be described as the "best sunset view in town" without fearing it will all be taken away from me soon. I have also not been able to build my dream house on the back of my section, due to the continued threat of this extension hanging over my head. I have written a blog on "What it means to be a Moa Pointer" (Rotmann, 2015) and would like to include this as part of this affidavit, by way of this link: http://guardiansofthebays.org.nz/opinion-dr-sea-rotmann-what-it-means-to-be-a-moa-pointer/. One sentence that bears quoting here:
>
> > It is important to note that not going through the fast-tracked board of inquiry process is an admission that they know they would fail. Going through the more protracted Environment Court hearings has nothing to do with a 'more open and transparent process' and everything with buying themselves time and bleeding the opponents dry due to the high costs associated with fighting a project like this through the Court. It also means many more years of this existential threat hanging over our heads, which is stressful in many ways - emotionally, financially and physically.
>
> It seems I have predicted, more than 3 years ago, exactly what would come to bear: WIAL - despite knowing it still had the NZALPA court case (which it finally lost in the Supreme Court) over safety concerns outstanding, still pushed for an Environment Court date, in 2016. It forced all of us - residents, business owners, ratepayers, community, recreational and environmental groups - into protracted, very costly and extremely stressful court proceedings, which have led to exactly nowhere.

39. If WIAL's application is struck out, then the community, including the Moa Point Community, will have some respite from the process and WIAL's proposal hanging over their heads. While WIAL will be entitled to re-lodge another application in the future, at least it will have to go through the rigour of that process rather being allowed to limp along with what is now a well out-of-date, stale, and patchwork application.

40. Quite possibly, if its current application is struck out, WIAL might even listen to the community and shelve its proposal, at least until it can be demonstrated that it is viable and won't impose significant environmental and social costs on the community with little or no wider economic gain to the region. At the very least, WIAL could wait until it has certainty of its CAA outcomes, as it should have done in the first place.

WIDER CHANGES IN CIRCUMSTANCES

41. It is also appropriate for the Court to consider the wider changes in circumstances that have occurred since the application was originally lodged in 2016.

42. In that regard, in general terms, as Dr Rotmann observes at [13]:

> The environmental and recreational data WIAL collected and which was ratepayer co-funded to the tune of millions, will be 5 years old by the time another Court date will actually be chosen.

43. Ms Weeber provides more specific evidence of the changes that have occurred at [12]-[14]:

> The landscape of the bay and surrounds around the WIAL are continuing to change. These changes are not identified in the WIAL 2016 environmental assessments of the effects of the airport extension. These changes over the last two year include:
>
> (a) Removal of sections of car parking at the eastern end of Lyall Bay (surfers' corner) with considerable engineering works incorporating a seawall and large rocks covered with sand and now coastal vegetation planting. The car parking has been moved in front of the 'Warehouse' building on Lyall Parade. Both these landscape improvements give the area a less 'industrial' and 'derelict' appearance and provide an improved entrance to the eastern end of Lyall Bay.
>
> (b) New mural at both ends of the pedestrian subway tunnel that goes under WIAL from Rongotai (at Coutts Street) through to Miramar. This mural plus other improvements by WIAL have improved the overall subway appearance.
>
> (c) WIAL's new car parking building and future hotel.
>
> (d) Two new restaurants in the Botanist on the corner or Lyall Parade and Onepu Road and Parrotdog on Kingsford Smith Street. In addition, Maranui Cafe is open late on a number of nights. These eating and drinking facilities increase the number of people using Lyall Bay at night and through-out the day.
>
> (e) Increased residential development within Lyall Bay with infill and removal of 'derelict' buildings.
>
> I am aware of over half a dozen new buildings being constructed in Lyall Bay. Infill has occurred at the rear of sites or building new two semi-detached buildings when there was only one. The removal of old 'derelict' buildings has occurred in a number sites with two in Rua Street occurring last year.
>
> This new residential development is important in how people visually see and feel about Lyall Bay. There is a perception that Lyall Bay now has a positive progressive 'vibe'.

44. A re-start of the current direct referral would also give WIAL the opportunity to gather various further baseline data. In particular, it is understood that further data has consistently been sought by SPS to understand potential effects on the surf breaks to be affected by the extension. One years' worth (or less) of baseline data, which is all WIAL ever originally obtained, is not enough to properly understand the dynamics of a surfbreak. Three to five years of monitoring is needed. It does not appear as if WIAL has taken the

opportunity whilst it has had its application on hold to obtain this much needed data.

45. As a related update, SPS and its key expert, Dr Mead, are on the steering committee of an MBIE funded study of Seven Nationally and regionally significant surf breaks, including Lyall Bay. The study of Lyall Bay commenced last year, and that data would be beneficial to WIAL in that they would be able to provide a more robust AEE for any future new application for an airport extension, in relation to impacts on Lyall Bay's surf breaks.

46. Climate change has assumed much greater significance over the past 4 years, as has the uncertainty as to its effects. This matter is likely to require additional information as to likelihood and risk factors.

47. All the changes and additional information referred to above are all important, and require fresh consideration as an integrated part of any proposal that is advanced; rather than as a "tack-on" afterthought. Striking out and requiring WIAL to re-apply (if it does wish to proceed again in the future) is the only way to require this to occur.

CONCLUSIONS

48. At some point, WIAL's delay must become an abuse of process; and if it is not now, then when?:

    (a) would it be if the CAA takes longer to make its decision, and WIAL asks for another extension at that point (based on past experience[7] that is more likely the case than not)?

    (b) or if CAA's decision is challenged (which cannot be discounted[8]), and WIAL asks for another extension at that point?

    (c) another four months, six months, eight months ... how much longer?

49. GotB and HtT respectfully submit that WIAL's delays have now reached the point of an abuse of process, and there remains too great a risk that further adjournments will be sought, further compounding and exacerbating the abuse. Real people and communities are being prejudiced by allowing the application to remain on foot. In contrast, there is limited prejudice to WIAL in having its application struck out. It will be entitled to apply again. At that point:

    (a) WIAL will necessarily have to update its application and supporting material in a comprehensive way;

    (b) WIAL will face the rigour of the councils to seeking further information from it under section 92;

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7 WIAL's assurances at the time its last adjournment was sought were that the DG's decision was expected to be given within six months. CAA has not made its decision and WIAL now seeks a further adjournment to "mid-March 2019", ie for nearly five more months

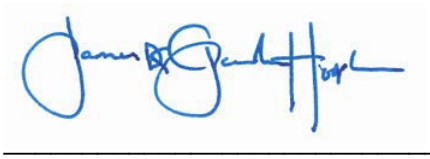
8 Any person with sufficient standing can seek judicial review of CAA's decision in the High Court.

(c) the councils will have to reconsider whether they support direct referral, which they may not in light of the circumstances that will apply at the time it would "re-make" that decision;[9]

(d) even if direct referral occurs again, the councils will have the ability to provide new section 87F reports, which will better inform section 274 parties of the issues re-assessed at the relevant time; and

accordingly, the application will then come forward for hearing before the Environment Court (if that is still the outcome) on the proper "footing" anticipated by the statutory scheme.

DATED 3 December 2018



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[9] Wellington Council has to manage heavy demands on limited funding in recent times, for example. Priorities are ever changing and it would be wrong to assume that the councils' position remains as it was 5 years ago.