

Under section 274 of the Resource Management Act 1991

In the matter of the Resource Management Act 1991 of 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

**MEMORANDUM OF COUNSEL FOR
GUARDIANS OF THE BAYS INCORPORATED**
16 March 2018

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May it please the Court:

Introduction

1 This memorandum is filed on behalf of the Guardians of the Bays Incorporated (**GotB**), which has a current supporters' list of over 450 individuals and over 30 organisations. Many GotB supporters are submitters, and some are also section 274 parties, in their own right. This memorandum follows Wellington International Airport Limited's (**WIAL**) request for an adjournment of its proceedings to a reporting date of 28 September 2018 (to allow WIAL to make progress with its application to the Director General of Civil Aviation (**Director**) for approval of its proposed Runway Safety Area Extension (**RESA**)), and the Court's direction of 1 March that:

Any party wishing to comment on the requested adjournment and/or reporting date is directed to file a memorandum in the Court by 5.00pm 16 March 2016.

2 GotB has consulted with Hue tē Taka (**HtT**) and the Surfbreak Protection Society (**SPS**), and understands that both strongly support GotB's concerns/position.

3 In summary:

3.1 GotB is concerned about the request for a further lengthy delay. It considers that further delays may (if they have not already) become inordinate, without good excuse (in the circumstances), and will cause substantial prejudice to GotB, its members, and other parties.

3.2 GotB seeks that the Court direct WIAL to provide additional reporting and information to the Court and parties as WIAL progresses its process with the Director.

Delays

4 WIAL's original application was finalised and filed in April 2016. Many of the assessments would have been completed (or commenced) in 2015 or earlier. If the Court approves WIAL's request for an adjournment to September 2018, it is unlikely, even if WIAL then sought for its application to be promptly heard and determined, that the hearing will occur until early 2019. WIAL's application could therefore well be heard three years after lodgement, and

much longer since many of the relevant assessments were first undertaken or data collected.

- 5 The reason put forward by WIAL is the challenge made by the Airline Pilots' Association Industrial Union of Workers Limited (**NZALPA**) to the Director's decision to approve a 90m RESA as part of WIAL's proposed runway extension. However, it is important to recall that WIAL embarked on its resource consent application and direct referred proceeding in light of the knowledge that the Director's decision was under challenge and could always have been set aside. WIAL could have resolved to not make its consent application until ALPA's challenge (and any appeals) were resolved but it did not do so. Its actions have put all parties in the current difficult situation where they have had to invest considerable time, effort and, in many cases, funds – but without any idea now when, or if, the application will proceed, and, if so, in what form.¹
- 6 Notwithstanding this, GotB accepts that in theory it may be possible for WIAL to continue with its application without re-notification – depending on the Director's decision (and the outcome, if a further challenge is brought by NZALPA, of any such challenge). However, if any modification is required beyond the scope of the current application, such as a longer runway which would have additional or different effects (e.g. coastal processes, visual and landscape, additional costs etc.), then a fresh application is likely to be required. It could also be expected that some different persons could be affected and, even within the currently affected community, properties may have changed hands and new persons may wish to participate.
- 7 Alternatively, WIAL may choose to abandon the current proceedings and re-notify any modified proposal in its entirety. From an integrated management approach, that would seem to be the more sensible outcome – particularly since the original reports and assessments supporting the application would then be likely to be more than three years old and, in many areas, out of date, so that the assessments are no longer an accurate description of the likely or potential effects of the proposal.
- 8 Just one example of the implications of any further lengthening of the required RESA/runway (raised by SPS) is that it will lessen wave height in

¹ The question of costs in these proceedings remain outstanding, and are not addressed at this point.

Lyall Bay, especially in the north-eastern Corner of the Bay. There is already evidence that the impact on wave height in the Corner has been miscalculated, by up to 0.8 of a meter under some scenarios. Even putting that aside, increasing the length of the runway extension would inevitably result in a greater impact than assessed under the current application. In other words, the effects would be out of scope, and would require a fresh application with further modelling. Other effects on natural character, landscape, visual amenity and other coastal processes will also arise from a longer runway.

- 9 While WIAL says that it intends to pursue a runway extension proposal, one would also hope, if WIAL is a responsible company, that it has not closed its mind to the prospect of not proceeding, or going back to the drawing board to find some other alternative. Abandoning the current proceedings would demonstrate its commitment to a fair evaluation of its options going forward.
- 10 If a fresh application were to be lodged, with updated reports, then everyone would then be able to re-evaluate their position accordingly. That includes Wellington City Council (if not WIAL) in respect of how the application should be processed (eg a direct referral, or not). There will also be the opportunity for new landowners to participate, where the previous owner did not submit or file a section 274 notice and so they have no party to “succeed”.
- 11 In terms of timing for WIAL, there is clearly no driving urgency for WIAL to secure its consents – and it does not know yet what it wants. With a fresh application, the Council will be able to consider again whether direct referral is appropriate. While that may still be WIAL’s preference, the Council will be able to consider the needs and wishes of its community in making its decision to enable direct referral. Many of GotB’s members and other submitters would have preferred a first instance Council-level hearing. That process is less confronting (with all due respect to the Environment Court, which accommodates lay-people as best as it can) and allows ordinary people to have their say and feel like they have been heard. A first instance decision can also help the parties narrow the issues on appeal to a greater extent than through a direct referral (even with mediation and conferencing). For parties with limited resources, like GotB, that is a further benefit of a two-step process.

- 12 Clearly, the whole current situation is less than ideal. Arguably, the delays have already become inordinate, inexcusable (particularly given WIAL's knowledge of the risks of delay when it lodged its application), and are seriously prejudicial in the circumstances. If those grounds are not satisfied already, at some point, with further delays, they will be. GotB urges WIAL to consider withdrawing its application now, rather than draw the process out even further.

Directions sought

- 13 If WIAL does not abandon or withdraw its application, GotB considers it appropriate in the circumstances that the Court direct a much greater level of reporting and sharing of information by WIAL with the parties to the proceedings.

- 14 The purpose of the adjournment, as stated by WIAL, is to allow it to make progress with its application to the Director for approval of its proposed RESA. WIAL has indicated that it intends to make its application "towards the end of March". Previously, WIAL had sought (and obtained) approval from the Director for a RESA of 90 m. The Director's decision was however found to have been unlawful, ultimately by the Supreme Court.

- 15 The Supreme Court emphasised that the Director must assess any proposal put to it against the requirements of the relevant CAA rules. As relevant, Appendix A.1 of the relevant rules requires a RESA of *at least* 240 m "if practicable", *or* any length between 240 m and 90 m that is "practicable", subject to an absolute minimum of 90 m. As the Court emphasised at [62], the rules are the "starting point", and:

... If a RESA of that length [240 m] is impracticable, the Director must consider whether a length between 240 and 90 m is practicable. Only if it is not is a 90 m RESA acceptable.

- 16 The Supreme Court found, approached this way, that the Director should have considered an EMAS option as part of his assessment (but he had not, because that was not part of WIAL's proposal). Further guidance as to the Director's requirements, in terms of what he should have done, was given by the Supreme Court at [71] as follows:

... He was required to consider whether safety could be improved, and in considering that ought to have considered benefits accruing to WIAL as a result of the extension; in this instance, they are relevant to the practicability assessment and it is possible that they are such as to justify him requiring an incremental improvement in safety in the form of a RESA longer than 90 m.

- 17 Despite indicating that it intends to lodge an application later this month (ie in a few weeks' time), WIAL has provided no indication of whether the RESA it intends to seek will still be 90 m, or if it has resolved that a RESA longer than 90m is in fact practicable. If it is the latter, then WIAL should be required to immediately identify whether this means its consent application would need to be replaced by a fresh application to provide for a longer reclamation, as that would be out of scope of the original application.
- 18 The question of alternatives, including options such as an EMAS option, is also relevant to the issues before the Environment Court, as are any claimed benefits (i.e. the economic case) to WIAL and the Region. These all appear to be matters that WIAL will need to address in its application to the Director. While the information may be centred around what is "practicable" under the CAA process, it should also be provided to the parties to the direct referred proceedings, so that they can understand what any new information means for their case. Otherwise, the parties remain in the dark about what new information WIAL is producing to support its position.
- 19 In the event that WIAL is seeking the same 90m RESA and that is approved and not challenged further by NZALPA, and WIAL requests the Environment Court to proceed with its current directly referred application, then GotB foreshadows that it will seek orders from the Court that require:
 - 19.1 WIAL to lodge any fresh assessments that WIAL is proposing to reply upon as updates or substitutions of the previous assessments;
 - 19.2 the Council to issue any supplementary report based on such updated material; and
 - 19.3 sufficient time be given to submitters to consider and investigate the updated assessments, well before any exchange of evidence occurs.
- 20 At this point, however, GotB respectfully requests the Court direct WIAL to:

- 20.1 immediately provide the parties with details as to the length of RESA that it intends to seek the Director's approval for;
- 20.2 provide the parties with copies of all information that it puts before the Director in support of its application, within two weeks of any such information being filed with the Director. If any information is considered confidential, the reasons should be clearly identified by WIAL and an appropriate application made to the Court for confidentiality / the redacting of any information; and
- 20.3 provide the Court and parties with regular, end of month, updates as to its progress with CAA.

DATED 16 March 2018



J D K Gardner-Hopkins

Counsel for Guardians of the Bays Incorporated