

Before the Independent Hearings Panels

In the matter of the Resource Management Act 1991 (**RMA**)

And

In the matter of Proposed Change 1 to the Wellington Regional Policy Statement (**RPS**) (being both a freshwater planning instrument, and a non-freshwater planning instrument)

And

In the matter of Hearing Stream 7 (Small topics, wrap up and Variation 1)

Rebuttal legal submissions on behalf of Wellington Regional Council

Hearing Stream 7

Date: 8 April 2024



Solicitor on the Record
Contact solicitor

Kerry Anderson
Emma Manohar

kerry.anderson@dlapiper.com
emma.manohar@dlapiper.com

+64 4 474 3255
+64 4 918 3016

Level 4, 20 Customhouse Quay, Wellington 6011
PO Box 2791, Wellington 6140
Tel +64 4 472 6289

MAY IT PLEASE THE PANELS:

Introduction

- 1 These rebuttal legal submissions on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 7 (Small topics, wrap up and Variation 1) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**). The hearing is scheduled to commence on 15 April 2024.

- 2 These legal submissions respond to matters raised by Wellington International Airport (**WIAL**), as to the definition of 'regionally significant infrastructure' and the inclusion of the airport in that list. In summary, the Council's position is that seawalls are not 'buildings' as that term is used in the RMA context, and whilst a seawall *may* fall within the definition of RSI (if it can be shown it is an 'installation'), it is not appropriate to reference a specific seawall in the definition of RSI within the RPS, as that definition includes a general list of infrastructure and associated activities, as opposed to specific list of every aspect of each type of infrastructure in the list.

The definition of RSI

- 3 The relevant part of the definition of RSI within Change 1 to the RPS is:

Wellington International Airport.

- 4 WIAL is seeking that definition be amended as follows:

Wellington International Airport including all associated infrastructure and structures (for the avoidance of doubt, this includes navigational aids and the sea wall between Lyall Bay and Moa Point).

Evidence of Claire Hunter, dated 28 March 2024, at [13]

- 5 The rebuttal evidence of the Council's section 42A officer, recommends the definition be amended in the following way:

Wellington International Airport ~~including all supporting navigational infrastructure~~ including its infrastructure and any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration

This includes infrastructure, buildings, installations and equipment not located on airport land.

What is a building under the RMA?

- 6 In its legal submissions, WIAL submits that a seawall is a building under the RMA in reliance on the broad definition of 'building' under the Building Act 2004.

Dated 28 March 2024, at [1.13]-[1.14].

- 7 We respectfully disagree. Whilst 'building' is not defined in the RMA or the RPS, it is a defined term included in the definitions standard in the National Planning Standards. That definition is:

building means a temporary or permanent movable or immovable physical construction that is:

- (a) partially or fully roofed; and
- (b) fixed or located on or in land;

but excludes any motorised vehicle or other mode of transport that could be moved under its own power.

- 8 It is submitted that the above definition is the more appropriate definition of 'building' to be applied to a term used in an RMA context – in this case, in an RPS made under the RMA.

9 In addition, it is submitted that the definition of 'building' within the Building Act 2004 is not appropriate to use in this RMA context as it is used in a different context – it is deliberately broad to ensure it captures as much as possible, given the purposes of that legislation. That is to ensure construction is done in a safe, sustainable and accessible manner. Applying that broad definition, to an RMA context, where the National Planning Standards require a much narrower definition is in our submission inappropriate.

10 Further, this approach aligns with the standard interpretation principle that the plain and ordinary meaning should be applied to a word and it is submitted that the definition of 'building' within the National Planning Standards is the plain and ordinary meaning of 'building' not the very wide definition of 'building' under the Building Act 2004 which covers everything from a traditional building, to fences, retaining walls, any temporary or permanent moveable or immovable structure, an immovable motor vehicle occupied on a long term basis to certain masts and aerials and cable cars (as per the definition in section 8 of the Building Act 2004).

Powell v Dunedin City Council
[2004] 3 NZLR 721 (CA).

11 On that basis, it is submitted that a seawall does not fall within the plain and ordinary definition of 'building', which for the purposes of the RPS is a meaning consistent with the National Planning Standards.

Is a seawall RSI?

12 The conclusion that a seawall is not a building, does not mean that WIAL's seawalls are not RSI under the RPS.

13 As WIAL has stated, 'Wellington International Airport' is not defined in the RPS. WIAL considers this is appropriate. At [1.8].

14 As set out in Mr Watson's rebuttal evidence, to be regionally significant infrastructure, the starting point was whether the activity fell within the definition of 'infrastructure' in the RMA.

15 Accordingly, to understand the scope of 'Wellington international Airport' in the RSI definition, the definition of 'infrastructure' in section 2 of the RMA is relevant:

Infrastructure means...

- (i) an airport as defined in section 2 of the Airport Authorities Act 1966:
- (j) a navigation installation as defined in section 2 of the Civil Aviation Act 1990.

16 The section 2 definitions from the Airport Authorities Act 1966 and Civil Aviation Act 1990 are as follows (emphasis added):

airport means any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration

navigation installation—

- (a) means any building, facility, work, apparatus, equipment, or place, (whether or not part of an aerodrome) that is intended to assist in the control of air traffic or as an aid to air navigation; and

- (b) includes any land adjacent to any such building, facility, work, apparatus, equipment, or place, and used in connection therewith

17 It is important to note here (although it is submitted it does not have a material impact), that once in effect, the Civil Aviation Act 2023 will amend the above 'infrastructure' definition in the RMA as follows:

Civil Aviation Act 2023, schedule 9, which comes into effect on 5 April 2025, or earlier by Order in Council.

In section 2(1), definition of **infrastructure**, replace paragraph (i) with:

an aerodrome as defined in section 5 of the Civil Aviation Act 2023:

In section 2(1), definition of **infrastructure**, paragraph (j), replace "section 2 of the Civil Aviation Act 1990" with "section 5 of the Civil Aviation Act 2023"

18 Respectively, the following definitions from section 5 of the Civil Aviation Act 2023 then become relevant (emphasis added):

aerodrome—

- (a) means any defined area of land or water intended or designed to be used, either wholly or partly, for the landing, departure, or surface movement of aircraft; and
- (b) includes any other areas, buildings, installations, and equipment that are on or adjacent to an area mentioned in paragraph (a) and that are used in connection with that area or its administration; and
- (c) where an airport operator is registered in respect of the aerodrome, includes any area included under section 222(3)(b) or 223

navigation installation—

- (a) means any building, facility, work, apparatus, equipment, or place (whether or not part of an aerodrome) that is

intended to assist in the control of air traffic or as an aid to air navigation; and

- (b) includes any land adjacent to, and used in connection with, that building, facility, work, apparatus, equipment, or place

19 Depending on the nature of the works, a seawall *may* fall within the meaning of 'installation' when used in the definitions of 'airport' and 'aerodrome' set out above. If it did, it would still need to be shown that the seawalls are used in connection with the area used for landing, departure or surface movement of the aircraft. We have been unable to find any case law on the meaning of 'installation' and accordingly, there is no reason why its plain and ordinary meaning would not be applied – for example, 'a structure that is designed and built for a particular purpose' (Merriam-Webster dictionary).

"Installation"
Merriam-
Webster.com
Thesaurus,
Merriam-Webster,
2024

20 It is submitted that whether or not a seawall is an installation is more appropriate for determination as part of a resource consent process, when the specifics of what is proposed are before the Council and when there is a specific project to be assessed and considered.

21 It is submitted that for an RPS level document it is not appropriate to include reference to some specific components of 'Wellington International Airport', but not all of its components, or to specific components in respect of Wellington International Airport, but not other listed items of RSI, as that, as WIAL's submissions acknowledge, creates uncertainty.

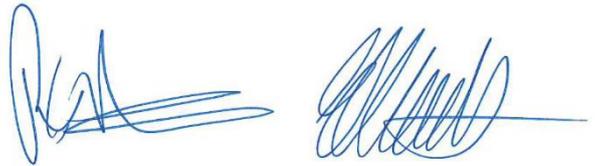
22 Contrary to WIAL's submissions, none of the other listed RSI elements include specific reference to established elements of the listed infrastructure, just simply additional detail as to the scope of that RSI through reference to ancillary structures and activities. That

WIAL
submissions, at
[1.9].

additional detail, for the reasons set out in the section 42A report, and as a result of the definitions above, is not required for the 'Wellington International Airport' as its definition already captures those ancillary and additional elements.

23 However, to reflect the fact that other listed RSI activities do have additional descriptors relating to ancillary activities, Mr Watson has recommended in his rebuttal evidence, the addition of text taken from the definition of 'airport' is added to the definition of RSI in response to WIAL's submissions.

Date: 8 April 2024



.....
K M Anderson / E L Manohar / K H Rogers
Counsel for Wellington Regional Council