

**Before Independent Hearing Commissioners  
Wellington City Council**

**I Mua Ngā Kaikōmihana Whakawā Motuhake  
Te Kaunihera o Pōneke**

In the matter of **The Wellington City Proposed District  
Plan**

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**Legal submissions on behalf of  
Wellington City Council  
Hearing Stream 10**

10 July 2024

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# Legal submissions on behalf of Wellington City Council

## Hearing Stream 10

### 1 Matters addressed

1.1 These submissions address legal issues arising in relation to two designations:

- (a) WIAL1 – relating to Wellington International Airport’s designation of obstacle limitation surfaces;
- (b) KRH1 – relating to KiwiRail’s designation of railway lines

### 2 WIAL1

2.1 The s 42A Report records that one of the key issues in contention with respect to designations is the impact of the modifications proposed to WIAL1.<sup>1</sup>

2.2 WIAL1 relates to the Obstacle Limitation Surfaces necessary for the safe and efficient operation of Wellington Airport. OLSs protect the airspace above and around an airport.

2.3 The impact of the designation – if WIAL’s position is accepted – is that owners of land subject to the designation will need permission from WIAL for any new objects or extensions of objects that penetrate the relevant OLS and exceed a height of 8m above existing ground level within the Inner Horizontal Surface.<sup>2</sup>

2.4 To cover off a preliminary issue, the Council does not consider the imposition of WIAL1 to require analysis as a qualifying matter. The Council’s approach to qualifying matters is that matters which may generally be seen as imposing a restraint on development, but which do not result in the modification of building heights or densities applying to a site, are not qualifying matters.<sup>3</sup> For example, at an earlier hearing the Panel discussed a hypothetical example of whether a rule requiring

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<sup>1</sup> See s 42A Report at [17].

<sup>2</sup> Or 30m if within the Outer Horizontal Surface, but for ease of reference I will focus on the 8m trigger in relation to the Inner Horizontal Surface.

<sup>3</sup> See the Council’s “Reply (Legal Points) Hearing Stream 2”, dated 29 May 2023.

resource consent for indigenous vegetation clearance on a residential site before it could be developed consistently with the MDRS amounted to a qualifying matter. The Council's position was that it was not because such a rule would not control building heights or densities (or the MDRS generally). Imposing an additional and discrete consent requirement, without modifying how the MDRS or policy 3 of the NPS-UD applied, did not engage the qualifying matter provisions.

- 2.5 Here, on residential land subject to the designation, the plan variously provides for MRZ, HRZ or CCZ zoning. While WIAL's permission may be required under s 176 of the RMA to develop some sites to their full potential, that does not amount to modification of the relevant height and density standards on account of a qualifying matter.
- 2.6 This does not mean that the Panel need not consider the impact of the requirement for permission from 8m above existing ground level on development capacity. Under s 171(1) the Panel will need to consider the effects on the environment of allowing the requirement, including the impact on development capacity. It will also have to have particular regard to:
- (a) the NPS-UD (s 171(1)(a)(i));
  - (b) whether requiring WIAL's permission for new objects or extensions to existing objects that exceed 8m above existing ground level is reasonably necessary for achieving WIAL's objectives (s 171(1)(c)), or whether these objectives are also achieved if the trigger is 11m instead of 8m;
  - (c) any other matter considered reasonably necessary to make a recommendation (s 171(1)(d)).
- 2.7 An "other matter" that may be helpful to consider is the cost to landowners of seeking the Airport's permission and the potential chilling effect this may have on enabling urban development. That is because, while not a qualifying matter, seeking permission from the Airport is a barrier to development otherwise encouraged by the MDRS and NPS-UD, and if that cost is significant, that could be factor weighing in favour of setting the trigger at 11m.

2.8 Associated with that is the nature of the process for obtaining WIAL's permission. I note Ms Lester's evidence is that WIAL has recently updated its internal processes to streamline the process which is helpful. I also note the development of the public GIS tool. However, I note that there is little information within the plan itself about how to obtain permission. I understand that permission may be sought via a form available on the Airport's website. It may be worth considering providing an advice note alongside the designation conditions providing information about the permission process.

### **3 KRH1**

3.1 KRH1 has been advanced by KiwiRail as a "rollover" designation with modifications. It is treated as such in the s 42A Report.<sup>4</sup>

3.2 The existing designation in the ODP contains "additional information" stating that the designation "includes tunnels and bridges", though tunnels and bridges, and the land above and below them respectively, are not mapped.<sup>5</sup>

3.3 I understand the modifications were provided by letter dated 2 March 2020, which said:

The comment 'includes tunnels and bridges' as included in each of the relevant designations, is from the existing designation provisions in the operative District Plan. The maps are proposed to be updated to accurately reflect the text.

3.4 This does not specify how the maps are proposed to be updated to reflect the text. It is not clear whether it is intended that the land above tunnels is intended to be shown as subject to the designation, or even, whether such land is actually subject to the designation. I would have thought it would pose some difficulty for KiwiRail if the land above the tunnels were not subject to the designation since it must be able, as it indicates in its tabled statement, to ensure that activities on the land surface do not affect the structural integrity of the tunnel beneath. However, the existing designation (as recorded in the ODP) does not suggest this is the case.

3.5 This issue was discussed in the s 42A Report at [116] as follows:

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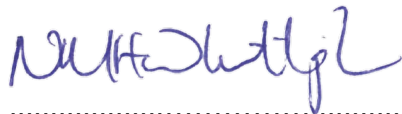
<sup>4</sup> See s 42A Report at Table 3 beneath para [45].

<sup>5</sup> To be clear, it is not suggested that bridges and tunnels are not currently designated – the "additional information" is clear that they are designated.

In response to WCC [266.38], as I understand it, this submission seeks a refinement to the designation mapping to differentiate between underground and above-ground infrastructure to provide greater clarity to plan users that there are sections of the rail network that are existing and located underground, and what impact the designation will have on properties previously not impacted by the designation. In my opinion, the impact of the designation now applying to new properties has not been adequately clarified by KiwiRail in their request to modify the designation area. Consequently, I consider that the amendments to the mapping of the KiwiRail designations that results in the designation applying to land not owned by the requiring authority should not occur without greater nuance introduced with respect to the designation conditions. It follows that I disagree with KiwiRail [408.3].

- 3.6 If it is not intended to record, through mapping, the designation on private land above tunnels then the issue is more a practical one about how to update the mapping to record the designation of the tunnels.
- 3.7 If, however, the intention is to record the designation on private land above tunnels, it may be that KiwiRail can provide further information that will justify that course. It may be, for example, that information from the process by which the designation was recorded in the ODP demonstrates that all land above tunnels was subject to the designation, and there is no substantive objection to recording the designation over this land through this rollover process.
- 3.8 That being the case, the ball is really in KiwiRail's court to clarify its position.

Date: 10 July 2024



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