IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2365
[2024] NZHC 2058

BETWEEN	AUCKLAND INTERNATIONAL AIRPORT LIMITED Applicant
AND	AUCKLAND COUNCIL First Respondent
	KĀINGA ORA Second Respondent

Hearing:	06 May 2024 to 07 May 2024
Appearances:	A A Arthur-Young, C J Curran and J A Tocher for Applicant S Quinn and M Dicken for First Respondent N Whittington for Second Respondent
Judgment:	26 July 2024
Reissued:	26 July 2024

(REISSUED) JUDGMENT OF WILKINSON-SMITH J

This judgment was delivered by me on 26 July 2024 at 2 pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Russell McVeagh, Auckland
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Introduction

[1] On 9 August 2022, Auckland Council (the Council) granted resource consent on a non-notified basis to Kāinga Ora – Homes and Communities (Kāinga Ora) for an intensive housing development located at Osterley Way, Manukau (the Development).

[2] The site of the Development is within the Business-Metropolitan Centre Zone (Manukau Precinct) (Manukau MCZ). The Development also sits under the main flight path used by Auckland International Airport (Auckland Airport). The flight path is regulated by the Aircraft Noise Overlay (Overlay), a chapter in the Auckland Unitary Plan (AUP) that restricts development within the Overlay to manage the adverse effects of aircraft noise. The Development is situated within the Moderate Aircraft Noise Area (MANA). Residential development in the Manukau MCZ in areas also within the MANA (Manukau MCZ MANA) is a discretionary activity.

[3] Before determining the resource consent application, the Council was required to consider whether notification was required. This included consideration of whether Auckland Airport was an affected person.

[4] The Council concluded that the adverse effects of the Development on Auckland Airport would be less than minor, and notification was not required. The decision was issued on 9 August 2022. Resource consent was granted that same day.

[5] Kāinga Ora did not consult Auckland Airport prior to lodging the resource consent application. Auckland Airport became aware of the application in late July 2022 when approached by another developer seeking to rely on the anticipated decision as a precedent for a similar proposed intensive development within the MANA.

[6] Auckland Airport seeks judicial review of:

(a) the decision not to notify it of the resource consent application (Notification Decision): and

(b) the decision to grant resource consent (Consent Decision).

[7] Auckland Airport advances four errors in the Council's decision-making process:

(a) The Council erred in law by misconstruing the requirements of the Overlay particularly by proceeding on the basis that acoustic insulation was sufficient to remedy adverse effects.

(b) The Council failed to carry out the mandatory assessment of all relevant adverse effects pursuant to s 95E of the Resource Management Act 1991 (RMA). The Council conducted a compliance focused assessment and did not assess the effects of aircraft noise on residents or the reverse sensitivity effects on Auckland Airport.

(c) The Council had inadequate information to make its decisions. In particular it relied on flight data that was artificially depressed by COVID-19 restrictions.

(d) The Council's decisions were unreasonable as they were inconsistent with the Council's established practice of proactive consultation with Auckland Airport; and the conclusion reached that the adverse effects on Auckland Airport would be less than minor is contradicted by the evidence.

[8] Auckland Airport seeks relief in respect of each decision namely:

(a) a declaration that the decision was unlawful; and

(b) an order setting aside the decision.

[9] The Council submits that it correctly applied the applicable statutory framework and did so in reliance upon adequate information, taking into account relevant considerations, and reaching an appropriate decision by following the correct process.

[10] Kāinga Ora submits that the Council correctly construed the relevant planning framework. The decision involved an orthodox application of the RMA's notification provisions in the planning framework for resource consent. Kāinga Ora submits that the Council considered the relevant effects on Auckland Airport and reached lawfully available conclusions on the evidence.

Background

[11] Kāinga Ora proposes to develop a 16-storey building comprising 123 residential apartments to be used for social pensioner housing and ground floor commercial premises with associated activities at Osterley Way, Manukau.

[12] On 18 May 2022, Kāinga Ora applied to the Council for residential subdivision and land use consents for the Development. The application was made by Forme Planning Ltd, Kāinga Ora's planning consultant, and sought to proceed on a non-notified basis. Kāinga Ora engaged acoustic consultants, Acoustic Engineering Services (AES), to prepare an acoustic report including in respect of aircraft noise. The AES report concluded that, based on the proposed facade elements, the Development would comply with the acoustic insultation requirements of the AUP in respect of aircraft noise if "a suitable mechanical ventilation system is provided".

[13] Dominique Cornford, a self-employed planning consultant, processed the application on behalf of the Council. The application was given to Ms Cornford for processing on 20 May 2022. As was explained by Mr Quinn for the Council, the use of external planning consultants is common given the volume of consents processed by the Council. Ms Cornford sought advice from Robert Andrews, the Council's Principal Specialist — Planning (South), regarding whether Auckland Airport might be an affected person requiring consultation or notification. Ms Cornford asked Mr Andrews if there were any requirements for liaising with Auckland Airport or whether she just needed to make a reverse sensitivity assessment with specialist input. Mr Andrews replied that the application was a discretionary activity under A41 of the AUP and said that the noise assessment was more than a matter of meeting acoustic insulation. Responding to Ms Cornford's query, he said:

Indeed, if the acoustic standards are not met the application will be Non-Complying i.e., it is not a nice to have but a basic minimum to be consistent with the AUP policy intent. Your assessment as to who might be an affected person must be wider than just a consideration of whether acoustic measures are met or not met.

D24.3 policies include,

(3) Avoid establishing residential and other activities sensitive to aircraft noise at:

(b) Auckland International Airport: within the area between the 60dB L_{dn} and 65dB L_{dn} contours, unless the effects can be adequately remedied or mitigated through restrictions on the numbers of people exposed to aircraft noise in the external environment through zoning and density controls and through providing acoustic treatment (including mechanical ventilation) of buildings containing activities sensitive to aircraft noise;

Additionally, in the AUP general rules C1.13 Notification states,

(4) When deciding whether any person is affected in relation to an activity for the purposes of section 95E of the Resource Management Act 1991, the Council will give specific consideration to the following entities with responsibility for any natural or physical resources which may be affected by the activity, including:
(a) in relation to infrastructure, the network utility operator which operates that infrastructure; and
(f) in relation to an overlay to manage reverse sensitivity effects, the operator of the activity which is protected by the overlay from such effects.

We can't require consultation but neither do I consider that council can say that Auckland International Airport Limited (AIAL) is not an affected party purely based on internal acoustic installation. This application is quite different from the normal situation of applicants seeking to exceed the density standards within the MANA area where we always see AIAL as an affected party. However, the issues of density and numbers of persons on site is still relevant and AIAL could well have a view on that.

[14] On 26 May 2022, Ms Cornford requested further information from Kāinga Ora pursuant to s 92 of the RMA — including information regarding airport noise. The questions relating to aircraft noise were suggested by Andrew Gordon (a senior specialist in the Council's Contamination, Air, and Noise team) who assisted Ms Cornford with the acoustic aspects of the application. In relation to aircraft noise, Ms Cornford asked Kāinga Ora to confirm:

(a) the numbers of people who would be exposed to aircraft noise;

(b) the extent of aircraft noise exposure;

(c) expectations of an acceptable level of outdoor amenity; and

(d) general disturbance and associated annoyance levels.

[15] On 3 June 2022, Forme Planning responded to the request for further information providing information prepared by AES in a s 92 response. AES provided responses to each question.

[16] AES said that only a small proportion of residents would be utilising the outdoor spaces at any given time and that there would be no such use during inclement weather at night. The design of the balconies, with only one exposed side, would provide shielding from noise. It was said that the number of people outdoors in a location where a given overflight was a distinct audible event in the context of other ambient noise in the area was expected to be low.

[17] The average daily flight number relied on was 337 flights between 0700 and 2200 hours and 45 flights between 2200 and 700 hours. This was based on 2021 flight data. It was estimated that 20 to 30 per cent of those flights would overfly the Development resulting in elevated noise levels for a small period each time a flight passed overhead. Noise levels of around 75–80dBA would be expected during a flyover dropping to ambient levels after 30–60 seconds. That peak noise level assumed an open location with no shielding. It was said that shielding would reduce actual noise levels in the outdoor living areas.

[18] AES stated that average aircraft noise levels expected at the site were similar to permitted noise levels for general activities within the Manukau MCZ. The elevated noise level during a flyover would be of the magnitude common in a mixed-use urban environment such as buses or trucks passing, rubbish bins being loaded, car alarms or horns, and emergency vehicle sirens. Aircraft noise levels were expected to be in the same general range as other ambient noise in the environment. Only a moderate level of outdoor amenity could be expected in the MCZ, and this was expected to be acceptable and in line with the expectations of occupants of the building. Aircraft

noise in outdoor areas was not expected to have a disturbance or annoyance effect that was "more than minor". It was also stated that the design incorporated multiple indoor communal areas that residents could utilise and that apartment balconies are typically better shielded from elevated noise sources than other situations.

[19] On 15 June 2022 Mr Gordon reviewed the AES acoustic report and the s 92 response. Mr Gordon advised Ms Cornford that he considered the response to be satisfactory and noted that the AUP "does not provide any specific noise controls for residential activities in regard to external noise effects, either from adjacent business activities or overflying aircraft. Therefore, a relatively low level of outdoor amenity is anticipated for residential outdoor living spaces".

[20] On 27 July 2022, Ms Cornford recommended that public notification and limited notification were not required.

[21] Auckland Airport was alerted to the Development on about 28 or 29 July 2022 when a different developer's consultants approached Auckland Airport about another proposed intensive residential development within the MANA. That developer sought consent for a 135-unit apartment block on Lambie Drive — two blocks away from the Development. When Auckland Airport expressed opposition, the consultant asked why the Development had been approved.

Planning concepts and legal frameworks

[22] The AUP contains planning provisions to regulate the establishment of new activities. These include "overlays" and "zones". Overlays apply across underlying zones and precincts and do not follow the boundaries of zones and precincts. The AUP governs the interaction between overlays and zones. Where more than one applies, the most restrictive rule determines the overall activity status for an application.

The Overlay

[23] The Overlay is contained in chapter D24 of the AUP. Its application is not limited to Auckland Airport. It covers five airports in the Auckland area being

Auckland Airport, Ardmore Airport, Kaipara Flats Airfield, North Shore Airport and Whenuapai Airbase.

[24] The Overlay follows noise contours. For Auckland Airport the Overlay contains three mapped areas: the High Aircraft Noise Area (HANA); the MANA; and the Aircraft Noise Notification Area (ANNA). The MANA which applies to the Development captures the area between 60 and 65 dB L_{dn} noise contours.

[25] The Overlay is intended to protect airports from reverse sensitivity effects and to avoid or mitigate the adverse effects of aircraft noise on residential and other Activities Sensitive to Aircraft Noise (ASAN). It contains objectives, policies, and rules to manage the density and design of new ASAN within those areas.

[26] The term ASAN is defined in J1.4 of the AUP as follows:

> Any dwellings, boarding houses, marae, papakāinga, integrated residential development, retirement villages, supported residential care, care centres, education facilities, tertiary education facilities, hospitals, and healthcare facilities with an overnight stay facility.

[27] Reverse sensitivity is a recognised effect and has been described as follows:

> Reverse sensitivity is sensitivity not to environmental impact, but to complaint about environmental impact. Reverse sensitivity exists where an established use produces adverse effects and a new use is proposed for nearby land. It is the legal vulnerability of the established activity to objection from the new use.[1]

[28] The objectives of the Overlay set out in D24.2 of the Unitary Plan are:

> (1) Airports and airfields are protected from reverse sensitivity effects.
>
> (2) The adverse effects of aircraft noise on residential and other activities sensitive to aircraft noise are avoided, remedied or mitigated.

[29] Reverse sensitivity effects have the potential to impede or limit the operation of Auckland Airport. Gregory Osborne, an experienced planning expert who provided evidence for Auckland Airport, provides examples in New Zealand and overseas

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1 *Taranaki Energy Watch Inc v South Taranaki District Council* [2018] NZEnvC 227 at [19] referring to Bruce Pardy and Janine Kerr "Reverse Sensitivity — The Common Law Giveth and the RMA Taketh Away" (1999) 3 NZJEL 93.

where this has happened. Wellington International Airport has a night-time curfew limiting flight and operational capability. Curfews and other restrictions placed on Sydney Kingsford Smith Airport in Australia led the Australian Government to establish a second major airport in Western Sydney.

[30] A night-time curfew on Auckland Airport would have considerable flow on effects. Freight is usually landed at night to free daytime slots for passenger carriers. Further, New Zealand's geographic position means flights to and from the northern hemisphere need to operate at night unless such flights are to be considerably reduced. Andrea Marshall, head of master planning and sustainability at Auckland Airport, explains that Auckland Airport cannot control the complicated and inflexible global scheduling system for international flights which results in an unavoidable number of night-time flights. She says the more people who live under flight paths, the more potential for complaints about the operation of Auckland Airport — which is New Zealand's main international gateway to the world and a key contributor to the local and national economy.

Activity status

[31] The RMA provides for consent authorities to classify activities into different categories called "activity status". There are six categories:

(a) Permitted activities (which do not require resource consent, provided they comply with the relevant standards).

(b) Controlled activities (which require resource consent but must be granted if the activities comply with the relevant standards).

(c) Restricted discretionary activities (which require resource consent but limit the matters a consent authority can consider).

(d) Discretionary activities (which require resource consent and allow consent authorities wide discretion to grant or decline consent or impose conditions).

(e) Non-complying activities (which may only be granted consent if the adverse effects will be no more than minor, or the activity will not be contrary to the objectives and policies of the relevant plans).

(f) Prohibited activities (which cannot be granted consent).

[32] New ASAN in the Manukau MCZ MANA require consent as a discretionary activity. A discretionary activity is "wholly discretionary" meaning that an aspect of an application that would be allowed as a permitted activity could be refused as a discretionary activity.[2] When considering an application for resource consent a "consent authority must have regard to all the matters listed in s 104(1) of the RMA that are relevant in the circumstances".[3] This contrasts with a permitted activity where no resource consent is required provided there is compliance with relevant standards.

[33] The Council and Kāinga Ora both argue that compliance with acoustic standards set out in D24.6.3 is the way in which reverse sensitivity effects on Auckland Airport are mitigated in the Manukau MCZ. They say that no further consideration needs to be given to the effects of reverse sensitivity if the acoustic standards are met.

[34] Auckland Airport says, if that is the correct interpretation, the Overlay would categorise the Development as a permitted activity — that is an activity not requiring resource consent provided the standards are met. As that is not the case and the activity is a discretionary activity, Auckland Airport argues that the interpretation sought by the respondents cannot be correct.

Notification

[35] Before a consent authority can determine a resource consent application, it must consider whether notification is required. There are two kinds of notification required under the RMA. These are public notification,[4] and limited notification.[5] Public notification is required where the adverse effects of an application on the environment are "more than minor".[6] Limited notification is required in respect of "affected persons".[7] A person is an affected person if the consent authority decides that the activity's adverse effects on that person are "minor or more than minor (but not less than minor)".[8]

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2 *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC) at 377–378.
3 *Rudolph Steiner School v Auckland City Council* [1997] 3 ELRNZ 85 (EnvC) at 87.
4 Resource Management Act 1991, s 95A.
5 Section 95B.
6 Section 95A(8)(b).
7 Section 95B(2)–(4).
8 Section 95E(1).

[36] The AUP provides guidance on who is to be considered an affected person. C1.13(4) provides:

> (4) When deciding whether any person is affected in relation to an activity for the purposes of section 95E of the Resource Management Act 1991, the Council will give specific consideration to the following entities with responsibility for any natural or physical resources which may be affected by the activity, including:
>
> …
>
> (f) in relation to an overlay to manage reverse sensitivity effects, the operator of the activity which is protected by the overlay from such effects.

[37] In making the decision not to notify, the Council had to find that the adverse effects of the Development on Auckland Airport, including reverse sensitivity effects, were less than minor. Whether an effect is minor or less than minor must be addressed on a case-by-case basis and is a question of fact.[9] Less than minor has been held to be:[10]

> ... that which is insignificant in its effect, in the overall context, that which is so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons.

[38] An "effect" includes a cumulative effect which arises over time and any potential effect of high probability and any potential effect of low probability which has a high potential impact.[11]

The pleadings

[39] In respect of the Notification Decision Auckland Airport pleads three causes of action:

> (a) the Council erred in law by basing its Notification Decision on inaccurate, unreliable, and irrelevant information;

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9 See discussion in *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.

10 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086 at [94] as cited in *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [139].

11 *Lysaght v Whakatane District Council* [2021] NZHC 68 at [4] citing Resource Management Act 1991, s 3.

(b) the Council erred in law by failing to take into account relevant information; and

(c) the decision was unreasonable.

[40] In respect of the Consent Decision Auckland Airport pleads two causes of action:

(a) the Council erred in law by failing to assess the application in accordance with s 104 of the RMA; and

(b) the decision was unreasonable.

Judicial review principles

[41] Judicial review proceedings relate to the exercise, failure to exercise or proposed or purported exercise of a statutory power.[12] Decisions relating to the issuing of a resource consent on a non-notified basis are reviewable.

[42] Judicial review is not an opportunity to review the merits of a decision to proceed on a non-notified basis or to grant a resource consent. An applicant on review must identify an error of law, failure to have regard to a relevant consideration, regard to an irrelevancy or procedural unfairness. The decision must be made with the benefit of adequate information.[13] The decision must be one a reasonable decision-maker could reach based on the available information.[14]

The Notification Decision

[43] On 9 August 2022, the Council determined that the application would be processed on a non-notified basis. The Notification Decision adopts the assessment and recommendations of Ms Cornford.

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12 Judicial Review Procedure Act 2016, s 3.

13 *O'Keeffe v New Plymouth District Council* [2021] NZCA 55 at [30]–[31].

14 *Sutton v Canterbury Regional Council* [2015] NZHC 313 at [34] citing *Petone Planning Action Group Inc v Hutt City Council* HC Wellington CIV-2006-485-405, 10 October 2006 at [36].

[44] Under the heading "Limited notification assessment" the recommendation (adopted in the Notification Decision) refers to "Auckland Airport – Aircraft Noise and Reverse Sensitivity Effect" as follows:

> As outlined within the [Assessment of Environmental Effects] submitted, the Auckland International Airport Limited is the operator of the activity which is protected by the D24 aircraft noise overlay under the AUP OP. The application and supporting Acoustic Engineer assessment, which has been reviewed by Council's Specialist, has confirmed that the proposals can achieve compliance with the relevant standards for the development in a location within the MANA.
>
> In addition to the assessment contained with the [Assessment of Environmental Effects] on page 53, which I adopt, the following comments are made:
>
> Council's Acoustic Specialist, Andrew Gordon, has reviewed the proposal in relation to the proposed apartment design and their ventilation systems in light of intermittent overhead aircraft noise and provides the following assessment:

[45] The recommendation then sets out part of the supporting AES assessment which confirmed that the proposals could achieve compliance with relevant acoustic standards for developments within the MANA. The s 92 responses are adopted including that the AUP does not provide specific noise controls for residential activities affected by external noise effects either from adjacent business activities or overflying aircraft.

[46] The effect of aircraft noise on residents using outdoor areas of the Development was assessed as less than minor on the basis set out in the s 92 response including that: at any given time only a small proportion of residents would be outdoors; and apartment balconies would be shielded on multiple sides and by the building itself for a large proportion of overflights. The number of people expected to be outdoors in a location where an overflight is a distinctly audible event in the context of other ambient noise was expected to be low.

[47] Ms Cornford's recommendation concluded that potential reverse sensitivity effects were considered to be less than minor. It also referred to the advice that the MANA overlay was registered as a covenant on the certificate of title and Land Information Memorandum (LIM) so buyers would be aware of the presence of aircraft noise.

[48] Ms Cornford summarised her position in making the recommendation to process the application non-notified:

> In summary of the above comments relating to potential reverse sensitivity effects from existing overhead aircraft noise, the proposed layout and design of the apartment building and the outdoor areas will be largely shielded from elevated noise sources and due to the approximate number of flight movements which may occur over the site in any given day, this also reduces the extent of exposure. It is noted that the applicant has sought to comply with all standards for acoustic insulation to ensure that adverse effects on the airport regarding reverse sensitivity are minimised. As a result, the potential reverse sensitivity effects are considered to be less than minor.

[49] Reverse sensitivity effects are further referenced in the Notification Decision under the subheading "All persons within the immediate surrounds":

> In terms of on-going noise effects, notably reverse sensitivity effects from surrounding activities upon the residents within the proposed apartment building, it is considered that the proposal comprises extensive acoustic design measures, including cladding and window design specifications and heating and ventilation requirements (as required by both D24 and E25 of the AUP), such that windows and doors can be closed if required whilst maintaining a high level of internal amenity for residents. These measures will ensure reverse sensitivity effects are mitigated.

The Consent Decision

[50] On 9 August 2022, the same day it made the Notification Decision, the Council also decided to grant the consent sought in the application.

[51] The Consent Decision refers to the Overlay as follows:

> The site lies within the Auckland Airport MANA overlay and such [sic] seeks to ensure that the Auckland Airport is protected from reverse sensitivity effects, as well as ensuring that the effects of aircraft noise on new residential activities is either avoided, remedied or mitigated. In this instance the proposal will include acoustic treatment measures to meet the relevant objectives and policies of the AUP OP.

[52] The Consent Decision records in the reasons section that, in accordance with an assessment under s 104(1)(a) and (ab) of the RMA, the actual and potential effects from the proposal would be acceptable as:

> j. With regards to introducing new residential activities within the MANA and potential for reverse sensitivity effects, the application and supporting Acoustic Engineer assessment, which has been reviewed by Council's

> Specialist, who has confirmed that the proposal can achieve compliance with the relevant standards for sites within the MANA and that suitable acoustic treatment measures are to be utilised to ensure on-site amenity for residents.

Issues

[53] The issues in respect of the Notification Decision are:

(a) Did the Council err by misconstruing the requirements of the Overlay?

(i) Specifically, must reverse sensitivity effects be considered beyond ensuring compliance with applicable acoustic standards for developments in the MCZ within the MANA?

(b) Did the Council fail to carry out the mandatory assessment of all relevant adverse effects pursuant to s 95E of the RMA?

(c) Did the Council have adequate information before it so that it could properly determine whether Auckland Airport was an affected person?

(d) Was the decision not to notify unreasonable?

[54] The issues in respect of the Consent Decision are:

(a) Did the Council have adequate information?

(b) Was the decision unreasonable?

[55] The parties agree that if the Notification Decision is overturned the Consent Decision must also be overturned.

Discussion

Did the Council misconstrue the requirements of the Overlay?

[56] The issue essentially comes down to whether compliance with acoustic standards is the sole mechanism by which reverse sensitivity effects are intended to be remedied or mitigated in the Manukau MCZ MANA.

[57] There is no reference in the Notification Decision to the potential need to restrict the number of residents in the MCZ to give effect to the objectives of the Overlay. The Council's position is that the Overlay does not impose density controls in the MCZ MANA and that, if a density control had been intended beyond that established through zoning, the rules in D24 would be express as they are in respect of residential zones in the MANA.

[58] The Council accepted during oral submissions that the reverse sensitivity effects on Auckland Airport were not considered to the extent required if reverse sensitivity effects must be considered beyond ensuring compliance with acoustic standards imposed by the Overlay.

[59] The Council says that the Overlay must be read together with the underlying zone. When read together the Council says that zoning delivers the density controls required by the Overlay to address reverse sensitivity effects. Both respondents argue that, except where it does so explicitly in D24.4.3, the Overlay does not modify the density rules created by the underlying zone within the MANA.

[60] The Council submits that it did not need to consider the objectives and policies of the Overlay beyond compliance with acoustic standards because policy D24.3(3)(b) is given effect at the plan making stage when the appropriateness of the underlying zoning is considered in conjunction with the Overlay. Thus, density restrictions apply to much of the MANA which is zoned residential but in the MCZ there are no density restrictions because of competing interests which favour intensification. Overall density control is achieved through restrictions on residential dwellings in most of the MANA and by limiting the area without restrictions to the small geographic area within the Manukau MCZ MANA.

[61] Kāinga Ora adopts and develops the Council's submission that the zone and Overlay provisions must be read together. Kāinga Ora says that the MCZ provides for a wide range of activities including high-density residential development and is specifically earmarked in the AUP for growth and intensification.

[62] Kāinga Ora submits that the Overlay manages residential development by:

(a) in residential zones, providing for a density control of one dwelling per 400 square metres and acoustic insulation requirements; and

(b) in the MCZ, which is not a residential zone, by applying no density control but imposing acoustic insulation requirements for noise-sensitive activities.

[63] Kāinga Ora submits that the correct construction of the Overlay, as it applies to the Manukau MCZ, is that it protects Auckland Airport by requiring new developments to meet strict acoustic insulation and ventilation standards and not by controlling or limiting density. Kāinga Ora submits that Auckland Airport's approach seeks to read a density control into the Manukau MCZ when a density control would counteract the zone's function of enabling intensified growth.

[64] Auckland Airport says that the policy in D24.3(3)(b) creates an avoidance framework with only a "narrow escape valve". That "escape valve" provides for the establishment of residential activities within the MANA only where the effects can be adequately remedied or mitigated "through restrictions on the numbers of people exposed to aircraft noise in the external environment through zoning and density controls and through acoustic treatment of buildings". Auckland Airport argues that the use of the word "and" rather than "or" means that acoustic treatment is never the only consideration. The mitigation of reverse sensitivity effects through limiting the number of people exposed to aircraft noise in the external environment must be considered in the Manukau MCZ MANA despite the lack of an explicit density control imposed by the Overlay.

[65] The area within the MANA is subject to different zoning requirements. The zones do not follow or conform to the Overlay in any way. Rather the Overlay sits over various zones. Part of the Manukau MCZ is within the MANA and part is not. The Manukau MCZ is one of many MCZs across the region and is the only one affected by the Overlay. Clearly the zone rules for developments within the MCZ were not developed with any consideration for the need to manage reverse sensitivity effects on Auckland Airport. It is the Overlay that exists to address that.

[66] The Overlay modifies the underlying zone. This is explicitly stated in H.9.1 of the AUP which reads:

> The zone provides for a wide range of activities including commercial, leisure, high density residential, tourist, cultural, community and civic services. Zone provisions, in conjunction with rules in the other business zones, reinforce metropolitan centres as locations for all scales of commercial activity.
>
> These centres are identified for growth and intensification. Expansion of these centres may be appropriate depending on strategic and local environmental considerations.
>
> Precincts and overlays that modify the underlying zone or have additional provisions apply to some of the metropolitan centres. Generally, however, to support an intense level of development, the zone allows for high-rise buildings.

[67] A reading of H.9.1 makes it clear that the AUP anticipates that intensive development in MCZs may have to be adapted where an overlay is in existence. A limit on intensive residential developments in the Manukau MCZ MANA is not necessarily inconsistent with intended function of the zone. There are parts of the Manukau MCZ that fall outside the MANA. There are several locations suitable for residential development within a short walk of the Manukau retail and transport hubs which sit outside the MANA. There are other activities less sensitive to noise that can be undertaken in the MANA. Kāinga Ora's argument that consideration of a restriction on residential development within the MANA is inconsistent with the intended function of the zone is not correct. Modification of zone rules by an overlay is contemplated within the AUP.

[68] The purpose, objectives, and policies of the Overlay are informative of the correct interpretation of the scheme. The objectives and policies are relevant to an assessment of whether a person is affected by an application including at the notification stage.[15] The purpose of the Overlay includes ensuring that the continued operation of airports is not compromised. The objectives are the protection of airports from reverse sensitivity effects and the avoidance, remedy, or mitigation of the adverse effects of aircraft noise on residential activities. The Overlay must be construed in a way that gives real effect to its fundamental purpose and objectives. The purpose of

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[15] *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [82]; and *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [25].

the Overlay could be thwarted if participation by Auckland Airport is prevented through a narrow interpretation of how the objectives and policies are to be given effect at the notification stage.

[69] Where differing interpretations regarding a notification requirement are available, the interpretation that supports notification should be preferred. This is because non-notification prevents participation. In *Tasti Products Ltd v Auckland Council* it was held that a broad or liberal approach should be taken to ensure that persons can participate in matters that affect them.[16] In *Discount Brands Ltd v Westfield (New Zealand) Ltd* Elias CJ said that:[17]

> [21] A decision not to notify has significant consequences. It deprives others of the right to participate in the determination of the resource consent application. It also precludes any person other than the applicant from appealing or participating in the hearing of an appeal to the Environment Court from the grant or refusal of resource consent. The Environment Court is a specialist tribunal which on appeal conducts a full rehearing of the application and is able to substitute its judgment for that of the consent authority. Non-notification precludes the opportunity for anyone other than the applicant to seek such reassessment and from further appeal on a point of law to the High Court.

[70] The importance of protecting Auckland Airport has been recognised by the Environment Court in *Independent News Auckland Ltd v Manukau City Council.*[18] The proposed development in that case was in Lambie Drive, Manukau and comprised a 349-unit residential development. The Environment Court said that mitigation by way of compliance with acoustic and ventilation standards was not adequate to address the reverse sensitivity effects on Auckland Airport. It was said:[19]

> In the present case, some 349 homes proposed in an area identified in the district plan as being within the high and moderate noise area, and where the physical resource sought to be protected is New Zealand's largest international airport. In our view, the "avoiding" elements of the plan's objectives and policies predominate in this case. There is a plain and unambiguous thread of protecting the airport from increased residential density in the high aircraft noise area. We find that a residential proposal of this magnitude is contrary to the objectives and policies of the district plan.

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16 *Tasti Products Ltd v Auckland Council*, above n 15, at [80] cited in *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625 at [182].

17 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 15.

18 *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16 (EnvC).

19 At [119].

[71] The considerations in the present case are not identical to those in *Independent News Auckland Ltd*. The development in that case was partly in the high aircraft noise area and was in a different zone. The provisions of the district plan that applied in 2003 are not the same as the provisions that apply under the AUP — including the Overlay. But the comments about the adequacy of acoustic measures to address reverse sensitivity effects are relevant and the case demonstrates the importance of the oversight exercised by the specialist jurisdiction of the Environment Court. That oversight is entirely avoided by non-notification.

[72] There is a further matter which contradicts the position taken by the Council and Kāinga Ora. If compliance with acoustic standards is all that must be considered to address reverse sensitivity effects in the Manukau MCZ MANA, it is unclear why new ASAN in non-residential zones in the MANA would be a fully discretionary activity. Residential development in the MCZ is a permitted activity unless subject to the Overlay. In areas where the Overlay applies, residential development in the Manukau MCZ is a discretionary activity if located in the MANA and a prohibited activity if located within the HANA[20].

[73] As Auckland Airport points out a "discretionary activity" is the broadest category containing no limits on matters that an authority may consider. The decision to make residential development in the MCZ MANA a fully discretionary activity, was a policy choice that modified the underlying zone. The Overlay anticipates density controls as a means of protecting Auckland Airport from reverse sensitivity effects. In the HANA, a density control is imposed by the Overlay itself. In the MANA, a density control is imposed in the residential zone and, if complied with, residential activity is a permitted activity subject to meeting acoustic standards. No density control is imposed by the Overlay in the Manukau MCZ MANA, but acoustic standards must be complied with. Compliance with the acoustic standards, however, does not transform the activity into a permitted activity or even a restricted discretionary activity in the Manukau MCZ MANA. It remains discretionary.

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[20] There appears to be a small area of the Manukau MCZ within the HANA.

[74] In this case, the Council took a narrow interpretation of the effect of the Overlay when deciding whether Auckland Airport was an affected person for the purpose of notification. The Overlay requires avoidance of residential development unless the adverse effects of aircraft noise, including reverse sensitivity effects, are adequately remedied or mitigated. The interpretation most consistent with the objectives of the Overlay is that the acoustic standards are a minimum requirement without which the activity is non-complying, but compliance does not necessarily remedy or mitigate reverse sensitivity effects created by large-scale residential developments within the MANA.

[75] The Council did give consideration to Auckland Airport as required but misconstrued the requirements of the Overlay. In considering whether Auckland Airport was an affected person for the purpose of notification, the Council was incorrect to take the view that the only consideration was whether the applicable acoustic standards were met. The Council failed to consider whether, even with acoustic treatment, the Development might have an adverse effect on Auckland Airport that was at least minor. As a result, the Council failed to give proper consideration to the need to manage reverse sensitivity effects on Auckland Airport. While it is true that a lower level of amenity is expected in a metropolitan centre zone generally, where that lower level of amenity results from aircraft noise, Auckland Airport is vulnerable to reverse sensitivity effects and that vulnerability cannot be ignored because there are other sources of noise in the environment or because the minimum requirements of acoustic treatment are complied with.

[76] To the extent that the Notification Decision is based on an erroneous view that compliance with acoustic standards was the only matter to be considered to remedy or mitigate reverse sensitivity effects, that is an error of law rendering the Notification Decision invalid.

Did the Council fail to carry out the mandatory assessments of all relevant adverse effects pursuant to s 95E of the RMA?

[77] This is closely related to the first cause of action and many of the same considerations apply.

[78] Auckland Airport says that the Council failed to carry out the mandatory assessment of all relevant adverse effects pursuant to s 95E of the RMA and instead conducted a compliance focused assessment.

[79] The Council does not dispute that it carried out a compliance focused assessment but says that compliance with acoustic standards is all that is required because any necessary density control not explicitly created by the Overlay is delivered through zoning. That argument has already been dismissed.

[80] To find that Auckland Airport was not an affected person the Council had to conclude that the activity's adverse effects on Auckland Airport were less than minor. In doing that the Council had to undertake an assessment of all relevant effects.

[81] The definition of "effect" in the RMA includes:[21]

> (a) any positive or adverse effect; and
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> (b) any temporary or permanent effect; and
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> (c) any past, present or future effect; and
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> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[82] The Council did not consider the adverse effects of aircraft noise on the indoor environment beyond ensuring compliance with applicable acoustic standards. Ms Cornford did consider the noise in the external environment such as balconies but concluded that reverse sensitivity effects would be mitigated by compliance with acoustic standards. Compliance with acoustic standards does not mitigate the effect of aircraft noise in the external environment. The Council's argument is that the AUP does not seek to protect outdoor living environments in the MCZ from aircraft noise.

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[21] Resource Management Act 1991, s 3.

[83] I accept the evidence of Mr Osborne that to properly consider a discretionary activity assessment a planner must consider all effects, including external exposure to aircraft noise, and that the planner needs to analyse the application against the relevant objectives and policies. In the present case, Ms Cornford adopted the assessment of the noise expert but did not independently conduct a broad assessment of all relevant adverse noise effects or how adverse noise effects might lead to reverse sensitivity effects on Auckland Airport.

[84] Affidavit evidence about the potential for adverse noise effects was provided by Mr Christopher Day for Auckland Airport. Noise levels during a flyover are expected to be around 75–80dBA dropping to ambient levels after 30–60 seconds. Mr Day says that the projected noise level constitutes a significant adverse effect for a residential development. Based on community response studies undertaken by the World Health Organisation and Federal Aviation Administration, 38 to 52 per cent of people would be expected to be highly annoyed living in this noise environment. In practical terms, residents in the outdoor areas of the Development or indoors with windows open would need to shout or pause a conversation for 30 seconds every time an aircraft passed overhead.

[85] The Notification Decision refers to existing noise levels in the Manukau MCZ but fails to consider the cumulative effect of aircraft noise on residents. There is also no reference to the fact that the aircraft noise will recur multiple times an hour and will require residents in outdoor areas, or with open windows to pause conversations or shout. There is no consideration of whether the necessity to keep windows closed because of aircraft noise will create annoyance and, if so to what extent.

[86] The respondents say that residents who choose to live in the Development will expect aircraft noise as the Overlay is identified on the LIM. This ignores the reality that the intended residents are social housing tenants, specifically pensioners. They will not be buyers and there is a risk that they will be vulnerable both by reason of poverty and age, with little choice but to accept whatever housing they are offered.

[87] I have little difficulty in concluding that the Council did fail to carry out the mandatory assessment of all relevant adverse effects pursuant to s 95E of the RMA. This is an error of law and renders the Notification Decision invalid.

Did the Council have adequate information before it so that it could properly determine whether Auckland Airport was an affected person?

[88] The Council submits that Auckland Airport's position, if accepted, would mean that the Council could not lawfully make any decision about consent applications in the Manukau MCZ MANA without notification because Auckland Airport alone holds relevant information as to both its activities and as to the effect of its operations on ASAN.

[89] Kāinga Ora also submits that Auckland Airport seeks to obtain, through judicial review, a de facto mandatory notification provision in the AUP.

[90] Ms Marshall says that Auckland Airport does not expect to be notified of every development within the Manukau MCZ MANA, but it should be notified of any mixed-use, multi-unit development. This is because it is inconceivable to Auckland Airport that a multi-unit residential development proposed in the MANA could have less than minor adverse effects on it.

[91] Failure to notify inevitably creates a risk that a decision maker proceeds with inadequate information. For that reason, information relied upon in making a decision not to notify should be carefully and critically scrutinised. In the present case, the risk of proceeding with inadequate information is demonstrated by the reliance on COVID-19 flight data. The Council submits that it can only proceed on the information available and that was the flight data provided. This is exactly why a decision to proceed on a non-notified basis should only be taken where the Council can properly take the view that, as Elias CJ said in *Discount Brands*, "notification would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor".[22]

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[22] *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 15, at [25].

[92] The Council relies on the evidence of Mr Gordon who says that the proposed acoustic design was based on future projected aircraft movements and associated noise levels. But Mr Gordon's evidence refers to the magnitude of noise not the frequency of flights.

[93] An average of 382 flights in a 24-hour period was relied on by the Council. Ms Marshall deposes that the average number of flights projected for 2044 was last assessed at 712 and Auckland Airport remains on track to meet that projection. If 20 to 30 per cent of those flights overfly the Development that is approximately 140 to 220 flights per 24-hour period which will raise the noise level to a level where anyone with an open window will have to pause a conversation or shout for a period of at least 30 seconds. The information from Mr Day about the level of annoyance this creates even where acoustic standards are met appears to be strongly evidence-based in contrast to the information relied on by the Council. The information which Mr Day provided was not available at the time of the Notification Decision but adds considerably to the available picture.

[94] So far as the adequacy of information is concerned, I accept Mr Osborne's evidence that, in respect of reverse sensitivity effects in particular, an operator of an activity will often be best placed to assess the impact of reverse sensitivity effects on future operations. This will obviously be affected by the complexity of the operation. In the case of Auckland Airport, the operation is both complex and nationally significant.

[95] I agree that the Council did not have adequate information to reach the conclusion that the effects on Auckland Airport would be less than minor such that notification was not required. That too invalidates the decision not to notify.

Was the decision not to notify unreasonable?

[96] Auckland Airport says that the conclusion reached by the Council is so clearly unsupportable that it was unreasonable in administrative law terms. This submission is based on the evidential matters discussed above as well as inconsistency with the Council's established practice of consultation.

[97] The Council says that the high threshold to establish unreasonableness cannot be reached. As to the established practice of consultation, the Council says that the examples provided by Auckland Airport relate mainly to applications within residential zones not the Manukau MCZ. In any event, the Council says the prior practice should not be treated as a requirement.

[98] Judicial review does not require or permit a determination relating to the merits of a decision. Unreasonableness in the *Wednesbury* sense requires a finding that a decision that is "so absurd that no sensible person could ever dream that it lay within the powers" of the decision-maker.[23]

[99] The Supreme Court in *Auckland City Council v CP Group Ltd* recently confirmed that the *Wednesbury* formulation of unreasonableness continues to have application in the context of challenges to local authority rating decisions.[24] It endorsed the earlier observations of the Court of Appeal in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* saying that the test was "a stringent one" such that an applicant would need to show that the decision is irrational or that no reasonable body of persons could have arrived at the decision.[25]

[100] The finding that the effects on Auckland Airport would be less than minor required a finding that the effects would be *de minimis* and could be safely disregarded as irrelevant and unimportant. Even minor effects require notification as illustrated by the wording "adverse effects on the person are minor or more than minor (but are not less than minor)".[26] In *Discount Brands*, Elias CJ described the purpose of exceptions to notification such as the less than minor rule as "important in streamlining consents where the consent authority can be confident it does not need any additional information which notification may provide".[27] The exception ensures that development does not become over encumbered by requirements to consult with parties who have no real interests at stake. It is not designed to cut out potentially

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23 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 689 (CA) at 229.

24 *Auckland City Council v CP Group Ltd* [2023] NZSC 53, [2023] 1 NZLR 35.

25 At [87] citing *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.

26 Resource Management Act 1991, s 95E(1).

27 *Discount Brands v Westfield (New Zealand) Ltd*, above n 15, at [27].

affected parties from contentious decisions. The threshold for adverse effects requiring notification is very low which is consistent with the natural justice implications of non-notification.

[101] The reasonableness or otherwise of the Notification Decision must be assessed against the Council's interpretation of the interplay between the zone rules and the Overlay. I have already found the Council made an error of law in proceeding on the basis that the lack of an explicit density control in the Manukau MCZ meant that reverse sensitivity effects on Auckland Airport need not be considered beyond ensuring compliance with acoustic standards. Had that interpretation been correct, however, the Council's decision would be consistent with that interpretation. The question then becomes whether it was unreasonable for the Counsel to interpret the AUP as it did. The interpretation does have a logical basis, but it is inconsistent with the purpose, objectives, and policies of the Overlay.

[102] Having found for Auckland Airport in respect of the first three causes of action, it is not necessary for me to consider whether the high threshold set out in *Wednesbury* has been met such that I should find that the decision not to notify was irrational or that no reasonable body of persons could have arrived at the decision. It was wrong in law and that is sufficient to require that it be set aside.

The Consent Decision

[103] The respondents accept that, if the Notification Decision is overturned, the Consent Decision must also be overturned. This is an inevitable consequence of the Consent Decision having been made on a non-notified basis. Section 104(3)(d) of the RMA provides that a consent authority must not grant a resource consent if the application should have been notified and was not.

Relief

[104] The Court has a discretion as to whether or not to grant relief. The default position is to grant relief and there must be strong grounds to refuse relief.[28]

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[28] *Tasti Products Ltd v Auckland Council*, above n 15, at [96].

[105] Kāinga Ora submits that, even if the Court determines that the Council made an error in the decision, in determining whether to grant relief, the Court should consider the "no-complaints" covenant Kāinga Ora undertook to impose.

[106] The nature of the Development means that a no-complaints covenant is unlikely to be sufficient to address reverse sensitivity effects because the Development will be tenanted by social housing tenants who will be the people actually affected by aircraft noise. The covenant will apply only to the owner of the property. It is unclear how such a covenant could operate to prevent complaint by the tenants actually affected by the aircraft noise.

[107] I do not consider that there has been any delay of the nature that would justify declining relief. Nor is the prejudice to Kāinga Ora so great that relief should be declined. The competing interests at stake are significant. On the one hand there is a recognised need for social housing; on the other, there is the need to protect the operation of New Zealand's largest airport. It is important that the Council has a realistic and informed picture of the future operation of Auckland Airport and how that operation will affect the occupants of an intensive residential development within the MANA, so that it can properly consider potential reverse sensitivity effects on Auckland Airport.

Result

[108] I am satisfied that the Council erred in law. The Notification Decision and the Consent Decision are unlawful and are set aside.

[109] The matter is remitted to the Council to consider afresh and in accordance with law. The matter should be reconsidered by planning officers not involved with the previous decisions.

Costs

[110] Auckland Airport is entitled to reasonable costs and disbursements. If the parties are unable to agree costs, I make the following directions:

(a) any application for costs is to be made by memorandum to be filed and served within 20 working days of the date of this judgment;

(b) any replies from the Council and Kāinga Ora are to be filed and served by memorandum within a further 10 working days; and

(c) memoranda as to costs are not to exceed 5 pages.

[111] I will then deal with the issue of costs on the papers.

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Wilkinson-Smith J