

Before the Queenstown Lakes District Council

In the Matter of the Resource Management Act 1991

And

In the Matter of the Queenstown Lakes Proposed District Plan

Chapter 37 (Designations)

**Right of Reply for Queenstown Airport
Corporation Limited (Requiring Authority
for Designations 2 and 4) – Legal
Submissions**

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Introduction

1. These legal submissions address issues raised during the hearing of Queenstown Airport Corporation Limited's (**QAC**) Notices of Requirements (**NORs**) to modify Designations 2 (Aerodrome Purposes) and 4 (Airport Approach and Land Use Controls) in the Proposed District Plan, including issues raised by submitters and QLDC in its capacity as regulatory authority.
2. The following issues will be addressed:
 - (a) The adequacy of the assessment of the potential effects of the modifications proposed to Designation 2, and related issues, as raised by Remarkables Park Limited (**RPL**)¹;
 - (b) RPL as a trade competitor;
 - (c) The inconsistency between the text and the explanatory Figures for Designation 4, as raised by RPL and the section 42A reporting officer;
 - (d) The underlining of the proposed modifications in the NOR for Designation 4.
3. To clarify, counsel does not intend or consider it necessary to rebut or otherwise address each and every outstanding issue as between the parties, but rather defers to the pre-lodged legal submissions and evidence, and further legal submissions and evidence given orally at the hearing.
4. For the avoidance of doubt QAC does not agree with or accept any of the arguments presented for RPL.
5. Nor does QAC agree with or consider justified the section 42A reporting officer's apparent change in position in respect of the modifications proposed to Designation 2 (specifically, the inclusion of retail, food and

¹ Noting that, as for QAC's pre-lodged legal submissions, references to RPL throughout these submissions should be read as including reference to QCL.

beverage and other commercial activities) following the hearing of QAC's and RPL's cases.

6. These issues will be addressed in this reply, as necessary.

Adequacy of Assessment of Modifications to Designation 2

7. RPL purports that QAC has presented no proper evidence or assessment to support the modifications sought to Designation 2². Specifically, RPL purports that:
- (a) the modifications proposed enable a significant increase in the range of activities that can be undertaken at the Airport;
 - (b) it is a failing of the NOR to not identify specific areas within the Designation's boundaries for activity types;
 - (c) it is a failing of the NOR that there are no "meaningful" conditions to address potential effects;
 - (d) there is no proper assessment of effects;
 - (e) the comparison of activity enabled under the NOR with that enabled in adjoining zones is flawed (for the purpose of assessing effects);
 - (f) it is a failing of the NOR that there has been no assessment of the NOR as against the Operative District Plan (including in particular the Frankton Flats B and Remarkables Park zone provisions);
 - (g) because the Environment Curt considered landscaping and building design related conditions were appropriate for the Lot 6 NOR, it follows that they are also appropriate for this NOR;
 - (h) the above errors are significant and can not now be remedied by QAC. The NOR must therefore fail.
8. Additionally, having heard RPL's legal submissions, the section 42A reporting officer now considers that QAC should provide further information to justify the inclusion of retail, food and beverage and other commercial

² RPL legal submissions dated 20 October 2016, at paragraph 1.4.

activities in Designation 2 and to demonstrate that limits on the nature and sale of such activities are not necessary³.

9. These purported issues are addressed in turn below.

The modifications enable a significant increase in the range of activities that can be undertaken at the Airport

10. RPL does not expressly take issue with the range of activities QAC seeks be enabled at Queenstown Airport, but rather, appears to accept that the range of activities sought to be provided for is consistent with those that might be justifiable under the umbrella phrase “modern airport”.⁴
11. RPL’s issue instead appears to be with the potential location of such activities at the Airport, and the ability to ensure that any potential adverse effects can be appropriately addressed (which is addressed in these reply submissions shortly).
12. As made clear in pre-lodged legal submissions, the range of activities sought to be enabled at Queenstown Airport is wholly consistent with activities undertaken at comparable New Zealand airports, and the activities can be properly considered as legitimate airport and airport related activities. The Court of Appeal has confirmed this.

It is a failing of the NOR to not identify specific areas for activity types

13. RPL has clarified that it takes no issue with the NOR in so far as it seeks to provide for an increased range of activities south and west of the terminal building and adjacent to Lucas Place.⁵ Its issue therefore appears to be with the potential for these activities to be located to the north of the main runway.
14. As explained by Mr Kyle, QAC is constrained by its existing infrastructure as to where it can locate such activities, noting that its most valuable asset is the main runway (including its associated clearance requirements etc).

³ Rebecca Holden, Summary Evidence dated 20 October 2016, at paragraph 8.

⁴ RPL legal submissions dated 20 October 2016, at paragraph 2.25.

⁵ Ibid, paragraph 1.2.

15. As also explained by Mr Kyle, the most likely location for the activities sought to be enabled by the NOR is within or adjacent to the existing terminal building – being a location in respect of which RPL has declared it has no issue.
16. Accordingly RPL's concerns in this regard appear to be overstated.

There is no proper assessment of effects / the comparison of activity enabled under the NOR with that enabled in adjoining zones is flawed / it is a failing of the NOR that there are no 'meaningful' conditions to address potential effects

17. As stated at the hearing, QAC does not accept that there has been no proper assessment of the potential effects of the proposed modifications.
18. The assessment of effects that accompanied the NOR stated that the proposed building height limits and setbacks requirements would ensure that the built form outcomes would be consistent with outcomes anticipated in the surrounding commercial zones, and would give rise to no adverse effects.
19. As Mr Kyle explained in evidence, and in further detail at the hearing, in reaching this conclusion as to effects, detailed consideration was given to the types of activities and nature of built form enabled in the adjacent commercial zones.
20. The nature and scale of the activities proposed to be enabled via the NOR fall within the range of outcomes enabled and anticipated for land in the adjacent zones.
21. Accordingly, given the assessment that the effects of the activities proposed to be enabled via the NOR would be similar to those enabled on adjacent land, the conclusion reached was that the effects of designated activities would not be incongruent with, and therefore could not be considered adverse on the surrounding environment.
22. Such comparison of built form outcomes is a reasonable and appropriate way to assess the effects of the proposed modifications. It demonstrates that at a general level, these effects are acceptable, in the context of the surrounding (zoned) environment.

23. As explained by Mr Kyle at the hearing, the fine grained assessment of effects can quite properly be addressed at the subsequent outline plan stage (section 176A RMA).
24. Contrary to that asserted by counsel for RPL, an outline plan is not a mere "*informational document used to establish compliance with the conditions of the designation*"⁶. The RMA is clear as to the matters that an outline plan must address, which include the very matters with which RPL purports to be concerned.
25. The outline plan process is akin to a controlled resource consent: the Council can not decline consent/approval to an outline plan, but it can request that QAC make changes and/or seek additional conditions "*that will give effect to the purpose of the Act*" (section 176A(6)). If QAC does not make the changes requested, the Council can appeal QAC's decision to the Environment Court, who then becomes the decision maker on the outline plan.
26. The outline plan process is therefore a substantive rather than token process, for which the Court can be the final (independent) arbiter.
27. The fact that councils may only infrequently invoke their appeal rights under section 176A is irrelevant: the right to appeal and have the outline plan determined by the Environment Court exists. That the right is infrequently invoked suggests, if anything, that requiring authorities are receptive to council's requests for changes to outline plans.
28. Notwithstanding the above, Mr Kyle has carefully considered the issues raised as to potential effects, in particular the concerns expressed by the section 42A reporting officer, and recommends the inclusion of additional conditions that will ensure any potential effects can be properly considered and addressed at the outline plan stage.
29. In formulating the additional conditions, Mr Kyle has had regard to the Auckland Airport example, on which counsel for RPL placed much reliance.
30. The rationale for the additional conditions is explained by Mr Kyle, in a brief statement of reply evidence, which is lodged contemporaneously with

⁶ Ibid, paragraph 2.13.

these reply legal submissions. The proposed additional conditions recommended by Mr Kyle, which are supported by QAC, are addressed in his evidence.

There has been no assessment of the NOR as against the Operative District Plan

31. This hearing relates to the Proposed District Plan. The Operative Plan is relevant only to the extent that it contains provisions which will not be addressed/reviewed through the Proposed Plan/review process (i.e. Operative provisions which will ultimately be included within the new District Plan, unaltered).
32. Mr Kyle has plainly assessed the NOR as against such provisions, as relevant. Specifically, he has undertaken a considered comparison of the nature and scale of activity enabled under the operative Remarkables Park and Frankton Flats B zonings, which it is understood will not be addressed through the review process.
33. RPL's criticism in this respect is therefore without merit.

Because the Environment Court considered landscaping and building design related conditions were appropriate for the Lot 6 NOR, it follows that they are also appropriate for this NOR

34. The relevance of the Lot 6 NOR was addressed in detail in pre-lodged legal submissions. The Lot 6 NOR related to privately owned 'Greenfields' land that is currently undeveloped. It related to an NOR for a different range of activities with a different objectives. It related to a concept development proposal for a new aviation precinct spanning approximately a 1 kilometre length (16 ha total) of RPL's land.
35. In contrast, through the present NOR QAC is seeking to the ability to establish a broader ranger of airport and airport related activities within its existing landholdings, of a nature and scale ordinarily expected at modern airports like Queenstown Airport, and consistent with commercial land use in surrounding zones.
36. RPL's comparison of this NOR with the Lot 6 NOR is therefore neither helpful nor relevant.

37. RPL has produced no evidence which demonstrates that the effects of this NOR will be adverse, and/or that detailed landscaping and building design conditions are required.
38. Mr Kyle's evidence is that there will be no adverse affects, and that the conditions proposed by QAC, in conjunction with the outline plan process, will ensure that any effects can be appropriately addressed at the time of development.
39. Mr Kyle's evidence is the only expert evidence on such issues and should be given considerable weight.

The above errors are significant and can not now be remedied by QAC. The NOR must therefore fail.

40. RPL's submission on this issue is patently incorrect. The very point of a public hearing process is to enable submitters to express their views, including any concerns with a proposal, in order to ascertain whether they can be addressed. If submitters concerns are valid and material, and cannot be addressed by lawful changes to a proposal, then the only available conclusion may be that the proposal must fail. But that is not the case presently.
41. The nub of RPL's argument appears to be that there is not enough detail in QAC's proposal to ascertain whether there will be any significant adverse effects on the environment, and that conditions are required to ensure such effects can be appropriately addressed at the appropriate time. QAC now proposes such conditions via its right of reply, in direct response to RPL's expressed concerns. That is an entirely appropriate and available course of action for QAC.
42. If the approach advocated by RPL was adopted in all instances, it would mean that an applicant would, in every case, be confined to the material presented in its original application, thereby rendering the section 42A report, submission and hearing process largely nugatory. Simply put, RPL's argument is a nonsense.
43. RPL's real concern appears to be that it does not have an opportunity to respond to, and further rebut, QAC's position. However that is not a valid reason for rejecting the NOR.

RPL as a Trade Competitor

44. RPL owns a significant amount of commercial land around Queenstown Airport, some of which is shown on the plan attached to QAC's pre-lodged legal submissions as Attachment A.⁷ This land⁸ is enabled for a range of retail, commercial and industrial uses, including uses that QAC seeks be enabled on its land.
45. RPL is, by its own implicit admission, a trade competitor of QAC. In its original submission on the Proposed Plan, RPL opposed Chapter 17 (Queenstown Airport Mixed Use Zone), and sought that the operative zoning be retained. Chapter 17 of the Proposed Plan seeks to broaden the range of activities enabled at Queenstown Airport, in a manner that is aligned with this NOR, and to extend its boundaries. RPL stated in its submission, as the relief sought: *"If the existing Airport Mixed Use Zone is to be amended to enable a range of activities including ASANs, the Activity Area of the RPZ be amended to also enable the same range of activities."*⁹ RPL also opposed the change in the boundaries of (so as to increase its extent) the Queenstown Airport Mixed Zone.¹⁰
46. In its further submission¹¹ RPL opposed QAC's submission in respect of (inter alia) *"all amendments that seek to enable urban activities on airport land where such activities are constrained on land adjoining or near the airport (Frankton and Remarkables Park)"*¹², and *"all amendments that seek to constrain any existing development opportunity within the Remarkables Park Zone"*.¹³ RPL also sought that *"any amendments or provisions supported/opposed by QAC that seek to achieve any of the outcomes set out above be rejected."*¹⁴

⁷ It is noted that this plan was not reproduced in colour when appended to the pre-lodged legal submissions, which made the relevance of the cross hatching unclear. A colour plan is **attached** to these legal submissions. The cross hatching is coloured coded and denotes land ownership.

⁸ Which is located within the Remarkables Park and Frankton Flats B zones.

⁹ RPL's submission dated 23 October 2015, at paragraph 10.4 (Submitter 807).

¹⁰ RPL's submission dated 23 October 2015, at paragraph 10.5.

¹¹ Dated 18 December 2015, (Submitter 1117).

¹² Ibid, page 7.

¹³ Ibid.

¹⁴ Ibid.

47. There is no mention in RPL's original and further submissions as to potential adverse effects of the proposed modifications to the Designation, as it now argues. Instead, the clear tenor of RPL's original and further submissions is that "QAC should not any new development opportunities unless RPL has them too". However, that does not give rise to an environmental effect, nor is it a valid resource management basis for any decision.
48. RPL's opposition to the NOR for Designation 2 is plainly motivated by trade competition. The recent case of *Kapiti Coast Airport Holdings Limited v Alpha Corporation Limited*¹⁵ supports this submission, a copy of which is **attached** to these reply submissions.
49. Section 171(1A) of the Act makes clear that "*when considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.*"
50. RPL's opposition to the NOR for Designation 2 should therefore be disregarded.

The inconsistency between the text and the explanatory Figures for Designation 4

51. QAC's NOR for Designation 4 seeks (inter alia) to correct an inconsistency between the text of the Designation and Figures 1 and 2 of the Designation (located in Volume 3 of the Operative Plan, and the Maps volume of the Proposed Plan), which depict the location the obstacle limitation surfaces addressed by the Designation.
52. The text of the Designation indicates that the obstacle limitation surfaces originate/start at a point 75 metres either side of the main runway centreline, whereas Figures 1 and 2 show these surfaces originating at a point 150 metres either side of the runway centreline. The Figures are correct. Through the NOR QAC seeks to modify the text of the Designation so that it aligns with the Figures.
53. As explained in evidence and at the hearing, QAC has always applied the Designation Figures (not the text) when determining the location of and

¹⁵ [2016] NZEnvC 137.

compliance with the Designation, both in terms of its own infrastructure, and for development proposals by third parties on land not owned by QAC.

54. Accordingly modifying the text as proposed by QAC will not have any materially different effect on land-use outside the Designation. To be clear, it will not result in any increased restrictions on land use, over and above those that apply by virtue of the Operative Designation.
55. The section 42A reporting officer has stated in her summary evidence¹⁶ that QAC has not yet demonstrated that the proposed modifications correctly reflect Figure 1, and that it would be useful for QAC to provide this information.
56. It is noted that Figures 1 and 2 are scale drawings, although the scale used is difficult to ascertain from the diagrams.
57. However, the land ownership plan appended to Mr Kyle's evidence for Hearing Stream 1¹⁷ and also appended to QAC's pre-lodged legal submissions¹⁸ is of some assistance in that it depicts a 300 metre wide runway strip, being a runway strip that extends 150 metres either side of the main runway centreline.
58. The edge of the 300 metre wide runway strip shown on the land ownership plan therefore corresponds with the starting point of the obstacle limitation surfaces, as shown in Figures 1 and 2 of Designations 4, and described in the NOR for this Designation.
59. When the landownership plan showing a 300 metre wide runway strip is read alongside Figures 1 and 2, it is apparent that the 300 metre wide strip aligns with the inner edge of the obstacle limitation surfaces, as depicted on the Figures. That is, it is apparent from this comparison that the Figures do show these surfaces as originating/starting at a point 150 metres either side of the main runway centreline.
60. Finally, it is noted that if QAC's proposed modification to the text of Designation 4 is not made, QAC will continue to apply the Figures for the purposes of determining the location of the obstacle limitation surfaces and

¹⁶ Dated 20 October 2016, at paragraph 13.

¹⁷ Dated 29 February 2016.

¹⁸ Dated 14 October 2016, as Attachment A.

compliance with the designation (as it has always done), but the ambiguity arising from the incorrect text in the Designation will remain. This is undesirable, and the modification to the text should therefore be made as proposed.

The underlined changes in the NOR for Designation 4

61. A purported issue has been raised by counsel for RPL, the section 42A reporting officer, and counsel for QLDC inspect of the underlining of QAC's proposed modifications to Designation 4 in its NOR.
62. It is acknowledged that the underlining in the NOR (the purpose of which was indicated as being to show the proposed modifications) was, inadvertently, inaccurate, in that it did not show all the modifications proposed to the text of the Designation.¹⁹
63. However, QAC brought this to the Council's attention well prior to notification in August 2016, and provided the Council with a copy of the NOR that correctly "tracked" all proposed modifications, in conjunction with a covering email which described the underling 'omissions', and the additional underlining required, in some detail.²⁰
64. For reasons unknown the Council did not address the inaccurate underlining prior to notification, despite QAC bringing it to its express attention.
65. In any case, there is no requirement or obligation on QAC, or any requiring authority, to "track" the modifications proposed to an NOR, and the entirety of Chapter 37 (Designations) was notified "clean" (i.e. no modifications to any NORs were tracked). That is appropriate given this process concerns a "new" district plan, and persons can submit on any part of it (including parts of designations that are rolled over without modification)²¹.
66. It is also noted that numerous other NORs did not track, or tracked inconsistently, modifications proposed to the designations, although these

¹⁹ To be clear, the text of the NOR was correct. The issue raised by RPL and the section 42A reporting officer is that not all of the proposed new text was shown by underlining.

²⁰ Sonya Baird's email (Mitchell Partnerships) to Craig Barr (QLDC) sent 26 June 2016.

²¹ Refer Schedule 1, cl 9 RMA.

NORs have not been addressed by the section 42A reporting officer, or in QLDC's legal submissions.

67. Finally, it is noted that the only substantive modification²² to Designation 4 related to the point of origin of the obstacle limitation surfaces (i.e. 75 metres being changed to 150 metres) and this change was clear from the underlining shown in the NOR and the accompanying assessment.
68. Accordingly, the inaccurate underlining in the NOR as notified is not an issue that requires any further consideration.

Conclusion

69. Excepting the additional outline plan related conditions now proposed by QAC for Designation 2, no legal submissions or evidence were presented during the course of the hearing of QAC's Designations that give rise to a need to revisit any of the modifications proposed to the Designations, or the assessment of the modifications under section 171 of the Act.
70. Accordingly, based on the NORs, Mr Kyle's evidence and the legal submissions presented for QAC, the modifications proposed to Designations 2 and 4 can and should be recommended for confirmation, without further amendment.
71. A copy of the Designations 2 and 4, incorporating the modifications supported by QAC (including the additional outline plan related conditions for Designation 2) is **attached**.

R Wolt
Counsel for Queenstown Airport Corporation Limited

²² As opposed to modifications to improve clarity.

