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
	Queenstown and Environs Hearings **Chapter 17 (Airport Mixed Use Zone)**
	Hearing Stream 13

Memorandum of Counsel for Queenstown Airport Corporation Limited (Submitter 433 and Further Submitter 1340) Relating to Scope of Hearing

Dated: 11 May 2017

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MAY IT PLEASE THE PANEL

1. This memorandum is filed in respect of the Queenstown and Environs hearings, in particular the hearing of Remarkables Park Limited's (**RPL**) submission (Submitter 807) in opposition to the extent of the Proposed Airport Mixed Use Zone (**AMUZ** or **Zone**) as notified.

Background

2. RPL's submission on the AMUZ seeks the following relief:

   (a) *"Amend the zone purpose to remove repetition, for instance the introduction could be amended to read ....[refer submission for proposed text]."*

   (b) *"If the existing Airport Mixed Use Zone is to be amended to enable a range of activities including ASANs, then Activity Area [sic] of the RPZ be amended to also enable the same range of activities; OR*

   (c) *The noise restrictions imposed on the RPZ under PC35 be imposed on the QAC (noting the comments above regarding the status of PC35 and the Lot 6 Notice of Requirement)."*

   (d) *"Delete the extension of the Airport Mixed Use Zone from land not currently zoned Airport Mixed Use Zone."*

   (e) *"Delete Policy 17.2.1.3."*

   (f) *"Retain the existing Airport Mixed Use Zone rules in relation to height, setbacks, building coverage, landscaping."*

3. Submissions on the AMUZ (Chapter 17 of the Proposed District Plan (**PDP**)) were heard in December 2016.

4. Queenstown Airport Corporation Limited (**QAC**) presented a full case in general support of the proposed Zone.

5. RPL presented a full case in support of its submission in opposition the to Zone.

6. Both parties pre-lodged their evidence in this respect.

7. Prior to the lodgement of evidence, the Section 42A Report for the AMUZ[1] made recommendations on RPL's submission, generally recommending that RPL's various submission points (summarised above) be rejected.

8. The Section 42A Report did not expressly address RPL's challenge to the extent of the AMUZ (paragraph 2(d) above), nor did the Reporting Officer indicate, as she did for other submissions[2] that the submission point would be transferred to a subsequent hearing stream.

9. Subsequent to the preparation of the Section 42A Report and the lodgement of the parties' evidence, at the commencement of the hearing stream the Queenstown Lakes District Council (**Council**) presented opening legal submissions in which counsel stated that the extent of the AMUZ, as challenged by RPL in its submission, was a matter for the for the mapping hearings,[3] (since scheduled to commence in July 2017, being the hearing stream to which this memorandum pertains) and indicated that RPL's submission point would be deferred to that hearing.

10. The suggested deferral of RPL's submission point took QAC by surprise, and QAC expressed strong opposition to it at the AMUZ hearing, where counsel submitted the following:[4]

> "*121. QAC considers there is no reason for RPL's submission on the extent of the AMUZ to be deferred to the later rezoning hearing, noting the general intention of that hearing is to deal with rezoning requests arising from submissions. In contrast, the extent of the AMUZ was included in the notified PDP.*
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> *122. QAC considers it would be wholly inefficient to defer RPL's submission in the manner suggested when RPL has presented evidence and legal submissions at this stream hearing which address the issue, presumably on the understanding that its submission would be addressed in its entirety at this hearing. That*

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[1] By Rebecca Holden, dated 2 November 2016.
[2] See for example, the recommendation in respect of submission 566.2 and 836.26. in Appendix 2 of the section 42A Report, noting that this Appendix contains a column entitled 'transferred', where the Reporting Officer indicates those submissions that are to be transferred to other hearings streams.
[3] Opening Legal Submissions for QLDC dated 25 November 2016, at paragraphs 8.13 and 8.16.
[4] QAC's Legal Submissions dated 29 November 2016, at paragraphs 121 – 125.

was certainly the understanding of QAC, noting that has no previous indication has been given that part of RPL's submission would be addressed at a later hearing. It is not raised in the section 42A report.

123. *In fact, the nub of RPL's submission is its opposition to the extent of the AMUZ. That is clear from the opening sentence of Mr Young's (counsel for RPL) legal submissions. ... RPL has pre-lodged and presented a full case in support of its submission, which clearly demonstrates it expects it to be addressed in full at this hearing.*

124. *QAC considers the Panel is therefore able to make a decision on RPL's entire submission following this hearing, and it would be efficient to do so. It would be wholly inefficient to defer [RPL's submission] to the rezoning hearing, so as to effectively rehear RPL's case in opposition to the extent of the AMUZ. Indeed, it would prejudice QAC to do so. That is because to defer RPL's submission would be to provide RPL with a second opportunity to present its case, and to bolster it in light of what has transpired at this hearing.*

125. *Further, the distinction required to be made between the different parts of RPL's submission in order to defer hearing part of it until the rezoning hearing is strained and artificial. How can the effects of the proposed AMUZ, and the appropriateness of the provisions (as raised by RPL and addressed in its evidence and legal submissions for this hearing) be properly assessed when the extent of the zoning is unknown? More particularly, how can the appropriateness of the proposed provisions for implementing proposed policy 17.2.1.3 (which relates to the zoning of sufficient land to meet the foreseeable future requirements on the Airport) be assessed when the spatial extent of the AMUZ is not being considered? The suggested approach is fundamentally at odds with the principles of integrated management. It appears to be an unintended consequence of the Panel's Second Procedural minute."*

11. In her Reply report[5] (which was prepared after hearing QAC's and RPL's legal submissions and evidence), the Section 42A reporting officer devoted an entire section[6], comprising 10 paragraphs, to the issue of the "*Extent of the Queenstown Airport Zone*", where she discussed in some detail the evidence presented for RPL in respect of this submission point. At the conclusion of the section she recommended that the extent of the proposed Zone should mirror the operative AMUZ, or alternatively, if the Zone was to remain as notified, that more restrictive provisions should apply to the additional 99 ha of land proposed to be included within it.[7]

12. It is understood that notwithstanding this recommendation, RPL's submission challenging the extent of the AMUZ is to be heard at the upcoming Queenstown and Environs hearings.

Direction Sought Limiting Scope of Hearing

13. The purpose of this memorandum is to seek a direction of the Panel in respect of RPL's submission challenging the extent of the AMUZ that limits the scope of evidence and argument to be presented at the upcoming Queenstown and Environs hearing to issues not addressed at the previous[8] AMUZ hearing. That is, a direction requiring that any evidence or argument presented at the upcoming hearing must be "fresh".[9]

14. For the reasons that follow, it is submitted that a direction on these terms would be consistent with established legal principles in respect of a similar issue, the principles of natural justice and the requirements of section 39(1) of the Resource Management Act (**Act**).

RPL's Case at Previous Hearing

15. It is noted that, with the exception of its challenge to provision for visitor accommodation within the AMUZ, the case presented by RPL at the previous hearing related solely and in its entirety to the expanded AMUZ.

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[5] Reply of Rebecca Dawn Holden dated 13 December 2013.
[6] Ibid, section 7.
[7] Ibid, paragraph 7.10, albeit that the recommendation is framed as 'preliminary'.
[8] December 2016.
[9] "Fresh" in the sense that it could not, with reasonable diligence, have been produced or presented at the previous hearing: see for example, *Rae v International Insurance Brokers (Nelson-Marlborough Ltd)* [1998] 3 NZLR 180 (CA) at pages 192 – 193, cited in *Lai v Auckland City Council* [2011] NZEnvC 82 at paragraph 7 and also 11, both cases addressing a different, albeit related issue to the present.

That is patently clear from the opening statement made by RPL's counsel in legal submissions presented at the previous hearing: [10]

"*RPL oppose the extension of the AMUZ. ... It does not oppose the extent of the existing AMUZ nor the proposed expansion of the types of activities that may be undertaken in that existing zoned area, with the exception of visitor accommodation.*"

16. Excepting provision for visitor accommodation within the AMUZ, all of RPL's evidence and argument related to the expanded AMUZ.

17. More specifically, the issues addressed by RPL at the previous hearing included:[11]

    (a) Whether the proposed extension of the AMUZ meets the purpose and principles of the RMA, or the requirements of section 74 to 76 of the Act;[12]

    (b) The adequacy of the section 32 analysis in respect of the expanded AMUZ;[13]

    (c) Whether the proposed range of activities within the expanded AMUZ is necessary;[14]

    (d) Integration of development within the expanded AMUZ with development in adjoining zones;[15]

    (e) Adequacy of the traffic assessment in respect of the expanded AMUZ;[16]

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[10] RPL's legal submissions dated 18 November 2016 at paragraph 2.1.
[11] It is noted that the references provided in the subsequent sub-paragraphs refer only to written evidence and legal submissions presented for RPL, however a significant amount of additional detailed evidence and argument was presented orally in respect of these issues at the AMUZ hearing.
[12] Ibid, at paragraph 2.2(a) and (e));
[13] RPL's legal submissions at paragraph 2.2(c), David Sarjeant's planning evidence dated dated 18 November 2016, at paragraphs 5.1 - 5.6, and 7.18 – 7.21 for example.
[14] RPL's legal submissions at paragraph 2.2(c), albeit it paraphrased; and David Sarjeant's planning evidence at paragraphs 7.12 and 7.14 for example.
[15] RPL's legal submissions at paragraph 2.2(a)), and to an extent, David Sarjeant's planning evidence at paragraphs 6.17 – 6.22.
[16] RPL's legal submissions at paragraph 2.2(h), and David Serjeant's planning evidence at paragraphs 6.12 – 6.15 and the conclusion at paragraph 6.16 for example.

(f) Adequacy of the economic assessment in respect of the expanded AMUZ;[17]

(g) Adequacy of the amenity and urban design assessment in respect of the expanded AMUZ and the proposed amenity and urban design provisions for the Zone, and related to this, the potential adverse effects on the Remarkables Park Zone;[18]

(h) Adequacy of the assessment of and the potential effects of the expanded AMUZ on the Queenstown Town Centre;[19]

(i) The appropriateness of the proposed range of activities within the expanded AMUZ as compared with other New Zealand airports;[20]

(j) The appropriateness of the proposed noise limits within the AMUZ;[21]

(k) Whether the operative Rural zoning or the proposed expanded AMUZ is appropriate for the land not zoned AMUZ in the Operative District Plan;[22]

(l) Whether the expanded AMUZ is consistent with the Otago Regional Policy Statement;[23]

(m) Provision for visitor accommodation anywhere within the AMUZ (in respect of legal, planning and noise issues), including the adequacy of the section 32 analysis[24];

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[17] RPL's legal submissions at paragraphs 2.2(h), and David Serjeant's planning evidence at paragraphs 6.4 – 6.8 and the conclusion at paragraphs 6.9 - 6.11 for example.
[18] RPL's legal submissions, paragraphs 2.2(i), and David Sarjeant's evidence at paragraph 6.17 – 6.22 for example.
[19] RPL's legal submissions at paragraph 2.2(j), and to an extent, David Sarjeant's planning evidence at paragraph 6.11.
[20] RPL's legal submissions at paragraph 2.2(j), and David Sarjeant's planning evidence at paragraph 4.14 – 4.21.
[21] Malcom Hunt's noise evidence dated 18 November 2016. See also his summary evidence dated 30 November 2016 at section 3.
[22] Summary Evidence of David Sargent dated 30 November 2016 at paragraph 7, and also answers given at the hearing in response to questions from the Panel.
[23] RPL's legal submissions at paragraph 2.2(d), and David Sarjeant's planning evidence at paragraphs 7.1 – 7.4 for example.
[24] RPL's legal submissions at paragraphs 2.2(c), (f), (g), (k); Malcom Hunt's noise evidence dated 18 November 2016 and his summary evidence dated 30 November 2016 at section 2, and David Sarjeant's planning evidence 7.6 – 7.10.

(n) All other planning issues pertaining to the expanded AMUZ[25].

18. The issues addressed at the previous hearing by RPL in respect of the expanded AMUZ can be summarised more succinctly as pertaining to the following issues:

(a) Legal;

(b) Planning;

(c) Traffic;

(d) Economics;

(e) Urban design; and

(f) Noise.

19. For the reasons already given,[26] it is submitted it would be procedurally and substantively unfair for QAC and inefficient for all parties and ratepayers if RPL were to be permitted to call evidence and make argument for a second time in respect of these issues. It is submitted that this is irrespective of whether the evidence is given by a different expert to that who addressed the issue at the previous hearing. That is because it was open to RPL to call expert traffic, economic and urban design evidence for example at the previous hearing – it having squarely raised these issues at that hearing – yet it chose not to do so, and to instead address these issue via planning evidence and critique, and legal submission.

20. It is submitted that to allow RPL to have, for all intents and purposes, a second opportunity to present evidence and argument in relation to matters addressed at the previous hearing is analogous further evidence being submitted following a hearing but prior to a decision being made. This issue has received judicial attention in the Environment Court.

Legal Principles

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[25] David Sarjeant's planning evidence.
[26] Refer paragraph 10 above.

21. The Environment Court has determined that it has a discretion to admit further argument or evidence after the close of a hearing but before a decision has been delivered where the interests of justice require it, but leave should only be granted to do so in exceptional cases.[27]

22. The discretion to permit such evidence or argument should be exercised sparingly, taking into account the nature of the argument sought to be made and the issue of fairness to all parties.[28]

23. In *Lai v Auckland City Council* leave was granted as a "significant indulgence"[29] only because the appellant sought to rely on evidence already called and there was no significant prejudice caused to other parties.

24. In considering applications to permit further evidence or argument following a hearing the Court has recognised the maxim that there should be an end to litigation, and has held that there should be no real likelihood of prejudice to any other party by admitting such evidence or argument.[30] Prejudice incudes additional cost and stress for the parties.[31]

25. Further, as a general matter of fairness, one party should not be permitted effectively to reopen the debate after evidence and submissions have been presented without very compelling reasons and justification,[32] and applications to adduce additional evidence or argument should not be brought simply to repair an omission in a party's case.[33]

26. In summary, it is established that the Court's discretion to allow further evidence and argument to be presented following a hearing but prior to a decision being delivered must be exercised sparingly. The ability to do so is underpinned by fairness and efficiency.

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[27] *Montego Motors v Horn* (1974) 2 NZLR 21 per Cooke J, cited in *Lyttle v Auckland City Council* W1/2000 at paragraph [9] and [10].

[28] *Lai v Auckland City Council* [2011] NZEnvC 82, at paragraph [11].

[29] As described in *Britten v Auckland City Council* [2011] NZEnvC 205, at paragraph [9].

[30] *Wynn-Parke v Auckland City Council* [2010] NZEnvC 064, paragraphs [10] – [11].

[31] Ibid, at paragraph [27].

[32] *Britten v Auckland City Council* [2011] NZEnvC 205Ibid, at paragraph [10].

[33] *Wynn-Parke*, at paragraphs [1] – [11] and [27], for example.

27. It is submitted that this principled approach should also apply and be adopted presently.

Application of Legal Principles and Appropriateness of Direction Sought

28. It is submitted that a direction limiting the scope of the hearing in the manner described in paragraph 13 above[34] is appropriate because it will ensure that the hearing is conducted efficiently and that neither the QAC nor the Council is put to the cost of relitigating matters already addressed by RPL in argument and evidence.

29. Additionally, the direction sought is appropriate because otherwise the Council will be required to bear the Hearing Panel's costs of rehearing evidence and argument on issues already addressed, which costs will ultimately be borne by the District's ratepayers.

30. As already stated, it is submitted that to adopt any other approach would be substantively and procedurally unfair and highly prejudicial to QAC in that it would provide RPL with an opportunity to re-run and bolster its case, informed by what transpired at the previous hearing. The prejudice would arise because QAC may be required to respond to any such evidence and/or argument, which would result in significant additional cost for it. It would also allow RPL "two bites at the cherry," which is at odds with the "finality in litigation" maxim cited in paragraph 24 above.

31. It is further submitted that a direction on the terms sought in this memorandum would be consistent with section 39(1) of the Resource Management Act (**Act**), which requires the Hearings Panel to establish a procedure that is appropriate and fair in the circumstances.

32. Finally, it is submitted that a direction on the terms sought would be consistent with newly enacted section 18A of the Act, which requires that *"[e]very person exercising powers and performing functions under this Act must take all practicable steps to—*

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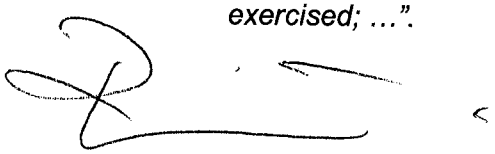
[34] See also paragraphs 17 and 18 as to the issues addressed by RPL at the previous hearing, in respect of which QAC seeks a direction that further evidence and argument not be permitted at the upcoming hearing.

(a) *use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised; …".*



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