IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2012-425-000576
CIV 2012-425-000566
CIV 2013-425-000242
[2013] NZHC 2347

	BETWEEN	QUEENSTOWN AIRPORT CORPORATION LIMITED Appellant (in respect of CIV 2012-425-000566)
		REMARKABLES PARK LIMITED Appellant (in respect of CIV 2012-425-000566 and CIV 2013-425-000242)
	AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
		AIR NEW ZEALAND LIMITED Interested Party

Hearing:	19-22 August 2013 (At Queenstown)
Counsel:	R J Somerville QC and R A Davidson for Remarkables Park D A Kirkpatrick and R M Wolt for Queenstown Airport Corporation JDK Gardner-Hopkins and E L Matheson for Air New Zealand Limited
Judgment:	12 September 2103

JUDGMENT OF WHATA J

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Introduction

[1] Queenstown Airport Corporation ("QAC") wants to:

> ... provide for the expansion of Queenstown airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[2] It has issued a notice of requirement ("NOR") seeking in effect an additional 19 or so hectares of land in order to achieve this objective. Remarkables Park Limited (RPL) owns property that is subject to the NOR. With this land QAC could enable, among other works, a precision instrument approach runway and a parallel taxiway. It also would be able to provide additional space for other aviation activity, including for relocation of smaller and private aviation operations and helicopters.

[3] The NOR was considered by the Environment Court.[1] The Court rejected that part of the NOR seeking to provide for a precision instrument approach runway and a parallel taxiway. As a result, the area of land subject to the NOR was reduced to 8.07 ha.

[4] Both QAC and RPL contend that the Environment Court got it wrong. QAC identifies five errors of law while RPL identifies 12 errors of law. RPL is supported in large part by Air New Zealand Limited ("ANZL").

[5] QAC says, in short, that the Environment Court exceeded its jurisdiction by revisiting the scope of the existing designation and erred in law also by imposing a limitation on the NOR based on an interpretation of civil aviation standards that might prove to be erroneous.

[6] The RPL appeal raises the following key issues:[2]

(a) Whether the Environment Court was empowered to cancel part only of the NOR;

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1 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206.

2 There are other discrete issues dealing with s 16, cost benefit analysis, QAC's inconsistent approach and a substation.

(b) Whether the Environment Court erred by not adopting a threshold test of "essential" for the proposed works and designation;

(c) Whether the Environment Court wrongly failed to consider the unfairness of the NOR to RPL; and

(d) Whether the Environment Court wrongly treated an alternative site for the works located on existing QAC land as suppositious.

Structure of the decision

[7] I propose to address the appeal in four parts, namely:

(a) Part A – The background, jurisdictional, and statutory frame;

(b) Part B – The appeal by QAC;

(c) Part C – The appeal by RPL;

(d) Part D – Outcome.

Part A

Background

[8] The background to these proceedings is usefully summarised by the Environment Court which I largely adopt.

The parties

[9] QAC manages one of the busiest airports in New Zealand. There are on average 40,000 aircraft movements and over one million scheduled and non-scheduled passenger movements through the airport every year. The airport is owned by Queenstown Lakes District Council and managed by QAC. ANZL is a major user of the airport and is the largest scheduled service provider to and from the airport. RPL owns all of the undeveloped land within an area subject to the

Remarkables Park zone. A significant parcel of RPL land is affected by the NOR issued by QAC and then confirmed by the Environment Court.

The airport and existing designations

[10] The airport, the area subject to existing designations and the proposed designation, together with the surrounding land uses is helpfully depicted on a plan produced by RPL (by consent) and attached to this judgment as Annexure A.

Proposed designation

[11] The NOR was applied for on 21 December 2010 with the objective:

> To provide for the expansion of Queenstown Airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[12] Its key elements are:

- a helicopter facility;
- a general aviation (fixed wing) facility for up to Code B aircraft;
- a private and corporate jet facility for up to Code C aircraft;
- a fixed based operator (to service jets and possibly general aviation);
- a Code D parallel taxiway adjacent to main runway;
- a Code B parallel taxiway adjacent to cross-wind runway;
- a precision approach runway with a 300 metre width runway strip;
- ancillary activities, including landscaping, car parking, and an internal road network which includes two access roads to connect with Hawthorne Drive at the western end of the designation area and the Eastern Access road (EAR) at the eastern end.

[13] Significantly, for the purpose of these proceedings, the area included in the requirement for the designation includes Part Lot 6 DP 304345 and a portion of an unformed road adjacent to the south western corner of Lot 6 DP 304345, being land owned by RPL. The airport's southern boundary and the extent of the existing aerodrome designation adjacent to Lot 6 is located 201 metres south of the main runway centre line. The requirement is for a strip of Lot 6 approximately 160 metres

in depth, lying parallel to the entire one kilometre length of the common boundary of the QAC and RPL land.[3]

The interim decision

[14] Relevant to this proceeding the Environment Court made the following key orders in its interim decision:

> A That part of the NOR required for instrument precision approach runway and Code D parallel taxiway is cancelled. The court reserves its decision on the balance of the NOR.
>
> B By 5 October 2012 QAC is to file and serve:
>
> (1) an amended Figure 1 to the NOR reducing the extent of the requirement to exclude provision for a (sic) instrument precision runway and Code D parallel taxiway and any land no longer required for carparking, circulation and landscaping.
>
> ...

[15] The judgment is then framed by reference to key legal and evaluative issues. I detail here the findings that are relevant to this appeal. I note for completeness that the final decision is not subject to appeal and it is not necessary for me to address it here.

"Requirement"

[16] The Environment Court rejected RPL's submission that the term "requirement" in s 168 Resource Management Act 1991 should be construed in light of s 40 of the Public Works Act 1981. The Court found that the matter and subject of these provisions are not, as submitted, *in pari materia*. The Court observed:

> [46] ... In this case neither the relevant term nor subject matter addressed in section 168 RMA and section 40 PWA are the same and we do not accept RPL's submission that "a requirement" has the same meaning as "required" for the reasons we gave in [45] above.

[17] At [45] the Environment Court observed that the term "requirement" is a noun that is a term given to a proposal for a designation.

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[3] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [37].

Scope of evaluation under s 171(1)(b)

[18] The Court observed that the central issue under s 171(1)(b), dealing with the assessment of alternatives, is whether QAC gave adequate consideration to alternative sites, routes or methods. The Court then adopted the principles stated in the final report and decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project as follows:[4]

> a) the focus is on the process, not the outcome: whether the requiring authority has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration.
>
> b) the question is not whether the best route, site or method has been chosen, nor whether there are more appropriate routes, sites or methods.
>
> c) that there may be routes, sites or methods which may be considered by some (including submitters) to be more suitable is irrelevant.
>
> d) the Act does not entrust to the decision-maker the policy function of deciding the most suitable site; the executive responsibility for selecting the site remains with the requiring authority.
>
> e) the Act does not require every alternative, however speculative, to have been fully considered; the requiring authority is not required to eliminate speculative alternatives or suppositious options.

Scope of evaluation under s 171(1)(c)

[19] The Court also adopted the summary provided by the Board of Inquiry dealing with the Upper North Island Grid Upgrade Project for the purposes of its assessment under s 171(1)(c) dealing with whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority. Of particular relevance to this appeal, the Court adopted the following passage:[5]

> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.

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4 *Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project* Ministry for the Environment, Board of Inquiry, 4 September 2009 at [117] and [186].

5 At [51].

[20] The Court added that it may consider the extent to which the work is reasonably necessary for achieving the requiring authority's objectives and may limit the extent of the designation accordingly.[6]

Section 171(1)(d) and the Public Works Act

[21] The Court agreed with submissions by QAC and QLDC that the compulsory acquisition process not having commenced s 24 PWA is not directly relevant to its determination. The Court noted:

> In particular, the three overlapping criteria in section 24(7) of fairness, soundness and the [reasonable] necessity for achieving the objective of the local authority (here QAC) are not matters we need to decide.

[22] The Court then goes on to observe:

> Even if we are wrong, and the issue of fairness (in particular) is relevant under section 171(1)(d), there is no evidence upon which we could find that QAC agreed, as submitted by RPL counsel, not to designate the land. Apart from the fact that QAC and RPL entered into contractual arrangements we have no evidence from RPL as to its reliance on the contracts or any representation made by QAC when subsequently planning to develop its land or that it held a legitimate expectation its "buffer" ie Activity Area 8, would not be reduced. (The contracts were handed up to the court as a bundle attached to counsel for RPL's opening submissions, which we were told "not to read".)

Best practicable option – s 16 of the Resource Management Act

[23] The Court held that s 16 is not to be applied as if it were an additional criterion to subs (1)(a)-(d) of s 171. The Court said in some cases adopting the best practicable option may be a useful check for the decision maker, particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

Statutory plans

[24] The Court then reviewed the various statutory planning documents applicable to the region, including the Regional Policy Statement (RPS) and the Queenstown Lakes District Plan, including the structure plan dealing with Activity Area 8, where RPL's land (Lot 6) is located. Reference is made to the fact that this activity area is a

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[6] Citing *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland AO52/01, 7 June 2001.

"buffer" area and the Court observes that while "buffer" is not explained in the District Plan, there was general agreement that these policies mutually benefited the RPL and QAC.

Section 171 evaluation

[25] The Court observes that QAC has commissioned no less than eight reports since 2003 dealing with its existing land and site facilities at the airport. It observes:

> [76] The reports produced in 2005, 2006, 2007 and 2008 consider sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. In four of the eight reports produced, consideration was given to relocating the general aviation/helicopter precinct south of the main runway. However, in each case the site of the proposed southern precinct is different from that supported by QAC in its NOR, albeit part of Lot 6 is included.

[26] The Court then deals with various master planning documents between 2005 and 2010. It notes that the 2005 Master Plan considered alternative locations within Lot 6 but they were dismissed because:[7]

> (a) these options required protracted negotiations and change of designations without guarantee of outcome;
>
> (b) there were no significant operational benefits; and finally
>
> (c) the options were highly distracting to QAC management.

[27] The Court then refers to an April 2007 South East Zone Planning Report observing that it is the only report to consider possible use of the designated land south of the main runway. The assumed planning parameters the Court said include a Code C aircraft design and a non-precision approach to the main runway. The Court observes that the report concluded:

> the northern side was a better location for future helicopter facilities

And the report also recommended:

> ... that general aviation flightseeing operations be grouped north of the main runway.

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7 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [79].

[28] The Court then refers to the 2010 Master Plan which listed five developments that it said has a significant bearing on the NOR provision for a general or aviation/helicopter precinct on part of Lot 6. The Court noted that these are:[8]

(a) the protection of airfield runway/taxiway/object separation distances for a precision approach runway;

(b) planning for a parallel taxiway;

(c) consideration of protection for aircraft with wider wingspans;

(d) accelerated traffic growth; and

(e) the decision to consider Lot 6 as an option for the general aviation/helicopter precinct.

[29] The Court considered that (a) through (c) above were critical in determining the spatial requirements of the designation. The Court observes that the 2010 Master Report evaluated two alternative locations for a general aviation/helicopter precinct:

(a) To the north east comprising 22 ha of land owned by QAC; and

(b) 19.1 ha to the south east located on part of Lot 6. The Master Plan concluded that the north east precinct is distinctly inferior.

Adequate consideration of alternative sites?

[30] The Court describes the five alternative sites as follows:[9]

(a) locating the general aviation/helicopter precinct on land north of the main runway including on undesignated land owned by QAC and/or QLDC;

(b) locating the general aviation/helicopter precinct on land north of the main runway within the aerodrome designation;

(c) whether RPL land should have a building restriction strip placed on it for a distance of 15.5m from the common boundary to satisfy taxiway separation distance requirements for a new southern taxiway or whether CAA dispensation could be obtained for this;

(d) the relocation of some or all of the general aviation and helicopter facilities off the Airport;

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8 At [82].
9 At [87].

(e) consideration of individual components of the work being accommodated within the existing aerodrome designation.

[31] The Court then found:

> We consider (a), (c) and (e) to be entirely suppositious for reasons that we set out next. However this is not true for (b) and (d) which we consider in more detail.

[32] Most relevant to this appeal, the Court treated option (a) as suppositious for the following reasons:

> [89] The Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the applications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[33] Before addressing the other mooted alternatives the Court makes the following initial findings of fact:

(a) there is insufficient land within the aerodrome designation to develop an instrument precision approach runway and southern parallel taxiway for Code D aircraft and to develop a general aviation/helicopter precinct; and

(b) QAC has no firm development plans for designated land north of the main runway.

[34] Dealing then relevantly with the alternative precinct on land north of the main runway within the area of the aerodrome designation the Court observed:[10]

> ... Several issues present themselves against a northern precinct, including the transportation of dust into helicopter hangars carried by the prevailing westerly winds and the stronger lower frequency southern winds, increased

[10] At [103].

> exposure to the winds from the south and west during helicopter take off and landings, increased runway occupancy by helicopters to minimise or reduce exposure to prevailing winds; the geographical constraints north of the cross wind runway and the desirability for flight paths over TALOs to be unobstructed by stacked (parked) helicopters. All these are important factors which lead to the adoption by QAC of a southern precinct.

[35] After considering the remaining alternatives, the Court then makes an overall conclusion, stating a summary of reasons as to why it considered that other alternatives had been given adequate consideration. The Court observed:

> [112] We conclude that there is an array of factors, including safety, which militate against a northern location for a helicopter facility. Of these cost (to the helicopter operator and other users of the Airport) is an important consideration, but it is not determinative. Section 171(1)(b) is satisfied as we find that adequate consideration was given to alternative location of the helicopter facility.
>
> [113] Likewise we are also satisfied that adequate consideration was given by QAC to alternative locations for corporate jets and that it is operationally efficient to locate these adjacent to the proposed Code C taxiway south of the main runway.
>
> [114] Apart from the April 2007 study, none of the studies looked at the option of splitting the various aeronautical businesses north or south of the main runway within the existing aerodrome designation. But in the absence of any contrary evidence we conclude, like corporate jets, it is operationally efficient to locate fixed wing operators adjacent to a proposed Code C taxiway.
>
> [115] We are also satisfied that under section 171(1)(c) that a general aviation/helicopter precinct south of the main runway is reasonably necessary for achieving the NOR's objective.

"Reasonably necessary"?

[36] The Court identified two key decisions made by QAC in terms of the area plan required for the designation, namely:

(a) The type of runway (whether an instrument non-precision or instrument precision runway); and

(b) The aircraft design parameters (whether a Code D aircraft would operate at the Airport).

[37] As to the first issue, the Court accepted Mr Morgan's evidence that:

> ... because of the terrain constraints inhibiting ILS approaches the final stage of an approach needs to be conducted by assuming a visual approach at 400 ft above ground level, which also means no more than a 150m runway strip width is needed.

[38] The Court also appeared to accept the evidence of ANZL and RPL and that there is no suggestion of Code C aircraft being phased out and indeed the converse appears to be the case.

[39] The Court then observed whether the works or designation, like these findings, is reasonably necessary for achieving the objective of QAC. The Court observed:

> [139] On the issue of whether the works or designation is reasonably necessary for achieving the objective of QAC the evidence is clear: within the planning horizon under negotiation there is no nexus between the NOR objective and enablement of Code D aircraft operating at Queenstown Airport. The predicted growth is able to be achieved using Code C aircraft.
>
> [140] For the same reason we find that there is no nexus between the NOR's objective and the provisioning for an instrument precision approach runway.

[40] Significantly, for the purposes of identifying the scope of the designation the Court observes:

> The consequences of the findings are this: the provision of an instrument non-precision approach runway and Code C parallel taxiway would reduce the lateral extent of the land required by 97.5m along the approximately 1,000m length of the common boundary with RPZ, being a total land area of about 9.75 hectares. Put another way, the land required for the designation would be reduced from around 160m into the RPZ to around 60m. We are not, however, required to approve the Code C parallel taxiway. Land within the existing designation is available for this purpose and it is a matter for QAC to decide whether to construct the same.

[41] And further:

> [142] Subject to what we say at [164] in all other respects we conclude that the work and designation is reasonably necessary for achieving QAC's objective. We prefer Mr Munro's assessment of the comparison of area requirements for the northern and southern precincts as it comprehensively addresses the proposed building and infrastructure. We found limited assistance in the area requirements produced by RPL's witnesses as these do not include all components of the aviation precinct or use different measurements to assess the components. ...

Effects on the environment

[42] The Court identified three categories of effects, namely noise, landscape and amenity, and traffic and transportation.

[43] As to noise, the Court was satisfied that with the resolution of PC35, the extension of the airport will not preclude opportunities for future development within the Remarkables Park Zone. The Court therefore concluded that this aspect of the NOR to locate the helicopter precinct on the southern side of the airport was not in tension with the planning instruments.[11]

[44] Other issues were said to be manageable by reference to operational plans or via an outline plan of works.

[45] Traffic management and access are not a feature of this appeal and I do not address them further. Nor do I address the Court's summaries in relation to landscape effects as they are not a matter subject to appeal.

Minister's reasons for direct referral

[46] The Court agreed with the Minister's statement that:

> Queenstown is a world renowned tourist destination and expansion of the Airport is likely to affect Queenstown, which is considered to be a place or area of national significance.

[47] The Court also observes that the NOR should be considered in the wider context of other far reaching proceedings before the Environment Court, including QAC's privately initiated PC35 and a second NOR also to amend Designation 2 and PC19.[12]

Part 2 of the Act

[48] The Court's decision focused on s 7(b), (c) and (f).

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[11] Refer to [157].
[12] Refer [207].

[49] Dealing first with s 7(b) (efficient use of resources), the Court observed that in this case the economists agreed that it was not possible to monetarise all the benefits or costs associated with the NOR. The Court observed that decisions on costs and economic viability or profitability of a project are not matters for the Court.[13] The Court then observed that a cost benefit analysis may be relevant and informative of matters in s 171(b) and s 7(b) but that does not elevate that matter to a criterion to be fulfilled. The Court then assesses the evidence produced by other parties, including that of Dr T Hazeldine, Professor of Economics at the University of Auckland, Mr Ballingall, an economist employed by the New Zealand Institute of Economic Research, and Mr Copeland.

[50] The Court observed that Professor Hazeldine's evidence was focused on whether the designation was reasonably necessary to achieve its objective, and having taken a different view found his concluding remarks of limited assistance.

[51] It then observes that the key difference between Mr Ballingall and Mr Copeland lies in the relevance of a cost benefit analysis for options which have been considered and discounted by requiring authorities. It says that Mr Copeland's approach is like an economic assessment considering the use of the aerodrome with or without Lot 6.

[52] The Court agrees with Mr Copeland that QAC is not subject to any requirement of NZ Treasury or any other government agency when presenting its NOR. It observes that a cost benefit analysis of the alternatives may be relevant and informative of the matters in s 171(1)(b), and in particular whether adequate consideration was given to alternatives in circumstances where a requiring authority either does not have an interest in the land or the work will have a significant adverse effect on the environment.[14]

[53] But as the Court did not have any cost benefit analysis the Court reached various conclusions qualitatively on operational efficiency and externality costs. The relevant conclusions were as follows:

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13 Citing *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

14 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [220].

Operational efficiency

(a) an instrument precision runway and a Code D taxiway is an *inefficient* use of part of the Lot 6 land when it is unlikely these uses will establish;

(b) a general aviation/helicopter precinct including air and landside buildings, infrastructure and landscaping is an *efficient* use of part of the Lot 6 land;

(c) it would be an *efficient* use of land to co-locate the Code C corporate jets south of the main runway in proximity to the Code C taxiway on the basis that QAC elect to build a Code C taxiway in this location;

(d) a hybrid alternative would be *inefficient* in that it would compromise the benefits which would accrue from the collocation of all operations on one site, including for example, shared support services, shared parking, shared accessways within the precinct, proximity for day to day interactions among operators and for customers, many of whom will be unfamiliar with the Airport, knowing that all flightseeing and helicopter operations are located in one precinct.

[54] As to externalities, the view is expressed that the western access imposes an unacceptably high cost on the public. It also said that:

> ... inadequate level of landscape mitigation proposed by QAC would create externality costs to the public using the airport facility and RPL in the development of its land.

[55] It concluded however that the effects are able to be adequately mitigated.

[56] As to s 7(c) and (f), the Court observed that even with conditions, the amenity values and quality of the environment within RPZ will not be fully maintained and that is an outcome to be taken into consideration when making an ultimate determination.

[57] The Court then turned to s 5, "the purpose of sustainable management" and adopted the longstanding approach recommended by the Court in *North Shore City Council v Auckland Regional Council (Okura)*,[15] namely that it is necessary to compare the conflicting considerations, their scale and degree and relative significance or proportion in arriving at the final outcome.

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[15] *North Shore City Council v Auckland Regional Council (Okura)* (1996) 2 ELRNZ 305, [1997] NZRMA 59 (EnvC).

[58] The key conclusion is then drawn:

> [231] For the reasons we have given, an insufficient nexus has been established between fulfilling the QAC's objective and making provision for an instrument precision approach runway and Code D parallel taxiway to support the use of RPL's land for these purposes. The balance of the work will be achieved at the cost to RPL of not being able to use the affected resources it owns for purposes authorized by the district plan. This is recognized and if required there is legislation to deal with any related considerations which may arise (such as compensation).

[59] The Court then concludes:

> [236] ... Overall we find the significant benefits to QAC and the wider community of developing and using the affected resources in the manner proposed, subject to the modifications and the conditions we have identified to avoid, remedy or mitigate adverse effects on the environment, to be consistent with the sustainable management purpose of the Act.

Jurisdiction on appeal

[60] Section 299 of the RMA confers a right of appeal on questions of law only. As stated in *Countdown Properties (Northland) v Dunedin City Council*:[16]

> …this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[61] Plainly also, I am not concerned with substantive merits of any conclusion. Rather, I must be satisfied that the conclusion has been arrived at by rational process.[17]

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[16] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

Statutory frame

[62] In order to properly frame the appeals, it is necessary to explain the legislative scheme as it relates to NORs.

[63] This proceeding came before the Environment Court by virtue of the exercise of powers by the Minister under s 147 of the Resource Management Act, after receiving a recommendation from the Environmental Protection Authority (EPA). In reaching a decision to refer, the Minister is required to apply s 142(3) dealing with whether the matter is, or is part of a proposal of national significance. This provides a cue to the importance of the underlying proposal.

[64] Section 149U sets out the relevant gateway tests for approval or otherwise of a notice of requirement. It states:

> **149U Consideration of matter by Environment Court**
>
> (1) The Environment Court, when considering a matter referred to it under section 149T, must-
>
> (a) have regard to the Minister's reasons for making a direction in relation to the matter; and
>
> (b) consider any information provided to it by the EPA under section 149G; and
>
> (c) act in accordance with subsection (2), (3), (4), (5), (6), or (7), as the case may be.
>
> ...
>
> (4) If considering a matter that is a notice of requirement for a designation or to alter a designation, the Court—
>
> (a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and
>
> (b) may-
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> (i) cancel the requirement; or
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> (ii) confirm the requirement; or
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> (iii) confirm the requirement, but modify it or impose conditions on it as the Court thinks fit; and

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[17] Refer also *Stark v Auckland Regional Council* [1994] NZRMA 337 (HC) at 340.

(c) may waive the requirement for an outline plan to be submitted under section 176A.

...

[65] The reference at subs (4) to s 171(1) incorporates the criteria ordinarily applicable to designation processes.

[66] The key criteria in s 171 are as follows:

> **171 Recommendation by territorial authority**
>
> (1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to-
>
> (a) any relevant provisions of-
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if-
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> ...

[67] The power to cancel, confirm, or confirm but modify under s 149U(4)(b) mirrors the equivalent power enjoyed by the Environment Court under s 174(4) in respect of appeals from decisions of requiring authorities.

[68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement.[18] Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.[19] Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance;[20] shall have regard to other matters specified at s 7 and shall take into account the principles of the Treaty of Waitangi.[21]

[70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.

Part B

[71] QAC raises five separate questions of law, namely:

1. Did the Court wrongly interpret cl 3.9.9 and Table 3/1 of Civil Aviation Authority Advisory Circular AC139-6?

2. Is the minimum separation distance between a runway and a parallel

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18 See Briar Gordon and Arnold Turner (eds) Brookers Resource Management (looseleaf ed, Brookers) at 1-1470 and *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

19 *McGuire* at 594.

20 Section 6.

21 Section 8.

taxiway for Code C aircraft (in the absence of an aeronautical study indicating that a lower separation distance would be acceptable) 93 metres or 168 metres on the true construction of AC139-6?

3. Did the Court err in failing to have regard to whether its conclusion that a parallel taxiway for Code C aircraft should be 93 metres from the runway would not be able to be implemented unless the Director of Civil Aviation found it to be acceptable after considering an aeronautical study?

4. Did the Court err in directing QAC as to the purpose for which land within the existing aerodrome designation can be used?

5. Did the Court err in holding that there needed to be a nexus between QAC's NOR objective and the provision for an instrument precision approach runway at Queenstown Airport?

The CAA standards

[72] The underlying and critical issue in relation to the first three questions is whether the Environment Court could impose conditions based on an interpretation of Civil Aviation Authority (CAA) standards for separation distances that ultimately might prove to be erroneous and thereby disenable the efficient operation of the designation. The significance of this and the separation distances is shown by an illustration produced by Mr Gardner-Hopkins. I attach this to the judgment as Annexure B.[22] It will be seen that the overall space requirement increases from 119m to 194m, depending which separation distance for Code C aircraft is adopted. If the latter separation distance applies, then a considerably larger encroachment into RPL's land might be needed. I propose to resolve this issue first.

[73] Mr Gardner-Hopkins submits that the Environment Court had no option but to assess the effect of the standards because they drove the land requirements of the

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[22] Mr Kirkpatrick disputed the subtitle references to "Non Precision" and "Precision", but otherwise consented to the production of Annexure B.

airport. Significantly QAC's counsel, having taken expert advice accepted in the Environment Court that 93m was a sufficient separation distance between the main runway and the parallel taxiway under the standards for Code C aircraft. There was therefore no other basis upon which the Environment Court could resolve the factual evaluation of QAC's land requirements. It was an evaluation of agreed fact and one that is not amenable to challenge in this Court.

[74] Mr Kirkpatrick immediately accepts that he must resile from the position he adopted in the Environment Court. He accepted the evidence of Mr Morgan that the appropriate separation distance for Code 4/C aircraft is 93m and that the Environment Court relied on that evidence (being the only evidence available to it). However he submits that immediately after the interim decision was released he advised the Court of the potential difficulties with Mr Morgan's and the Court's assessment, namely that the CAA might insist on a greater separation distance with the result that a key component of designation would be disenabled, as QAC would not have sufficient land to make a parallel taxiway. He says that the requisite separation distance could be as much as 168m. He contends that there is no bar to counsel seeking to resile from a concession where it is in the interests of justice to do so.

[75] Mr Kirkpatrick also submits that the interpretation of the standards is an assessment of law, not fact. In short, he says that the Court is engaged in an assessment of the separation distance required by law, but that the jurisdiction to make that assessment is reposed with the Director of CAA.[23]

Assessment

[76] I agree with Mr Kirkpatrick that the efficacy of the separation distance of 93m is dependent on the approval of the Director of Civil Aviation. If s/he does not approve the 93m separation distance and requires a greater separation distance, a key component of the designation works cannot then be enabled. A condition with that disenabling effect cannot be lawful unless it is the product of a thorough evaluation

[23] Civil Aviation Rule 139.51(c).

in terms of s 171, because it is, in substance, a condition derogating from the grant.[24] Regrettably, the Environment Court did not appear to turn its mind to the potentially disenabling consequences of a 93m limitation prior to the interim decision. Accordingly, the Environment Court did not discharge its duty to consider the effects of the designation in terms of s 171.

[77] In saying this there can be no criticism of the Environment Court. It logically assumed that the proper separation distance was 93m given the agreement of all parties. Ordinarily I would refuse to grant relief in circumstances where the Environment Court has proceeded to a decision on an agreed factual basis. But here the impugned spatial limitation might preclude a significant component of the designation activity and therefore render nugatory a key enabling justification for it. In the absence of the assessment of the effects of this potentially significant outcome, the decision is flawed.

[78] It is also reasonably apparent that Mr Kirkpatrick was agreeing to the evidence about separation while focused on Code D rather than Code C aircraft. Further, he sought to have the matter addressed by the Environment Court prior to the final decision, but the Court ruled that it had already decided the evidential issue. But with respect to the Court's reasoning on this, the Court had not, on the face of the decisions, assessed the significance of the disenabling effect of a negative decision from the Director of Civil Aviation. Whatever the Court's finding of fact or law about the standards, that evaluation needed to be made. Against a backdrop where we are dealing with a project of national significance, this 'error' is significant.

[79] Given the foregoing it is not necessary for me to address the interpretation of the standards and I refuse to do so. In short, there are major problems with this Court, on an appeal under the RMA, purporting to inquire into the interpretation of the standards that must still ultimately be applied by the Director of Civil Aviation. It quickly became abundantly apparent to me that the interpretation of the standards would need to be premised on a sufficient understanding of their practical effect, in

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[24] As to the principle of non derogation refer *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA) at [24].

context, and the interrelationship of the various standards. It appears from submission from the Bar that they are disputable matters and that the Court would be assisted by expert evidence on them. Normally on an appeal like this I would have the benefit of a detailed discussion about the key issues in the decision of the Environment Court, or in terms of my supervisory jurisdiction, an assessment from the Director. I have neither. Furthermore, whatever I say here could not bind the Director, or if it could, runs the risk of usurping the statutory function reposed in the Director and then without the benefit of the Director's assessment of those standards in context.

Existing rights

[80] Questions 4 and 5 relate to the effect of the modified designation on existing rights. Mr Kirkpatrick initially claimed that the Court incorrectly altered the scope of the existing designation by purporting to exclude the potential for instrument precision approaches. He says that the present NOR did not seek to revisit any existing grant. Therefore while the Court could refuse to enlarge the designation to enable an instrument precision approach, it could not thereby extinguish an existing right to pursue that course if QAC deems it feasible to do so in the ordinary operation of its business. He says that the Court was also wrong to resolve there was no nexus between the instrument approach and the objective of the NOR to the extent that this might preclude such an approach in the future.

[81] On closer examination Mr Kirkpatrick accepted that observations made by the Court about nexus and necessity did not translate into conditions or limitations on the internal operations of the Airport.

Assessment

[82] The decision is not purporting to limit the internal operations of the Airport in any material way beyond the existing limits of the current designation and the extent of the designation area. I was not taken to any changes to the designation that had this effect. I do not think therefore that there is anything against which to attach the points of law raised for the purpose of relief. In short, the points of law do not call for a remedy so I see no need to address them.

Part C

[83] RPL claims that the Environment Court acted outside its jurisdiction by purporting to cancel part only of the NOR. It also raises the following questions of law:

1. Should the term 'requirement' in s 168(2) of the Act be defined as meaning 'essential'?

2. Should the term 'requirement' in s 168(2) of the Act be construed in light of s 40 of the PWA?

3. Is the principle of fairness and equitable issues (estoppel) relevant under s 171(1)(d)?

4. Should the duty under s 16 of the Act have formed part of the Court's assessment of alternative locations for FATOs (Final Approach and Take Off)?

5. Did the Court fail to consider relevant alternatives under section 171(1)(b) of the Act?

6. Should the Court have given weight to the absence of any assessment by the QAC of alternatives raised by RPL and Air New Zealand Limited (ANZL) under section 171(1)(b) of the Act?

7. Would a strict application of the "reasonably necessary" test necessitate a determination of the best site for the works?

8/9. Having found that it should reject land required for works associated with a Code D taxiway and a precision approach runway, did the Court subsequently err in:[25]

[25] Items 10.8 and 10.9 of the appeal were consolidated and recast as above.

(i) Finding that the QAC had given adequate consideration to alternatives (section 171(1)(b))?; and

(ii) Finding that the remainder of the works were reasonably necessary (section 171(1)(b))?

10. Did the Court err in determining that the NOR was efficient in the absence of any cost benefit analysis?

11. Does the inconsistency between the QAC's position at the hearing that it could undertake the work and meet the NOR's objective on 8.07 ha of land and the content of its High Court appeal and Public Works Act Notice render the NOR hearing process unfair?

12. Did the Court err by including an existing substation within the land to be designated for airport purposes?

Jurisdiction and procedural fairness

[84] On the question of jurisdiction under s 149U(4) Mr Somerville QC submits:

(a) The Court decided to cancel part and to confirm part of the NOR (refer interim decision cited at [15] above);

(b) Referring to *Takamore Trustees v Kapiti Coast District Council*[26] s 149(U)(4)(b) empowered the Court to cancel or confirm or confirm with modification but it does not expressly empower the Court to mix and match these alternatives;

(c) The scale of the cancellation (a 50% reduction) logically precludes confirmation of the balance – the NOR has been altered so fundamentally that even QAC says that the balance will not achieve the stated objective of the NOR;

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[26] *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [37]-[38].

(d) The Court erroneously relied on *Bungalo Holdings Limited v North Shore City Council*[27] to the effect that the Court had jurisdiction to reduce the scale of the proposed designation when that decision concerned the scope of the discretionary assessment under s 171, not the power to grant relief under s 174;

(e) Part cancellation carries the risk of procedural unfairness in that affected persons may have challenged the altered NOR and did not do so;

(f) There being no power to confirm part only of the NOR, that part of the decision may be set aside without the need to refer the decision back to the Environment Court.

Assessment

[85] I do not accept that the interim decision to cancel part only of the NOR was flawed for want of jurisdiction for the following reasons.

[86] First, the meaning of s 149U(4)(b) from its text and in light of its purpose is reasonably clear.[28] The power to "modify it or impose conditions on it as the Court thinks fit" literally and logically includes the power to modify the scale of the NOR as occurred here; and there is no obvious reason to read down those words to preclude a reduction in scale.[29] This interpretation better serves the overt scheme of the requiring provisions to enable necessary works with appropriate effects, having regard to the criteria expressed at s 171. Further, a flexible power to modify will, in my view, better enable decision makers to carry out their functions in a manner that is consistent with the broad purpose of sustainable management. Conversely, a narrow interpretation of the power may unduly inhibit the capacity of functionaries to achieve that purpose.

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27 *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland A052/01, 7 June 2001.

28 Interpretation Act 1999, s 5(1).

29 Cf by analogy see *West Coast Regional Council v Royal Forest & Bird Protection Society of New Zealand* (2006) 12 ELRNZ 269, [2007] NZRMA 32 (HC) (cited by Mr Gardner-Hopkins). See also *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) – the Privy Council said in the designation context that "a full right of appeal on the merits is contemplated" and the Environment Court had "wide powers of decision" at 595.

[87] Second, no legitimate question of procedural unfairness arises in this case – the scope of works and envelope of effects is substantially reduced as a consequence of the modification. The prospect of affected parties not having submitted because a much larger proposal was notified is, in my view, highly unlikely.

[88] Third, the reliance placed on *Takamore Trustees v Kapiti Coast District Council* by RPL is misplaced. The Court in that case was confronted with a submission that part of a road route could be cancelled and redirected with the result that an altogether different proposal from that notified would have been enabled. The observation of the Court therefore that "cancellation of a significant piece of the NOR is well beyond modifying a proposal" is understandable, but altogether removed from the present facts. Unlike *Takamore*, the revised designation falls entirely within the envelope of the notified proposal.

[89] Finally, to the extent that the Court decided that the NOR was part cancelled, rather than modified, the error was not sufficiently material to warrant referral back. The difference in this context is semantic.

[90] Accordingly this ground of appeal is dismissed.

Essentiality, PWA, Best Option

[91] Questions 1, 2, 7, 8 and 9 concern the meaning of the terms "requirement" and "reasonably necessary". I deal with them together.

[92] Mr Somerville submitted:

(a) The Environment Court erred when it held that "requirement" under s 168 and the phrase "reasonably necessary" under s 171 meant something less than essential (refer [94]).

(b) Given that the NOR was a precursor to compulsory acquisition of private land, the Court should have instead adopted a narrow meaning of requirement or reasonably necessary, namely essential as this would accord with the common law approach to interpretation where

property rights might be subject to the coercive powers of the State.[30]

(c) The Environment Court further erred by refusing to interpret the meaning of "requirement" in the same way as the term require or required has been interpreted under s 40 of the PWA.[31]

(d) The requiring provisions of the RMA and the acquisition powers under the PWA touch and concern the same underlying subject matter and should be applied consistently. And, as the Court of Appeal said in *Seaton* (not overruled on this point), s 24(7) of the PWA provides an appropriate guide to the legislative policy in terms of decision making involving derogation from and the taking of property for public purposes.

(e) Furthermore, with the rejection of the requirement for a precision runway and Code D aircraft taxiway, the taking of private land is not reasonably necessary in the sense of essential.

Assessment

[93] The language of "requirement" and "reasonably necessary" in ss 168(2) and 171(1)(c) (and in s 24(7) of the PWA) are standards used in everyday language. They should require no undue elaboration. But in the present context, involving the coercive powers of public authorities for public purposes, the words "requirement" and "reasonably necessary" are statutory indicia that any proposed works must be clearly justified by reference to the objective of the NOR. This aligns with the threshold identified by the Court of Appeal in *Seaton* when dealing with the concept of "required" and given the prospect of compulsory acquisition.[32] Whether the scope of the NOR is clearly justified, in context, is of course a question for the Environment Court.

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30 Referring to *Edmonds v Attorney-General* HC Wellington CIV 2000-485-695, 3 May 2005; *Deane v Attorney-General* [1997] 2 NZLR 180 (HC).

31 Referring to *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA).

32 *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA) at [31]. Note the substantive decision of the Court was overturned by the Supreme Court, but these observations were not tested or criticised. See *Seaton v Minister for Land Information* [2013] NZSC 42.

[94] The Environment Court adopted what might be called the orthodox threshold test of reasonably necessary namely:[33]

> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.

[95] The inbuilt flexibility of this definition enables the Environment Court to apply a threshold assessment that is proportionate to the circumstances of the particular case. This is mandated by the broad thrust of the RMA to achieve sustainable management and the inherently polycentric nature of the assessments undertaken by the Environment Court. Provided therefore that the Environment Court was satisfied that the works were clearly justified, there was no error of law in applying this orthodoxy.

[96] I acknowledge that in *Seaton* the Court of Appeal used the concepts reasonably necessary and essential interchangeably.[34] I also accept that a NOR that will derogate from private property rights calls for closer scrutiny.[35] Further, I think that the Environment Court was mistaken when distancing the PWA from the designation powers under the RMA. Both statutes deal with the coercive powers of public authorities to derogate from private property rights. They should be interpreted in a consistent way. This suggests that the Environment Court erred by adopting a threshold test of falling between essential and desirable. But the Environment Court's rejection of RPL's submission that "requirement" and "reasonably necessary" mean "essential" must be understood in the sense that the Court was using that word. As Mr Kirkpatrick highlighted, the Court equated "essential" with the proposition that the "best" site must be selected.[36] And I agree with him that this would set the test beyond the required threshold of "reasonably" necessary. Indeed to elevate the threshold test to "best" site would depart from the everyday usage of the phrase "reasonably necessary" and significantly limit the capacity of requiring authorities to achieve the sustainable management purpose. If

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33 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [51].

34 *Minister for Land Information v* Seaton [2012] 2 NZLR 636 (CA) at 644-645.

35 *Deane v Attorney-General* [1997] 2 NZLR 180 (HC); and is to be distinguished from planning regulation simpliciter: *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112.

36 *Re Queenstown Airport Corporation Limited* [2012] EnvC 206 at [94].

that was the intention of Parliament then I would have expected express language to that effect (as it has done in relation to s 16 and the duty to use the "best" practicable option for noise mitigation).[37] I therefore discern no error in the Court's adoption of a threshold test that falls below this benchmark.

[97] If I then turn to the substance of the Court's assessment, it is evident that the Court carefully evaluated whether the works were clearly justified. In this regard, the Court was aware that NORs that affect private property must be afforded "less tolerance".[38] I also agree with Mr Kirkpatrick that the various passages of the judgment illustrate that the Court sought clear justification for the scope of the NOR.[39] And it is important to view the judgment as a whole. When this is done, very careful consideration was plainly given to whether the works were justified.

[98] Accordingly, I see no definitional flaw of substance. This ground also fails.

Fairness and substantive legitimate expectation

[99] Question 3 concerns the relevance of fairness in designation proceedings. Mr Somerville contends:

(a) The Environment Court erroneously did not consider the unfairness to RPL resulting from a NOR, deeming it to be irrelevant as a matter of law and factually (refer [54]-[55]).

(b) Fairness is a mandatory relevant consideration as a matter of common law principle, and at the very least is a relevant consideration under s 171(1)(d).

(c) The previous dealings between RPL and QAC involved land transfer and other agreements concerning the use of the land now subject to the NOR, including the following clauses:[40]

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37 Refer also to discussion in *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [118]-[120].

38 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [94].

39 For example at [112]-[115], [139]-[142], [226], [236].

40 Deed Settling Resource Management Issues Between Queenstown Airport Corporation Limited

> 3.3 The land transferred to RPH pursuant to clauses 3.1 and 3.2 and other RPG holdings shown on Figure 6-1R and Figure 6-3R referred to below, shall not thereafter be the subject of any claim or requirement by QAC other than Air Noise Boundary and Airport Approach and Land Use Controls and aerodrome purposes designations/requirements QAC needs to maintain for the continuing operation of Queenstown Airport in accordance with agreed present and future layout.
>
> ...
>
> 6.3 RPG shall after the land exchange, utilise the buffer land only for rural and/or recreational uses and infrastructural utilities not of a noise sensitive nature in terms of NZS6805. ... This limitation shall be the subject of a registrable restrictive covenant in favour of QAC which shall enure during the life of this airport at its present location. The term "recreational uses" expressly allows for provision of a golf course and associated facilities.

(d) In a subsequent agreement, the parties agreed:

> 15.2 ... To the extent that the QAC's aerodrome purposes designation has not already been uplifted, QAC shall modify that designation to remove it from Areas A, B, C and D and all legally vested roads along with the other parcels of land described in clauses 3.3 and 6.4 of the 1997 deed.

(e) As a minimum, these dealings gave rise to a legitimate expectation on the part of RPL that QAC (as the requiring authority) and the Environment Court (as the confirming authority) would give due consideration to alternatives that did not involve the taking of RPL's land recently acquired from QAC as part of the transfer agreement.

(f) Contrary to the findings of the Environment Court, there was direct reference of the existence of the land transfer agreements and the reliance on them by RPL. For example RPL's submission stated:[41]

> 3.21 By way of background, it is important to note that the QAC exchanged land with RPL under a series of formal contractual agreements. This raises estoppel issues. The land now owned by the QAC on the northern side of the airport that it is seeking to rezone to enable urban activities

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and Remarkables Park Limited, October 1997.

[41] Refer also to the Statement of Evidence of M Foster at 7.6, Statement of Evidence of S Sanderson at 71, and transcript at Vol. 4 p 1156, Vol. 5 at 1405 and 1415, and see the covenant attached to the notice of requirement.

> was previously owned by RPL. RPL exchanged that land for much of the land that is now the subject of the QAC;s NOR. In short, QAC seeks to keep the land it acquired from RPL through the contractual agreements and take back the land it agreed RPL should acquire.
>
> 3.22 The land swap referred to above was part of a comprehensive zoning settlement including consent orders endorsed by the Environment Court, to which the QAC and the Queenstown Lakes district council was a party. The QAC is effectively seeking to unravel those agreements and zonings, despite previously consenting and committing to them. In doing so, the QAC is undermining a sustainable and integrated zoning pattern already endorsed by the Court.

(g) The finding also that the prospective use of QAC's land in preference to RPL's land was suppositious was, in light of the historical position up to 2010, not an available conclusion on the evidence.

(h) The reference to PC19, and the scarcity of industrial land, could not justify a finding that the use of QAC land was suppositious (refer [89] and [90]) – and the Court could not properly fill the gap left by QAC's assessment of alternatives with its own supposition about future use of QAC's land.

(i) The Environment Court's approach to s 24(7) and that the question of fairness need not be decided was flawed (referring to [55]).

[100] Mr Kirkpatrick submits that the key evidence relied upon by RPL was never produced to the Court and there are no findings of fact upon which I can reasonably graft a legitimate expectation. He says that the key cl 3.3 was not referred to at the Environment Court hearing and there is no evidence that QAC bound itself to exclude RPL's land from a future designation. He also says that to the extent that there was any contractual right of the nature claimed, it could not fetter the proper exercise of a statutory discretion; though he accepted that whether there was a proper exercise of discretion depended on the circumstances.[42] He also accepted that, if QAC did contract to avoid the use of RPL's land, that this might give rise to a legitimate expectation that RPL's rights would be considered before any final

[42] Citing *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 548.

decision is made and that this might require an assessment of alternatives not involving RPL's land. He said however that in any event the alternatives were thoroughly considered, either before the NOR and during the Environment Court hearing.

[101] Mr Kirkpatrick also rejects the suggestion that assessment at s 24(7), namely whether the works are "fair, sound, and reasonably necessary", should be applied in the context of s 171(1)(b). He says that the Environment Court is bound, like all Courts, to securing fair process, and that substantive fairness is an element of sustainable management. He also accepts that the language used in both sections should be interpreted consistently. But that does not mean that the criteria expressed at s 171 are overlaid by the fairness and soundness assessments contemplated at s 24(7).

[102] As to the finding that the alternatives were "suppositious", Mr Kirkpatrick says this was a finding available to the Court (and I address the substantive issue below at [115]-[126]). The Court I am told also put various questions to Mr Foster concerning the issues confronting PC19 and provided the parties with an opportunity to comment. Therefore he says, no clear procedural unfairness arises.

Assessment

[103] This ground of appeal brings into focus the fairness of a requirement affecting RPL's land in light of QAC's previous dealings with RPL. RPL's basic contention is that it held a legitimate expectation that Lot 6 would not be used for aerodrome designation purposes, or if it is used, all alternatives not using RPL land would be thoroughly explored. The Court appeared to decline to entertain this argument because fairness is not an express criterion under s 171 and in any event there was no evidence to support a legitimate expectation.[43]

[104] The resolution of this appeal point is vexing because of the way it appears it was argued in the Court below by analogy to s 24(7) of the PWA and the focus of the

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[43] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [54]-[55].

Court in light of that argument. Nevertheless I consider that the Court erred for the following reasons.

[105] Parliament will be presumed to legislate consistently with minimum standards of fairness, especially when dealing with coercive powers of the State.[44] Moreover, the scheme of the Act dealing with designations is purpose built to secure a fair outcome having regard to the broad criteria specified at s 171 and in light of Part 2, with full rights of participation and then appeal rights on points of law. Indeed, as the Privy Council stated in *McGuire v Hastings District Council*,[45] the jurisdiction of the Environment Court under the RMA is broad, with the administrative law jurisdiction of the High Court very much a residual one. The Environment Court therefore plays the key role in providing judicial oversight in relation to the designation process. The central issue therefore is not whether fairness is a mandatory relevant criterion (as per s 24 of the PWA) but whether fairness or any alleged unfairness is relevant to the evaluation under s 171 in the circumstances of the case. The Court erred because it did not address this central issue.

[106] As to whether RPL's claimed unfairness is prima facie relevant, the doctrine of legitimate expectation is also not new to resource management law. In *Aoraki Water Trust v Meridian Energy Ltd*[46] the High Court recognised that the doctrine of legitimate expectation might be applied in the RMA context.[47] The Court in that case was dealing with the expectation of water rights holders that the regional council would not derogate from their water rights grants unless specifically empowered to do so by the RMA.[48] The application of the doctrine will however depend entirely on the facts of the particular case. But a key ingredient is whether there has been reliance on an assurance given by a public authority, made in the lawful exercise of the authority's powers. If so, the affected person may legitimately expect compliance with that assurance subject only to an express statutory duty or

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44 Refer: Lord Steyn in *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC539 (HL) at 591.
45 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [25].
46 *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZLR 268 (HC).
47 At [39]-[42].
48 At [46].

power to do otherwise.[49] In the present case, that must mean satisfaction of the criteria expressed at s 171 and in particular at subs (1)(b) and (c), having regard to any relevant legitimate expectations, properly established. Fairness would then implore an outcome which is consistent with those expectations provided that the outcome met the statutory criteria and achieved the statutory purpose. Conversely, the Court, like QAC, cannot be bound to give effect to those expectations where to do so is inconsistent with the requirements of s 171.[50] In short the Court's jurisdiction, though wide, is framed by the scheme and purpose of the RMA.[51]

[107] Unfortunately the Court's substantive fairness assessment was diverted by the approach taken to the production of the contracts relied upon by RPL. The Court appeared to assume that it did not need to consider the contracts themselves based on submission of counsel. On closer inspection of the record I accept Mr Somerville's contention that the Court was not invited to "interpret" the contracts, there being no serious dispute about the key representations, but that they remained central to the assessment of unfairness.

[108] I also accept Mr Somerville's basic contention that the contracts were themselves evidence of reliance. In short, the contracts represented the exchange of mutually enforceable promises, for valuable consideration with consequences for breach. The contracts recorded land swaps, that future airport development would accord with agreed plans and not otherwise (and I understand no agreed plan was produced showing Lot 6 would be developed for aerodrome purposes), that QAC would withdraw the aerodrome designation from Lot 6 and that Lot 6 would act as a "buffer" zone, i.e. as between airport activities and RPL's activities. Also attached to one of the contracts were plans showing "potential Helicopter Area 7 Hectares" to the north of the main runway."[52] Effect was given to these contracts by the parties, including the imposition of a covenant over Lot 6 and the withdrawal of the aerodrome designation over Lot 6. I understand that these facts were not challenged.

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49 Refer *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

50 *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

51 Furthermore, the Environment Court does not have jurisdiction to examine the legality of the decision to notify a NOR. Any challenge to legality of QAC's decision to notify must still be brought by way of judicial review. *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112 at [38].

52 See transcript at 1406.

It is therefore at least arguable that on the face of the agreements it was the expectation of both parties that Lot 6 would remain a buffer zone.

[109] The outcome of all of this is that the Court never correctly assessed the claim based on legitimate expectation to the extent that it might be relevant to the s 171 evaluation.

[110] I deal with the materiality of this error below at [146].

Section 16

[111] Mr Somerville claims that the Court erred by not holding that s 16 applied as if it were an additional criterion. Section 16 imposes the following duty:

> **16 Duty to avoid unreasonable noise**
>
> (1) Every occupier of land (including any premises and any coastal marine area), and every person carrying out an activity in, on, or under a water body or… the coastal marine area, shall adopt the best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level.
>
> (2) A national environmental standard, plan, or resource consent made or granted for the purposes of any of sections 9, 12, 13, 14, 15, 15A, and 15B may prescribe noise emission standards, and is not limited in its ability to do so by subsection (1).

[112] He said that it is commonsense to adopt an approach that is consistent to the performance of this duty, that is to take a best practical option approach to the assessment of alternatives for Final Approach and Take Off (FATO) locations. He said that while s 16 was not triggered in every case, it should have been in this case. RPL claims that sites on QAC's land are more likely to meet the best practicable option (BPO) requirement than the proposed sites on Lot 6.

Assessment

[113] I reject this ground. It is necessary to record the key part of the decision:

> [58] We hold section 16 is not to be applied as if it were an additional criterion to subsection (1)(a)-(d) of section 171. In some cases adopting the best practicable option may be useful check for the decision-maker,

particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

[114] The refusal to apply s 16 as an additional criterion must be read together with the observation that "in some cases adopting the best practicable option may be useful check for the decision-maker". Plainly the Court considered whether the s 16 duty and BPO was relevant to the evaluative exercise and decided that it was not. For my part this is an orthodox approach to the assessment of effects. Moreover, the s 16 duty imposes a minimum BPO requirement in circumstances where the effects of the noise are not reasonable. It is not a duty that applies where the noise effects are reasonable to their context. Whether or not noise levels can be mitigated to reasonable levels is a matter for the Court to assess, and whether BPO is required to achieve those levels is an assessment of fact, in each case, for the Court. Accordingly, the Court made no error of law by not insisting on adopting a BPO approach to the assessment of alternatives.

Assessment of Alternatives

[115] Questions 5, 6, 8 and 9 raise concerns with the assessment of alternatives.

[116] Mr Somerville submits that:

(a) The Court erroneously rejected an alternative site involving QAC owned land to the north of the existing designation on the basis that it was suppositious.

(b) The Court should have given weight to the absence of an assessment of this alternative by QAC.

(c) Further, as two of the five major reasons for the designation have been rejected, the alternative assessment by QAC proceeded from a false premise.

(d) Similarly, as the modified position was never assessed as an alternative, it could not possibly satisfy the adequacy criterion at s 171(1)(b). This is linked to the issue of jurisdiction and fairness,

and the implicit requirement that any modification must be one of the assessed alternatives.

[117] Turning to the merits, Mr Somerville says that the finding that the alternative to the north was suppositious was not available to the Court on the evidence. In fact he said that background showed that until 2010 the land was considered as appropriate for expansion. He also says that the Court placed improper reliance on PC19 and the scarcity of industrial land in Queenstown, there being no evidence or submission on the relevance or significance of these matters. He said that the Court must have relied on its own knowledge of those matters, but never afforded the parties the opportunity to comment other than through some questions from the Court to RPL's witness, Mr Foster, about the nature of the aviation activities and whether they might qualify as industrial.

[118] He points to the language of s 171(1)(b) which specifically requires the Court to consider "whether adequate consideration has been given to alternative sites". Thus, he submits, by failing to give weight to the absence of the assessment by QAC of the merits of the use of its own land, the Court has not discharged this statutory duty under s 171(1)(b).

[119] Mr Kirkpatrick responds that the Court had before it various master plans, including proposals to use QAC land to the north and outside of the existing designation. Plainly therefore QAC had previously considered various alternatives, including the one now raised by RPL. He says that there was evidence on which the Court might find that expansion to the north was suppositious.[53] He accepts that the Court did not raise with the parties the significance of the scarcity of industrial land in light of PC19, but that Mr Foster was tested on the proposition that aerodrome uses include industrial activity. In any event, he says the Court made a detailed examination of the alternatives, including on sites to the immediate north and rejected them. He specifically referred me to [112]-[115] of the decision (noted above) to demonstrate the careful assessment undertaken of alternatives by the Court. There was therefore no failure in terms of s 171(1)(b).

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[53] See submissions of Mr Kirkpatrick at [25] in reply to RPL's submissions. Mr Kirkpatrick cited evidence of P West and B Macmillan.

Assessment

[120] It is important to commence this analysis by referring to the language of s 171(1)(b) relevant to this ground of appeal. The Environment Court was required to have particular regard to:

> "whether adequate consideration has been given to alternative sites... if ... the requiring authority does not have an interest in the land sufficient for undertaking the work..."

[121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered.[54] But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.[55]

[123] RPL insisted that the Court was required to assess whether adequate consideration was given to locating the general aviation/helicopter precinct on land north of the main runway, including the undesignated land owned by QAC and/or QLDC. The Court responded that this option was suppositious for the following reasons (repeated here for ease of reference):

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54 *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [29].

55 Cf by analogy, *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [36] and [37].

> [89] Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the implications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[124] There are two immediate issues with this reasoning. First the Court introduces the scarcity of industrial land as a reason for rejecting QAC's land to the north of the designation. I am told that scarcity of industrial land was not mentioned in submissions or evidence and Mr Kirkpatrick said that reference to it cannot be found anywhere in the transcript. Second, the Court appears to shift the burden of demonstrating the efficacy of the suggested alternative to RPL in light of PC19. But the task of persuading the Court as to the adequacy of the consideration of alternatives always rested with QAC for the orthodox reason that QAC is seeking to persuade the Court that all relevant alternatives were adequately considered.[56]

[125] Having said all of that, as the Canadian Supreme Court said in *Housen v Nikolaisen*:[57]

> Appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole

[126] And, it is too easy to alight on isolated passages in a judgment and to dismiss the full evaluation undertaken by the Court, based on detailed information, including expert evidence, about the assessment (and efficacy) of the various alternatives.

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[56] Cf *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC). And see *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP18/02, 7 June 2002.

[57] *Housen v Nikolaisen* [2002] 2 SCR 235 at 250, cited with approval by the Supreme Court of the United Kingdom in *McGraddie v McGraddie* [2013] UKSC 58.

[127] In this regard, the judgment also refers to reports produced in 2005, 2006, 2007 and 2008 considering sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. The 2005 Master Plan expressly rejects such a precinct within Lot 6. It then records that QAC's advisor recommended in a 2007 report that general aviation flight-seeing operations be grouped north of the main runway.[58] However, in 2010, QAC's advisor changed its recommendation, concluding that a north-east precinct "is distinctively inferior".[59] While this north-east precinct appears to be located within the existing designation (and so is not synonymous with RPL's suggested alternative), it identifies problems with a northern location as distinct from a southern location and relevantly that: [60]

> ... the southern site would not require helicopters or fixed wing to cross runway 23/05 when departing to the south or east (a very common flight path), if departing north or west from the proposed northern site, it appears aircraft would still need to track south initially (crossing the main runway....

[128] The point of this observation is not to shore up an alleged deficiency in QAC's or the Court's assessment, but to illustrate with one example the detailed information before the Court and the reason why this Court must be slow to interfere with findings of fact by telescope.

[129] Problematically however, the Court identified "scarcity of industrial land" and PC19 as a key reason for treating the site to the north as suppositious. As there was no evidence about this, and no argument directly addressing its merits, the Court fell into procedural, if not substantive error. It may be that the Court treated scarcity of industrial land in Queenstown as a matter of uncontroverted fact.[61] Certainly recent decisions of the Environment Court and this Court about PC19 refer to the significant need for industrial land in Queenstown.[62] And the Court could not be criticised for referring to PC19 as it was a mandatory relevant consideration.[63] But

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58 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [76]-[81].

59 At [86].

60 Refer Assessment of Environmental Effects, 5.3.4; and Appendix T.

61 While the Environment Court is not strictly bound by rules of evidence, the capacity to take into account uncontroverted facts is allowed by s 128 of the Evidence Act 2006.

62 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817 at [25]; *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 at [563].

63 Section 171(1)(a)(iv) and s 43AAC.

RPL should have been invited to submit on the factual issue of scarcity if it was going to be the reason for rejecting RPL's alternative site as suppositious. As a minimum, and in the absence of any party raising the issue of scarcity of industrial land, RPL was entitled to notice of the Court's conclusions about that issue before it was used as a reason to reject RPL's objection. While I would ordinarily afford the Court a significant amount of latitude for the reasons mentioned at [125]-[126], an issue of procedural justice arose when the Court resolved a substantive issue relying on its own knowledge and without notice to the parties.[64]

[130] Accordingly the appeal on this point is allowed. I deal with materiality and relief below. It must be considered in light of my findings on the question of fairness.

Cost benefit analysis

[131] Mr Somerville submits that the Court erred by determining that the NOR was efficient in the absence of a cost benefit analysis.

[132] There is nothing in the language of ss 7(b) or 171(1)(b) that imposes a legal duty on the requiring authority to prepare a cost benefit analysis or requires the Court to consider a cost benefit analysis. As the Court noted, such an analysis may be very helpful and the failure to do one may mean that the Court finds that the assessment of efficiency and/or alternatives is inadequate. But rarely will the failure of the Court to require a cost benefit analysis amount to an error of law. Indeed the full High Court in *Meridian Energy Ltd v Central Otago District Council* considered that the Environment Court erred by requiring a cost benefit analysis.[65] Moreover, it is inherently part of the evaluative function for the Environment Court to determine whether there has been adequate consideration of alternatives or whether the proposal is an efficient use of resources and whether there is a sufficient basis to draw a robust conclusion. In short, the assessment of efficiency and/or alternatives is essentially an assessment of fact, on the evidence, not readily amenable to appeal on a point of law.

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64 Cf *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 (PC) at 522.

65 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [116].

[133] Mr Somerville's submissions sought to distinguish leading authority eschewing the requirement to assess the viability of a project. The submissions also sought to distinguish the observations of the full High Court about cost benefit analysis in *Meridian*. I readily accept the proposition that the case law dealing with viability has nothing to do with cost benefit analysis. Viability is essentially concerned with profitability and the Courts in this context have never been concerned with profitability.[66]

[134] Cost benefit analysis is however concerned with quantifying, in economic terms, whether the costs of a proposed use of a resource exceed the benefits of that use. It is therefore a recognised method for assessing efficiency and/or the relative merits of alternatives, especially in circumstances where the ordinary operation of the market to achieve allocative efficiency cannot be assumed. But, as to the requirement to undertake a cost benefit analysis, the Court in *Meridian* observed:

> [111] Parliament has not mandated that the decisions of consent authorities should be "objectified" by some kind of quantification process. Nor does it disparage, as a lesser means of decision making, the need for duly authorised decision-makers to reach decisions which are ultimately an evaluation of the merits of the proposal against relevant provisions of policy statements and plans and the criteria arrayed in Part 2. That process cannot be criticised as "subjective". It is not inferior to a cost-benefit analysis. Consent authorities, be they councillors, commissioners or the Environment Court, and upon appeal the High Court Judges, have to respect that reality and approach decision making in accordance with the process mandated by the statute. It is not a good or bad process, it simply is the statutory process.

[135] I do not think this reasoning can be readily distinguished, as it is a general statement of principle about the functioning of the RMA. To that extent, it remains apposite to this case. However, unlike s 7(b), the Court under s 171(1)(b) must decide whether "adequate" consideration has been given to alternatives. It may be that a Court might find that the assessment was inadequate without a cost benefit assessment. But whether that is so is an evaluative matter for the Court and is not a mandatory requirement in every case.

[136] I have also reviewed the reasons given by the Environment Court in relation to cost benefit analysis, and I cannot identify any obvious flaw that might warrant

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66 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

further investigation by me or suggest a reviewable error of law. Quite the opposite, the Court assembled the information available to it, examined key considerations of operational efficiency and externalities, and formed a conclusion that was available to it on the evidence.[67] Accordingly, there being no general or specific duty at law to require a cost benefit analysis, this ground of appeal must fail.

Inconsistency of position

[137] Mr Somerville submits that QAC advised the Court that 8.07 ha was sufficient to enable it to undertake its operation, yet it has now sought to exercise powers of acquisition for 15 ha under the PWA. He says the Court relied on the QAC's representation in finally resolving that the modified position was appropriate. He therefore contends that had it known that in fact QAC needed more than 8.07 ha, the Court would have had to cancel the designation in its entirety, because it would not then have had a sound basis for the grant of a designation affecting that land.

[138] Mr Kirkpatrick responds that the PWA process was triggered to provide surety that, in the event that QAC was successful in this appeal, it could acquire the land it needed. He says there is no need to have the designation in place before commencing the PWA procedures. He also indicated that QAC would not seek to complete the PWA process without first having resolved the final scope of the designation.

Assessment

[139] I reject this ground. I do not accept that QAC represented to the Court that 8.07 ha was sufficient. I have the transcript of the relevant passage. I will not lengthen this judgment by quoting it. In short, Mr Kirkpatrick plainly indicated to the Court that compliance with Civil Aviation Authority standards might demand a greater amount of land to accommodate Code C aircraft. He simply confirmed that 8.07 ha was sufficient for general aviation and helicopter aircraft.[68] Accordingly there is no inconsistency of position.

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[67] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [226], [235] and [236].
[68] Transcript at pp 1419 and 1420.

The substation

[140] Question 12 deals with the inclusion of a substation within the designation. RPL is concerned to ensure that the substation is not affected by the designation, presumably as it is useful infrastructure. Mr Somerville submitted that the substation was beyond the designation boundary.

[141] Mr Kirkpatrick says that it is simply efficient to include the substation within the designation because of access issues. But there is no intention to affect its usual operation.

[142] I was not taken to the original designation to understand its areal extent. But assuming the substation was not contained within the literal boundary of the notified designation, Mr Kirkpatrick advises that there was a great deal of evidence about the substation, so plainly RPL had an opportunity to deal with any prejudice to it. Mr Kirkpatrick also advises that if the substation is relocated before any works are undertaken in respect of the designation, then it may be possible to re-align the boundary of the designation.

[143] To the extent therefore that there might be an issue arising out of the areal extent of the notified designation (which is not clear to me), I do not consider that a material issue of law arises warranting relief given the representations made by Counsel for QAC in its written submissions.[69]

Part D – Outcome

[144] I have identified the following errors (in summary):

(a) The Environment Court did not have regard to the potential disenabling effect of a maximum separation distance of 93m between the main runway strip and the taxiway;

(b) The Environment Court incorrectly excluded fairness as an irrelevant consideration;

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[69] See paragraphs 65-67 of outline of submissions on behalf of QAC in reply to RPL.

(c) The Environment Court did not correctly assess RPL's claims based on legitimate expectation;

(d) The Environment Court did not provide RPL with an opportunity to address the issue of scarcity of industrial land and its relevance or otherwise to the adequacy of the assessment of alternatives under s 171(1)(b).

[145] The first error, raised by QAC, is plainly material. If the Director of Civil Aviation does not approve the 93m separation distance, there may be insufficient land subject to the designation to enable both a Code C taxiway and a general aviation precinct. A key justification for the designation and its coercive effect over Lot 6 may then not eventuate. I cannot dismiss the prospect that the Court, properly apprised of this potentially disenabling effect, might allow more land to be subject to the designation or cancel the designation altogether rather than simply confirm the interim decision.

[146] The three remaining errors, raised by RPL, are interrelated. The central concern is that the Environment Court, by rejecting the relevance of fairness and RPL's asserted legitimate expectations, did not properly frame the alternatives or reasonableness assessment. The Court proceeded on the assumption that it could treat RPL's suggested alternative as suppositious even though the contractual background envisaged that QAC's land to the north might be used for aerodrome expansion, and while RPL's land to the south would remain a buffer zone. Yet there is at least an arguable case that RPL could legitimately expect that Lot 6 would remain a buffer zone, and/or alternatives not involving RPL's land would be thoroughly explored before the decision to designate was notified or confirmed. As a minimum RPL could expect that clear justification for using Lot 6 would be established prior to confirmation.

[147] One real difficulty for RPL is that the Environment Court has closely assessed the effects of the NOR in light of the criteria at s 171 and found clear justification for it. To the extent therefore that there has been any unfairness in the process leading up to the issuance of the NOR, it could be said to have been

remedied by the subsequent Environment Court process. The tipping point however is that the Court referred to scarcity of industrial land to disregard RPL's alternative. RPL was never afforded the opportunity to address the scarcity of industrial land and whether that provided a proper basis for the Court's conclusion. This was procedurally unfair and compounded the failure to have regard to RPL's asserted expectations. I cannot foreclose the possibility that the Court might be persuaded that scarcity of industrial land is not a valid issue, or if it is, that scarcity was and is not a proper reason to foreclose consideration of RPL's alternative, especially in light of the previous contractual arrangements.

[148] I therefore allow the appeals in part, and refer the application back to the Environment Court to reconsider:

(a) Whether the requirement should be cancelled or modified after it has provided the parties with an opportunity to be heard in relation to the separation requirements for a Code C taxiway and the process for confirming those requirements.

(b) The assessment of the adequacy of alternatives and reasonable necessity under s 171(1) (b) and (c) after it has provided the parties with an opportunity to be heard in relation to RPL's legitimate expectation claims and the scarcity of industrial land.

[149] Beyond these specific directions, it will be for the Environment Court to determine how it proceeds to reconsider the above matters and any consequential relief that might follow, if any, including but not limited to further modification or cancellation of the designation.

[150] I note that none of the parties have sought to challenge the findings about the improbability of a precision runway and Code D aircraft. Nothing in this judgment or the relief granted affects those findings or the substantive reduction in areal extent of the designation based on those findings.

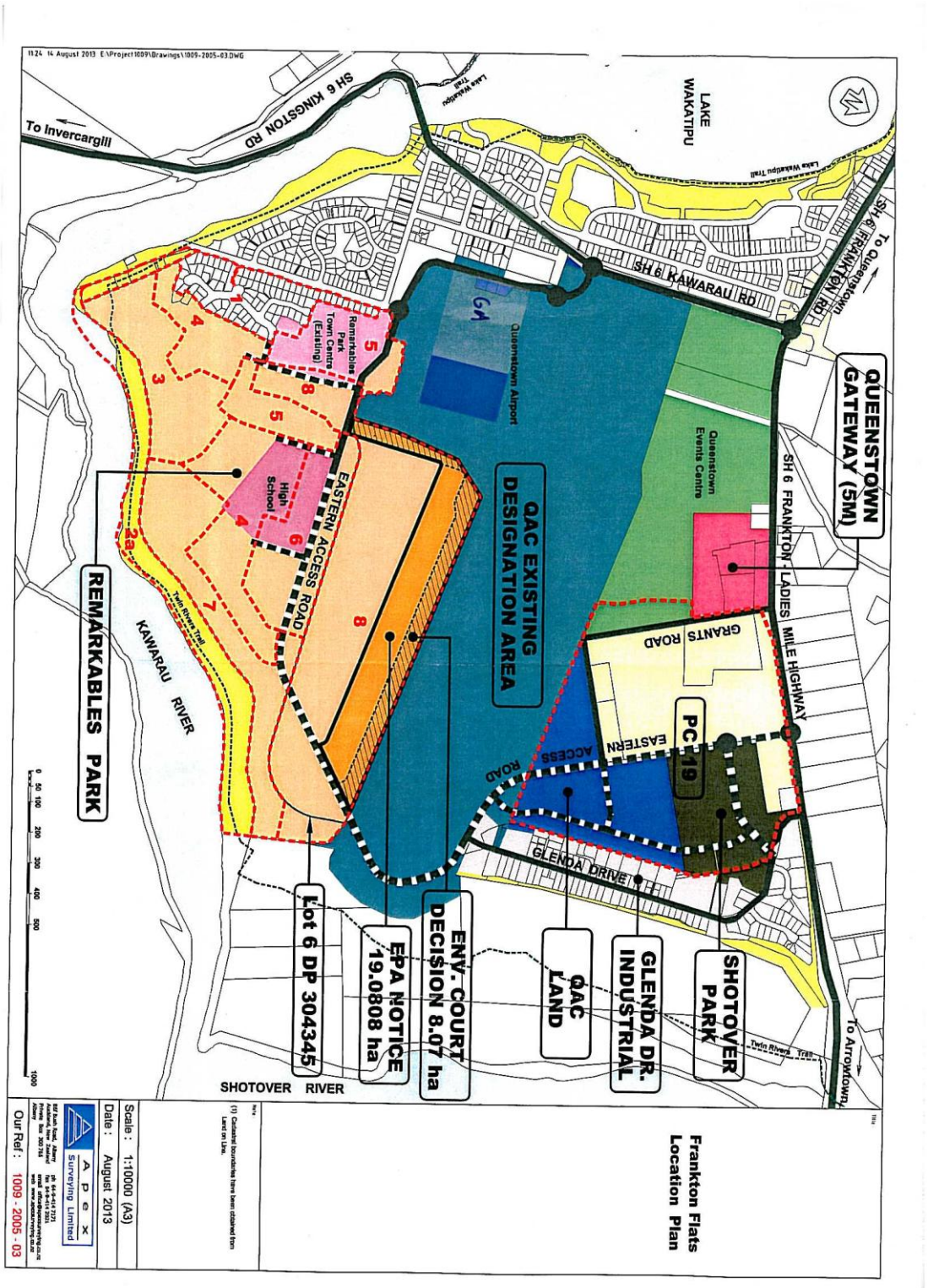
[151] Leave is granted to the parties to seek clarification of my orders if that is necessary. I will separately minute my availability in this regard.

Costs

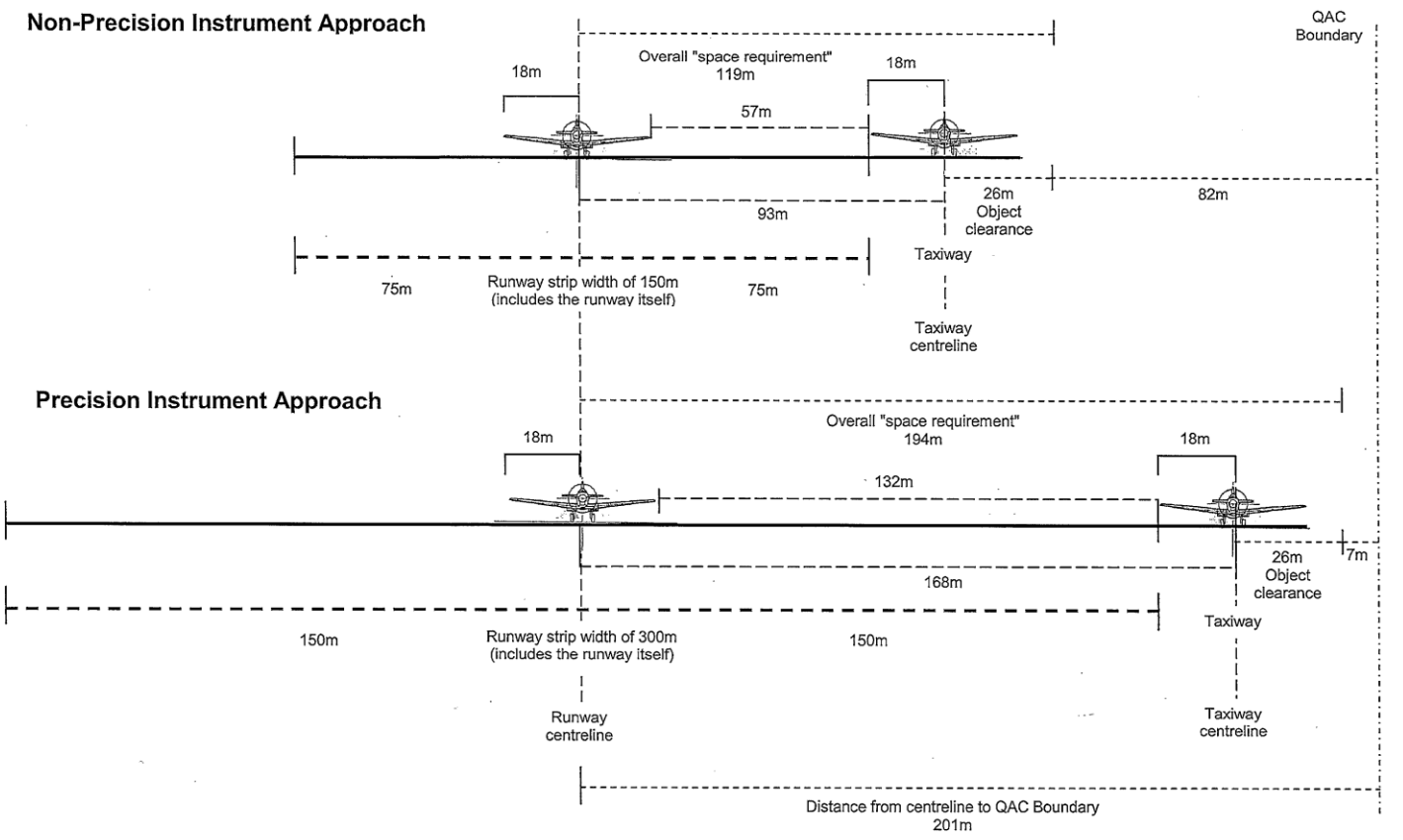
[152] Both appellants have had partial success on their appeals. I am minded therefore to let costs lie where they fall. If the parties do not agree they may file submissions, of no more than three pages in length.

Solicitors:
Brookfields, Auckland
Lane Neave, Christchurch
Russell McVeagh, Wellington

ANNEXURE A


QUEENSTOWN GATEWAY (5M)
QAC EXISTING DESIGNATION AREA
REMARKABLES PARK
SHOTOVER PARK
GLENDA DR. INDUSTRIAL
QAC LAND
ENV. COURT DECISION 8.07 ha
EPA NOTICE 19.0808 ha
Lot 6 DP 304345
PC 19
EASTERN ACCESS ROAD
GRANTS ROAD
LADIES MILE HIGHWAY
SH 6 FRANKTON RD
SH 6 KAWARAU RD
SH 6 KINGSTON RD
To Invercargill
To Queenstown
To Arrowtown
LAKE WAKATIPU
Lake Wakatipu Trail
Queenstown Airport
Queenstown Events Centre
Remarkables Park Town Centre (Existing)
High School
KAWARAU RIVER
SHOTOVER RIVER
Twin Rivers Trail
GLENDA DRIVE
Frankton Flats
Location Plan
Scale : 1:10000 (A3)
Date : August 2013
Our Ref : 1009 - 2005 - 03
Apex Surveying Limited

ANNEXURE B
SEPARATION DISTANCES FOR CODE C AIRCRAFT



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