

IN THE MATTER                      of the Resource  
Management Act  
1991

AND

IN THE MATTER                      of an Objection under  
Section 357 of the Act

BY    the Aircraft Owners and  
Pilots Association of New  
Zealand (“AOPA”)

**DECISION ON AN OBJECTION UNDER SECTION 357 OF THE ACT BY  
THE AIRLINE PILOTS AND OWNERS ASSOCIATION OF NEW ZEALAND**

**Introduction**

1. On 14 September 2018 Queenstown Lakes District Council applied to have part of Submission 2663 lodged by the Aircraft Owners and Pilots Association of New Zealand (“AOPA”) struck out under section 41D of the Resource Management Act 1991 (“the Act”).<sup>1</sup> The grounds relied on were that parts of the submission were not “on” Table 24.2 of the Proposed District Plan provisions as notified on 9 August 2018, and consequently disclosed no reasonable or relevant case.<sup>2</sup>
2. In a decision dated 30 September 2018,<sup>3</sup> the Chair of the Hearing Panel struck out those parts of Submission 2663 that did not relate directly to Rule 24.4.28 (“the Hearing Panel decision”). The relief available to the submitter was limited to, in the alternative:
  - in the Wakatipu Basin Lifestyle Precinct only, the noise limits prescribed in Chapter 36 Table 3 (Rules 36.5.10 and 36.5.11) apply in place of Rule 24.4.28; or

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<sup>1</sup> Memorandum of Counsel on Behalf of Queenstown Lakes District Council Seeking to Strike Out Part of a Submission Point Under Section 41D of the RMA, dated 14 September 2018 (“Council’s Memorandum”).

<sup>2</sup> Ibid, paragraph 1.

<sup>3</sup> Decision on Request to Strike Out S2663 in Part by Denis Nugent, Hearing Panel Chair, dated 30 September 2018.

- that Rule 24.4.28 be deleted and the provisions for informal airports in the Wakatipu Basin Amenity Zone apply in the Wakatipu Basin Lifestyle Precinct.
3. AOPA filed a Notice of Objection to the partial Strike Out decision on 19 October 2018 (“the Objection”).
  4. I have been appointed by Queenstown Lakes District Council (“Council”) as an Independent Hearing Commissioner under the Act to hear and determine this Objection.
  5. A hearing was held at Queenstown on Monday 26<sup>th</sup> November 2018. The AOPA was represented by Mr Vance Boyd and Mr Jules Tapper. The hearing was attended by Council officers Mr Ian Bayliss and Ms Heidi Baillie, who helpfully responded to questions from the Commissioner.

### **Background**

6. The background to the request for Strike Out of Submission 2663 under Section 41D of the Act was set out in the Hearing Panel decision at paragraphs 4 to 10. The facts are consistent with the evidence of the AOPA at the hearing, except with regard to the following aspect.
7. At paragraphs 6 and 7 the Hearing Panel Decision records:
  - “6. *In addition to the public notice, on 23 November 2017 all submitters on Stage 1 of the PDP were sent a copy of a memorandum of counsel explaining the contents of Stage 2. In relation to the Wakatipu Basin, this memorandum contained the following:*

*A new Wakatipu Basin Chapter 24 will be notified. Proposed Chapter 24 provides a framework of objectives, policies, zones and rules for the Wakatipu Basin. The Wakatipu Basin Rural Amenity Zone and the Wakatipu Basin Lifestyle Precinct will be notified on the planning maps. All of the Wakatipu Basin Rural Amenity Zone will cover land previously notified in Stage 1, and therefore will be a variation to the planning maps as far as the Rural, Rural Lifestyle and Rural Residential zones previously notified for this land in Stage 1 will be replaced with the proposed Wakatipu Basin Rural Amenity Zone and Wakatipu Basin Lifestyle Precinct.*

*The proposed new zone will be located on planning maps*

10, 13, 13d, 15, 26, 27, 28, 29, 30, 31, 31a, and 39.

7. *The memorandum also stated:*

*For the purposes of submissions, the intention is that submitters make a separate submission for any of the six discrete Stage 2 topics that interest them (which may contain numerous submission points), whether their area of interest is new PDP (Stage 2) chapters, or variations to the PDP (Stage 1).*

8. In contrast to the understanding of the Hearing Panel, the evidence of the President of the AOPA, Mr Vance Boyd, was that the AOPA did not receive either the Public Notice in relation to the notification of Stage 2 of the Proposed District Plan (“PDP”), or the Memorandum prepared by Council dated 23 November 2018, although he accepts that the Public Notice was emailed to [president@aopa.org.nz](mailto:president@aopa.org.nz). I accept the evidence of the AOPA in this regard; however, nothing in my decision turns on this point.
9. What is not in dispute is that APOA lodged a submission and further submission on Stage 1 of the Proposed District Plan.<sup>4</sup> However, it did not lodge a submission on Stage 2 in the period between 23 November 2017 and the closing date for submissions, 23 February 2018. AOPA has submitted that the reasons it did not submit on Stage 2 were:
- The AOPA only became aware of the Stage 2 variation to the PDP in August 2018 following the notification of Table 24.2 on 9 August 2018.
  - Even if it had been aware of Stage 2 (and the evidence has established that some members of the AOPA were aware of the notification of Stage 2, including Mr Tapper), it would not have made a submission as it was under the misapprehension that the submissions it had made on informal airports in relation to Stage 1 would apply equally to Stage 2. It formed this view based on its understanding that Stage 2 was effectively an iteration or subset of Stage 1 and, further, that there was nothing in the public documents, the Council’s Memorandum dated 23 November 2017 or the Stage 2 Section 32 report that indicated that there had been any changes to the treatment of informal airports in the Stage 2 proposal. “Informal airports” was not one of the “discrete Stage 2

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<sup>4</sup> Submission 211 and Further Submission 1066.

topics” highlighted in the Stage 2 Memorandum.

### Legal Principles

10. Section 41D requires that at least one of the five criteria set out at sections 41D(1)(a) to (e) be satisfied before a submission may be struck out. Although the Chair of the Hearing Panel did not specifically refer to this section in his decision, Council’s Memorandum dated 14 September 2018 submitted that section 41D(1)(b), which requires that the submission “discloses no reasonable or relevant case” was the basis for the strike out application. Accordingly, I have proceeded on the basis that section 41(1)(b) formed the basis for the exercise of the discretion in this particular case.
11. The Chair of the Hearing Panel relied on the legal principles regarding scope; that is, whether a submission is “on” the proposed plan, in determining the strike out application under section 41D. It is accepted that the legal principles regarding scope; that is, whether a submission is “on” the proposed plan, is clearly a relevant consideration. However, the inquiry under section 41D(1) is not necessarily limited to an interpretation of scope and may include other relevant factors that go to the reasonableness of a submission in all of the circumstances, including procedural fairness. Given the emphasis of the Act on public participation, striking out a submission under section 41D in the context of a proposed plan, which effectively denies a representative body or a member of the public from participating in the process (including any rights of appeal), should not be exercised lightly.
12. The legal criteria regarding scope were distilled by the Chair of the Hearing Panel from *Palmerston North CC v Motor Machinists Limited* as follows,<sup>5</sup> and are accepted for the purposes of my decision:
  - the focus of a submission must be on “specific provisions of the proposal”;<sup>6</sup>
  - variations to the proposal which have not been evaluated in the Section 32 analysis are unlikely to be addressing the change to the pre-existing status quo;<sup>7</sup>
  - if the resource management regime for a site is not altered by a plan

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<sup>5</sup> [2014] NZRMA 519.

<sup>6</sup> *Ibid* at [38].

<sup>7</sup> *Ibid* at [76].

change, then a submission seeking a new management regime for that site is unlikely to be “on” the plan change;<sup>8</sup>

- incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial Section 32 analysis is required to inform affected persons of the comparative merits of that change.<sup>9</sup>

*Was the submission “on” the proposed plan?*

13. The Chair of the Hearing Panel set out the background to the proposed plan at paragraphs 14 to 18 of his decision, which helpfully explains the context to the issues and is summarised as follows.
14. When Stage 2 was notified on 23 November 2017, Chapter 24 – Wakatipu Basin provided for informal airports as a permitted activity (Rule 24.4.12 in Table 24.1). This activity was subject to the standards in Rule 24.5.14 and non-compliance with this standard required consent as a discretionary activity. The policy framework for these rules is explicitly provided by Policies 24.2.2.6 and 24.2.3.1, although various other policies relating to non-residential activities are also relevant.
15. The variation to Stage 2 notified on 9 August 2018 introduced Table 24.2 – *Activities in the Wakatipu Lifestyle Precinct*, which was acknowledged by Council to have been “inadvertently omitted” from Chapter 24 when first notified in November 2017.<sup>10</sup> It is accepted that the specific rules for the Precinct in Table 24.2 prevail over the general rules in Table 24.1 by virtue of Rule 24.3.3.1. No changes were made to the Chapter 24 objectives and policies, nor were any changes made to the standards in Table 24.3.
16. The effect of the variation notified in August 2018 was that informal airports within the Precinct Zone were no longer permitted activities subject to the standards in Rule 24.5.14 but were instead classified as a discretionary activity. The activity status and standards relating to informal airports in the Amenity Zone remained substantially unchanged from that promulgated in Stage 1.
17. In reaching his decision, the Chair of the Hearing Panel held that “*the notification of Table 24.2 on 9 August 2018 did not provide a second opportunity for anyone*

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<sup>8</sup> Ibid at [81].

<sup>9</sup> Ibid at [81].

<sup>10</sup> Paragraph 6 of Council’s Memorandum dated 14 September 2018.

*to lodge submissions on any objectives and policies in Chapter 24, or any rule other than Rules 24.4.25, 24.4.26, 24.4.27, 24.4.28 and 24.4.29 [Table 24.2] irrespective of their reasons for not lodging a submission during the period from 23 November 2017 to 23 February 2018".* Accordingly, he concluded that any parts of the submission *"that did not relate directly to Rule 24.4.28 are struck out under section 41D"*. The effect of this decision was that any submissions on the objectives and policies directly applicable to informal airports (specifically 24.2.2.6 and 24.2.3.1), Table 24.1 - Activity Rule 24.4.12 and Table 24.3 - Standard 24.5.14 were struck out.

18. In my view the Chair erred in reaching this narrow interpretation of the scope of the variation introduced by Table 24.2 for the following reasons.
19. Table 24.2 introduced an activity rule (Rule 24.4.28), the effect of which was to classify all informal airports in the Precinct Zone as a discretionary activity. In order to make any meaningful submission on an activity rule in a proposed plan, it is necessary to do so within the context and framework of the objectives, policies, any other rules and standards that are relevant and applicable to the rule in question. I concur with the AOPA's submission that the rules governing activity status cannot reasonably be severed from or considered in isolation to the applicable standards, and that without those standards and higher order provisions the rule (particularly with regard to discretionary status) is virtually meaningless, as there is no understanding as to how the rule would be applied if, for example, resource consent was to be sought. Accordingly, any submission that addresses the planning framework within which the rule exists and should be interpreted must necessarily be "on" the variation.
20. In my opinion to find otherwise would effectively restrict any submitter on the 9 August 2018 variation to a submission that Rule 24.4.28 be deleted, which is both unreasonable and unworkable, and which would constitute a breach of fair process in these circumstances. Rather, it was open to the AOPA to consider and submit on any modifications to the specific objectives and policies, rules and standards that relate to the interpretation of Rule 24.4.28. In the case of informal airports, that includes specifically Policies 24.2.2.6 and 24.2.3.1, Rules 24.4.12 and 24.4.28 and Standard 24.5.14.
21. Although the introduction of Rule 24.4.28 effectively renders Standard 24.5.14 applicable only to the Amenity Zone, it was nonetheless open to AOPA to propose, in submitting that Rule 24.4.28 be deleted or amended in some way,

that the applicable Standard, which applies to both Zones, also be amended for the reasons touched on above. To attempt to separate the Amenity and Precinct Zones in this respect is an artifice that fails to accord due consideration to the principles of the Act and the planning context and framework within which the variation must reasonably be assessed.

22. Accordingly, I find that the AOPA submission was “on” the variation in its entirety. The Objection is therefore upheld, including the submissions on Standard 24.5.14 as applied to both the Precinct and Amenity Zones.

*Other considerations*

23. In reaching this conclusion I am also mindful of the fairness and reasonableness of the planning process to AOPA and its members in all of the circumstances. Council has acknowledged that Table 24.2 was “inadvertently omitted” from Chapter 24 – Wakatipu Basin.<sup>11</sup> It is not in dispute that Rule 24.4.28 of Table 24.2 introduced a material change to the activity status of informal airports in the Precinct Zone that had not previously been contemplated in Stage 1 and was certainly not apparent on the face of Stage 2 as initially notified (and which, at that stage, was fundamentally consistent with the approach to informal airports in Stage 1). Had Table 24.2 been included in Stage 2 when notified on 23 November 2017 it is my conclusion, based on the oral evidence of Mr Tapper, that this would have been drawn to the attention of the AOPA at that time by one or more of its members and that a full submission would have been made within the necessary timeframe, notwithstanding that the AOPA did not receive notification of Stage 2. Mr Tapper’s evidence, which I accept, was that he received advice of the notification of Stage 2, and that he did then read and digest the Stage 2 Proposed Plan. As he considered the proposed treatment of informal airports to be more or less consistent with that of Stage 1 (which included at that time the Wakatipu Basin), he did not see any need to make a further submission. The relevant point here is that had Table 24.2 been included in Stage 2 when first notified, the need to make a fresh submission *at that time* on the activity status of informal airports in the Precinct Zone would have been obvious to Mr Tapper, a highly experienced local pilot and senior member of the AOPA. I have no doubt that Mr Tapper, and in all likelihood other members of AOPA<sup>12</sup> would have alerted the AOPA to the Stage 2 Proposed Plan and the new classification of informal airports as a discretionary activity in the Precinct

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<sup>11</sup> Paragraph 6 of Council’s Memorandum dated 14 September 2018.

<sup>12</sup> AOPA’s evidence was that 20 to 30 of their members had made individual submissions on Stage 1, therefore it is reasonable to assume that they would also have an active interest in Stage 2.

Zone under Rule 24.4.28, when it was first notified. The fact that Mr Tapper (and others) were under the misapprehension that their Stage 1 submissions would be carried over to Stage 2 (as it initially comprised part of the Stage 1 area) is not relevant to my findings, as it is the impact of Rule 24.4.28 on the activity status of informal airports that would have prompted – and indeed necessitated – a further submission on Stage 2 had Table 24.2 been included in the Stage 2 when it was first notified.

24. I am also mindful that the Section 32 Evaluation Report on Chapter 24 did not address the significant proposed change in the activity status of informal airports in the Precinct Zone introduced by Rule 24.4.28. Apart from a very brief reference in the policy framework on page 36 (which is not relevant to this particular matter), the Stage 2 Section 32 report was silent on informal airports. This contrasts starkly with the position with respect to Stage 1, where a special Section 32 Evaluation Report was prepared specifically to address the resource management issues associated with informal airports. Had the Stage 2 Section 32 Report discussed Rule 24.4.28 and explained the resource management reasons for its inclusion, the AOPA and its members would in all likelihood have been alerted to the proposed changes. In forming this view I also note that the inclusion of Rule 24.4.28 appears to be a significant departure from the special Section 32 report on informal airports in which it was stated: *“This proposed policy promotes informal airports as an important part of recreational activities within the district as opposed to the current plan provisions which are silent on this activity”*.
25. The Chair of the Hearing Panel stated that:<sup>13</sup> *“While that document [the Section 32 Report] does not contain extensive discussion specific to informal airports, a cursory examination of Chapter 24 would have identified that specific rules were proposed for the Wakatipu Basin”*. I do not agree. There was no reference in the Section 32 report to the substantial proposed change in activity status imposed by Rule 24.4.28 and, accordingly, the AOPA could not have identified the specific rules proposed for the Wakatipu Basin from that document. Further, Rule 24.4.28 is prima facie inconsistent with the theme of the Section 32 Report prepared for Stage 1, and accordingly there was a reasonable expectation that a material change of this nature should have been addressed comprehensively in the Stage 2 Section 32 report.

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<sup>13</sup> Paragraph 21 of the Decision to Strike Out Submission 2663 in Part, dated 30 September 2018.

26. In summary, it is inconsistent with fair process and the principles of natural justice, in my view, that a material change to the activity status of informal airports be introduced by way of a variation some nine months after Stage 2 was first notified, and submitters then be denied the opportunity to make the submission that they would almost certainly have made on the proposed plan (which is in effect what the AOPA did on 5 September 2018) had Table 24.2 been included in Stage 2 when notified in November 2017.
27. In reaching my decision I have not placed any weight on the AOPA argument that it misunderstood the need to resubmit on Stage 2 having made extensive submissions on Stage 1, as it is not necessary to do so. While I am satisfied that Council's processes were appropriate insofar as the notification of Stage 2 is concerned (apart from the consequences of the 9 August 2018 variation as set out above), it is unfortunate that the Memorandum dated 23 November 2017 did not make it clear that submitters on Stage 1 that were not deemed to be carried over to Stage 2 were required to make a "new" submission with respect to Chapter 24 - Wakatipu Basin. The evidence of the AOPA was that none of its 20 to 30 members that submitted on Stage 1 realised that it was necessary to make a new submission on Stage 2 at the time of its notification in November 2017, as they understood Stage 2 to be an "iteration" of Stage 1 in which no substantive changes to the provisions regarding informal airports had been made. Further, as outlined above, no mention had been made of changes to the activity status of informal airports in either the Stage 2 Section 32 Report, or the Council's Fact Sheets on Stage 2 (as had previously been the case with Stage 1). It would be helpful to make this procedural requirement very clear in any future memoranda if a similar situation was to arise again as, in my opinion, it was not intuitive to a reasonable lay submitter that a new submission was required, and the process then runs the risk that public participation is unintentionally excluded.

### **Decision**

28. For the reasons set out above, the AOPA's Objection is upheld, and Submission 2663 is reinstated insofar as it addresses Policies 24.2.2.6 and 24.2.3.1; Activity Rules 24.4.12 and 24.4.28 and Standard 24.5.14 (which potentially applies to both Zones), together with any other relevant matters, such as the noise standards in Chapter 3.
29. The AOPA's evidence at the Objection hearing was that during the course of

the Stage 2 hearing it had the opportunity to present on the entirety of its submission, including Standard 24.5.14. In response to a question from the Commission it stated that if its Objection was upheld, it “*might tweak its submissions a wee bit but there would not be a substantial amount of difference*”. The AOPA confirmed that it was comfortable with and did not seek any changes to Policies 24.2.2.6 or 24.2.3.1.

30. Accordingly, having regard to the Council’s legitimate concerns with regard to process (as noted in the Hearing Panel decision at paragraph 23), and notwithstanding that this situation has resulted from Council’s own inadvertent omission, I have determined that there is no merit in a new or resumed hearing on the basis that there would be de minimis prejudice to the AOPA, provided that its submissions and any supporting evidence presented at the Stage 2 hearing are accepted by the Hearing Panel in full.
31. Accordingly, although the Objection is upheld, the relief sought is limited to the submissions made in writing (Submission 2663), together with the submissions made at the Stage 2 hearing and any evidence presented in support. The AOPA’s right to appeal any decision of the Hearing Panel is preserved.



Jane Taylor  
Commissioner

10 December 2018