In the High Court of New Zealand
Invercargill Registry

I Te Kōti Matua O Aotearoa
Waihōpai Rohe

CIV-2019-425-112

Under	the Judicial Review Procedure Act 2016
Between	**Wānaka Stakeholders Group Incorporated** **Applicant**
And	**Queenstown Lakes District Council** **First Respondent**
And	**Queenstown Airport Corporation Limited** **Second Respondent**

Submissions for Queenstown Lakes District Council

17 September 2020

Next event: Hearing, 21-25 September 2020

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Submissions for Queenstown Lakes District Council

May it please the Court:

1 Summary and structure of Council's submissions

1.1 WSG's application for judicial review raises five main issues.

Transfer of ownership or control of strategic assets?

1.2 Under s 97(1)(b) of the Local Government Act 2002 (**LGA**), a local authority may transfer ownership or control of a strategic asset only if the decision is provided for in its long-term plan and has been publicly consulted on using a "Consultation Document". The Council decided to enter into a long-term lease (**Lease**) for Wānaka Airport to Queenstown Airport Corporation Limited (**QAC**), a Council-controlled organisation. It continues to own the land on which the Airport is situated. It controls any future development of the Airport as (super)-majority shareholder of QAC and by agreeing annually a statement of intent for QAC as a Council-controlled organisation. This control is preserved by the Lease which expressly provides for the statement of intent to be paramount. Wānaka Airport remains a strategic asset of the Council. Was s 97(1)(b) engaged by the decision?

1.3 The 2018 statement of intent did not expressly prohibit development of Wānaka Airport, though the 2019 statement of intent did. Did the Council's agreement to the 2018 and 2019 statements of intent amount to a transfer of control or ownership of Wānaka Airport to QAC?

1.4 Immediately adjacent to Wānaka Airport is Project Pure, a wastewater treatment facility. It is also a strategic asset. Through the long-term lease, the Council has ensured that a process exists through which decisions about Project Pure take into account any impact on the Airport. The converse is provided for through the statement of intent process. Did the Council's decision about the Airport engage s 97(1)(b) as it applies to Project Pure?

Significant alteration of level of service at Wānaka Airport?

1.5 Under s 97(1)(a) of the LGA, a local authority may only decide to alter significantly the intended level of service provision for any significant activity if the same preconditions have been complied with. The decision was made expressly on the basis that development would be the subject of a master planning exercise to be undertaken by QAC. After the decision to enter into a long-term lease was made, the intended level of service provided at Wānaka Airport was the same as it was before. Was s 97(1)(a) engaged by the decision?

Non-compliance with general principles of consultation?

1.6 The Council's decision was made following a lengthy public consultation process undertaken using the special consultative procedure and engaging directly with Wānaka residents. Did the Council's consultation process meet the general principles of consultation found in ss 77-82 of the LGA?

Was the decision unreasonable, or made failing to take into account relevant considerations?

1.7 The Amended Statement of Claim pleads that the decision to enter into the Lease was unreasonable or failed to take into account relevant matters. While "reasonableness" is referred to in a heading,[1] Wānaka Stakeholders Group Limited (**WSG**) does not appear to be pressing this argument in its submissions. Nor does it appear to press the argument about relevant considerations. If this issue remains, was the decision to enter into the Lease unreasonable? Were all mandatory relevant matters considered?

Is the relief sought appropriate?

1.8 WSG has made clear through its public statements, statements of claim, and evidence, that it believes the Council, or QAC, or both, have decided to develop Wānaka Airport into a Code C jet-capable airport facility. Neither the Council nor QAC have made any decisions on whether future development of the Airport is appropriate, or, if it is, what form it should take. If or when that occurs, the Council will need to satisfy itself that any consultation obligations under the LGA are complied with. Therefore, even if s 97 was engaged by the decision to enter into the long-term lease, is the relief sought appropriate? Is

[1] WSG's submissions at 84.

the delay and prejudice to the Council, QAC, and third parties of controlling significance?

The Council's position

1.9 It will be apparent from the above that the parties' positions on the facts are incompatible. It is a fundamental premise of WSG's case that the Council, or QAC, or both collectively, have decided to undertake a significant redevelopment of Wānaka Airport to convert it into a Code C jet-capable facility.

1.10 The Council has done no such thing. No record of such a decision exists. Nor is there any evidence before the Court that QAC has done so. But even if it had, it is subject to the Council's control, and before implementing such a plan it would have to be authorised by the Council. It has not been so authorised.

1.11 All that the Council has done is alter the governance and management arrangements for Wānaka Airport, with a view to enabling development options, if appropriate, to be the subject of a master planning process.

1.12 The Council considered several options and identified a long-term lease to QAC as its preferred governance and management option. The Council undertook seven weeks of formal public consultation about the issue. It held public meetings in Wānaka and at the Airport itself. A panel of Councillors heard submitters orally. Following that process the Council decided to enter into a long-term lease with QAC. That decision was made expressly anticipating that future development may be appropriate, but also expressly leaving for another day the appropriateness of any development and, if so, what form it might take. The decision was not tied to any particular development proposal. To the contrary, QAC's statement of intent was amended to direct it to undertake a master planning process for the Airport, including community engagement on a draft master plan. The process has not yet concluded.

1.13 Section 97 of the LGA was not engaged because:

(a) The Lease did not transfer ownership or control of the Airport. The Council still owns the Airport. The Council owns and controls QAC as majority shareholder and through the Statement of Intent process. The Lease contains a number of provisions ensuring that QAC's right of exclusive possession is subject to the Council's direction through the

statement of intent. The terms of the Lease appropriately reflect the decision that the Council made.

(b) There has been no decision to significantly alter the intended level of service provision at the Airport. Decisions about the intended future level of service at the Airport have not been made yet.

1.14 The Council appropriately complied with the general consultation requirements in the LGA. It treated the matter as having high significance and used the special consultative procedure. It gave ample time for the public to formulate their submissions. It gave them plenty of information about the scope and nature of the decision, limited as it was to governance and management arrangements. It engaged directly with Airport stakeholders and Wānaka residents. The Council has a broad discretion about how to carry out consultation and it appropriately observed the relevant principles.

1.15 The Amended Statement of Claim is clear that the allegations of unreasonableness and failure to consider all relevant matters rest on the premise that the decision to enter into the Lease included or gave effect to a decision to convert Wānaka Airport into a Code C jet-capable facility. That is wrong. Regardless, the decision cannot be said to meet the required threshold for unreasonableness, and the matters listed are not mandatory relevant considerations to a decision to enter into a long-term lease to enable governance and management of an asset.

1.16 If the Court considers that the Council has erred in any way, it does not follow that relief is appropriate for several reasons:

(a) The Council undertook an extensive consultative process that materially complied with the consultation principles in the LGA. The statement of proposal expressly recorded that the Council did not need to amend the long-term plan to effect the proposed decision.

(b) The Lease itself is unaffected by the question of whether any development of the Airport is appropriate.

(c) Despite WSG's reliance on the fact it did not receive a copy of the Lease until 24 September 2019, most of its arguments do not arise out of the terms of the Lease. WSG's focus on the Lease stems from its incorrect

belief that the Lease somehow demonstrates that a decision has been made to convert the Airport into a Code C jet-capable facility. Accordingly, dependent on the Court's assessment of this fundamental question, there has been significant delay in WSG commencing the proceeding. That delay is coupled with associated prejudice in that the Council and QAC have undertaken a significant negotiation process, and QAC has undertaken a lengthy process of contracting with hangar and ground lease holders.

1.17 Finally, WSG has filed numerous affidavits addressed to the question of what, if any, development at Wānaka Airport is appropriate. That is an important question, but, as noted above, it is one for the future. The evidence focused on this question is irrelevant. Much of WSG's evidence is also inadmissible for other reasons. This is set out in more detail in the Appendix.

Structure of submissions

1.18 The Council's submissions are structured in the following way:

(a) Part 2 provides a factual narrative of the decision-making by reference to the admissible evidence;

(b) Part 3 concerns the application of section 97 of the Local Government Act 2002;

(c) Part 4 explains how the Council's decision-making complied with the principles in ss 77-82 of the Local Government Act;

(d) Part 5 addresses the allegations of reasonableness and failing to consider relevant matters.

(e) Part 6 addresses relief and Part 7 addresses costs.

2 Facts relevant to decision-making

2.1 WSG's submissions purport to provide a factual summary of the decision-making challenged in this case, and yet they make barely any reference to the evidence filed on behalf of the Council or QAC.

2.2 At the heart of this dispute is an assertion by WSG that the Council, or QAC, or both, decided in 2016/2017 to convert Wānaka Airport into a Code C jet-capable facility, and that decisions made since then have been for the purpose of bringing that about. The Council has made no decision about future development of Wānaka Airport.[2] To the contrary, its decision to lease the Airport to QAC was expressly on the basis that QAC would undertake a master planning exercise to identify what, if any, future development at Wānaka Airport was appropriate. Both QLDC and QAC have been clear throughout that any decision to significantly develop Wānaka Airport would be consulted on.

2.3 What follows is a chronological summary of the decisions actually made in this case, punctuated by explanations of the matters which, according to WSG, prove that a decision has been made about the future development of Wānaka Airport.

Wānaka Airport

2.4 Wānaka Airport is modest in size. In addition to some small buildings, it has a series of privately owned hangars (on ground leases) used by private aviators and tourism businesses.[3] The main airport assets are the runway, taxiway, and apron.[4] It is the host of the biennial Warbirds over Wānaka airshow. An area of the Airport is also leased by NASA for its scientific balloon programme.

2.5 The local wastewater treatment facility, Project Pure, is located on Airport land to the north-east of the Airport. It appears to be common ground that the decision in 2007 to locate Project Pure so close to the Airport was unfortunate.[5]

2.6 Immediately prior to the decisions being challenged in this case, Wānaka Airport was governed by a Council Committee called the Wānaka Airport Management Committee, and day-to-day management was contracted to QAC under a management services agreement.[6] In 2015 a steering group of Council and QAC

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2 There is an extent to which WSG's insistence that a decision has been made, despite any documentary evidence of it, mirrors the position of the plaintiffs in *Friends of Onekawa Aquatic Centre Society Inc v Napier City Council* [2020] NZHC 850 at [64]-[74].

3 Affidavit of Richard Pope at [2.4] **[CB, Part 2, p 00486]**; Exhibit RP-04 **at 16-18 [CB, Part 3, p 00555-00557].**

4 Affidavit of Richard Pope, Exhibit RP-04 at 26 **[CB, Part 3, p 00565].**

5 Affidavit of Aaron Heath at [23] **[CB, Part 2, p 00252]**; Affidavit of Peter Hansby at [3.2]**[CB, Part 2, p 00479].**

6 Affidavit of Richard Pope at [2.1]-[2.3] **[CB, Part 2, p 00486];** Exhibit RP-04 at 34-35 **[CB, Part 3, p 00573-00574].**

representatives commissioned Astral Limited, an aviation consultancy, to review the governance, management, and strategic direction of the Airport "to provide an up to date basis for making long term decisions on airport development".[7]

Identification and assessment of options – 2015 to September 2016

2.7 From late 2015 to April 2016 Astral undertook its review. The final Report was dated 20 April 2016 and covered:[8]

(a) the financial performance of the Airport;

(b) the performance of the existing governance and management arrangements;

(c) the existing demand for additional hangar space for privately owned aircraft, helicopters and general aviation, and aircraft maintenance, and operational space for sport aviation activities; and

(d) future infrastructure requirements.

2.8 The report concluded that the Airport's governance and management arrangements had not served it well. While "well run" in a day-to-day sense, "effective long term planning for the airport has languished." It recommended that this be addressed urgently.[9]

2.9 It identified several alternative governance and management arrangements to be explored.[10]

2.10 It also assessed the viability of acquisition of additional land adjacent to the Airport to accommodate the additional demand, and recommended that expansion towards the south was preferable than towards the north.

2.11 Around this time, land adjacent to the Airport became available for purchase. WSG asserts that the acquisition is evidence that a decision had been made to develop the Airport into a Code C jet-capable facility. This conclusion does not follow at all. The evidence establishes it was a prudent acquisition to future-proof options for development of the Airport.

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7 Affidavit of Richard Pope, Exhibit RP-04 at 5 **[CB, Part 3, p 00544].**
8 Affidavit of Richard Pope, Exhibit RP-04 **[CB, Part 3, p 00540].**
9 Affidavit of Richard Pope, Exhibit RP-04 at 36 **[CB, Part 3, p 00575]**.
10 Affidavit of Richard Pope, Exhibit RP-04 at 38-39 **[CB, Part 3, p 00577]**.

2.12 The land was acquired by QAC, with the acquiescence, if not encouragement, of the Council.[11] The then Chair of QAC wrote to then Mayor Vanessa van Uden to raise the issue in March 2016.[12] Mayor van Uden was present at some QAC Board meetings where the potential purchase was discussed.[13] As is addressed below, by the time the purchase occurred in November 2016 the Council had determined that a long-term lease to QAC was its preferred governance and management option for the Airport and was consulting the public on the question. If it transpired that the Council adopted a different option there was no downside to QAC – it would likely be able to dispose of the land with it having appreciated in the meantime.[14]

2.13 In April 2016 the Astral Report was presented to the Council, which gave officers instructions to explore alternative governance models.[15] Alternative models were developed through a series of workshops run by Rationale Limited. This involved investment logic mapping, and the drafting of a "long-list options assessment" by Rationale of the various options considered.[16] Five options were selected to take forward for further assessment.

2.14 In July 2016, QAC commissioned a high level siting study from Arup Limited.[17] As Mr Keel explains, this was to assess options for a second airport to support operations at Queenstown Airport.[18] The report was eventually delivered on 7 April 2017. It identified Wānaka Airport as the preferred second airport site in a dual airport model.[19] WSG sees significance in the fact that this report was not provided to the Council. There is nothing in the point. This is the sort of long-term planning and assessment a local authority would expect its airport-operating-Council-controlled-trading organisation to undertake as a matter of course.

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11 Affidavit of Mike Theelen at [2.11]-[2.12] **[CB, Part 2, p 00465]** and Exhibit MT-01 **[CB, Part 4A, p 01598].**

12 Affidavit of Colin Keel at [3.23] **[CB, Part 2, p 00507]**.

13 Second Affidavit of Kylee Murphy, Exhibit RM.001.00059 **[CB, Part 4M, p 08986]**; Exhibit RM.001.00061 **[CB, Part 4M, p 09013].**

14 Affidavit of Mike Theelen, Exhibit MT-01 **[CB, Part 4A, p 01601]**.

15 Affidavit of Richard Pope at [2.9] **[CB, Part 2, p 00487].**

16 Affidavit of Richard Pope at [2.11] **[CB, Part 2, p 00488].**

17 Affidavit of Colin Keel at [3.17] **[CB, Part 2, p 00506].**

18 Affidavit of Colin Keel at [3.17] **[CB, Part 2, p 00506].**

19 Affidavit of Colin Keel at [3.19] **[CB, Part 2, p 00506].** WSG has an idiosyncratic view of the meaning of the phrase "dual airport". It simply means airports operated in tandem. Other similar phrases used in the documentary evidence include "complementary and supplementary airport".

2.15 In advance of the issue coming before the Council again in late September 2016, Rationale produced a Business Case assessing the advantages and disadvantages of the five shortlisted options.[20] This was considered at a joint workshop for the Council and the Wānaka Community Board. It was clear from the meeting that a long-term lease to QAC was favoured as the preferred option and Council officers acted accordingly by developing a statement of proposal to be available at the next Council meeting.[21]

2.16 It is clear from the documents provided to Councillors at that workshop that the Council had turned its mind to the issue of the application of s 97 of the LGA and decided that it only applied in the event that a sale of the Airport was being seriously considered as an available option.[22]

2.17 On 29 September 2016 the Council voted to adopt the statement of proposal and consult with the public, using the special consultative procedure, on entering into a long-term lease for the Airport with QAC. At the time of making the decision Councillors had before them the Astral and Rationale Reports.[23] The covering Council officer report considered the Council's Significance and Engagement Policy, and recorded that the proposed change in governance did not affect the Council's ultimate control of the Airport. It did, however, consider that as the Airport was a strategic asset, the decision was of high significance and the special consultative procedure was appropriate for the consultation.[24]

Special consultative procedure – September 2016 to March 2017

2.18 The facts explained to this point have related to decision-making by the Council of which Vanessa van Uden was the Mayor. In early October 2016, the local body elections were held and Jim Boult was elected Mayor together with a new Council. Mr Boult appears to have become something of a lightning rod for WSG's grievances, but as will be seen he has only been a bit-player in the second half of the story.

2.19 The statement of proposal was titled "Wānaka Airport – A Long-Term Lease?". Its first sentence conveyed its purpose – "considering options for changing the

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20 Affidavit of Richard Pope at [2.14] **[CB, Part 2, p 00488].**
21 Affidavit of Richard Pope at [2.17] **[CB, Part 2, p 00489]**.
22 Affidavit of Richard Pope, Exhibit RP-16 **[CB, Part 4A, p 01155]**.
23 Affidavit of Richard Pope at [2.19] **[CB, Part 2, p 00489]**.
24 Affidavit of Richard Pope at [2.20] **[CB, Part 2, p 00490]**.

way Wānaka airport is managed and governed."[25] In a section titled "Background", the statement of proposal expressly referred to Auckland International Airport's 24.99% shareholding in QAC. It referred to the fact that the "level of day-to-day operational governance" of the Airport would not change, but "the long term planning and vision would be increased." It highlighted that the capital expenditure programmed in the long-term plan was insufficient to achieve the development required over the next decade or more to provide for the expected growth of the Airport.[26]

2.20 Growth of the Airport had a page dedicated to it. It discussed growth in conditional terms – as being something that "could" occur.[27]

2.21 The document set out advantages and disadvantages of the five options considered. The long-term lease option noted potential community concern around losing control of the Airport's strategic direction, but reiterated that the Council (and community) would be able to influence investment decisions and the direction of the Airport through the statement of intent process.[28]

2.22 Nowhere does the document commit to any development of the Airport, let alone any particular form of development. It makes it clear that that a long-term lease to QAC is the preferred governance and management model to ensure that long-term planning for the Airport is properly undertaken. It notes that the Council's ultimate control of the direction of the Airport (which the lease eventually entered into has carefully preserved) "would provide a way in which the Wānaka community could continue to have a say in the future direction of the Airport."[29]

2.23 Consultation under the special consultative procedure takes place over not less than one month.[30] The public was given seven weeks to respond to the statement of proposal in this instance. The consultation process was targeted at those most affected by the decision – information sessions were held with airport stakeholders (for example, hangar owners) at the Airport, and the

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25 Affidavit of Richard Pope, Exhibit RP-22 **[CB, Part 3, p 00750]**.
26 Affidavit of Richard Pope, Exhibit RP-22 **[CB, Part 3, p 00751]**.
27 Affidavit of Richard Pope, Exhibit RP-22 **[CB, Part 3, p 00753]**.
28 Affidavit of Richard Pope, Exhibit RP-22 **[CB, Part 3, p 00755]**.
29 Affidavit of Richard Pope, Exhibit RP-22 **[CB, Part 3, p 00756]**.
30 LGA, s 83(1)(b)(iii).

Wānaka community in Wānaka. There appear to be insignificant factual disagreements about the content of the meetings.[31]

2.24 78 written submissions were received.[32] Those residents who wished to speak orally to their submissions were able to do so at a public hearing held in Wānaka on 13 February 2017 before a Panel of three Councillors – Councillors Tony Hill, Ella Lawton, and Callum MacLeod.[33] The submissions were roughly split in favour of or against the Council's preferred option.[34]

2.25 One of the issues raised by submissions was how the community could be involved in the Airport's direction and its planning. Councillors Hill, Lawton and MacLeod actively considered this question, and determined that planning was a matter best led by QAC after the lease was finalised (as opposed to the Council undertaking master planning before leasing the Airport).[35] They recommended this course to the Council, noting that the master plan would have to involve public engagement.[36]

Decision to enter into long-term lease of Airport to QAC – April 2017

2.26 The decision to enter into a long-term lease with QAC was made by the Council on 20 April 2017. The record shows that the Council had before it all of the public submissions, and the minutes of the hearing and deliberations of Councillors Hill, Lawton and MacLeod.[37]

2.27 The covering officer report referred to the discussion during the Panel's deliberations about the timing and leadership of the creation of the Airport's master plan.[38] Through its decision to enter into the long-term lease the Council must be taken to have endorsed the views of Councillors Hill, Lawton and MacLeod, that this work was best carried out once the lease was finalised and that QAC was best placed to lead that work.

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31 Affidavit of Alistair Hudson at [11] **[CB, Part 2, p 00155]**; compare Affidavit of Richard Pope at para [3.7] **[CB, Part 2, p 00491]**.
32 Affidavit of Richard Pope, Exhibit RP-24 **[CB, Part 4A, p 01169]**.
33 Affidavit of Richard Pope at [3.8] **[CB, Part 2, p 00491].**
34 Affidavit of Richard Pope at [3.9] **[CB, Part 2, p 00492].**
35 Affidavit of Richard Pope at [3.11]-[3.12] **[CB, Part 2, p 00492].**
36 Affidavit of Richard Pope at [3.11]-[3.12] **[CB, Part 2, p 00492].**
37 Affidavit of Richard Pope at [4.2] **[CB, Part 2, p 00493].**
38 Affidavit of Richard Pope, Exhibit RP-29 at [8] and [11] **[CB, Part 2, p 00767-00768].**

2.28 The Council also had before it a draft statement of intent.[39] The purpose of this document was to illustrate to Councillors how the statement of intent could be updated to reflect a long-term lease.[40]

2.29 The minutes of the meeting record that the Council delegated to the Mayor and Chief Executive, and Councillors Hill and MacLeod the authority to negotiate and execute the long-term lease.[41]

Conclusion of long-term lease – March 2018

2.30 The lease to QAC was concluded in March 2018,[42] following the agreement of Heads of Terms in January 2018, which included guiding principles for the Airport.[43]

2.31 The Court will be well-placed to consider the Lease. Its terms are addressed to common leasing matters. It necessarily deals with two particular elements of the arrangement which are not common:

(a) That the lessee is a Council-controlled trading organisation, owned and controlled by a local authority with a super-majority of shares (ie, more than 75%).

(b) That it relates to a piece of significant local infrastructure situated immediately adjacent to another piece of significant local infrastructure, where decisions about each piece of infrastructure must consider the impact on the other.

2.32 The fact that the Council owns and controls QAC is addressed through three clauses in particular, which ensure that as between QAC's right of quiet enjoyment and powers to deal with the land as it sees fit on the one hand, and the Council's control through the statement of intent on the other, it is the statement of intent that is paramount:

8 Permitted Use

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39 Affidavit of Richard Pope at [4.4]-[4.5] **[CB, Part 2, p 00493];** Exhibit RP-30 **[CB, Part 4A, p 01365].**

40 Affidavit of Richard Pope at [4.4] **[CB, Part 2, p 00493]**.

41 Affidavit of Richard Pope at [4.3] **[CB, Part 2, p 00493].**

42 Affidavit of Richard Pope at [5.3] **[CB, Part 2, p 00495];** [RP-33] **[CB, Part 3, p 00806].**

43 Affidavit of Richard Pope at [5.2] **[CB, Part 2, p 00494];** [RP-32] **[CB, Part 3, p 00786].**

> … The Lessee must ensure that the Land is not used for any use, activity or event which is not within the contemplation of the Lessee's statement of intent (as required under section 64 of the Local Government Act 2002 and updated from time to time) insofar as the statement of intent relates to the development and operation of the Wānaka Airport.
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> …
>
> **18.8 Regulatory Capacity**
>
> The Lessee acknowledges and accepts that the Lessor has entered into this Lease as the owner of the Land and nothing in the ground lease will fetter, restrict or bind the Lessor in its regulatory capacity acting as a local authority. To avoid doubt, any consents or agreements that are given by the Lessor under this Lease will not be construed as a consent or agreement of the Lessor in its regulatory capacity.
>
> **18.9 Governance under the Local Government Act not affected by this Lease**
>
> The parties acknowledge that QAC is a council controlled trading organisation subject to governance under the Local Government Act 2002. Nothing in this Lease will prejudice the statutory rights and obligations in Part 5 of the Local Government Act 2002 for so long as those statutory rights and obligations apply to those parties.

2.33 To deal with the two pieces of infrastructure impacting on each other, the Council is able, through the statement of intent process, to ensure that any decisions QAC wishes to make about the Airport do not impact Project Pure's current operation or possible future development. To address the reverse – that the Airport master plan may be affected by Council decision-making about Project Pure – the parties included clause 12.1, which:

(a) Notes the Council's operation of Project Pure and that the Council may continue to operate Project Pure without interference from QAC.

(b) Seeks to ensure that the continuing operation or any future development of Project Pure does not detrimentally affect any Airport development, by providing for QLDC to obtain QAC's consent to any expansion of capacity at Project Pure, while it is situated on its current site (thereby acknowledging that due to its unfortunate location it may have to be relocated) and for the parties to work together to find a mutually acceptable solution if there is a conflict regarding that expansion.

(c) Provides for QAC to give three years' written notice to the Council requiring it to relocate Project Pure to a new location of sufficient size to accommodate Project Pure and any expansion required at QAC's cost (including all costs of relocating existing plant, procuring and installing new plant, commissioning the new plant and decommissioning the existing plant, any necessary subdivision, design, consenting and project management costs, etc).

2.34 WSG places significant store in the form of the Lease as a prepaid lease, as if using that form of lease were designed to effect a sale by stealth. The transaction is not a sale despite the rental being prepaid. The Lease gives QAC the right of exclusive possession for a determinable period, which is the hallmark of a lease.[44] No transfer of land title has occurred. At the end of the term of the Lease the land will be returned to the Council and the community. The Council's expert, John Schellekens, has noted that prepaid leases of this length have become more prevalent, particularly for local authorities, in recent years to avoid the extreme uncertainty associated with the outcome of ground lease rent review cycles with long intervals between each review.[45] This appears largely to be after the retirement of Mr Hudson, who purports to give expert opinion evidence on the matter on behalf of WSG.[46]

2.35 The length of the term is another focus of WSG's evidence. Several witnesses opine that the length is too long, or that the public would have assumed from the consultation documents that a shorter period was intended.[47] Former Councillor Ella Lawton states that she believed it would be a 33 year lease.[48]

2.36 With respect to Councillor Lawton, this belief appears to be an incorrect reconstruction from documents. She points to minutes of the Council's meeting on 20 April 2017 which state that she referred at one point to a 33 year lease. In fact, before making the decision the Council had no settled or specific view on what length a lease to QAC would be for. It was a matter left for negotiation, if

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44 *Fatac Limited (in liquidation) v Commissioner of Inland Revenue* [2002] 3 NZLR 648 (CA).

45 Affidavit of John Schellekens at para [8.6] **[CB, Part 2, p 00457]**.

46 Affidavit of Alistair Hudson at para [7] and [21]-[25] **[CB, Part 2, p 00154 and 00158-00160]**. But note that Mr Hudson's evidence is largely inadmissible – see the Appendix to these submissions [see Table at [1.19]].

47 Affidavit of Andrea Joy Oxley at [7]**[CB, Part 2, p 00172]**; Affidavit of Alastair Charles Wayne Hudson at [23]-[24] **[CB, Part 2, 00158-00159]**; Affidavit of Noel Williams at [11] **[CB, Part 2, p 00415].**

48 Affidavit of Ella Lawton at [5(a)] **[CB, Part 2, p 00145]**.

leasing to QAC was what the Council chose to do.[49] She asserts that a 33 year term had some support (among the Panel) "because it retained the ability for Council processes (i.e. 30-year infrastructure plans)". But there is no evidence for this statement in the Panel's deliberations at all.[50] And as Mr Keel has explained, Airport planning usually takes in a horizon of 20-50 years.[51]

2.37 There are other available inferences to explain the reference to 33 years. 33 years also happens to be the length of a recreation reserve lease under the Reserves Act 1977,[52] which local authorities will be familiar with. If this was what she was thinking of it was clearly irrelevant, the land not being a reserve. It is also entirely plausible that she said 33 years anticipating the availability of rights of renewal (which are also common in Reserves Act leases).[53] Finally, it is also possible that Ms Lawton was corrected at the time – but the correction was not minuted.

2.38 The length of the term is referable to the length of time that any significant investment in the Airport, if at any stage it occurs, would need to be recouped.[54]

2.39 Clause 4.1 of the Second Schedule of the Lease effected a sale of the improvements on the Airport land on an "as is where is" basis, with no warranties as to condition. This included the runway, taxiway and apron, and internal roading and carparking. This reflects that these improvements are not expected to last the duration of the lease and in all likelihood will not exist at the conclusion of the lease. WSG suggests that these improvements are what makes a piece of rural land an airport. That is a superficial argument. What makes the land able to be used for the operation of an airport is the designation of the land as an airport by a requiring authority under the Resource Management Act 1991 and the exercise of the relevant authority under the Airport Authorities Act 1966. In any event, the taxiway, runway and apron are not removable from the land intact, and are therefore not much good without the land they sit on.

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49 Affidavit of Richard Pope at [4.6] **[CB, Part 2, p 00494]**; Affidavit of Mike Theelen at [4.7] **[CB, Part 2, p 00469].**

50 Affidavit of Richard Pope, Exhibit RP-28 **[CB, Part 3, p 00759]**.

51 Affidavit of Colin Keel at [3.1] **[CB, Part 2, p 00502]**.

52 Reserves Act 1977, Sch 1. Local authorities are administering bodies of reserves under the Act.

53 Reserves Act 1977, Sch 1.

54 Affidavit of Colin Keel at [5.3] **[CB, Part 2, p 00513].**

2.40 WSG asserts that the Lease:

(a) provides no ability for the Council to control the future direction of the Airport – but clauses 8, 18.8 and 18.9, set out above, suggest otherwise.

(b) authorises QAC to undertake whatever development it wishes – but rather it *permits* QAC to undertake any form of development which makes sense because in principle the proposed undertaking of any development will have been through a statement of intent process.

(c) permits QAC to assign the lease to any suitable person – but again this is subject to clause 18.9, and if the proposed assignee was unrelated to the Council, either they would be unsuitable, or the decision to consent would trigger consultation under s 97 of the LGA.

2.41 WSG asserts that the delegated authority to the Councillors and Chief Executive has been exceeded. This is because the Officer Report recommending adoption of the Statement of Proposal stated that ultimate ownership would remain with the Council, and the Council would retain ultimate control of the direction of the Airport through mechanisms retained in the lease.[55] But it has retained ownership and control. Again, clauses 8, 18.8 and 18.9 could not be clearer. More generally, the delegation expresses no limitations or conditions, and follows a resolution that the governance and management of Wānaka Airport shall be under a long-term lease. The Lease is well within the scope of the delegated authority.

2.42 Finally, various Lease terms are inconsistent with the notion that the Council was transferring ownership or control to QAC. Clauses 8.2, 8.3, and 12.3 all address what may happen in the event that future development occurs. Two points arise:

(a) Why, if the Council was transferring ownership or control of the Airport would it have any need to protect its interest in the reversion by, for example, ensuring a first right of purchase for adjoining land?

(b) If there has been a pre-determined development plan, exhaustive provisions around future land ownership would have been unnecessary.

[55] WSG Submissions at [110](b).

These clauses are only explicable on the basis that future development is uncertain.

2.43 Before addressing the remaining factual chronology, it is as well to address here an argument made by WSG about the duty of candour in judicial review. The argument it makes appears to culminate in WSG seeking that the Court draw adverse inferences in particular from the fact that the Council has not provided affidavit evidence from Mayor Jim Boult.[56]

2.44 To this point in the chronology, the Mayor has been involved in two respects:

(a) as one of 11 Councillors making a decision about the governance and management of Wānaka Airport, a decision triggered by the actions of the previous Council prior to his election; and

(b) as one of four Council representatives negotiating a lease, the terms of which are before the Court and which the Court can interpret for itself.

2.45 In none of the decisions under review is the Mayor the decision-maker. He is one of 11 voices as part of a committee which makes decisions by the tally of votes. His role is not akin to a Minister making a statutory decision.

2.46 The Council's evidence about the process has been given by two witnesses: its Chief Executive Mike Theelen, and Property Director Richard Pope, both of whom were more involved in all of the matters addressed to date. And at least one reason that Council decisions are made having regard to a report from an officer is so that the report functions as a statement of the matters considered. Minutes of decisions are kept. It is difficult to see how evidence from the Mayor could have assisted the Court. Notably, any evidence from the Mayor about his experience of the negotiations, for example, to explain what certain provisions of the Lease mean, would have been inadmissible on orthodox contract interpretation principles (and under s 7 of the Evidence Act). The terms of the Lease speak for themselves. The duty of candour cannot extend to giving irrelevant and therefore inadmissible evidence.

[56] WSG Submissions at [36] and [39].

Post-lease – master planning Wānaka Airport

2.47 The evidence of Colin Keel sets out the process by which QAC has started work on a master plan for Wānaka Airport. He notes that airport planning can be broken into five phases, and QAC is somewhere around the first (pre-concept planning) or second (concept planning) phase.[57] There are several remaining steps, including community engagement on the master plan. Depending on what the master plan proposes, there may also be formal LGA consultation undertaken by the Council on any decisions to carry the master plan forward into the QAC statement of intent.

Statement of intent process – March 2018 to June 2018

2.48 Section 64 of the LGA provides:

> **64 Statements of intent for council-controlled organisations**
>
> (1) Every council-controlled organisation must prepare and adopt a statement of intent in accordance with Part 1 of Schedule 8.
>
> (2) The purpose of a statement of intent is to—
>
> (a) state publicly the activities and intentions of the council-controlled organisation for the year and the objectives to which those activities will contribute; and
>
> (b) provide an opportunity for shareholders to influence the direction of the organisation; and
>
> (c) provide a basis for the accountability of the directors to their shareholders for the performance of the organisation.

2.49 The process set out in Part 1 of Schedule 8 is an annual process. In short, the relevant council-controlled organisation provides a draft statement of intent to the local authority by 1 March in each year. The local authority makes comments and recommendations for the council-controlled organisation to consider by 1 May. The council-controlled organisation finalises the statement of intent and delivers it to the local authority.

2.50 Under s 65(2) of the LGA:

[57] Affidavit of Colin Keel at [3.7]-[3.9] **[CB, Part 2, p 00503]**.

> (2) A local authority must, as soon as practicable after a statement of intent of a council-controlled organisation is delivered to it,—
>
> (a) agree to the statement of intent; or
>
> (b) if it does not agree, take all practicable steps under clause 6 of Schedule 8 to require the statement of intent to be modified.

2.51 In short, the statement of intent is, in any given year, acceptable to the relevant local authority or, if not, the local authority is obliged to require it to be modified.

2.52 The process of agreeing the QAC statement of intent in 2018 was relatively straightforward. It is set out in the evidence of Mike Theelen.[58]

2.53 Like the Lease, the parties approach the statements of intent challenged by WSG in opposing ways. WSG considers that the Council's decision to agree the 2018 statement of intent, when read with the Lease, amounted to the Council authorising QAC to develop Wānaka Airport into a jet-capable airport.[59] This is not really explained, and does not bear scrutiny. The closest that the 2018 statement of intent comes to authorising development is:[60]

(a) "develop a Master Plan for Wānaka Airport with input from the community, that provides a spatial framework for the airport's future";

(b) "prepare a Master Plan for Wānaka Airport which explores feasible opportunities to develop Wānaka Airport and contribute to services across the region".

2.54 WSG's position draws a long bow to read those statements as authorising the development of Wānaka Airport as a Code C jet-capable facility.

Statement of intent process – March 2019 to December 2019

2.55 The statement of intent process in 2019 was much more involved. The statement of intent went through several iterations and was not finalised until December 2019. It was delayed by issues around the treatment of the noise

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58 Affidavit of Mike Theelen, at [5.4]-[5.8] **[CB, Part 2, p 00471]**.

59 WSG Submissions at [259].

60 Affidavit of Mike Theelen , Exhibit MT-09 at 96 **[CB, Part 3, p 00890]**.

boundary for Queenstown Airport, and the content of the statement of intent as it related to Wānaka Airport.[61]

2.56 In August 2019, the Mayor announced that the Council would commission social and economic impact reports relating to Queenstown and Wānaka Airports and that work on the master plans for the two Airports would go on hold.[62]

2.57 In December 2019 the Council agreed to the statement of intent.[63] The Council and QAC also issued a joint position statement confirming that certain activities would not occur, including introducing scheduled passenger flights at Wānaka Airport, until after the 2020 statement of intent is agreed (by which time the social and economic impact reports will be available).[64] In light of this is it difficult for WSG to maintain, as it does,[65] that agreeing the 2019 statement of intent amounts to a decision to develop Wānaka Airport into a Code C jet-capable facility.

2.58 As noted earlier, WSG's arguments about the duty of candour seem to focus on the statements of intent and the actions of the Mayor, Mr Boult. An exhaustive account of the steps taken in both 2018 and 2019 to agree the statements of intent is included in the evidence of the Council's chief executive Mike Theelen. Because WSG amended its statement of claim to challenge the 2018 and 2019 statement of intent decisions after discovery, Mr Theelen has gone to some trouble to set out the record of both decisions including all of the back and forth between the Council and QAC.

2.59 As the documentary evidence he exhibits establishes, Mr Theelen was heavily involved in that process. The Mayor made a number of public statements during the process. That is not surprising given his role. To the extent the Mayor has acted as a spokesperson, his recorded statements speak for themselves. Otherwise, as with the Lease decision, he was one of 11 voices in a committee. It is difficult to see how evidence from the Mayor could assist the Court.

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61 Affidavit of Mike Theelen at [5.12]-[5.13] **[CB, Part 2, p 00473]**.
62 Affidavit of Mike Theelen at [5.19] **[CB, Part 2, p 00474]**.
63 Affidavit of Mike Theelen at [5.23] **[CB, Part 2, p 00475]**; Exhibit MT-29 **[CB, Part 3, p 01037]** and MT-30 **[CB, Part 3, p 01091-01092]**.
64 Affidavit of Mike Theelen at [5.23] **[CB, Part 2, p 00475];** Exhibit MT-28 **[CB, Part 3, 01035].**
65 WSG Submissions at [260]-[264].

Upgrades of Project Pure – 2019 to present

2.60 The evidence of the Council's General Manager Property and Infrastructure, Peter Hansby, explains that the Council is considering upgrades to Project Pure to address resilience and capacity issues.[66]

2.61 WSG asserts that the proposed upgrades are significantly different as a direct result of the terms of the Lease, including with an additional $2.7m cost.[67] This submission is misconceived. As Mr Hansby explains:

(a) The upgrades have become urgent for a number of reasons, the most significant of which is faster than projected population growth since the commissioning of Project Pure.[68]

(b) Whether or not the Airport was leased to QAC, the Council would have to consider the advantages and disadvantages of locating the relevant plant (a third SBR tank) in a location which limited available future development options of the Airport. Cutting off future development options also comes at a cost by devaluing the Airport.[69]

2.62 If one assumes a counterfactual in which no lease has been entered into, the Council would still have to determine whether to locate the third SBR tank in a location that limits future development of the Airport. In doing so, the Council would have to consider not only the interests of current but also future communities.[70]

3 Was section 97 of the LGA engaged?

3.1 Section 97 sits in Part 6, Subpart 1 of the LGA, under the heading "Planning". It provides:

> **97 Certain decisions to be taken only if provided for in long-term plan**
>
> (1) This section applies to the following decisions of a local authority:

66 Affidavit of Peter Hansby at 4.2 **[CB, Part 2, p 00480]**.
67 WSG Submissions at [64].
68 Affidavit of Peter Hansby at [4.11] **[CB, Part 2, p 00481]**.
69 Affidavit of Peter Hansby at [4.12]-[4.13] **[CB, Part 2, p 00482].**
70 LGA, ss 14(1)(c)(ii) and 14(1)(h)(iii).

(a) a decision to alter significantly the intended level of service provision for any significant activity undertaken by or on behalf of the local authority, including a decision to commence or cease any such activity:

(b) a decision to transfer the ownership or control of a strategic asset to or from the local authority.

(c) [Repealed]

(d) [Repealed]

(2) A local authority must not make a decision to which this section relates unless—

(a) the decision is explicitly provided for in its long-term plan; and

(b) the proposal to provide for the decision was included in a consultation document in accordance with section 93E.

3.2 Essentially, if engaged, the section requires a more prescriptive way of consulting with the public. Section 93A provides that when consulting on a proposal to amend the long-term plan, the special consultative procedure under s 83 applies, but instead of a "statement of proposal", a "consultation document" is used. The main difference between the two types of document is that a consultation document is to contain a report from the Auditor-General on whether the consultation document gives effect to the purpose set out in section 93B and on the quality of the information and assumptions underlying the information provided in the consultation document.[71]

No transfer of control of the Airport

3.3 The Lease does not transfer control of Wānaka Airport to QAC. Certainly, under the Lease, QAC is responsible for operational management, planning and economic management. This was signalled in the statement of proposal.[72] But the Council continues to own the Airport land, and retains ultimate control over the strategic direction of the Airport via the statement of intent process.

71 LGA, s 93D.

72 Affidavit of Richard Pope, Exhibit RP-22 **[CB, Part 3, p 00756].**

3.4 WSG suggests that the word "substantial" is required to be read into s 97 of the LGA in order to give it a "sensible purposive construction".

3.5 Adding a gloss on the clear statutory language is unnecessary. The section, as drafted, is not unworkable, and the phrase "ownership or control" is not ambiguous – the decision either transferred ownership or control of a strategic asset, or it did not.

3.6 Indeed, adding "substantial" to the phrase makes it difficult to apply – what is "substantial" control? Is it in the sense of "significant"? Or in the sense of "substantive", as opposed to "formal" control? Perhaps indicative of the difficulty, WSG's submissions are inconsistent. Having stated that s 97 applies to a transfer of "substantial" ownership or control (at [223]), they later suggest it applies to "any changes" to ownership or control (at [268]).

3.7 By contrast, s 97(1)(a) expressly includes a qualifier – that paragraph provides that the requirements of the section apply to "a decision to alter *significantly* the intended level of service provision for any *significant* activity undertaken by or on behalf of the local authority…" (emphasis added). This drafting suggests that Parliament was of the view that a qualifier was necessary in s 97(1)(a) but not in s 97(1)(b).

3.8 There are no relevant cases on what constitutes a transfer of control under s 97. The Court need not determine whether, and the Council does not deny that, entering into a long term lease to an unrelated party may amount to a transfer of control. That can be decided in a future case. The issue raised in this case is whether entering into a long-term lease to a Council-controlled organisation is a transfer of control for the purposes of s 97(1)(b). The Council's position is that in principle it cannot – the word "control" occurs both in s 97(1)(b) and as the determinant of the relationship between the local authority and the subsidiary organisation it "controls". While there is no general rule that the same meaning must be given to an expression in every part of a statute, it is reasonable to suppose that the same meaning will be given throughout.[73] In other words, by transferring an asset a local authority "controls" to an organisation it "controls", it does not transfer "control".

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[73] *New Zealand Breweries Limited v Auckland City Corporation* [1952] NZLR 144 (CA) at 158.

3.9 Here, as between the Council and QAC, the Council plainly is in control of the Airport. The Council owns 75.01% of QAC's shares. As a shareholder with a super-majority, QLDC has ultimate control over QAC. It has ultimate control over the content of the statement of intent, to which QAC's directors must give effect.[74] If Board members do not appropriately give effect to the statement of intent the Council can have the relevant members removed.[75]

3.10 The suggestion by WSG that Auckland International Airport Limited's minority shareholding somehow limits that control ignores the legal and practical reality of the shareholdings. Nor do its rights under the Strategic Alliance Agreement suggest any difficulty. WSG appears to misinterpret this document completely.

3.11 The Council may also exercise control over the operation and direction of the Airport through the lease. Because of clause 8 – permitted use – any non-compliance with the statement of intent may also amount to a default under the lease. The Council could enforce this through a claim for specific performance.

No transfer of ownership of the Airport

3.12 There has been no transfer of the ownership of the Airport. The Airport has not been sold. Title to the land has not passed.

3.13 Nor does the Lease's prepaid rental make it akin to a sale – prepaying the rent is a recognised and legitimate form of lease.[76]

3.14 It is correct that under the Lease ownership of the improvements is transferred to QAC, but those improvements – particularly the runway, taxiway, and apron, would be of little utility without the underlying land they sit on, and the transfer recognises the reality that they will not exist in their current form in 100 or more years when then lease comes to an end. Selling the improvements on land is a standard way of dealing with them as part of a long-term ground lease.[77]

No transfer of control of Project Pure

3.15 WSG's argument that the Council's decision to enter into a long-term lease for the Airport transferred control of Project Pure to QAC should be rejected. The

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74 LGA, ss 60 and 64(2).
75 Companies Act 1993, s 156.
76 Affidavit of John Schellekens at [8.6] and [9.2] **[CB, Part 2, p 00457 and 00459]**.
77 Affidavit of John Schellekens at [8.7]-[8.8]] **[CB, Part 2, p 00457-00458].**

Lease is clear that the Council owns and operates Project Pure and may continue to do so without interference from QAC.[78] Clause 12 provides for QLDC to obtain QAC's consent to any expansion of capacity at Project Pure, to ensure that the continuing operation or any future development of Project Pure does not detrimentally affect any Airport development. QAC cannot withhold consent unreasonably. Withholding would be unreasonable if a proposed upgrade would not affect any reasonably available future plan. And if there ever was a genuine impasse about the appropriate location of an upgrade, the Council could amend the statement of intent to require consent to be given.

3.16 Clause 12 also provides for QAC to give three years' written notice to require Project Pure to be relocated to enable development at the Airport. This is no more a control than the right of consent. Before QAC gave notice the Council would have already had to authorise the proposed Airport development through the statement of intent process, necessarily taking into account the fact that it would trigger Project Pure's relocation.

3.17 WSG's reliance on clause 12 is misguided. Clause 12 is appropriate to address the situation current Councillors and staff find themselves in, dealing with the unfortunate siting of Project Pure too close to the Airport.

No change to the intended level of service provision

3.18 The decisions to enter into the Lease, or agree the statements of intent, were not decisions to significantly alter the level of service provision at the Airport. The decision to enter into the Lease was fundamentally about the governance and management of the Airport. The level of services provided immediately before and immediately after the decision were the same.

3.19 The statement of proposal records that the "level of day-to-day operational governance" of the Airport would not change, but "the long term planning and vision would be increased." An increase in the long term planning and vision is not a significant change in the level of intended service – it is just good governance.

3.20 WSG's argument relies on the statement of intent not having expressly prohibited any development of Wānaka Airport. It appears to suggest that this

[78] Clause 12.1(a) of the Lease **[CB, Part 3, p 00832]**.

implicitly authorises development – in other words, it implicitly increases the level of service provision. That argument only needs to be stated to realise its flaws. The statement of intent expresses intents; it does not state a series of prohibited activities leaving the relevant council-controlled organisation to deduce what it should do from whatever activities are not prohibited.

3.21 If the Court accepts that there has been no decision to develop the Airport into a Code C jet-capable facility, realistically this argument falls away.

4 LGA decision-making

4.1 Assuming s 97 does not apply, WSG must fall back on the general principles of consultation in Part 6, Subpart 1 of the LGA. Relevant to this proceeding are ss 76-79, which relate to decision-making, s 82, which provides for consultation principles, and s 83, which provides for the special consultative procedure.

4.2 *Wellington City Council v Minotaur Custodians Ltd* and *Save Chamberlain Park Inc v Auckland Council* are the leading authorities on Part 6, Subpart 1 of the LGA.[79]

4.3 Both cases summarise and elaborate on the key provisions. Rather than repeat those summaries, the Council emphasises the following points:

(a) Local authorities have a broad and flexible discretion to determine when and how to make themselves aware of their communities' views. As the Court of Appeal noted in *Minotaur*, this idea is expressed no fewer than four times in the legislative provisions.[80]

(b) Section 76(2) provides that the obligations in ss 77 and 78 are subject to the judgements of the local authority under s 79. Section 76(3) provides "two standards of performance" for the local authority in its decision-making under subs (1):[81]

> … In respect of "significant decisions", the local authority must ensure that the provisions contained in subs (1) have been "appropriately observed". This is the higher of the two standards. Where the matter is not "significant", the standard is more aspirational: decision-making

[79] *Wellington City Council v Minotaur Custodians Ltd* 3 NZLR 464 (CA) (***Minotaur***); *Save Chamberlain Park Inc v Auckland Council* [2018] NZHC 1462 (***Save Chamberlain Park***).

[80] LGA, ss 76(2), 77(2), 78(4), 79(1)(a); see *Minotaur* at [41].

[81] *Minotaur* at [33].

> is only required to "promote compliance" with the provisions referred to in subs (1). Even that lower standard is subject to s 79 as noted.

In this proceeding, the Council decided that the decision to enter into a long-term lease was one of high significance in terms of the Council's Significance and Engagement Policy. Accordingly, the decision in question in the proceeding qualifies as a "significant decision" in terms of the statutory definition,[82] and the "appropriately observed" standard under s 76(3)(b) applies.

(c) Section 78(1) provides that a local authority must give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter. Section 78(2) originally provided that consideration must be given at four specific stages of the decision-making process, but this was repealed in 2010,[83] highlighting even further the move away from prescription and toward flexibility that these sections provide for. In *Whakatane District Council v Bay of Plenty Regional Council*, the Court of Appeal commented that:[84]

> In terms of s 78(1) the decision-maker is the local authority and it is no function of the courts to engage in intense scrutiny of its decision-making processes. The s 78(1) requirement to "give consideration to the views and preferences of persons likely to be affected by, or have some interest in, the matter" is distinctly less than that of consultation under s 82 which s 78(3) explicitly excludes. By s 79 it is for the local authority to make the discretionary judgment about how to achieve compliance with ss 77-78. A court will not interfere with a discretionary judgment unless it is irrational or made on a wrong legal principle. If not, it is enough to validate such a judgment that there is some evidentiary basis for it.

(d) When local authorities choose to give effect to these principles by consulting, s 82(1) provides a list of consultation principles that local authorities must act in accordance with. In summary, those principles are that those affected should have access to relevant information in an appropriate format and be encouraged to present their views having been given clear information as to both the purpose of the consultation

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82 "**Significant**, in relation to any issue, proposal, decision, or other matter, means that [it] has a high degree of significance": LGA, s 5(1).

83 Local Government Act 2002 Amendment Act 2010, s 9. The Court of Appeal's decisions in *Whakatane District Council v Bay of Plenty Regional Council* [2010] 3 NZLR 826 (CA) (***Whakatane District Council***) and *Minotaur* (though that particular issue was not relevant), must be read in light of this legislative change.

84 *Whakatane District Council* at [76].

and the scope of any likely decision.[85] The Council should consider those views with an open mind and make available information about the decision made. The Court of Appeal in *Minotaur* explained that:[86]

> In substance, these principles [under s 82(1)] are really basic performance standards. Subsection (3) is the counterweight. This restates (now for the third time) that the "how" of compliance with these guidelines is a matter for the local authority. That proposition is subject to the following further considerations which the local authority must (relevantly) bear in mind:[87]
>
> (a) the terms of s 78 including, presumably, the fact that it is subject to the reservation to the local authority of the decision of how to implement;
>
> (b) whether the views of those affected are already known to the local authority;
>
> (c) the significance of the issue in question for those affected; and
>
> (d) the costs and benefits of consultation.

4.4 Next, given WSG's frequent assertions that its position is representative of the majority will of the public, two points arise. Most significantly, it is by-the-bye. The evidence establishes that there will be plenty of opportunity for the public to influence the development of the master plan, and if or when a decision is to be made about any future development the public will have a fair opportunity to comment. Second, the court will not act as an appeal body from a council decision in a local authority judicial review, but will only intervene where at least one of the clearly established principles are transgressed. The decision is always one for the local authority to make – consultation is not a poll.[88] Acceptance that the courts and the legislation do not provide for an open right to intervene or review a decision of a local authority reflects the constitutional principles of government and the separation of powers.[89]

4.5 That leaves the question as to what level of intensity a court should afford its review of any given local authority decision that comes before it. In *Gwynn v Napier City Council*, the High Court observed:[90]

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85 LGA, s 82(1)(a)-(f); *Minotaur* at [38].

86 *Minotaur* at [39].

87 LGA, s 82(4).

88 Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) at 5.10.8.

89 Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) at 5.12.2.

90 *Gwynn v Napier City Council* [2018] NZAR 1410 (HC) at [33]-[35] (footnotes omitted).

> [33] … In *Progressive Enterprises Ltd v North Shore City Council*, Baragwanath J set out a continuum of approaches to judicial review, which accords greater or lesser intensity in light of a variety of factors, including the nature of the decision and characteristics of the decision-maker. In other decisions, Courts have made similar observations, employing terminology such as "variable intensity". Heightened scrutiny, or a hard look, has been justified in cases touching on fundamental human rights concerns. Wherever along the continuum the appropriate intensity of review lies, the Court's function is not to assume the Council's role but to ensure it has acted lawfully.
>
> [34] A factor against any intensive level of scrutiny in the present proceeding is that the structure provided by the LGA reasonably leaves the detail of decision-making processes to local authorities. The Court of Appeal has eschewed any function to engaged in intense scrutiny of local authority decision-making processes.
>
> [35] Moreover, the challenges in this case are not about the reasonableness or rationality of the Council's substantive decision to adopt a policy permitting trading on Easter Sunday. Rather, the challenges are to how the process for arriving at that decision was conducted.

4.6 The same lesser degree of scrutiny applies in the current proceeding, which does not engage fundamental human rights concerns, but is rather about whether the Council followed a LGA-compliant process.

4.7 The Council carried out a LGA-compliant process. While the special consultative procedure was not required by the LGA, the Council used it anyway.

4.8 The officer report to the Council recommending the use of a special consultative procedure recorded that the proposed change in governance would not necessarily affect the Council's ultimate control of the Airport. However, it recommended that the special consultative procedure be used because the matter was of high significance, the Airport being a strategic asset.[91]

4.9 WSG's criticism of the consultation process again highlights the difference between the parties about the scope of the consultation and decision to enter into the lease. While the statement of proposal discussed potential development that could occur at the Airport, if planned and managed well, the consultation was not about and was not seeking feedback on specific development proposals. Nor was the Council intending to make, and nor has it subsequently made, any decision about future development of the Airport based on that consultation. WSG's complaint that the community has not been given an opportunity to present its views on the future use of the Airport, in particular development of a Code C jet-capable airport, is simply premature.

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[91] Affidavit of Richard Pope, Exhibit RP-17 **[CB, Part 3, p 00712]**.

WSG's criticisms of the content of the statement of proposal are similarly flawed.[92]

4.10 Rather, it is readily apparent from the statement of proposal that the consultation was focused "on changes to the way Wānaka Airport is managed and governed". The five options being consulted on were possible governance and management models. The purpose and objective of the consultation was made clear. There was no hidden agenda. It is clear from the content of the statement of proposal and Council reports and minutes at the time.[93]

4.11 The objective of the proposal was not, as WSG alleges, to transfer all or enough of the effective ownership and control of the Airport to QAC to enable it to develop the Airport however it wished, including to build a new airport to be operated to the same extent as Queenstown airport.[94] There is no evidence that there was an undisclosed objective to convert Wānaka Airport into a Code C jet-capable airport that was not made clear during consultation.

4.12 The statement of proposal was publicly notified, including online, in the relevant local newspapers, and in the Council's publication, Scuttlebutt.[95] The public was invited to make written submissions on the proposal. WSG's evidence is oddly inconsistent in that, on the one hand witnesses say the consultation was not well-publicised, yet many recall it occurring and say they chose not to participate at the time.[96]

4.13 The public was invited to make any oral submissions before a panel of Councillors at a hearing of submissions. The period to make written submissions was longer than required under the LGA.

4.14 The public was given appropriate and adequate information about the options being consulted on, including the preferred option of the Lease. The statement of proposal set out the reasons for considering the change, and the advantages and disadvantages of the options (as required by s 77(1)(b)) in an easy to digest manner. It would be unusual to include detailed contractual provisions in

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92 WSG's submissions at [74] – [77].

93 Affidavit of Richard Pope, Exhibit RP-22 **[CB, Part 3, p 00749]**; Exhibit RP-17 **[CB, Part 3, p 00712]**; Exhibit RP-21 **[CB, Part 3, p 00719]**; Exhibit RP-29 **[CB, Part 3, p 00766]**; Exhibit RP-31 **[CB, Part 3, p 00771]**.

94 WSG's Amended Statement of Claim at [72].

95 Affidavit of Richard Pope at [3.1] **[CB, Part 2, p 00490];** Exhibit RP-19 **[CB, Part 4A, p 00165].**

96 Affidavits of Graeme Perkins at [2] **[CB, Part 2, p 00334]**; Christopher Riley at [4](f)**[CB; Part 2, p 00331]**; Terry Hetherington at [7]-[8] **[CB, Part 2, p 00245].**

proposal for public consultation, but in any event the precise shape of the lease was as yet undetermined. There is nothing in the consultation principles that says that consultations about potential contractual arrangements must attach the proposed contract or set out key terms.

4.15 The Astral and Rationale Reports were publicly available for those seeking further information, but these were background reports considered by the Council as part of the Council's development of governance and management options. They did not form part of the consultation itself. WSG's submissions treat them as constitutive documents rather than as inputs into a decision-making process.

5 Reasonableness

5.1 WSG pleaded that the decision to enter into the Lease was unreasonable or failed to take into account relevant considerations. WSG's submissions do not advance these grounds in any substantive way. Reference is made to "reasonableness" (among other things) in a section heading,[97] but it is not subsequently expanded on.

5.2 Similarly, of the list of considerations in WSG's pleadings, brief reference is made to only three factors, in support of WSG's broad assertion that the Council was required to take account of all relevant factors prior to entering into the lease but that it did not consider such factors at all.[98]

5.3 As with many of the preceding issues, the problem with these grounds is that they are premised on the Council making a decision to convert the Airport into a Code C jet-capable airport. The Council's position has already been made clear that no such decision has been made and that decisions about future development are yet to come.

5.4 If the Court accepts that there has been no decision to develop the Airport into a Code C jet-capable facility, these grounds cannot succeed. The Council's decision to enter into the Lease cannot be said to be unreasonable in the sense required – perverse, absurd, or outrageous in its defiance of logic that Parliament could

97 WSG's submissions at 84.
98 WSG's submissions at 57-58.

not have contemplated such decisions being made by an elected council.[99] The decision followed a special consultative procedure carried out on that option through which the Council considered submissions and information before reaching a conclusion. The decision was an available one.

5.5 The list of considerations pleaded by WSG, such as over tourism, may well be relevant to future decisions made about development of the Airport. However, those are matters to be considered at the time of making a decision about that. That has not occurred and might never occur. They are not mandatory relevant factors for the Council to have considered in changing the governance and management model for the Airport.

6 Is relief otherwise appropriate?

6.1 If the Court finds that any of WSG's grounds of review is made out, the next question for the Court to determine is whether the error is material, justifying relief. That depends on all of the circumstances of the case. It is well established that relief in judicial review is discretionary, and that discretion is reflected in ss 16 to 19 of the Judicial Review Procedure Act 2016.

Materiality of error

6.2 Assuming for the purposes of this point that the Court does not accept WSG's submission that a decision has been made to develop the Airport into a Code C jet-capable facility, but that nonetheless an error has successfully been made out relating to the consultation process, it is an open question whether that error is a material one justifying relief.

6.3 Section 93A of the LGA makes it clear that the only difference between a consultation process undertaken using the special consultative procedure, and a consultation process undertaken to amend the long-term plan is that instead of a statement of proposal the Council releases a "consultation document". The Court will be well-placed to consider the statement of proposal to see whether it meets the purpose of a "consultation document" in s 93B. The Council's statement of proposal stated that the decision to enter into a long-term lease would not affect the Council's financial position, except positively. A

[99] *Wellington City Council v Woolworths New Zealand Ltd* (No 2) [1996] 2 NZLR 537 (CA) at 552.

comparison of the 2015 and 2018 long-term plans reveals no substantive changes were made on account of the entry into the lease in the intervening period.[100] It follows that the only material difference between the statement of proposal released, and a hypothetical consultation document would be the absence of a note from the Auditor-General confirming that the document meets the purpose in s 93B and the quality of the assumptions made.

Delay and prejudice

6.4 Whether a delay in commencing a judicial review affects the granting of relief is a fact specific question. "The effect of delay on third parties is likely to be critical. If third parties have been adversely affected by the delay, then a remedy that may adversely affect the third party will probably be refused."[101]

6.5 WSG relies on the Council's declining of requests for a copy of the Lease under the Local Government Official Information and Meetings Act 1987 as explaining why it delayed commencing the proceeding. But a joint release was made at the time of the Lease's execution making clear some terms of the Lease that have attracted WSG's concern[102] – most notably the length of the term and that the rental was prepaid. And had a judicial review been brought at that time, a copy of the Lease would have been available in the proceeding.

6.6 Moreover, again assuming the Court does not accept WSG's assertion that there has been a decision to develop Wānaka Airport into a Code C jet-capable facility, but that an error has been made out relating to the consultation process, all of the facts about that process have been known since 20 April 2017 when it concluded.

6.7 Since that date, the Council and QAC have spent the best part of a calendar year negotiating the terms of the Lease, and QAC has spent significant time and effort negotiating around 90 subleases with hangar owners and other business operators at the Airport.[103]

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100 Affidavit of Kylee Murphy, Exhibit TLN 14.2 **[CB, Part 4E, p 03739]**; Exhibit 44.1 **[CB, Part 4F, p 04670]**.

101 Taylor (ed) *Judicial Review – A New Zealand Perspective* (4 ed, 2018) at [5.36].

102 Affidavit of Colin Keel, Exhibit A **[CB, Part 4B, p 02343]**.

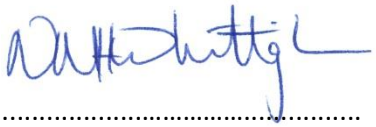
103 Affidavit of Colin Keel at [9.1] **[CB, Part 2, p 00522].**

6.8 Declaring the Lease to be invalid would therefore necessarily have a significant prejudicial impact on the Council, QAC and a large number of third parties which could have been avoided had WSG acted promptly.

7 Costs

7.1 Regardless of the result, the Court is invited to reserve costs. The Council considers that several aspects of the conduct of this case by WSG, some of which have been outlined above, will affect the determination of costs.

Date: 17 September 2020



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Appendix – Analysis of admissibility of WSG evidence

1 Evidential matters

1.1 This Appendix addresses the inadmissibility of a significant proportion of WSG's evidence, and comments on the inclusion by WSG in its evidence of "without prejudice" correspondence.

Inadmissible evidence

1.2 WSG filed and served 21 affidavits. Unusually, two witnesses, Kylee Murphy and Ella Lawton, produced two affidavits each. The affidavits of Ms Murphy simply exhibit a significant number of documents as a single exhibit. The relevance of a substantial proportion of those documents is not apparent.

1.3 At the time of filing the first 19 of its affidavits, WSG wrote to the Respondents advising that, in addition to the documents exhibited, it intended that the common bundle should include:[104]

(a) all documents discovered in the proceeding (whether exhibited to an affidavit or not); and

(b) unidentified further documents not exhibited to WSG's evidence to be provided by list the following week.

1.4 By letter,[105] counsel questioned the inclusion of all discovered documents, suggested that the parties should identify the particular documents they wish to rely on for inclusion in the bundle, and noted that if additional documents were to be included the list was required urgently. It was pointed out that the Court of Appeal has warned against parties requiring courts to "scramble through a mass of material".[106]

1.5 WSG's response was to simply exhibit to Kylee Murphy's second affidavit all discovered documents and, presumably, the previously unidentified documents that it had intended to list for inclusion. This step removed the possibility of the

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104 Letter Fyfe Karamaena to Meredith Connell **[CB, Part 5, p 09963]**.

105 Letter Meredith Connell to Fyfe Karamaena **[CB, Part 5, p 09967]**.

106 *New Zealand Fishing Industry Association Limited v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) **[Authorities, Tab 18]**; see Letter Meredith Connell to Fyfe Karamaena **[CB, Part 5, p 09968]**.

parties pruning the irrelevant documents from the bundle. The bundle is as a result unwieldy.

1.6 When the Court comes to make its decision it will be well placed to determine how much of the numerous volumes of material were genuinely relevant to the proceeding, as tending to prove or disprove a matter in dispute.

Affidavits

1.7 A majority of the affidavits are replete with evidence that is either not relevant in terms of s 7 of the Evidence Act 2006, or opinion evidence that is inadmissible by virtue of ss 23-26 of the Evidence Act.

Not relevant

1.8 Some of WSG's witnesses set out in their evidence to prove that the Council, or QAC, or both, have made a decision to develop Wānaka Airport into a Code C jet-capable facility. The conclusions they draw purport to be reliant on inferences from facts.

1.9 Except where it contains conjecture or opinion, the Council accepts that this evidence is generally admissible. That does not mean that the Court should accept the evidence, or give it weight. As has been explained in the main body of the submissions, the inferences drawn are not logical or necessary inferences from the proved facts. As an example, Mark Sinclair reproduces media articles containing statements of various people including the Mayor alleging "spin". These statements are all consistent with the Council's position that no decision on development of the Airport has been made.

1.10 By contrast, other WSG witnesses state their evidence expressly assuming that the decision to develop Wānaka Airport into a Code C jet-capable facility has been made. They then give evidence about the merits of, or consequences flowing from, that decision.

1.11 Most, if not all, of this evidence is inadmissible. It does not tend to prove or disprove a matter in dispute in the proceeding. What is challenged is the decision to enter the Lease and 2018 and 2019 statements of intent. Whether converting the Airport into a Code C jet facility is a good idea or not is a matter for Councillors as elected members to decide, if or when they are asked to.

Judicial review is not concerned with the merits of decisions that have not yet been made, let alone political ones.

Inadmissible opinion evidence

1.12 Under s 23, opinion evidence is not admissible except as provided by ss 24 or 25. As the authors of *Mahoney on Evidence* state, "conjecture without personal knowledge or observation holds little relevance and is unreliable,"[107] and "bare statements of belief in the existence of facts without personal knowledge are opinion, and therefore inadmissible".[108] WSG's affidavits contain a significant amount of conjecture and statements of belief without any personal knowledge on the part of the deponents.

1.13 Section 24 provides for the admissibility of opinion evidence where necessary to enable the witness to communicate what the witness saw or heard. None of the opinion evidence is admissible under this section.

1.14 Section 25 provides for the admissibility of opinion if it is "expert evidence", from an "expert", and substantially helpful to the fact-finder in understanding other evidence or ascertaining a fact of consequence to the determination of the proceeding. "Expert" and "expert evidence" are defined in s 4(1).

1.15 Also relevant is s 26. Section 26 provides that in a civil proceeding, experts are to conduct themselves in accordance with the applicable rules of court – in other words, they must comply with the "Code of conduct for expert witnesses" in Schedule 4 of the High Court Rules. Where they do not, the evidence is only to be given with the permission of the Judge.

1.16 Several of WSG's witnesses purport to give expert opinion evidence, but none comply with the Code of Conduct. In particular, none of the witnesses state that they have read, let alone agreed to comply with, the Code of Conduct.[109] And importantly most if not all of them claim, as members of WSG, to be strongly opposed to any development of the airport into a Code C jet-capable facility. Putting to one side that no such decision has been made, this suggests a lack of

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107 McDonald and Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV23.02].

108 McDonald and Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV23.02].

109 High Court Rules 2016, sch 4, cl 3(a).

impartiality – the overriding duty of an expert witness – and a focus instead on advocacy.[110]

1.17 This includes the evidence of Dr Carly Green, Alistair Hudson, Terry Hetherington, Richard Sommerville, Andrea Oxley, Shaun Gilbertson, Nicholas Page and Christopher Riley.

1.18 There are other issues:

(a) Alistair Hudson is a now retired corporate lawyer. He retired in 2012. He purports to give opinion evidence about the terms of the Lease and in particular, that he had never heard of pre-paid rental structures. It is questionable whether the Court will find his evidence substantially helpful, but regardless his evidence strays outside his expertise. Since 1984 he has focused on corporate and commercial law, mergers and acquisitions, and intellectual property and technology law. The Council's evidence is that pre-paid rental structures have become prevalent only over the last 20 years.[111] It is not surprising he is unaware of them.

(b) Richard Sommerville is a company director, chartered accountant and former investment banker. Yet he purports to give evidence of financial investment in the aviation sector without establishing his expertise to do so. He purports to lend his opinion weight by stating that the report on which his evidence is based was peer reviewed – but the process by which it was peer reviewed, and by whom, is not disclosed. The evidence is also irrelevant since no decision to upgrade Wānaka Airport into a Code C jet-capable airport has been made.

(c) Andrea Oxley is a motelier. She purports to give her opinion, apparently based on experience in the motel industry, that it is extremely rare to see a 100 year lease term "even for ground leases for infrastructure developments like Wānaka Airport".[112] She has strayed beyond her expertise.

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110 High Court Rules 2016, sch 4, cls 1 and 2.

111 Affidavit of John Schellekens at [7.2]-[7.5] and [8.5] **[CB, Part 2, p 00454 and 00457]**.

112 Affidavit of Andrea Oxley at [7] **[CB, Part 2, p 00172].**

(d) The second affidavit of former Councillor Ella Lawton purports to express her opinion on whether certain terms of the Lease are "common" but she is not qualified to give that opinion.

1.19 Counsel does not intend to waste the Court's time going through all of WSG's affidavits paragraph by paragraph to seek rulings as to which paragraphs are admissible and may be read. It is requested that the Court, in making its decision, be alert to these issues and take care before relying on any evidence filed on behalf of WSG.

2 Without prejudice correspondence

2.1 Following the advent of the Covid-19 crisis WSG wrote to QLDC proposing a "reset".[113] While unclear as to what was meant by a "reset", the letter expressly purported to resolve a civil proceeding. The Council believed it to be a confidential proposal, and therefore subject to settlement privilege as provided for in s 57 of the Evidence Act. The Council's response was expressly marked "without prejudice", and likewise sought to resolve the proceeding based on what it believed WSG meant by a "reset". WSG rejected that proposal, but it did state that it had – at least initially – intended its first letter to be confidential.[114]

2.2 On 3 August 2020, the Council was alerted to the fact that WSG had made this correspondence public. In making it public WSG had only partially quoted the Council's letter, thereby giving an unfair impression of the Council's position. The Council requested that WSG immediately remove the material from the public domain.[115] WSG agreed to remove reference to the Council's letter, but not its own. It removed the quote, but continued to assert that the Council had rejected the proposal, without stating that the Council had made a proposal of its own, which WSG had rejected. WSG has not otherwise corrected the unfair impression given in its public statements.

2.3 Perhaps even more surprisingly, WSG included this without prejudice correspondence in its evidence before the Court.[116] Counsel cannot understand how WSG's lawyers allowed this to occur.

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113 Affidavit of Kylee Murphy, Exhibit C661 **[CB, Part 4D, p 03126]**.
114 Affidavit of Kylee Murphy, Exhibit C69 **[CB, Part 4D, p 03131].**
115 Letter Meredith Connell to Fyfe Karamaena **[CB, Part 5, p 09965].**
116 Affidavit of Kylee Murphy, Exhibit C682 **[CB, Part 4D, p 03128]**.

2.4 Nonetheless it has occurred and the Council now must deal with it. In light of WSG's disregard for the joint privilege, the Council considers that it has no option but to waive privilege over the correspondence to address the inappropriate way in which WSG has sought to use this material and so that there is not a misleading impression given to either the Court or the public from this correspondence.