BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND in the matter of the Queenstown Lakes Proposed District Plan, Submissions and Further Submissions on Chapter 37 Designations

BY SKYDIVE QUEENSTOWN LIMITED

Submitter

CASEBOOK

MACALISTER TODD PHILLIPS
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JEM-404430-12-141-V2:LN

CONTENTS

CASEBOOK

SKYDIVE QUEENSTOWN LIMITED

Submitter Details

First Name: **Tony**
Last Name: **Ray**
Organisation: **Skydive Queenstown Limited**
On behalf of: **Mactodd**
Street: **PO Box 653**
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City: **Queenstown**
Country: **New Zealand**
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Trade competition and adverse effects:
○ I could ◉ I could not
gain an advantage in trade competition through this submission
○ I am ○ I am not
directly affected by an effect of the subject matter of the submission that :
a. adversely affects the environment, and
b. does not relate to the trade competition or the effects of trade competitions.

Wishes to be heard:
◉ Yes
○ No

Preferred hearing location:

○ **Ch 1 - Introduction**	○ **Ch 2 - Definitions**	○ **Ch 3 - Strategic Direction**	○ **Ch 4 - Urban Development**
○ **Ch 5 - Tangata Whenua**	○ **Ch 6 - Landscape**	○ **Ch 7 - Low Density Residential**	○ **Ch 8 - Medium Density Residential**
○ **Ch 9 - High Density Residential**	○ **Ch 10 - Arrowtown Residential Historic Management Zone**	○ **Ch 11 - Large Lot Residential**	○ **Ch 12 - Queenstown Town Centre**
○ **Ch 13 - Wanaka Town Centre**	○ **Ch 14 - Arrowtown Town Centre**	○ **Ch 15 - Local Shopping Centres**	○ **Ch 16 - Business Mixed Use Zone**
○ **Ch 17 - Queenstown Airport Mixed Use**	○ **Ch 21 - Rural Zone**	○ **Ch 22 - Rural Residential and Rural Lifestyle**	○ **Ch 23 - Gibbston Character Zone**
○ **Ch 26 - Historic Heritage**	○ **Ch 27 - Subdivision and Development**	○ **Ch 28 - Natural Hazards**	○ **Ch 30 - Energy and Utilities**
○ **Ch 32 - Protected Trees**	○ **Ch 33 - Indigenous Vegetation and Biodiversity**	○ **Ch 34 - Wilding Exotic Trees**	○ **Ch 35 - Temporary Activities and Relocated Buildings**
○ **Ch 36 - Noise**	◉ **Ch 37 - Designations**	○ **Ch 41 - Jacks Point Zone**	○ **Ch 42 - Waterfall Park**
○ **Ch 43 - Millbrook Resort Zone**			

Submission

Consultation Document Submissions

Part Five - District Wide Matters > 37 Designations > 37.2 Schedule of Designations

- ○ Support
- ◉ Oppose
- ○ Other - Please clearly indicate your position in your submission below

I seek the following decision
- Correction of designation 239 in the Schedule of Designations (Chapter 37.2) to refer to the purpose of Glenorchy Aerodrome as 'local purpose (airport) reserve. - Amendment of Proposed District Planning Map 25a, Designation 239 to include all of Section 11 Survey Office Plan 443869 within the designation.

My submission is
Designation 239 is a Queenstown Lakes Designation which provides for Glenorchy Aerodrome. Its purpose is listed in Chapter 37.2 Schedule of Designations as Recreation Reserve (Aerodrome). This description is incorrect. All of Section 11 SO Plan 443869 was classified 'local purpose (airport) reserve' and vested in Queenstown Lakes District Council in trust for that purpose by Notice in the New Zealand Gazette 13 June 2013, No. 74, page 1990. The site of the designation is listed correctly as 'Glenorchy Aerodrome, Section 11 Survey Office Plan 443869.' Proposed Planning Map 25a however appears to show only the runway as being designated and not the balance of the aerodrome comprised in Section 11. This is inconsistent, not only with the Schedule and the Gazette Notice which refer to all of Section 11 but also with the definition of Aerodrome in Chapter 2 which 'means a defined area of land used wholly or partly for the landing, departure and surface movement of aircraft including buildings, installations and equipment on or adjacent to any such area used in connection with the aerodrome or its administration.' The land either side of the runway, within Section 11 is used for aerodrome purposes including the refuelling of aircraft, provision of toilet and some office facilities. For safety purposes it is necessary to be able to control the use of the designated land to prevent obstruction of aircraft using the runway and encroachment onto the aerodrome.

Attached Documents

File
Proposed District Plan 2015 - Stage 1

D Definitions

Aerodrome	Means a defined area of land used wholly or partly for the landing, departure, and surface movement of aircraft including any buildings, installations and equipment on or adjacent to any such area used in connection with the aerodrome or its administration.
Aircraft	Means any machine that can derive support in the atmosphere from the reactions of the air otherwise than by reactions of the air against the surface of the earth.
Aircraft Operations	Includes the operation of aircraft during landing, take-off and taxiing but excludes: • aircraft operating in an emergency; • aircraft using the Airport as an alternative to landing at a scheduled airport; • military aircraft movements; and • engine testing.
Air Noise Boundary	Means a boundary, the location of which is based on predicted day/night sound levels of Ldn 65 dBA from future airport operations. The location of the boundary is shown ~~in Figure 31a~~ on the District Plan Maps.
Air Noise Boundary Queenstown (ANB)	Means a boundary as shown on the District Plan Maps, the location of which is based on the predicted day/night sound level of 65 dB Ldn from airport operations in 2037.
Airport Activity	Means land used wholly or partly for the landing, departure, and surface movement of aircraft, including but not limited to: (a) aircraft operations, private aircraft traffic, domestic and international aircraft traffic, rotary wing operations, aircraft servicing, general aviation, airport or aircraft training facilities and associated offices. (b) Runways, taxiways, aprons, and other aircraft movement areas. (c) Terminal buildings, hangars, control towers, rescue facilities, navigation and safety aids, lighting, car parking, maintenance and service facilities, catering facilities, freight facilities, quarantine and incineration facilities, border control and immigration facilities, medical facilities, fuel storage and fuelling facilities, facilities for the handling and storage of hazardous substances, and associated offices.
~~Airport~~ Aerodrome	~~Means any defined area of land or water intended or designed to be used whether wholly or partly for the landing, departure, movement or servicing of aircraft.~~ Note: see proposed definition of AERODROME.
Airport Operator	Means the person or body that has the necessary statutory authority for the establishment, maintenance, operation or management of the airport.
Airport Related Activity	Means an ancillary activity or service that provides support to the airport. This includes, but is not limited to, land transport activities, buildings and structures, servicing and infrastructure, police stations, fire stations, medical facilities and education facilities provided they serve an aviation related purpose, retail and commercial services, industry and visitor accommodation associated with the needs of Airport passengers, visitors and employees and/or aircraft movements and Airport businesses.
All Weather Standard	Means a pavement which has been excavated to a sound subgrade, backfilled and compacted to properly designed drainage gradients with screened and graded aggregate and is usable by motor vehicles under all weather conditions, and includes metalled and sealed surfaces.

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FURTHER SUBMISSION IN SUPPORT OF, OR IN OPPOSITION TO, SUBMISSIONS ON THE QUEENSTOWN LAKES DISTRICT COUNCIL PROPOSED PLAN

To: **Queenstown Lakes District Council**

1. **Name and address of person making further submission:**

   Skydive Queenstown Limited

   c/o Jayne Macdonald

   Mactodd

   PO Box 653

   Queenstown

2. **This is a further submission in opposition to a submission on the Queenstown Lakes District Council Proposed District Plan ("the proposal").**

3. **I am:**

   A person who has an interest in the proposal greater than the interest the general public has. My interest in based on the following grounds:

   I lodged submission #23 which sought the correction of Designation 239 to record the correct purpose of Glenorchy Aerodrome and the amendment of Planning Map 25a to include the whole of the property within Designation 239. The original submission I am opposing directly impacts on my submission.

4. **I oppose the submission of:**

   Name of original submitter: *Wyuna Preserve Residents Association Incorporated*

   Submission number: *744*

5. **The particular parts of the submission I oppose are:**

   I oppose the original submitter's request that conditions be added to Designation 239 to manage the operations of Glenorchy Aerodrome.

6. **The reasons for my opposition are**

Glenorchy Aerodrome is better controlled via a management plan under the Reserves Act 1977, rather than being too prescriptive via the designation process.

7. **The following decision is sought from the local authority:**

I request that the relief sought by the original submitter not be allowed, and that Designation 239 and Planning Map 25a be amended in accordance with my original submission.

8. **The submitter does wish to be heard in support of this submission.**

9. **If others make a similar submission, the submitter will consider presenting a joint case with them at a hearing.**

pp.

Signature of J E Macdonald for and on behalf of Skydive Queenstown Limited

18 December 2015

Date

Copy to:

Wyuna Preserve Residents Association Incorporated
PO Box 1164
Queenstown 9348
Attn: Jay Cameron

Jay.Cameron@darbypartners.co.nz

(original submitter)

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DOUBLE SIDED

ORIGINAL

Decision No. A074/2002

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two appeals under section 174 of the Act

BETWEEN **SHAYRON LEE BEADLE**

(RMA408/00)

RONALD WIHONGI and RIANA WIHONGI

(RMA429/00)

Appellants

AND **THE MINISTER OF CORRECTIONS**

Respondent

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **THE MINISTER OF CORRECTIONS**

(RMA306/01)

Appellant

AND **THE NORTHLAND REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner D H Menzies

HEARING at Paihia on 10, 11, 12, 13, 14, 17, 18, 19, 20 and 21 September, 8, 9, 10, 11, 12, 23, 24, and 25 October 2001 and 14, 15, and 16 January 2002. (Final submissions received 1 February 2002.)

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

COUNSEL

G M Illingworth and K R M Littlejohn for S L Beadle, R and R WiHongi (Appellants in Appeals RMA408/00 and 429/00) and for Friends and Community of Ngawha Inc, E Clarke, Te Kereru Trust, and Ngatirangi Ahuwhenua Trust (all under section 271A in Appeal RMA306/01)
P J Milne and D G Allen for the Minister of Corrections
R M Bell and C N Whata for the Northland Regional Council

DECISION

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PERMITTED BASELINE COMPARISONS

Does the duty apply to regional consents and designation requirements?

[988] We have attended to the various duties expressly stated in the Resource Management Act for the consideration of the designation requirement and the resource consent applications. We have now to consider whether the law obliges us also to make permitted baseline comparisons in respect of any of them.

[989] There are three different aspects of permitted baseline comparisons. The first is to compare the environmental effects of the activity the subject of consideration with the environmental effects of activity actually being carried out lawfully on the land. The second is to compare them with the environmental effects of hypothetical activity that (not being fanciful) could occur on the land as a permitted activity under the relevant plan. The third is to compare the environmental effects of the subject activity with those of an activity authorised by an earlier resource consent that has not been implemented.[93]

[990] At least in the case of applications for land-use consent,[94] and for subdivision consent,[95] the first two comparisons are obligatory; and it is for the consent authority to decide whether or not the third is appropriate in the circumstances.[96]

[991] However as far as we were aware, neither the Act nor the case-law states whether the obligation to make permitted baseline comparisons extends to designation requirements or to applications for regional resource consents (those required by sections 12-15). Therefore we invited counsel to offer submissions on those questions.

[992] Mr Littlejohn submitted that there is no legal or policy basis to restrict the obligation to make permitted baseline comparisons to land-use consents under section 9(1). He offered three reasons.

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[93] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA); *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473; 7 ELRNZ 126 (CA); *Arrigato v Auckland Regional* [2001] NZRMA 481 (CA).
[94] *Bayley* supra, and *Smith Chilcott* supra.
[95] *Arrigato* supra.
[96] *Arrigato*, supra.

[993] The first reason was that the practice of permitted baseline comparison arose out of notification duties under section 94, which apply to all consent authorities, and are driven by the status of the activity, not by its nature.

[994] The second reason was that there is no implicit restriction of the duty to land-use activities in the reasoning of the Courts in developing the obligation.

[995] The third reason was that the statements of the restriction on activities in sections 9(1), 13, 14 and 15 all envisage a baseline or level of permitted effects (expressly provided for in regional plans), below which resource consent would not be required. Counsel submitted that activities having effects for which resource consent is not required could be seen as being "as of right".

[996] Mr Littlejohn also submitted that the public policy reasons for the permitted baseline approach in relation to section 9(1) referred to in *Barrett v Wellington City Council*[97] apply equally to activities requiring regional consents; and that in this case the Court would be entitled to disregard adverse effects of activities expressly authorised by the regional plans.

[997] Mr Bell also submitted that the obligation to make permitted baseline comparisons applies to applications for regional consents. He asserted that in any particular case an assessment of effect on the environment of an activity for which consent is sought may involve enquiry into a wide range of environmental matters, and evaluation of the effects (even with regard to what is permitted under the rules of the plan) is one of evaluation based on particular facts. Mr Bell also submitted that application of the permitted baseline test is not necessarily determinative, observing that some activities are classified as permitted because they have particular social utility despite their adverse effects, citing taking of water for firefighting, and coastal structures for navigational safety, as examples.

[998] Mr Bell submitted that the structure of duties in Part III, in which some activities are prima facie allowed unless controlled by rule, and others are prima facie prohibited, does not make any difference for this purpose. In *Arrigato* the permitted baseline obligation was applied to a subdivision application although section 11(1) makes subdivision prima facie prohibited.

[97] [2000] NZRMA 481 (HC).

[999] Mr Milne also submitted that there is no clear reason why the permitted baseline practice should not be extended to applications for regional consents and to designation requirements, and agreed with other counsel that it should apply to applications under sections 12 to 15. He suggested that the 'permitted' part of the baseline should be treated as applying to all activities for which a certificate of compliance would have to be issued (if applied for). Mr Milne cited *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council and Glendon Trust* [98] in which Justice Chisholm held that in evaluating the cultural and spiritual effects of proposed activity (in terms of Part II) the Environment Court had been entitled to take into account activities that could be undertaken as of right.

[1000] In respect of designation requirements, Mr Milne observed that unlike section 104, section 171 does not expressly require that regard is to be had to environmental effects of the proposed activity (though he acknowledged that consideration of environmental effects is required in terms of Part II, and particularly section 5(2)(c)).

[1001] Mr Milne suggested that in practice the permitted baseline will have little applicability in the context of an activity that might be designated. That may be so, but it does not affect the principle.

[1002] As there was no submission to the contrary, for the present case we accept that the obligation to apply the permitted baseline comparisons extends to the applications for regional consents and to the designation requirement.

Application of the permitted baseline comparisons

[1003] In the present case there was no evidence of any unimplemented resource consent affecting the subject land, so we are relieved of the duty of considering whether the third baseline comparison is appropriate in the circumstances of the case. We make comparisons of the effects of the regional consents, and of the designation, separately.

[1004] The purpose of the comparison is to consider whether the environmental effects of the proposal exceed a putative baseline of acceptable environmental effects that are inferred from the existing lawful activities and hypothetical permitted

[98] High Court, Wellington, AP6/01; 25 June 2001, Chisholm J.

activities, as explained in this passage from the judgment of the Court of Appeal in *Arrigato v Auckland Regional Council*[99]–

> Thus the permitted baseline in terms of Bayley, as supplemented by Smith Chilcott, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the sections 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[1005] The first aspect of the baseline is the environmental effects of existing lawful activities on the site. They are the environmental effects of a working dairy farm, particularly diffuse discharges to the Ngawha Stream and tributaries of runoff contaminated by cattle, and impact of stock on riparian and other vegetation.

[1006] The second aspect is to identify the environmental effects of non-fanciful hypothetical activity permitted by the applicable plans. The wick drains are permitted, so we treat their effects (if any) as being within the baseline. So is drain-clearing and maintenance. In addition 2000 cubic metres per year of earthworks can be carried out anywhere on the land except in the stream-side management areas.

[1007] Turning to land-use activities, those permitted by the transitional district plan are readily identified, so the baseline includes the effects of kokiri centres, marae development, outdoor recreation and entertainment activities excluding motor sports and firearms sports. By the proposed district plan permitted activities are limited by the performance standards (detailed earlier in this decision) stipulating intensity of residential development, maximum area of impermeable surfaces, maximum site coverage, and traffic intensity.

[1008] So the environmental effects that make up the permitted baseline are those of depasturing by dairy cows and of milking operations; diffuse discharges of contaminants from that activity to the stream and its tributaries; drainage by wick drains; and 2000 cubic metres per year of earthworks (except in the stream-side area). In land use, they are the environmental effects (such as they may be) of kokiri centres, marae development, outdoor recreation and entertainment activities excluding motor sports and firearms sports, residential development up to one unit per 4 hectares, and other undefined activities, limited to impermeable surfaces not

[99] [2001] NZRMA 481 para [29].

exceeding 15% of site area or 5000 square metres, site coverage not exceeding 20% or 8000 square metres, and traffic up to 100 vehicle movements per day.

[1009] Now we have to compare the environmental effects of the prison proposal with those of the permitted baseline, to assess whether there are "other or further" adverse effects of the proposal that are to be taken into account in making the judgements under section 174(4) whether the designation requirement should be confirmed, modified or cancelled; and under section 105(1)(b) whether the resource consents should be granted or refused.

[1010] The proposal involves discharges of potentially contaminated stormwater runoff to the stream and its tributaries. We find that the environmental effects of those discharges would be considerably less than the existing diffuse discharges, because of the elaborate proposals for diversions and detention ponds in accordance with the appropriate technical standard. Also, the proposed stream works on the eastern tributary would have less adverse effect on the environment than normal drain-clearing and maintenance operations.

[1011] However the scale of the land disturbance proposed considerably exceeds the extent permitted, even outside the stream-side management area (2000 cubic metres per year), and has "other or further" adverse effects beyond the baseline. The environmental effects of *using* the land for the proposed prison fall outside the permitted baseline, because a prison is neither existing nor permitted on the site, and the extent of the impermeable surfaces and site coverage exceed the standards.

[1012] We find therefore that in making the judgements referred to, we are not to take into account the effects of discharge of contaminants or of the wick drains, as they are not "other or further adverse effects" than the adverse effects included in the permitted baseline. However the effects of the other earthworks and streamworks proposed, and those of the scale and intensity of the accommodation, the extent of impermeable surfaces, and site coverage (being "other or further adverse effects" beyond the baseline), are to be taken into account in making those judgements, to which we now proceed.

JUDGEMENTS

[1013] In preceding sections of this decision we have made our findings about the affirmative case for the proposal; about the claimed physical effects on the environment; the Maori cultural and traditional issues raised; and the other non-

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OOPS = relevant hard copy RMA

Part 3
Duties and restrictions under this Act

Land

[9 Restrictions on use of land

(1) No person may use land in a manner that contravenes a national environmental standard unless the use—
- (a) is expressly allowed by a resource consent; or
- (b) is allowed by section 10; or
- (c) is an activity allowed by section 10A; or
- (d) is an activity allowed by section 20A.

(2) No person may use land in a manner that contravenes a regional rule unless the use—
- (a) is expressly allowed by a resource consent; or
- (b) is an activity allowed by section 20A.

(3) No person may use land in a manner that contravenes a district rule unless the use—
- (a) is expressly allowed by a resource consent; or
- (b) is allowed by section 10; or
- (c) is an activity allowed by section 10A.

Note: See s 4(3) of this Act as to this subsection not applying in specified circumstances.

(4) No person may contravene section 176, 178, 193, or 194 unless the person obtains the prior written consent of the requiring authority or the heritage protection authority.

(5) This section applies to overflying by aircraft only to the extent to which noise emission controls for airports have been prescribed by a national environmental standard or set by a territorial authority.

(6) This section does not apply to use of the coastal marine area.]

History

Subsection (1)(b) was amended, as from 7 July 1993, by s 6(1) Resource Management Amendment Act 1993 (1993 No 65) by substituting the words "section 10 or section 10A" for the words "section 10 (certain existing uses protected)".

Subsection (2) was amended, as from 7 July 1993, by s 6(2) Resource Management Amendment Act 1993 (1993 No 65) by substituting the words "section 176 or section 178 or section 193 or section 194 (which relate to designations and heritage orders)" for the words "section 178 or section 194 (which relate to requirements for designations and heritage orders and prohibit the doing of certain things)".

Subsection (3)(b) was amended, as from 1 August 2003, by s 95 Resource Management Amendment Act 2003 (2003 No 23) by substituting the expression "20A" for the expression "20".

See ss 109 to 113 of that Act as to the transitional and savings provisions.

Subsection (4)(da) was inserted, as from 7 July 1993, by s 6(3) Resource Management Amendment Act 1993 (1993 No 65) .

Subsection (8) was inserted, as from 7 July 1993, by s 6(4) Resource Management Amendment Act 1993 (1993 No 65).

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FORM 5
SUBMISSION ON PROPOSED QUEENSTOWN LAKES DISTRICT PLAN

Clause 6 of Schedule 1, Resource Management Act 1991

To: Queenstown Lakes District Council

Submitter Details:

Name of submitter: Wyuna Preserve Residents Association Incorporated

Address for Service: Wyuna Preserve Residents Association Incorporated
PO Box 1164
Queenstown 9348
Attention: Jay Cameron

Jay.Cameron@darbypartners.co.nz
03 450 2200
021 441 215

1. **This is a submission on the Proposed Queenstown Lakes District Plan.**

2. **Trade Competition**

The submitter could not gain an advantage in trade competition through this submission.

3. **Wyuna Preserve Residents Association Incorporated submission is that:**

4.1 Wyuna Preserve Residents Association Incorporated ("WPRAI") is the residents' association for Wyuna Preserve – a high quality rural lifestyle development comprising thirty four rural living allotments south of Blanket Bay near Glenorchy.

4.2 The Wyuna Preserve development includes communal landholdings and facilities containing a recreation centre, boat shed and associated trails and native re-vegetation. The Aro Ha wellness retreat also operates within the southern portion of Wyuna Preserve.

The submitter **opposes** in part the PDP to the following extent:

4.5 The submitter opposes the inclusion of Designation #239 – Recreation Reserve (Aerodrome) in its current form.

4.6 The Designation presently contains no conditions relating to the use of the aerodrome for its designated purpose. Of specific concern to the submitter is that there are no noise controls, and no controls on the scale, nature and intensity of aviation operations that may occur from the subject site.

4.7 The submitter acknowledges that the aerodrome existed prior to the development of Wyuna Preserve and the continued operation of the aerodrome is beneficial to the community in terms of recreational and commercial use and for emergency purposes.

4.8 The submitter does not seek that the Designation be removed in its entirety but rather that conditions should be added to manage its operation in accordance with community expectations and with regard to the amenity of surrounding residents inclusive of those at Wyuna Preserve.

4.9 The submitter proposes that such conditions should control the level of use of the aerodrome to a similar level as to what presently occurs as at the date of this submission.

4.10 The submitter notes that the Council has notified a Draft Management Plan pursuant to the Reserves Act 1977. This Management Plan identifies that community consultation has been undertaken and that:

> *"The community and user groups have indicated that they wish the level of service at the airstrip and intensity of use to remain generally as it was prior to the transfer of administration from DoC to QLDC[1]."*

4.11 Further, there are a number of proposed objectives and policies in this Draft Management Plan that support the submitter's position in this submission such as:

> *"Ensure that the nature, scale and intensity of the use of the airstrip remain generally unchanged."*
>
> *"Council will regulate the use of the Glenorchy Airstrip Reserve in a manner that ensures that nature, scale and intensity of the use of the airstrip remains generally unchanged and that uses of the reserve are compatible with the reserve's principle purpose."*

4.12 Further, the Objective for Future Development in this Draft Management Plan states:

> *"Glenorchy Airstrip Reserve is managed and developed in a manner that maintains its use as an airstrip in balance with maintaining the amenity of the site and surrounds."*

4.13 The submitter generally supports the approach currently proposed in the Draft Management Plan but notes that this is still subject to a formal process under the Reserves Act 1977 and there is no certainty that those policies and objectives will be accepted as drafted.

4.14 Further, while these objectives and policies demonstrate a management philosophy that the submitter generally supports, there is no specificity as to the current level of use of the aerodrome that it is intended to be maintained.

4.16 Accordingly, to ensure that an appropriate management regime is derived for the Glenorchy aerodrome it is submitted that Council clarifies the scale, nature and intensity of the existing operations as at the date of notification of the District Plan Review i.e. number of approved operators, numbers of flights per day and per annum.

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[1] Reserve Management Plan Glenorchy Airstrip, March 2015 page 6

4.17 In addition it is submitted that the Council should add the following conditions to Part C of the Designations Chapter with respect to Designation #239:

1. Hours of operation (except for emergencies) for all aircraft flight operations shall be 8:00am to 8:00pm;

2. Unless necessary to do so for safety and/or emergencies no arrivals or departures to the airstrip shall overfly the Wyuna Preserve subdivision.

3. Circulatory flights that originate from or land at the aerodrome and have the potential to concentrate noise over the Glenorchy Township or Wyuna Preserve are prohibited.

4. There shall be no more than thirteen leases/licenses issued for aviation operators using the aerodrome.

5. The scale, nature and intensity of use of the aerodrome shall be maintained at the level of use that occurred as at 26th August 2015. For the avoidance of doubt this was [insert max # of flights].

4. The submitters seek the following decision from the Queenstown Lakes District Council:

- That the Designations chapter be amended to include conditions 1 – 5 above in Part C for Designation #239 Recreation Reserve (Aerodrome).

- The submitter also seeks such further or consequential or alternative amendments necessary to give effect to this submission, and to:

(a) Promote the sustainable management of resources and achieve the purpose of the Resource Management Act 1991 ("Act");

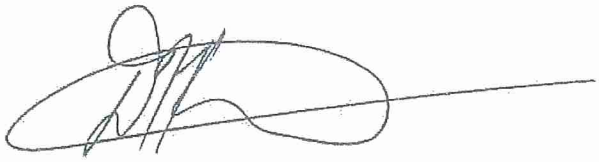
(b) Meet the reasonably foreseeable needs of future generations;

(c) Enable social, economic and cultural wellbeing;

(d) Represent the most appropriate means of exercising the Council's functions, having regard to the efficiency and effectiveness of other means available in terms of section 32 and other provisions of the Act

5. **The submitter wishes to be heard in support of their submission.**

6. **If others make a similar submission the submitter will consider presenting a joint case with them at a hearing.**



Signature
(Don Fletcher, Chairman - Wyuna Preserve Residents Association Incorporated)

Date...23 October 2015

Form 5

Submission on a Publicly Notified Proposal for Policy Statement or Plan

Clause 6 of First Schedule, Resource Management Act 1991

To: **Queenstown Lakes District Council ("the Council")**

Name of Submitter: SHAI LANUEL ON BEHALF OF SKYTREK TANDEMS LTD.

Introduction:

1. This is a submission on the proposed **Queenstown Lakes District Plan** ("the Proposed Plan") notified on 26 August 2015.

2. The submitter could not gain an advantage in trade competition through this submission.

3. The submitter has an interest in the Proposed Plan as a whole, and as such the submission relates to the Proposed Plan in its entirety. The submitter has particular interest in all provisions relating to aircraft/airport activities and the associated controls and effects.

4. The specific provisions of the Proposed Plan that this submission relates to *includes, but is not limited to*, the provisions in the following chapters:

    a. Chapter 2: Definitions;
    b. Chapter 3: Strategic Direction;
    c. Chapter 21: Rural;
    d. Chapter 22: Rural Residential & Rural Lifestyle;
    e. Chapter 23: Gibbston Character Zone;
    f. Chapter 27: Subdivision & Development;
    g. Chapter 36: Noise
    h. Planning Maps.

5. The Proposed Plan seeks to introduce further controls on the establishment of informal airstrips and landing areas (defined as "informal airports"), the numbers of craft movement and controls on the proximity of such activities to various features.

General Reason for Submission:

6. The submitter supports the effort to clarify the existing rules in the Operative Plan surrounding "informal" airports. The current rule framework captures nearly every landing location that is used more than a handful of occasions; this is impractical and unnecessary.

7. The submitter also supports the efforts of the Council to reduce administration and costs associated with needing to obtain land use consent for informal airports.[1]

8. In reference to the section 32 report titled "Informal Airports", it states that the focus of the changes are on reducing statutory approvals for landings on Crown land and enabling aircraft into the "back country".[2] It fails to acknowledge and provide for the essential and fundamental activities that rural landowners have in the district: recreationally, practically and economically.

9. The submitter agrees that location controls are a necessary response to help avoid potential adverse effects of aircraft activity in rural areas. The submitter however **opposes** the level of controls that have been adopted by the Council.

10. It is noted in the section 32 report that "*...separation of informal airports from noise sensitive receivers was identified as the key attribute in mitigating the variety of adverse environmental effects that may arise from the operation of informal airports*".[3] The section 32 report is a relatively detailed document however it is very light on what issues have been experienced by residents in rural areas and whether there is a need for the level of control proposed by the Council on aircraft location and movements.

11. To this end, the section 32 report has relied on acoustic advice from Dr Stephen Chiles, however the methods adopted are largely inconsistent with the acoustic advice.[4] For instance, the acoustic report suggests a much reduced setback with greater provision for aircraft movements each day than has been adopted in the Proposed Plan.

12. No explanation is given as to how the Council arrived at the low number of movements specified in the Proposed Plan.

13. The Proposed Plan also refers to "formed roads" as being a trigger to control the location of informal airports. It is requested that reference to this is removed as quite often roads in rural areas are infrequently used and should not be treated as sensitive receivers. The same applies to property

[1] Page 9 of Section 32 report
[2] Page 9 of Section 32 report
[3] Page 14 of Section 32 report

boundaries; such reference should be removed with the onus placed solely on the proximity to residential dwellings.

14. Many operators of aircraft have been doing so for a number of years and in some cases, existing use rights are likely to apply. The Proposed Plan should include provision to recognise existing uses and the associated effects.

15. Making the changes as proposed will:

    a. Promote the sustainable management of natural and physical resources, will be consistent with Part 2 of the Resource Management Act 1991 ("RMA") and ultimately achieve its purpose;
    b. Enable the social, economic and cultural well-being of the community;
    c. Meet the reasonably foreseeable needs of future generations; and
    d. Represent the most appropriate means of exercising the Council's functions, having regard to the efficiency and effectiveness of the provisions relative to other means.

Relief sought:

16. The submitter requests the following decision:

    a. Provision is made in the Proposed Plan to recognise existing uses;
    b. For new informal airports, the restriction on movements be amended to 10 in any calendar week;
    c. The setback on new alighting areas be 120 metres for fixed wing and 100 metres for rotary wing aircraft;
    d. Any other additional or consequential relief to the Proposed Plan, including but not limited to, the maps, issues, objectives, policies, rules, discretions, assessment criteria and explanations that will fully give effect to the matters raised in this submission.

17. The suggested revisions do not limit the generality of the reasons for the submission.

18. The submitter wishes to be heard in support of its submission.

19. If others make similar submissions, the submitter will consider presenting a joint case at any hearing.

Signed by ~~or on behalf of the submitter~~
Submitter.

23-10-15

Date

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submission was not "on" Stage 1 will need to make a *new* submission when Stage 2 of the DPR is notified – the disregarded submission will have no legal status for Stage 2 and will not "transfer over" to Stage 2 under the RMA; and

(b) where the submission was on an area of land or District-wide chapter that is specifically excluded from the DPR (ie, as listed in paragraph 5.4 above), Council's position is that this Review is not the opportunity to make changes to the ODP provisions, and there is no opportunity to pursue the change sought through this process.

Legal principles / case law regarding 'scope'

7.3 Whether a Council is considering a partial review under section 79(1) of the RMA (as is the case here), or a plan change under Schedule 1, submissions are made under clause 6 of Schedule 1 of the RMA:

> *once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission* ***on it*** *to the relevant local authority.* (our emphasis)

7.4 The legal principles regarding scope and the Panel's powers to recommend and subsequently the Council's power to decide are:

(a) a submission must first, be *on* the proposed plan; and

(b) a decision maker is limited to making changes within the scope *of the submissions* made *on the* proposed plan.

7.5 It is acknowledged at the outset that the case law discussed below largely deals with discrete plan changes rather than plan reviews. Plan changes are typically directed at a specific issue or geographic area, and targeted towards achieving a certain end, whereas plan reviews will inevitably involve a broader and less confined approach to the question of scope – albeit that this has in turn been complicated by the Council's approach of initiating a partial review in stages. This is because the Council through section 79 must, even after reviewing operative provisions and deciding they do not need to be changed, notify them as part of the PDP. In other words, there may be no change to the "status quo" in a Review, and therefore

Hearing Stream 1
Council's reply legal submissions

those words in the first limb of the test set out below has limited relevance to this Review.

7.6 The meaning of "on" was considered by a superior court in *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519. The High Court in *Motor Machinists* firmly endorsed the two-limb approach from *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003. The two questions that must be asked are:

(a) whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and

(b) whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

7.7 A submission can only be fairly said to be "on" a proposed plan if it meets both these limbs. The High Court in *Motor Machinists* clearly confirms that "on" should *not* be treated as meaning "in connection with". The principles that underlie these decisions are those of fairness and due process, which are embodied in the RMA by its emphasis on public participation in decision making.

7.8 While *Motor Machinists* does endorse the *Clearwater* approach, the decision indicates a tightening of the two-limb approach. The Court began by stating that for a submission to be "on" a plan change, it must directly address the degree of change in the proposed plan/change itself. The first limb is the dominant consideration and acts as a 'filter'.

7.9 As set out in paragraph 7.5 above, a notified PDP will not always change the status quo, and the inclusion of those words in the first limb are arguably inimical to the purpose of a plan review. However, the first limb is submitted to still be of relevance in the context of this Review, in terms of defining the geographic area notified in Stage 1 for the zoning chapters (ie. residential and rural zones only, plus three Special Purpose zones – Jacks Point, Millbrook and Waterfall Park). The District Wide chapters require different treatment, as they apply

across the District, including to geographic areas of the land not notified in Stage 1 (ie, the Industrial and excluded Special Zones).

7.10 The first limb in the *Motor Machinists* case has more recently been considered in an application for declarations in the Environment Court, *Palmerston North Industrial and Residential Developments Limited v Palmerston North City Council* [2014] NZEnvC 17. The Court concurred with the following extract from the Palmerston North City Council's legal submissions:[34]

> *Palmerston North City Council is entitled to put forward changes to provisions in its district plan at any time to provide for urban growth in particular areas (in this case Whakarongo Residential Area), without risking opening the debate to a much wider one of where else growth should occur. Proposing an area to be rezoned does not open the door to submission on 'where else', but 'whether and how'. This is the point of* Palmerston North City Council v Motor Machinists Ltd.

7.11 This extract is relevant to the question of whether submissions are on a geographic area of land notified for zoning in Stage 1. The Courts have endorsed the approach where "me too" submitters are not "on" a plan change (or proposed plan) and therefore can be disregarded by the Panel. As mentioned above, the District wide chapters require different treatment as they apply across the District (and are addressed in the following paragraph).[35]

7.12 The *Motor Machinists* judgment also proposes several tests for determining whether a submission falls "within the ambit" of the plan change. For example, if the submission seeks a new management regime, it must be in response to a plan change that alters the management regime. If the submission raises matters that should have been addressed in the section 32 evaluations and report, then it is unlikely to be within the ambit of the plan change. This suggests a more rigorous test than that in *Clearwater*, as it seems that where the submission addresses matters that could be addressed by other means, the submission will not be "on" the plan change. These tests are most relevant in considering those submissions that seek to add a management regime for District wide matters that have not been

34 Paragraph [57].
35 Except for the geographic area covered by PC50 – Queenstown Town Centre, as all provisions that relate to that area of land have been withdrawn under clause 8D of Schedule 1 of the RMA.

notified in Stage 1 – for example those that seek to add Transport provisions into Stage 1 zoning chapters.

Council's position on four specific categories of submissions

7.13 There are in general, two types of situations where analysis is required as to scope. The first is a matter of the geographic area which is included within the scope of the review (for zoning chapters in Parts 3 and 4 and 6 of the PDP), the second is the policy/rule change (i.e. the subject matter) itself (generally an issue for District Wide chapters in Part 5 of the PDP).

7.14 Set out in **Schedule 3** is the Council's position on five specific types of categories of submissions that have been made on the PDP. These categories apply not just to the chapters within the scope of Hearing Streams 1A and 1B, but also to the remainder of the Stage 1 hearings, and will be referred to and adopted during the course of those hearings.

7.15 The Council acknowledges that there is likely to be specific factual circumstances within these categories that the Panel will need to carefully consider through the hearings as they arise, and that will require case by case consideration and possibly specific legal submissions. The Council also wishes to foreshadow that it will be seeking a minute or guidance note from the Panel to assist submitters with the Panel's general approach to scope for the remainder of Stage 1 hearings.

8. COUNCIL'S EVIDENCE

8.1 The Council is calling the following evidence in support of its position:

(a) Mr Tony Pickard – Council officer – Introduction and Tangata Whenua Chapters;
(b) Mr Clinton Bird – urban design;
(c) Mr Fraser Colegrave – population / visitor accommodation projections;
(d) Dr Philip McDermott – centres;
(e) Dr Marion Read – landscape;

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-2486
[2012] NZHC 1687

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal from the Environment Court
BETWEEN	ACTION FOR ENVIRONMENT INCORPORATED Appellant
AND	WELLINGTON CITY COUNCIL First Respondent
AND	WELLINGTON BADMINTON ASSOCIATION INCORPORATED Second Respondent and applicant for consent

Hearing: 10 May 2012

Counsel: G Taylor for Appellant
K Anderson and A White for First Respondent
C Anastasiou for the Second Respondent

Judgment: 13 July 2012

JUDGMENT OF CLIFFORD J

Introduction

[1] The second respondent Wellington Badminton Association Incorporated ("Wellington Badminton") was, on appeal to the Environment Court in October 2011, granted a resource consent to extend its facilities known as Badminton Hall located on Town Belt land in the Wellington suburb of Hataitai.[1] Action for Environment Incorporated, the appellant ("AfE") now appeals against that decision. The essential issue raised by this appeal is whether the Environment Court, when

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[1] *Wellington Badminton Association Inc v The Wellington City Council* [2011] NZEnvC 343.

allowing Wellington Badminton's appeal, had proper regard to what may be broadly described as the "open space value" of the Wellington Town Belt.

Background

[2] The Town Belt is an important feature of Wellington's urban landscape. As the name suggests, the land comprising the Town Belt encircles the inner city from Oriental Bay, just short of Point Jerningham, across and along the Mt Victoria hills in the east, south to the area of the Berhampore (public) golf course and then north to the Tinakori hills in the west. The Town Belt is held on trust by the first respondent, the Wellington City Council ("the Council") pursuant to a deed of trust of 20 March 1873 made by the then Superintendent of the Province of Wellington in favour of the Mayor, Councillors and Citizens of the City of Wellington ("the Trust Deed") for use as "a public Recreation ground for the inhabitants of the City of Wellington".

[3] Badminton Hall has occupied Town Belt land adjoining Ruahine Street, itself now part of State Highway 1, since 1957 when the Council built a four court hall for its use. The Association holds the site – which comprises a separate certificate of title, on lease from the Council. As extended in the 1970s, Badminton Hall now comprises eight courts, changing facilities, a small "pro-shop" and an adjoining car park.

[4] Other sports facilities occupy Town Belt land. For example, at nearby Hataitai Park there is a complex comprising playing fields, netball courts, a velodrome and associated buildings, club rooms and gymnasiums. Further away, the Renouf Centre provides covered and open tennis courts, stands and associated facilities in an area adjoining Central Park in Brooklyn.

[5] Something of the flavour of the way in which the Town Belt has been used over time for recreational purposes is to be found in the following extract, taken from the still operative Wellington Town Belt Management Plan of January 1995 ("the Management Plan"):

> Patterns of recreation use have changed a great deal over the life of the Town Belt. Previously the emphasis was on structured 'sport', with little recognition of the importance of informal recreation such as walking and picnicking. As shown in Figure 3 parts of the Town Belt have been intensively developed for organised sport including an extensive range of team sports as well as specialised activities such as croquet, squash, bowls, gun and rifle shooting, golf and cycling. Various cultural and community groups such as scouts, Plunket and the dog obedience clubs also use the Town Belt.
>
> However, to most people the Town Belt represents a piece of close, accessible open space that they "own" and in which they can freely ramble, walk to work, hike, run, dog- walk, picnic and relax. The LINZ (*Life in New Zealand* survey, June 1991, by the Hillary Commission) data suggests that informal activities such as walking and playing with children are high on peoples' favourite activity list these days.
>
> This increase in the popularity of informal recreation has been noted by the Council and is also reflected in the public submissions (received in 1992) which suggest that there is more than enough land set aside for formal recreation on the Town Belt, that additional facilities should not be permitted, and, in fact, that some should be removed.

[6] This case reflects an ongoing debate as to the appropriate use of the Town Belt.

[7] In February 2010 Wellington Badminton applied to the Council for resource consent to extend the Badminton Hall facilities. The Town Belt is designated as Open Space C in the Wellington District Plan ("the District Plan"). The building works associated with the expansion of the Badminton Hall are a Discretionary Activity (Unrestricted). The Council officer reporting to the appointed Commissioners opposed the application. He concluded, on balance, that the adverse effects of the proposal on the vegetation, amenity and landscape values of the Town Belt would not be adequately mitigated and nor would the flow on positive effects outweigh the negative effects. Thus the proposal was, in his view, contrary to the objectives and policies of the District Plan. It was also, in his view, contrary to the Management Plan as a relevant consideration under the District Plan. In August 2010, in a carefully written decision, the Commissioners declined the application. The Commissioners reached similar conclusions to those of the Council officer. They concluded that the proposal was generally inconsistent with the District Plan in relation to Open Space C land. In their view, the proposal would "prioritise one type or form of recreation through building additions over more informal uses" and would not maintain, protect or enhance the open spaces of

Wellington City, a fundamental objective of the District Plan. Like the officer, they also found the proposal inconsistent with the Management Plan and, they added, the Trust Deed.

[8] Wellington Badminton appealed to the Environment Court. Negotiations ensued and a revised proposal was agreed which the Council supported. Although not explained in any detail to me, the revised proposal would reduce the size and change the layout of the proposed additions to Badminton Hall. Thus the appeal to the Environment Court became, in effect, a hearing for a resource consent for that revised proposal. AfE participated in the Environment Court hearing as a s 247 party. AfE opposed Wellington Badminton's appeal.

The Environment Court decision

[9] In the Environment Court the planning witnesses for AfE, the Council, and Wellington Badminton agreed that the modified proposal was acceptable in respect of all matters, other than the actual and potential adverse effects upon heritage, open space, town belt, recreation and landscape values. More specifically, AfE opposed Wellington Badminton's application on the basis of a detailed set of five issues, all of which addressed those matters by reference to relevant provisions of the District Plan, the Management Plan and other documents relating to the Town Belt. AfE's arguments before the Environment Court, as on this appeal, focus in particular on the Trust Deed, the Management Plan and relevant reserves legislation, as those documents provide for the Town Belt to be, or to be predominantly, open space and which limit the type and extent of the buildings that are allowed on the Town Belt.

[10] The Environment Court structured its decision to reflect the requirements of s 104(1) of the Resource Management Act 1991 ("the RMA"). Thus the Court identified and considered relevant provisions of the District Plan, the Management Plan and the Trust Deed. There is no suggestion that the Court overlooked, as opposed to misunderstood, any relevant provision of those documents. The Court used the issues that had been identified by AfE as a framework for its analysis. In doing so, and as a discrete part of its judgment, it considered under the heading "The terms of ownership of the Land", what it understood to be meant by the central trust upon which the Town Belt is held by the Council: namely for use as a public

recreation ground. In terms of the arguments it had heard from AfE, it recorded that the Trust Deed made no mention of a prohibition of, or indeed any restriction at all upon, buildings on the Town Belt. It noted that in the case *Solicitor-General (ex Rel Wilson) v Mayor Councillors and Citizens of Wellington* the Court's view was that the statute and the Trust Deed did not require the whole of the Town Belt to be available for recreational purposes.[2] By the Court's assessment, the point was the Council retained a discretion to direct differing uses of different parts of the Town Belt. This was reflected in the phrase used in the Trust Deed providing that the Town Belt was to be "used as a public Recreation Ground *in such manner as in and by rules and regulations to be from time to time made in that behalf by the corporation shall be prescribed in directors*". In a central part of its reasoning, which AfE now challenges, the Environment Court concluded:[3]

> ... So, a *recreation ground* is an area of land on which enjoyable leisure activities can be pursued. We see no reason to confine those activities to those which can only be pursued outdoors, particularly when the 1873 Deed gives the Council the ability to prescribe and direct how the land is to be used.
>
> Nor are we at all convinced by the argument that the construction of a building for a particular recreational use that excludes passive or other uses, must be contrary to the Deed. The point was made in cross-examination of Mr David Armour, the planning witness for AfE, that the provision of any facilities to enable a particular sport to be played will almost certainly exclude other sports and activities from that spot. One cannot, for instance, play rugby on netball courts, or enjoy a leisurely walk with a dog across a field on which a game of hockey is being played. The short answer to that point is that there is room for many recreational choices to be pursued, and the separation of incompatible choices is the simple and common-sense use of a public resource.
>
> In the context of the 21st century, the primary *rules and regulations* governing the use of the Town Belt will be found, as one might expect, in the District Plan made under the RMA, and a management plan made under the Reserves Act.

[11] In response to AfE's very specific argument that, as a matter of law, the use of Town Belt land in the manner proposed by AfE would be in breach of the Trust Deed, the Environment Court concluded:[4]

> It is our clear view that this is a question of the ownership of the land, and the rights and restrictions attaching to that ownership. No matter how it might be presented, to delve into and decide issues such as that in this case

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2 *Solicitor-General (ex Rel Wilson) v Mayor Councillors and Citizens of Wellington* (1902) 21 NZLR 1.

3 At [28] – [30]

4 At [43.7].

would require a Court to, at the least, decide upon the correct interpretation of a chain of statutes and then analyse the extent of the Council's powers and rights as the trustee owner of the Town Belt land to authorise the construction of buildings on it. That has nothing to do with the purpose and principles of the Resource Management Act, and would not, in any event, be within the jurisdiction of this Court to resolve.

[12] There was, the Environment Court correctly noted, no requirement that an applicant for a land use resource consent own the land in question, or even be able to demonstrate a right to use it. Therefore, that there might be a restriction having its legal foundation outside the RMA on the type of building that the Council could erect, or authorise to be erected, on the land in question could not be a prohibition on an application for a grant of resource consent.

AfE's appeal

[13] As argued, AfE advanced its appeal by reference to eight separate errors of law organised under three headings:

A. The Construction of the [Trust Deed] and Related Legislation

1. The Court misinterpreted the [Trust Deed] by failing to give primacy to the trust objective in the Inner Town Belt being held as a "public recreation ground".

2. The Court misinterpreted the Wellington (City) Town Belt Act 1908, which, on its proper construction, retained the trust contained in the [Trust Deed] that the land be used for a "public recreation ground".

3. The Court applied an old Supreme Court decision, *Solicitor-General, ex rel Wilson, v Mayor etc of Wellington* (Full Supreme Court), which was wrongly decided.[5]

4. The Court failed to consider a relevant factor, namely, the actual submissions of the present appellant on the meaning of "public recreation ground".

B. The Effect of the [Trust Deed] and Related Legislation as Correctly Interpreted

5. The Court erred in law when holding that to grant consent was not repugnant to the law, namely the lawful use of the Inner Town Belt.

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5 *Solicitor-General, Ex rel Wilson, v Mayor, Councillors, and Citizens of City of Wellington* (1902) 21 NZLR 1.

6. The Court failed to consider a relevant factor, namely, the actual submissions of the present appellant on the effect of the lawful use of the Inner Town Belt on granting resource consents.

C. Other Matters

7. The Court misconstrued the meaning of "site" in the Resource Management Act 1991, when it held that "the recreational potential of this site is, realistically, the potential for playing and watching badminton".

8. The Court failed to apply the High Court decision in *Stirling v Christchurch City Council* correctly, and, in purporting to apply the decision, found a fact which was contrary to the evidence.[6]

The nature of this appeal

[14] This is an appeal under s 299 of the RMA on a question of law. The approach on appeal is:

(a) The High Court review should not scrutinise the merits of the case under the guise of a question of law;[7]

(b) The question of weight to be given to the assessment of relevant considerations is for the Environment Court alone, and not for reconsideration by the appellate court as a point of law;[8]

(c) A reviewable question of law includes:[9]

(i) Whether the Environment Court has applied a wrong legal test;

(ii) Whether the Environment Court has come to a conclusion without evidence or one which on the evidence could not reasonably have been reached;

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6 *Stirling v Christchurch City Council* HC Christchurch CIV-2010-409-2892, 19 September 2011.

7 *Sean Investments v Mackellar* (1981) 38 ALR 36.

8 *Hunt v Auckland City Council* [1996] NZRMA 49 (HC); *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

9 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145, 153 (HC) and *West Coast Regional Council Abattoir Co Ltd v Westland County Council* (1983) 9 NZPTA 289 (HC), as cited in *Stark v Auckland Regional Council* [1994] 3 NZLR 614 (HC) at 617.

(iii) Whether the Environment Court has taken into account matters that should not have been taken into account; or has failed to take into account matters which should have been considered.

(d) Any error of law identified must have materially affected the Environment Court's determination.[10] Where such an error is found, the usual practice is to remit the case for further consideration.

(e) In reviewing these matters, the Environment Court ought to be given some latitude in reaching findings of fact within its areas of expertise.[11] The role of this Court is not to delve into questions of planning and resource management policy, but rather to ensure that the statute, the district plan and the regional plan have been correctly interpreted and applied.[12]

[15] Effectively, AfE's first six grounds say that the Environment Court erred in the way it interpreted the phrase "public recreation ground" as not excluding the extension of the Badminton Hall facilities because they provide for indoor, and not outdoor, recreation. In terms of the grounds upon which a decision of the Environment Court may be appealed, the Environment Court's alleged error can be categorised as it having misunderstood in a fundamental way the significance and status of the Town Belt and therefore having failed to take that significance and status, a relevant matter, into account.

The positions of the parties

AfE

[16] For AfE, Mr Taylor's principal argument was that all use of the Town Belt was subject to the core trust of the Trust Deed, that it be used as a "public recreation ground". By AfE's interpretation, that was an area open to the public to be used for outdoor recreation. Mr Taylor based that proposition on a detailed analysis of the

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10 *Smith v Takapuna* (1988) 13 NZPTA 156 (HC).

11 *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349 (HC) at 353.

12 *Stark v Auckland Regional Council* [1994] 3 NZLR 614 (HC) at 617.

history of the Town Belt, and the various statutory instruments that had applied to it over time.

[17] The origins of the Town Belt date back to instructions given by the New Zealand Company to its Surveyor-General, prior to his departure on 1 August 1839 on the *Tory* for the Cook Strait area. Those instructions include a reference to separating the town from the surrounding area by a broad belt of land to be held as public property on the condition that "no buildings ever be erected upon it". It is clear that those original instructions did not constitute a trust. To the extent that AfE had argued in the Environment Court that the reference to no buildings being constructed upon the Town Belt was now part of the trusts that governed its use, Mr Taylor rightly did not pursue that argument before me. Mr Taylor also based his arguments on a very detailed analysis of the range of reserves and similar legislation that had been in force over time. He initially argued, by reference to s 5(2) of the Wellington (City) Town Belt Reserves Act 1908 (a private Act still in force) that in some way all that previous legislation remained potentially relevant to what might constitute a lawful use today of the Town Belt. Thus, to the extent that building might be allowed on the Town Belt, it was limited by the provisions of the (now repealed) Public Reserves and Domains Act 1908. But, again sensibly in my view, Mr Taylor did not pursue that argument.

[18] Rather, he based his argument on the description in the Trust Deed of the Town Belt use as being that of a public recreation ground. The overriding purpose was, therefore, that the Town Belt was to be available as an open space to all the citizens for their recreation. To the extent that areas of the Town Belt could be divided off, those areas were to be used for outdoor recreation. Buildings associated with those outdoor uses, such as gymnasiums, grandstands and pavilions, were permitted. The class of permitted buildings did not extend to buildings of the type of Badminton Hall. That was a facility for the indoor recreation of badminton, a sport which could not – generally speaking – be played outdoors.

[19] Thus, when the Environment Court had considered relevant provisions of the District Plan, as those referred to the Trust Deed, the Management Plan and other relevant documents, the Environment Court had erred: it had failed to properly

understand what was the dominant purpose of the trust of the Town Belt and therefore had failed to properly consider those matters.

[20] As regards the other, more specific, points on appeal:

(a) When assessing the impact of the proposal on the site, the Council had wrongly limited its consideration to the current subdivided title on which Badminton Hall sits. Rather, what was required was an assessment of the larger site comprising the Mt Victoria and associated areas of the Town Belt, of which the Ruahine site of Badminton Hall was but a part.

(b) In considering the issues of precedent, the Council had failed to apply the *Stirling* decision correctly. Moreover, it had misconstrued the evidence before it of the precedential significance of its decision as regards Badminton Hall.

The Council

[21] The Council's position was that the question of "lawful use" was not one for the Environment Court under the RMA. The RMA was a code governing the consenting of activities and matters that could and could not be taken into account when granting consent to an activity. The lawfulness of an activity under another statute or document, such as the Trust Deed, was not a matter to be considered under the RMA. There was no requirement that an applicant for a resource consent own the land in question, or even be able to demonstrate the right to use it. That proposition had been accepted in a number of decisions. The Trust Deed, the Management Plan and the various statutory instruments referred to by AfE in its arguments were not, themselves, planning documents and nor had they been integrated into the District Plan. To the extent that they required consideration by the Environment Court, the Environment Court had properly considered them. The question of whether or not the Council could lawfully agree, as a matter of land use, to the extension to Badminton Hall was a separate question which could be determined when, and if, the Badminton Association chose to implement its consent, which it had five years to do.

[22] In any event, such a lease of a building such as Badminton Hall, including as extended pursuant to the challenged consent, was allowed by, if nothing else, the proviso to s 54 of the Reserves Act 1977 which reads:

> Provided that a lease granted by the administering body may, with the prior consent of the Minister given on the ground that he considers it to be in the public interest, permit the erection of buildings and structures for sports, games, or public recreation not directly associated with outdoor recreation.

Wellington Badminton

[23] For Wellington Badminton, Mr Anastasiou supported the Council's position. In doing so, he emphasised the structure for decision making provided by the RMA and, within that, the hierarchy of considerations set out in s 104. He was firmly of the view that the question of the lawfulness of the possible lease was not for the Environment Court under the RMA, and therefore neither for this Court on appeal. What the Environment Court was required to consider were environmental and resource management matters as reflected in the provision of s 104. Section 104 established a code by which decisions on resource consents were to be made. In any event, and as the Council had submitted, if the Court thought it necessary to consider the question of lawful use, then the use of a small area of Town Belt land for recreation purposes as provided by Badminton Hall was clearly within the spirit and intendment of the Trust Deed. To conclude otherwise would be to reach an artificially narrow and constrained interpretation of that document.

Analysis

[24] As both the Council and Wellington Badminton argued, the RMA, and in particular s 104, provide a code for the consideration of applications for resource consents.[13] Section 104, as enumerated in subsections (a), (b) and (c), sets out the matters which, here, the Environment Court was to have regard to. The general lawfulness of a proposed activity is not a matter referred to in s 104. Moreover, and as the Council and Wellington Badminton submitted, there is also clear authority that questions relating to the right to use land in a particular way, as a matter of private property rights, are not issues which are properly the concern of the Environment

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[13] *Springs Promotion Limited v Springs Stadium Residents Association Inc* [2006] NZRMA 101 (HC) at [61].

Court. As noted by the Environment Court in *Director-General of Conservation & Others v Marlborough District Council*:[14]

> Disputes about private property rights are outside the Environment Court's jurisdiction and are not generally considered in determining a resource application.

[25] The Court of Appeal in *MacLaurin v Hexton Holdings Limited* has held that consent authorities are concerned with the effects of proposed activities, and not the nature of the applicant's legal rights or interests in the particular land.[15]

[26] *Auckland Volcanic Cones Society Inc v Transit NZ Limited* is authority of similar effect.[16]

[27] The provisions of s 104(3)(c), which set out that resource consents may not be granted contrary to certain sections of the RMA itself, any Order in Council in force under s 152 of the RMA, any regulations under the RMA and any Gazette notice referred to in certain provisions of the Foreshore and Seabed Act 2004, provide further support for that interpretation.

[28] The District Plan itself emphasises, at several places, the fact that not only will resource consents be needed for use of Open Space Land, but that permission to use publicly owned land may also be required from the Council as administering authority. At s 16.1, the following text appears:

> Activities and uses on publicly owned land are required to obtain permission (such as a lease or a licence) from the Council as the administering authority. This is in addition to any requirements under the District Plan the Resource Management Act 1991. Council, as steward of much of the City's open space, is working to ensure Wellington retains the asset of its open space. All activities will also have regard to any relevant management plans and legislation (for example the Wellington Town Belt Management Plan, the Town Belt Deed and also the Reserves Act 1977).

[29] Similar text also appears in other sections, for example as a marginal reference alongside the explanation that relates to Permitted Activities allowed by

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14 *Director-General of Conservation & Others v Marlborough District Council* [2010] NZEnvC 403 at [32].

15 *MacLaurin v Hexton Holdings Limited* [2008] NZCA 570.

16 *Auckland Volcanic Cones Society Inc v Transit NZ Limited* [2003] NZRMA 54 (EnvC).

the open space rules in s 17 of the District Plan. In my view, the position is, therefore, very clear.

[30] At the same time, and as the Environment Court itself recognised, it was required to have regard to "the special status" of the Town Belt when making its decision. Therefore I think it must follow, as AfE argued, that if the Environment Court materially misunderstood that special status then it would fail to have regard to it, and would have erred in law, both as regards that misinterpretation and the need to have regard to a relevant matter.

[31] The question really becomes, therefore, whether in the District Plan, as it incorporates or refers to the Trust Deed and the Management Plan, the special status of the Town Belt reflects the essential element that AfE argues for, namely that buildings such as Badminton Hall are, because they provide for essentially internal recreational activities, not permitted.

[32] A review of the District Plan, and in turn the Trust Deed and the Management Plan as referred to in the District Plan, in my view make it clear that that is not the case, and that therefore the Environment Court did not err in the manner AfE argued.

[33] The relevant provisions of the District Plan are found in Part 16, "Open Space" and Part 17, "Open Space Rules".

[34] In the Introduction to Part 16, found at 16.1, the open space areas of the City are first described in the following terms:

> Open space covers a large proportion of the City. It encompasses a wide variety of environments from coastal habitats to mountain tops and from bush covered areas to playing fields, and includes areas such as parks and reserves that are available to the public for recreational use, both passive and active. Private and publicly owned land is included.

[35] Reference is then made to the [Inner] Town Belt[17] being administered under the terms of the Trust Deed and Management Plan, whilst most other land held for recreation purposes has reserve status under the Reserves Act 1977. The

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[17] The District Plan refers to the Town Belt as the Inner Town Belt by reference to the Council's efforts to create an Outer Town Belt. In this judgment, I have used the commonly known phrase "the Town Belt", and transposed references in the Plan accordingly.

Introduction describes open space as characterised by the fact that it has few buildings and can therefore be enjoyed and experienced as a visual distinction between built and unbuilt areas. It can also be used for a variety of activities from which people experience enjoyment for different reasons. The Introduction then explains that three broad distinctions have been made to facilitate the management of activities that can adversely impact on open spaces. Those distinctions are Open Space A (Recreation Facilities); Open Space B (Natural Environment) and Open Space C (Town Belt). As can be seen already, therefore, the Town Belt is part of a broader area of land that is seen as having both visual amenity and recreational use characteristics which contribute to its special status.

[36] In 16.4 the Open Space C designation is expressed in the following way:

> The Town Belt is valued for its historic, social and cultural importance. The Wellington City Council acts as trustee of the Town Belt, for and on behalf of the people of Wellington. The Town Belt is zoned as Open Space C and identified on the Planning Maps. In addition to the District Plan requirements, the Town Belt is administered under the terms of its own deed and also the Wellington Town Belt Management Plan.

[37] Objective 16.5.1 requires the Council, to maintain, protect and enhance the open spaces of Wellington City. In terms of that general objective, explanatory text in the District Plan at 16.5.1.1 notes that recreation space often has multiple functions. An area may be used as a sports field and also be viewed as part of the landscape. To avoid the reduction of open space quality in general Council will continue to assess proposed recreational structures and buildings in order to determine if they can be located on areas other than open space. Accessibility to the City's open space is also an important part of their management. The Council's aim is to ensure that everyone has equitable access to sports fields, reserves and other open spaces. A number of policies are articulated to give effect to that general objective. Of specific relevance to use of the Town Belt are the following policies:

(a) 16.5.1.2: Recognise the special status of the Town Belt as public recreation land held in trust by the Council under the Town Belt Deed 1873 and identify that land on the District Plan Maps.

(b) 16.5.1.3: Manage the impact of activities in the Town Belt in order to protect and preserve its special qualities for the benefit of future generations.

[38] The District Plan then incorporates a heading "Methods", under which reference is made to Rules, Planning Maps and other mechanisms, namely the Management Plan and the Trust Deed. The following text then appears:

> *The Town Belt provides a backdrop to the inner city and provides for a wide range of activities and recreational pursuits. It is a significant part of Wellington's heritage. Council aims, where practical, to add land that was alienated from the original land area or that adds to the Town Belt's visual continuity. All activities on the Town Belt are undertaken in accordance with the Wellington Town Belt Management Plan, the Town Belt Deed and the Reserves Act 1977. Separate approval may be required under these documents in addition to the District Plan requirements.*
>
> *The environmental result will be the retention of the open space character of the Town Belt.*

[39] Perhaps somewhat repetitively, objective 16.5.1.4 provides that the Council must:

> Recognise the special status of Wellington's Town Belt and manage the impacts of activities in order to protect and manage its special qualities for the benefit of future generations.

[40] Thus far the special status of the Town Belt can be seen as reflecting the Town Belt's open space characteristics, the visual amenity that provides along with provision of a "wide range of activities and recreational pursuits". Moreover, the Town Belt is managed not only in accordance with the District Plan, but also the Trust Deed and the Management Plan. Separate approval may be required under these documents in addition to the District Plan requirements.

[41] Section 17 of the District Plan sets out the rules that apply to activities, permitted and otherwise, within the open space areas. Under the general provisions of the District Plan, activities fall into four categories, defined as follows:

(a) Permitted.

(b) Controlled.

(c) Discretionary (Restricted).

(d) Discretionary (Unrestricted).

[42] Broadly speaking, the rule types are listed in order of increasing actual or potential adverse effects. Resource consents (land use consents or subdivision consents) are not required for Permitted Activities but are required for all others. Discretionary Activities have been divided into those where Council has chosen to restrict the exercise of its discretion to certain matters, and those where there is no restriction on the exercise of Council's discretion: these are identified in the Plan as Discretionary Activities (Restricted), and Discretionary Activities (Unrestricted). Where rules in the Plan are contravened, applications will be deemed to be Non-complying.

[43] My understanding is, therefore, that the category of Discretionary Activity (Unrestricted) gives the Council the greatest discretion to make decisions designed to protect the environment from possible harm.

[44] As relevant for these purposes, the construction (etc) of buildings of less than 30 square metres in floor area and less than four metres in height for recreation purposes is a Permitted Activity in Open Space C. The construction (etc) of other buildings in Open Space C is a Discretionary Activity (Unrestricted).

[45] Included in the criteria to be considered in determining whether to grant consent are:

17.3.2.1 Whether the structure is designed and located so as to be visually unobtrusive.

17.3.2.3 The extent that buildings and structures within identified ridgelines and hilltops are sited and designed in ways that avoid visually obtrusive development by:

...

17.3.2.3 Whether the structure is needed for the public enjoyment of the site's recreational potential.

17.3.2.4 Whether the site's open space character is maintained.

17.3.2.5 Any relevant provisions of:

- Reserves Act 1977 and any amendments to that Act

- Queen Elizabeth II National Trust Act 1977 and any amendments to that Act
- any management plan prepared for the site e.g. Belmont Regional Park Management Plan and the Wellington Town Belt Management Plan
- the Town Belt Deed 1873.

17.3.2.6 Whether established public access or the possibility of such access is maintained.

[46] The following commentary appears immediately after those assessment criteria:

> *In general, structures in Open Space B or Open Space C are viewed unfavourably unless there is a need for public facilities that cannot reasonably be satisfied by using other land. Council will pay particular attention to this point in decisions on the use of Town Belt land. Any new building works will also be governed by the provisions of any relevant management plans (for example the Wellington Town Belt Management Plan).*

[47] Just as with the objectives and policies found in s 16, the rules in s 17 do not express a prohibition on the erection of buildings on Town Belt land in the terms argued for by Mr Taylor. Rather, they reflect the fact that the use of Town Belt land has, over time, involved the erection of buildings. The explanatory commentary just referred to, and the reference to "structures on Open Space B or Open Space C land being viewed unfavourably unless there is a need for public facilities that cannot reasonably be satisfied by using other land" reflects a policy that would restrict buildings, but not eliminate them. AfE's "not for indoor recreational use" criteria simply does not appear.

[48] Another feature of this part of the District Plan can also be observed: that is, and as relevant, the Management Plan and the Trust Deed are both matters to be considered when consents are considered, but are also considerations which will, outside the District Plan processes themselves, govern the use of the Town Belt.

[49] So the question now becomes whether the Management Plan and the Trust Deed, as relevant in considering whether the consent should have been granted, reflect the prohibition as argued for by Mr Taylor. It is therefore appropriate to refer

to those documents themselves. The Environment Court described its approach to those documents in this way:[18]

> The Wellington Town Belt Management Plan (WTBMP) is not a statutory document and cannot be given, of itself, as much weight as such a document. Nevertheless, it is referred to in the Assessment Criteria (17.3.2.5) and is to be given its place accordingly, as should the Town Belt Deed of 1873, to be mentioned shortly.

[50] In that context, Mr Anastasiou for Wellington Badminton referred to the Environment Court's decision in *Intercontinental Hotel v Wellington Regional Council*, by reference to which Mr Anastasiou argued that the Management Plan and the Trust Deed should have been considered more properly as "other matters" under s 104(1)(c) of the RMA, rather than as the Environment Court did when considering the District Plan itself under s 104(1)(b)(iv).[19] As I read the *Intercontinental Hotel* decision, the Environment Court took that approach because, in that case, there was clear evidence that submitters on the relevant provisions of the District Plan were not allowed to submit on the external document, the Waterfront Framework, that was at issue. There was no evidence before me that the position was the same as regards these District Plan references to the Trust Deed and the Management Plan. But, even if they were, I do not think the Environment Court erred in the approach it took. In my view the issue, on this appeal, is as I have set it out at [15].

[51] Against that background, I refer first to the terms of the Trust Deed. There are, by my assessment, two key features to the Trust Deed. The first is the clear trust upon which the Council holds the Town Belt, that is on trust as "a public Recreation ground". Secondly, the Trust Deed provides a restricted power to lease Town Belt land, namely that no such lease shall be for a term exceeding 42 years. There is no express restriction in the Trust Deed on the erection of buildings on the public Recreation Grounds. Nor, in my view, does the phrase "public Recreation ground" import such a restriction or, more accurately in terms of Mr Taylor's argument for AfE, the restriction that is here argued for.

[52] The Management Plan, as I have already noted, reflects the history of use of Town Belt land for recreation and other purposes. It notes that the Reserves Act

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18 At [20].

19 *Intercontinental Hotel v Wellington Regional Council* ENC Wellington W015/08, 14 March 2008.

1977 applies generally to the Town Belt, where its provisions are consistent with the Trust Deed, but that overall the Trust Deed prevails. The Trust Deed is described as being "a simple self-contained code which provides for the use, maintenance, protection and preservation of the reserve". In a section described as "Aims and Objectives", the overall aim is described as being to manage the Town Belt in accordance with the intent of the Trust Deed, namely as land to be kept for ever as a public recreation ground for the inhabitants of the City of Wellington, and to manage the Town Belt sustainably. That aim is then explained in the following terms:

> By way of explanation the term 'recreation' is defined in its broadest sense, but recognises the emphasis in outdoor recreation because of the original instruction from the New Zealand Company Secretary to set aside land that "no buildings be ever erected upon it." Recreation refers not just to the active and passive pastimes of organised team sport, casual individual pursuits such as walking, running and picnicking, but also to the emotional and spiritual benefits of having the green space of the Town Belt close and visible to a large part of Wellington's community.
>
> The term 'public' means the absence of private ownership and affirms the need to preserve free access to the land, and to make this apparent in the treatment of the boundaries so that people can easily understand and interpret their collective ownership.

[53] A range of objectives, under the headings "Public Recreation", "Conservation and Land Management", "Administration" and "Interpretation" are set out, no doubt as some form of guiding policy. Included in these objectives are the following:

(a) to maintain and enhance the public recreation qualities of the Town Belt for the people of Wellington;

(b) to allow as wide a range of appropriate and sustainable recreational activities as possible on the Town Belt, with an emphasis on outdoor, informal public recreation;

(c) to ensure that there will be no additional land area developed for organised recreational facilities (formal recreation) on the Town Belt but to encourage shared use of these existing facilities;

(d) to promote the public recreational use of the Town Belt through the use of interpretive signs, access ways and the dissemination of

information on the recreational opportunities available within the Town Belt.

[54] Perhaps the strongest support for Mr Taylor's argument is the policy that there should be no additional land developed for organised recreational facilities (formal recreation). This is, however, a policy, and not a legal constraint. Moreover, it comes within a document that accepts the term recreation in the Trust Deed as defined in its broadest sense, whilst emphasising outdoor recreation. The following description of policies applying to leases for non-utility purposes, as is the type of lease pursuant to which the Badminton Association occupies Badminton Hall, confirms that interpretation:[20]

> *Policies*
>
> *The following policies apply to non-utility leases.*
>
> 1. *Future leases*[21] *of Town Belt land and facilities shall only be made where the activity undertaken by the organisation applying for the lease is consistent with the objectives of this management plan and, as such, complies with the following:*
>
>   *(i) The activity is primarily concerned with public recreation. Preference will be given to outdoor recreation, either active or passive.*
>
>   *(ii) The activity is open for public participation. Clubs will be encouraged to allow casual play on their facilities or, at least, that their membership shall be open to all members of the public.*
>
>   *(iii) The occupation by the lessee will not restrict public access across the land except during times of active use. Where existing clubs or community groups, by their very specialised nature, cannot permit this (for example, croquet or bowling greens) their tenancy will be allowed to continue until they wish to relinquish their lease.*
>
>   *(iv) The activity will not be detrimental to any of the other values of the Town Belt protected under this management plan.*
>
> The only exception to these conditions shall be where leases are required to remedy existing encroachments (see section on Encroachments by Occupation, page 18), or where leases are granted for utilities (see section on Utilities, this page).

[55] Again, I note the reference to preference being given to outdoor recreation and allowing the continuance of specialised activities which by their very nature do

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20 Wellington Town Belt Management Plan, General Provisions at 21.

21 'Future leases' means both renewal of existing leases or the granting of new leases to organisations who are not currently lessees.

not permit public access across the underlying Town Belt land. By my assessment, therefore, and as referred to in the District Plan, the Management Plan does not by itself or in combination with other relevant documents provide a prohibition on the erection of buildings on Town Belt land for, as described by AfE, indoor recreational use.

[56] The final matters to refer to are relevant statutory provisions. The District Plan refers to the Reserves Act 1977. Also of relevance is the Wellington (City) Town Belt Reserves Act 1908, and earlier reserves legislation as it applied from time to time.

[57] An important element of AfE's argument was based on the provisions of the Public Reserves and Domains Act 1908, which are today reflected in the Reserves Act 1977. The provisions in question explicitly provide for the erection of certain buildings on recreation ground reserves. Under the Town Belt Act 1908, the Council was given the powers of the Governor under ss 33, 34 and 38 of the Public Reserves and Domains Act 1908. Those are powers:

(a) to lay out, enclose and plant such lands "and build any lodge, museum, or other ornamental building thereon" (s 33(a));

(b) to lease such lands for a period not in excess of 21 years (s 34); and

(c) to make bylaws relating to such lands (s 38).

[58] The Public Reserves and Domains Act 1908 also provides directly that trustees having control of reserves set apart as a recreation ground may erect or authorise any person to erect on some portion of that reserve buildings for ornamental purposes, or a stand or pavilion.

[59] Similar provisions are to be found today in the Reserves Act 1977. Section 53(g) provides as follows:

> Erect on some portion of the reserve stands, pavilions, gymnasiums, or other buildings and structures associated with and necessary for the use of the reserve for outdoor recreation, and (subject to paragraphs (d) and (e) of this subsection as to the number of days on which a charge may be made for admission to any such building or structure) may fix reasonable charges for the use of and

> generally regulate the use and custody of and admission to any such buildings or structures:
>
> Provided that where the Minister considers it to be in the public interest, the administering body may, with the prior consent of the Minister, erect buildings and structures for public recreation and enjoyment not directly associated with outdoor recreation:

[60] The argument for AfE was that the use of the words "stands, pavilions, gymnasiums and other ornamental buildings" in earlier legislation counted against the Council having the power to provide for the erection of a building such as Badminton Hall. Such a building does not come within the permitted types of buildings, as those are buildings directly associated with the use of Town Belt land for outdoor recreational purposes. That had been made clear by s 53(g), with the specific reference to such buildings and structures as were "associated with and necessary for the use of the reserve for outdoor recreation".

[61] I acknowledge there would appear be something in that argument as a matter of interpretation. However, I think at that level of detail those provisions are outside the proper scope of the Environment Court's matters for consideration under the RMA, as they are very clearly land use constraints found in legislation other than the RMA. Moreover, and as the Council fairly pointed out, at the end of the day and if that argument is right, the Council may pursuant to the proviso approach the Minister for his consent to erect "buildings and structures for public recreation and enjoyment not directly associated with outdoor recreation".

[62] The extent to which those provisions of the Reserves Act reflect restrictions on the Council's ability to erect or authorise the erection of buildings on the Town Belt is, I think, the issue which will need to be confronted if and when Wellington Badminton proceed to action their resource consent, and the Council must decide as landowner whether it will give Wellington Badminton the necessary permission as lessee to do so. But, in my view, and as reflected in many ways throughout the District Plan, that is not a matter under the District Plan itself, but for the Council to consider as trustee landowner. On that basis, I say no more about it.

[63] In that context, I do observe that I think the Environment Court may have read the decision in *Solicitor-General ex rel Wilson v Mayor Councillors and*

Citizens of Wellington as giving the Council greater discretion when it comes to leasing Town Belt land than I consider was appropriate.[22] In my view, however, that was not a material error by the Environment Court.

[64] I therefore conclude that AfE has not established the core contention it argued for, namely that in terms of the core trust of the Trust Deed the Council was to hold the Town Belt as a public Recreation ground forever for the benefit of the citizens of the City of Wellington, the Council may not arrange or authorise the erection of buildings, such as Badminton Hall, which are associated with essentially indoor recreational activities. I think that is sufficient to dismiss this appeal.

[65] Having said that, I now refer to the two more specific arguments that were made.

[66] AfE argued that the Environment Court had misconstrued the meaning of "site" when it held that the "recreational potential of this site is, realistically the potential for playing and watching badminton". AfE argued that the site in question was properly to be regarded as the some 36 hectares of surrounding land. As the Council pointed out, site is defined in the District Plan relevantly as an area of land comprised wholly in one Certificate of Title. Badminton Hall is in fact located on its own title. This is separate from the wider title of the surrounding land. On that basis, I do not think the Environment Court erred in the way it interpreted the meaning of site.

[67] Finally, AfE submitted that the Environment Court failed to apply *Stirling v Christchurch City Council* on the question of precedent.[23] It did so because, erroneously AfE said, the Court had concluded that there was no evidence of a queue of waiting applications. I accept the Council's submissions on this point. There is no queue of waiting applications. All the relevant evidence indicated was that at some point in the future other users of indoor covered court facilities might approach the Council to extend their facilities in a similar way.

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22 *Solicitor-General (ex Rel Wilson) v Mayor Councillors and Citizens of Wellington* (1902) 21 NZLR 1.

23 *Stirling v Christchurch City Council* HC Christchurch CIV-2010-409-2892, 19 September 2011.

[68] I add that even if the Environment Court had made some error in those aspects of its decision, I would not regard them as being sufficiently material to uphold AfE's appeal.

[69] I therefore dismiss AfE's appeal against the decision of the Environment Court. I reserve the question of costs. If the parties are unable to resolve that matter, submissions may be filed within one month of this judgment. The submissions are not to extend beyond five pages in length for each party.

"Clifford J"

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QUEENSTOWN LAKES DISTRICT COUNCIL

www.qldc.govt.nz

7 October 2016

NZONE Skydive
C/- Jayne Macdonald
Macalister Todd Phillips
PO Box 653
Queenstown 9348

Dear Jayne

COMMERICAL USE OF GLENORCHY AIRSTRIP

The Queenstown Lakes District Council (QLDC) formally adopted the Glenorchy Airstrip Reserves Management Plan (the Management Plan) in August 2016. In accordance with the objectives and policies in the Management Plan, QLDC is now seeking to regulate commercial use of the airstrip through leases and/or licences and will be setting landing fees. It has been confirmed that your client NZONE (Skydive) is a commercial operator that uses the airstrip and subsequently they are required to submit an application.

In order for QLDC to undertake an initial assessment of Skydive's operation and the type of agreement that they should have, please provide the following:

Description of activity

Size of company
Numbers of employees
Description of operation
Demonstrated current and historic use of Glenorchy Airstrip including:

- Frequency of flights including time of day and year
- Numbers of take offs and landings
- Types of aircraft
- Approximate flight paths in the vicinity of the airstrip

Please provide records as far back as possible.

Infrastructure

Description of infrastructure or facilities located at Glenorchy Airstrip

- Date that this was installed

Does Skydive park vehicles, aircraft or aviation equipment at the airstrip?

- For what duration/frequency?

Health and Safety

- Status of Health and Safety procedures (eg H&S Plan)
- Does Skydive undertake any refuelling or maintenance of aircraft at the airstrip?

This information will be used to assist QLDC to determine the format of the leases and/or licences and to begin to determine the landing fees. Please note that based on the information we receive we may seek further clarification or details.

We would appreciate if you could respond with the above information by 1st November 2016. Please note submission of this information by this date will meet the requirement in the management plan which states that all applications for commercial operations must be submitted within three months.

Should you have any questions or wish to discuss further my contact details are Jeannie.galavazi@qldc.govt.nz or (03) 450 1757. Please note I work part time on Monday, Tuesday and Thursday.

Yours sincerely

JGalavazi

Jeannie Galavazi
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