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Waikato District Council
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For: Emma Ensor
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Dear Emma

Hearing 17: Te Kowhai Airpark Zone: Submission by Waikato Regional Airport Limited

INTRODUCTION

1. The notified Proposed Waikato District Plan ("PDP") proposes a new zoning and associated provisions for the management of the Te Kowhai Airport and surrounding land, known as the Te Kowhai Airpark Zone ("TKAZ").

2. The Waikato Regional Airport Limited ("WRAL"), which runs the Hamilton Airport, has lodged a submission in opposition to the provisions in the PDP relating to the Te Kowhai Airpark (the "WRAL Submission").

3. The WRAL Submission expressly declares that it "could gain an advantage in trade competition" through the submission.

4. You seek advice as to whether the WRAL Submission satisfies the criteria for a valid submission under clause 6(3) and (4) of Schedule 1 of the Resource Management Act 1991 ("RMA") or whether it must be disregarded on the basis it relates to trade competition or the effects of trade competition.

5. You also seek advice on how you should address the WRAL Submission in your section 42A report.

EXECUTIVE SUMMARY

6. Pursuant to clause 6(4) of Schedule 1 to the RMA, the WRAL Submission can only be considered by the hearing panel if WRAL is directly affected by an effect of the Te Kowhai Airpark plan provisions that adversely affects the environment; and does not relate to trade competition or the effects of trade competition.

7. The plan provisions seek to modify the obstacle limitation surface at the Te Kowhai Airport which could increase the existing flight operations. The relevant effect raised in the WRAL Submission is the safety concerns as a result of increased aeronautical activity in close proximity to the Hamilton Airport.

8. Safety effects are a legitimate effect on the environment under the RMA.

9. We consider WRAL, as the airport authority responsible for operating and managing the Hamilton Airport, is likely to be "directly affected" by the increased risks to safety. However, based on the information in the submission, we cannot be certain.

10. We consider it is at least arguable that the safety effects relate to trade competition as the operators of both airports are in the business of attracting recreational flyers. If the evidence establishes that they are trade competitors, the safety effects must be "significant" before they can properly be regarded as being beyond the effects ordinarily associated with trade competition.

11. Based on the information in the submissions by WRAL and the operator of the Te Kowhai Airport, there is insufficient information for you to make a recommendation in your section 42A report as to whether:

    (a) WRAL is "directly affected" by the safety effects raised in its submission; and

    (b) whether the safety effects relate to trade competition and, if so;

    (c) whether the safety effects are sufficiently "significant" to go beyond the effects of trade competition and therefore be properly regarded.

12. Accordingly, your section 42A report must proceed to make a recommendation on the merits of the WRAL Submission (i.e. putting aside the issue of trade competition) as the hearing panel, after hearing the relevant evidence, may determine that WRAL's submission is a valid submission under clause 6(4) which can be taken into account. If the hearing panel finds the WRAL Submission does not satisfy the criteria in clause 6(4), it must be disregarded.

THE LEGAL FRAMEWORK

Clause 6, Schedule 1

13. The ability to make a submission is governed by clause 6(2) Schedule 1 of the RMA. The Resource Management Amendment Act 2009 introduced new clauses 6(3) and 6(4) into Schedule 1 limiting the persons who can make a submission on a proposed plan publicly notified under clause 5. Clauses 6(3) and (4) provide:

> (3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).
>
> (4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed plan… that –
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.

14. Section 308B(3), which was introduced into Part 11A of the RMA, provides that a failure to comply with the limits on submissions set out in Schedule 1 is a contravention of Part 11A of Act. The purpose of Part 11A is to prevent trade competitors frustrating legitimate activities for the purpose of preventing commercial competition.[1]

15. The above provisions mirror section 74(3) RMA which provides that a territorial authority must not have regard to trade competition or the effects of trade competition when preparing or changing a district plan.

WRAL SUBMISSION

16. The WRAL Submission expressly declares that it could gain an advantage in trade competition through the submission.

17. Accordingly, in light of that declaration, pursuant to clause 6(4), WRAL's Submission can only be considered by the hearing panel if:

    (a) it is **directly affected** by an effect of the Te Kowhai Airpark plan provisions; and

    (b) that effect **adversely affects the environment**; and

    (c) **does not relate to trade competition or the effects of trade competition**.

18. All three elements must be met for WRAL's Submission to be valid and not in breach of section 308B(3) RMA.

19. The WRAL Submission is stated to be in "opposition" to Chapter 9.2 (objectives and policies for Te Kowhai Airpark) and Chapter 27 (rules for Te Kowhai Airpark Zone).

20. The relief sought by WRAL is expressed as follows:

> Waikato Regional Airport Limited, as the administrating authority for Hamilton Airport pursuant to the Airport Authorities Act 1966, is supportive of aspects of the proposal that facilitates recreational aviation in the region however object to the proposal due to aeronautical safety considerations.

21. The reasons for the submission are stated in full below:

> Te Kowhai Airfield is situation 10 nautical miles from Hamilton Airport and 5 nautical miles from the edge of the controlled airspace surrounding the Airport.
>
> Activities that have the potential to intensify aeronautical activity to a commercial scale in close proximity to Hamilton Airport and our airspace present a greatly increased threat to users of our airport. Hamilton Airport is New Zealand's second busiest airport. Our view is that modifying the obstacle limitation surface at Te Kowhai to permit traffic at night or under instrument flight rules further compromises safety in contrast to simply increasing the volume of the current types of air traffic known to operate at Te Kowhai by encouraging faster, more high performance aircraft to operate in vicinity of Hamilton Airport, without reference to our Air Traffic Control.

[1] Ministry for the Environment Fact Sheet 2: Trade competition, Representation at Proceedings and Environment Court costs, dated October 2009.

> We have not been provided with the results of any aeronautical safety study that addresses, identifies and proposes any mitigation to increased air traffic in proximity to the airspace and approach paths flown by scheduled airline traffic at Hamilton Airport. Without presentation of the results of a study to our satisfaction we are unable to support this proposed amendment.

22. As is evident from the submission document, the WRAL Submission is solely concerned about the increased safety risks on the users of the Hamilton Airport as a result of increased aeronautical activity at a commercial scale in close proximity to Hamilton Airport and its airspace.

23. It is logical to first consider the second test in clause 6(4), that being whether the "safety" concerns are an "adverse effect on the environment".

Are "Safety" concerns an adverse effect on the environment?

24. The definition of "effect" in section 3 RMA is broad and includes -

(a) any positive or adverse effects; and
(b) any temporary or permanent effect; and
(c) any past, present or future effect; and
(d) any cumulative effect which arises over time or in combination with any other effects –

regardless of the scale, intensity, duration, or frequency of the effect, and also includes –

(e) any potential effect of high probability; and
(f) any potential effect of low probability which has a high potential impact.

25. The term "environment" is defined in section 2 RMA to include, relevantly:

(a) people and communities;
(b) all natural and physical resources;
(c) amenity values;
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraph (a) to (c) of this definition or which are affected by those matters.

26. An effect on the environment must also be read in light of the purpose of the RMA which is to promote the sustainable management of natural and physical resources.[2] "Sustainable management" in section 5 means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables **people and communities to provide for their social, economic, and cultural well-being and for their health and safety** while…"(emphasis added)

27. The Courts have confirmed in many cases that the health and safety of persons and communities are an adverse effect on the environment within the meaning of the RMA. This will be illustrated by two Court decisions discussed further. Accordingly, the aeronautical safety concerns raised in the WRAL Submission are an adverse effect on the environment, thus satisfying the second element of clause 6(4) in Schedule 1.

[2] Section 5 RMA.

Is WRAL "directly affected" by the safety effects arising from the Te Kowhai Airpark plan provisions?

28. We understand from the section 42A Report for Hearing 17 (section 2.2) that the notified Te Kowhai Airpark provisions will enable flights to operate on an Instrument Flight Rules basis (flights operating in "poor weather conditions"). The existing operative plan provisions only enable flights to operate on a Visual Flight Rules basis ("good weather conditions").

29. It is understood this change (as a result of modifying the obstacle limitation surface) may result in an expansion of existing flight operations at the Te Kowhai Airport. Further, the proposed precinct rule provisions will result in an intensification of the site for activities relating to both aerodrome operations and commercial and residential activities.

30. The WRAL Submission refers to the "greatly increased threat to users of the Hamilton Airport". It does not specify a risk to WRAL per se. Therefore, the issue is whether WRAL, as the administrating authority for the Hamilton Airport, is "directly affected" by increased risk to aeronautical safety as a result of increased flights at Te Kowhai Airport in close to proximity to both the Hamilton Airport (10 nautical miles) and the edge of the controlled airspace surrounding the Hamilton Airport (5 nautical miles).

31. The Environment Court in *Bunnings v Queenstown Lakes District Council*[3] referred to the Concise Oxford Dictionary definition of "directly" as meaning:

> […] adv. 1 without an intermediary or intervening factor […] 2 by a direct route and […].

32. The Court in *Bunnings* went on to state:

> *[53] The use of the term "directly" in section 308B is intended to reduce the set of effects which permits participation by a trade competitor. Obviously "indirect" effects are excluded, and so too would be "consequential effects".*

33. Section 3 of the Airport Authorities Act 1966 ("AAA") empowers an airport authority to establish, operate and manage an airport. An "airport authority" is defined in section 2 AAA to mean the local authority for the time being authorised under section 3 to establish, operate and manage an airport. The shareholders in WRAL consist entirely of local authorities within the Waikato region.[4]

34. It therefore appears that WRAL, as the airport authority responsible for operating and managing the Hamilton Airport, is likely to be directly affected by the increased risks of aeronautical safety as a result of modifying the obstacle limitation surface at Te Kowhai Airport to permit night flying and flying under poor weather conditions which, according to WRAL's submission, is generally undertaken by higher performance aircraft, operating in close proximity to the Hamilton Airport.

35. We have not however undertaken a review of WRAL's statutory functions and responsibilities under the AAA, or for that matter, its obligations under Health and Safety at Work Act 2015

[3] [2018] NZEnvC 15 at para [53].

[4] Being Hamilton City Council (50%), Waikato District Council (15.62%), Waipa District Council (15.62%), Matamata-Piako District Council (15.62%) and Otorohanga District Council (3.12%).

or any other applicable aviation legislation. It is appropriate that WRAL provides evidence at the hearing to demonstrate that it is "directly affected" in terms of clause 6(4). Based on the information in the submission, we cannot form a final view on this point.

Are the safety effects raised in the WRAL Submission related to trade competition or the effects of trade competition?

36. If WRAL's evidence establishes that it is "directly affected" by the increased risk of safety, the remaining question to be determined is whether or not the safety effects relate to trade competition or the effects of trade competition.

37. The RMA does not define "trade competition". The High Court in *Montessori Pre-School Charitable Trust v Waikato District Council*[5] held the general test as to whether trade competition exists between two entities is whether there is a "competitive activity having a commercial element". This test was applied recently by the Environment Court in *Kapiti Coast Airport Holdings v Alpha Corporation Holdings Limited*[6]. That Court also stated that "whether or not an activity is trade competition is something that must be determined on the facts at any given instance".[7]

38. The Supreme Court in *Discount Brands Limited v Westfield (New Zealand) Limited*[8] found that effects may go beyond trade competition however, they must be "significant" before they can properly be regarded as being beyond the effects ordinarily associated with trade competition.

39. The High Court in *General Distributors Limited v Waipa District Council*[9] provides useful commentary on the meaning of trade competition. It said the words "trade competition" are ordinary English words and they should carry their ordinary and common sense meaning. It said that the words "refer succinctly to the rivalrous behaviour which can occur between those involved in commerce"[10].

40. The High Court succinctly summarised the position on trade competition, in the context of sections 104(3)(a) and 74(3). It stated:

> [87] *The Courts have striven to give effect to the statutory prohibition, and to the wider purpose and principles of the Act, by making it clear that it is only trade competition and those effects ordinarily associated with trade competition, which are required to be ignored under s 104(3)(a), and which cannot be had regard to when preparing or changing a district plan under s 74(3).* ***Effects may however go beyond trade competition and become an effect on people and communities****, on their social, economic and cultural wellbeing, on amenity values and on the environment. In such situations the effects can properly be regarded as being more than effects ordinarily associated with trade competition.* (Emphasis added)

[5] [2007] NZRMA 55 at para [19].
[6] [2016] NZRMA 505.
[7] Ibid, para [12].
[8] [2005] 2 NZLR 597 at para [120].
[9] CIV 2008-404-004857, 19 December 2008, Auckland at para [82].
[10] Ibid.

41. We have located two decisions which considered safety considerations in the context of trade competition. Both decisions relate to jet boating on the Kawarau River. In the first decision, *Kawarau Jet Services Holdings Limited v Queenstown Lakes District Council,*[11] the High Court considered a judicial review claim against the Council's decision to grant a non-notified resource consent to Frontier Adventure Tours Limited ("Frontier") to operate four commercial jet boat tours per day on the Kawarau River. The applicant was concerned about the safety issues that would arise as a result of another jet boat company operating on the river.

42. French J acknowledged the safety concerns were within the ambit of the RMA and should not be left to Maritime New Zealand as that body "is not the consent authority and does not operate under the Resource Management Act".[12] He agreed with the applicant that "the Act and the District Plan envisage a thorough investigation into the implications of the proposal in terms of amenity and safety" and that had not been done by the consent authority charged with that responsibility.[13]

43. On the issue of trade competition, French J concluded:

> [59] …I am satisfied there are genuine concerns as to safety and that at least some of the operational effects identified by Kawarau Jet – particularly those relating to its rafting operation – go beyond trade competition effects.

44. The High Court made orders setting aside the resource consent. The application was subsequently notified on Kawarau Jet Services Holdings Limited ("KJSHL") and Council granted two resource consents to Queenstown Water Taxis Limited (the successor to Frontier) ("QWTL") to operate up to four jet boats on the Kawarau River. The second decision concerns procedural applications in the Environment Court arising from KJSHL's appeal: *Kawarau Jet Services Holdings Limited v Queenstown Lakes District Council.*[14] QWTL applied to strike out certain grounds of the appeal and for early commencement to operate one of the resource consents (one–boat consent).

45. The Environment Court identified safety as the primary adverse effect:

> [25] T*he main adverse effects alleged by Kawarau Jet are that QWTL's operations would cause potentially very serious risks to safety and that it would have effects on landscape values, flora and fauna, and the enjoyment by Kawarau Jet's passengers of their experiences on the river.* **Obviously the most fundamental issue will be safety**.
> [Emphasis added]

46. The Court found the appellant and applicant to be trade competitors - they operated the same activity on the same river. However, the Court said there may also be direct and legitimate environmental concerns under the RMA (safety and amenity of existing boat users) which are resolved in the normal way by mitigating adverse affects to the extent appropriate and by weighing all the relevant considerations.[15]

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[11] CIV-2008-425-00518, 9 March 2009, High Court at Invercargill, J French.
[12] Ibid at para [57].
[13] Ibid at para [58].
[14] Decision no. C126/2009, 11 December 2009, Environment Court.
[15] Ibid at para [28].

47. The Court concluded it could not determine without hearing the substantive case whether granting the one-boat consent to QWTL would have adverse effects on safety on other operators' passengers/crew and adverse effects on the environment. Accordingly, both procedural applications by QWTL were declined.

48. We now turn to the issue of whether WRAL's alleged safety concerns relate to a competitive activity having a commercial element or whether they go beyond trade competition effects.

49. The WRAL Submission states that the Hamilton Airport is the second busiest airport in New Zealand, operating on a commercial scale with their main operation air transportation. Hamilton Airport also includes Titanium Airpark, which has leased (developed) and undeveloped business spaces.

50. According to the submission by the owner of the Te Kowhai Airport, NZTE Operations Ltd (submission no. 823), "the airpark is intended to be used solely for people who have an interest in aviation and wish to utilise the Airfield facilities as part of their day-to-day living environment". The submission states "central to the airpark concept is the ability to taxi aircraft from residential or commercial precincts onto the existing runway".

51. In our view, it is at least arguable that the safety effects relate to trade competition being a "competitive activity having a commercial element" as both airports are in the business of attracting recreational flyers for a fee. Further, the proposed planning provisions may result in more of a commercial style operation at the Te Kowhai Airport. However, without further information, we cannot make a finding on this aspect.

52. Notwithstanding this, the case law is clear that even if the evidence establishes that the two airports are in trade competition, that is not fatal for WRAL. The case law demonstrates that if there are significant effects on the safety of people and communities, those effects can properly be considered as being beyond those ordinarily associated with trade competition. On the face of it, the safety concerns raised by WRAL appear significant, particularly as an effect in section 3 includes an effect of low probability but with a high potential impact. That is, even if the risk of an air accident is low, the impact from an accident is high (death or serious injury).

53. In our view, it is likely the safety effects can be properly considered as being beyond the effects ordinarily associated with trade competition however, the submitters (WRAL and NZTE Operations Ltd) will need to address this matter in their evidence.

APPROACH TO WRAL'S SUBMISSION IN YOUR SECTION 42A REPORT

54. Based on the submissions by WRAL and NZTE Operations Ltd, we consider there is insufficient information for you to make a recommendation in your section 42A report as to whether:

    (a) WRAL is "directly affected" by the safety effects raised in its submission; and

    (b) whether the safety effects relate to trade competition and, if so;

    (c) whether the safety effects are sufficiently significant to go beyond the effects of trade competition and therefore be properly regarded.

55. In our view, the hearing panel will not be able to make a determination as to whether the WRAL Submission satisfies the criteria in clause 6(4) to Schedule 1 until it has heard and

considered the evidence and any legal submissions from both WRAL and NZTE Operations Ltd at the hearing.

56. WRAL have requested to be heard at the hearing. You have asked whether WRAL should be allowed to present at the hearing. The answer to that is yes. As the hearing panel may not make a determination on WRAL's submission under clause 6(4) until it issues its final decisions on submissions and further submissions on Hearing 17, WRAL must be given the opportunity to be heard and present its case in support of its submission. Natural justice requires this.

57. Accordingly, your section 42A report should proceed to make a recommendation on the merits of the WRAL Submission (i.e. putting aside the issue of trade competition) as the hearing panel, after hearing all relevant evidence, may determine that WRAL's submission is a valid submission under clause 6(4) which can be taken into account.

58. If you have any questions, please do not hesitate to contact us.

Yours faithfully
TOMPKINS WAKE

Bridget Parham
Partner