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Dear Mike

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Queenstown Airport Corporation Statement of Intent 2019

Summary of advice

- 1 This letter sets out the Council's legal obligations following the Council's decision on 26 August 2019 not to accept the proposed SOI from QAC for 2019, and how we consider the Council should go about carrying out those obligations.
- 2 The Council must, as soon as practicable, either agree to the SOI to take all practicable steps to require the statement of intent to be modified. Taking all practicable steps means passing a shareholder resolution if modifications cannot otherwise be agreed. What the next practicable steps are, and what is as soon as practicable, depends on the scope of modifications a majority of Councillors wish to see to the SOI.
- 3 Modifications that are inconsistent with recent decisions regarding Wānaka Airport's governance or which propose a new direction for either Airport would almost certainly require community consultation, and as outlined to Councillors before the 26 August meeting, arguably should not be considered in the pre-election period. It is also not practicable to make such a decision in the absence of up to date information about the economic and social impacts of such a decision – that being the subject of reports currently being briefed. Assuming a majority of Councillors can reach agreement on what the SOI should say, these hurdles will affect the timeframe in which it is practicable (and lawful given the process requirements of the Local Government Act 2002) to pass a shareholder resolution. More modest modifications amounting to a continuation of the status quo with direction to QAC to consider how to manage the forecast growth for inclusion in the 2020 SOI, or "pressing pause" while work is progressed to inform a future decision about QAC's direction in accordance with a wider Council-led growth strategy, would not require community consultation, and could be made by shareholder resolution more quickly. However, that is by and large what was proposed in the SOI before the Council at the 26 August meeting and a majority of Councillors could not agree to it.
- 4 For that reason we recommend that, unless Councillors can agree to make more modest modifications and to progress that by agreement with the QAC Board, it is really for Councillors to identify a package of modifications that a majority support. Once we have that, a decision can be

made about how best to practicably advance the modifications – whether by agreement with the QAC Board or shareholder resolution – and how quickly it is practicable to do so.

Statements of intent

- 5 As a CCTO, QAC's actions and intentions are governed by its constitution and its statement of intent (s 60¹). The SOI is drafted annually for the following three year period and explains what the CCTO's objectives are and how it will implement those objectives (Sch 8, cl 9(1)). The objectives are set having regard to the general purpose of the CCTO (identified when it is established) and the overall aims of the Council as majority shareholder (s 65). In turn, those aims should reflect the Council's broader strategy documents such as the LTP and Annual Plan and be consistent with the purposes and principles of local government in ss 12 and 14.
- 6 The process for adoption of a SOI is that the CCTO must deliver a draft SOI to the Council by 1 March every year (Sch 8, cl 2). The Council must provide comments to the CCTO within two months (Sch 8, cl 3(a)). The CCTO must then deliver the final SOI to the Council by 30 June (Sch 8, cl 3(b)). These timeframes were intended to fit with Council work on its annual or long-term plan, so that if any intentions of the CCTO require consultation that can be done in concert with an existing consultation process.² In practice though this is only realistic if proposed SOIs are provided earlier in the year than 1 March.
- 7 Outside the annual March to June process, modifications to SOIs may be made at any time using one of two methods. The first is CCTO-initiated. The Board of the CCTO may propose changes to the council for comment and then give notice to the Council of the changes once those comments have been considered. (Sch 8, cl 4) The second is council-initiated. A council may make a shareholder resolution to amend the SOI (Sch 8, cl 5(1)). A council may only take that course following consultation with the CCTO (Sch 8, cl 5(2)).
- 8 The shareholder resolution process is provided for because a council is required, as soon as practicable after a completed SOI is delivered to it, to either agree to it, or, if it does not agree, to take all practicable steps to require it to be modified (s 65(2)). The collaborative or consultative model is the preferable way of making changes to a SOI.³ The shareholder resolution option is then available for situations where following consultation there remains disagreement about the direction or intentions of the CCTO.

QAC's SOI 2019

- 9 We understand that QAC provided a draft SOI to the Council for comment before 1 March 2019. The Council then provided comments by way of letter. The completed SOI was delivered by QAC together with a copy showing changes tracked following the Council's comments. At this point, both QAC and QLDC had complied with their LGA obligations in relation to the SOI.
- 10 On 27 June 2019 the completed SOI was formally presented to the Council to "receive". This is strictly unnecessary, but has been the consistent practice of the Council, and has the benefit of publicly recording delivery in accordance with the legislation.

¹ All statutory references are to the LGA.

² Office of the Controller and Auditor-General *Governance and Accountability of council-controlled organisations* (September 2015), at [7.15].

³ Office of the Controller and Auditor-General *Governance and Accountability of council-controlled organisations* (September 2015), at [7.14].

- 11 The Minutes of the 27 June meeting record that a number of Councillors expressed dissatisfaction with the SOI's focus on growth and stated an intention to vote against the motion. As noted, "receiving" the SOI was formally unnecessary so this would not have had any legal effect.
- 12 Nonetheless, the Council resolved to receive the SOI subject to two requirements:
- a. The Council drawing to QAC's attention that it remains concerned at the content of the Statement of Intent that addresses the future development of Queenstown and Wānaka Airports, notwithstanding the current masterplan processes underway; and
 - b. The Council seeking further discussions between QAC and Council to seek further changes to the 2019/20 Statement of Intent to better reflect its and the community's concerns and expected directions.
- 13 We understand that in July and August the Council's staff worked with QAC to make further modifications to address the references to the future development of Queenstown and Wānaka Airports. These were put to the Council on 26 August 2019. The Council did not agree to the changes and made no other resolutions.
- 14 The consequence of this is that:
- (a) The current SOI governing QAC's actions and intentions is the completed SOI delivered to the Council before 30 June 2019.
 - (b) However, the Council has not yet agreed to the SOI.
 - (c) It is therefore obliged as soon as practicable to either agree to the SOI or to take all practicable steps to require the statement of intent to be modified.

Community concerns

- 15 At this point it is necessary to bring in to the reckoning the concerns that have arguably influenced some Councillors to vote against agreeing to the current SOI. In turn, those concerns appear to reflect concerns expressed by community groups about the current direction of QAC.
- 16 The concerns expressed by community groups relate in general terms to how QAC deals with growth in passenger and general aviation services demand. How that issue affects Queenstown Airport and Wānaka Airport is different.
- 17 A group calling themselves Wānaka Stakeholders Group (WSG) has written to the Council threatening a judicial review. The letter (7 August 2019) and follow up are not clear. They suggest that the SOI in its current form is inconsistent with the Council having meaningful control over QAC's decisions whether to redevelop Wānaka Airport. We do not understand this. Even assuming the Council chose to exercise minimal influence over how QAC intends to develop Wānaka Airport, if reflected in the SOI that would be lawful. But the judicial review threatened appears to be about the decision to enter into a long-term lease for Wānaka Airport with QAC, a decision made in 2017 by the present Council following a special consultative procedure in which the public was given an opportunity to address these matters.
- 18 The decision to enter the long-term lease followed a report sought by the Council from Astral Limited, a specialist aviation consultancy practice, a business case prepared by Rationale Limited,

and the special consultative procedure referred to these documents. We have reviewed the Council's statement of proposal. Underlying the proposal was that the District was anticipating growth in domestic and international passengers, and that the movement of people and goods in and out of the district was vital for all tourism businesses. Subject to future planning processes, there was a significant opportunity for Wānaka Airport to grow, and that this should happen in a complementary and supplementary way to Queenstown Airport. The growth was anticipated to include, again, subject to further planning, the reintroduction of scheduled transport services, and the purchase of additional land. It noted that continuing the then status quo would mean that Wānaka Airport's infrastructure would not keep up with the growth of the Airport.

- 19 The proposed judicial review would have very little chance of success given that the decision to enter into the lease was reached following substantial public consultation and was entirely within the scope of the statement of proposal. The situation feels similar to a recent judicial review we were involved with in Wellington which challenged the degree of consultation undertaken before a Council decision. The judicial review was dismissed and the Court reiterated the substantial discretion that local authorities have to make decisions about public engagement before decision-making.⁴
- 20 The concerns of various Queenstown groups, under a "Flightpath 2050" moniker, appear to be related to the noise and environmental sustainability of further increases in aircraft numbers. They prefer relocation of Queenstown Airport and rejection of a complementary two-Airport model. But expansion of noise boundaries would require a resource management process the public would have the opportunity to participate in. The SOI does not suggest otherwise, and indeed the version put to Councillors on 26 August 2019 states an intention of making no changes to the noise boundaries.

What is practicable and by when

- 21 We now draw these threads together by addressing what is required to comply with the obligation to, as soon as practicable, either agree to the SOI or to take all practicable steps to require the statement of intent to be modified.
- 22 What is practicable, in other words, what modifications are proposed, and by when they should be made, depends on their scope.
- 23 Respectfully, it does not appear clear that there is a majority of Councillors who agree on what modifications are necessary to the completed SOI. The views appear to fall on a spectrum of (at least) maintenance of the status quo at one end, to, at the other end, substantial modifications to require a freeze on any increase in passenger numbers while a fundamental airport futures study is undertaken.
- 24 Any modifications proposed that would represent a material change in direction for QAC, or are materially inconsistent with the recent decision on Wanaka Airport's governance, would likely require a degree of public consultation before they could be made. So too arguably would modifications proposing a more permanent restriction on expansion of the noise boundaries in Queenstown. That is because such a restriction would appear to be a proxy for a broader moratorium on allowing growth at Queenstown Airport. Such a direction would affect the community to a high degree, again triggering public consultation obligations.

⁴ *Island Bay Residents Association Inc v Wellington City Council* [2019] NZHC 1240.

- 25 The possible need for consultation on such modifications does not mean that the Council may not make them— as noted above, the LGA anticipates that intended actions of a CCO could require public consultation. But it is not practicable to make modifications of that nature and scope by shareholder resolution until probably March 2020 at the earliest. That is because taking all practicable steps includes taking any steps otherwise required to make such a change lawful under the Local Government Act:
- (a) The first step would be to identify what those modifications are (and get a majority of Councillors in agreement).
 - (b) The second step will be to consider the proposed modifications against ss 78-83 of the LGA, including making an assessment of the significance of the changes under the Council's Significance and Engagement Policy. Inconsistency with previous Council decisions or policies increases the level of significance, suggesting that an appropriate process will include some degree of public consultation and, given the consideration of Wanaka Airport governance was itself of high significance, this may lead to the use of the special consultative procedure. In this workstream there will also have to be an assessment of what effect, if any, the modifications may have on the financial value of QAC and the expected dividend that the Council has relied on in its financial planning. While perhaps unlikely, amendments to the LTP could be required if the modifications have a material impact on the amount or security of the forecast dividend.
 - (c) Consultation would also require the Council to make available information to inform the public, possibly including the economic and social impact assessments that are being briefed and will not be available until 2020.
 - (d) As explained to Councillors in the workshop prior to the 26 August meeting, the more substantial the change in direction or inconsistency with recent decisions the more likely it is that the question is an inappropriate one for the Council to consider in the pre-election period. Certainly, to the extent that the modifications engage the significant and strategic question of the Council's overall growth strategy, that is really a matter for the next Council.
 - (e) Following any public consultation process, the third step will be to consult with the QAC Board (although the Board will have had the opportunity of commenting in the public process). This process should responsibly also involve consulting with the minority shareholder.
- 26 More modest modifications could practicably be progressed sooner. For example, modifications aimed at preserving the status quo or "pressing pause" while work is done to inform consideration of the 2020 SOI would not require public consultation because they would not be inconsistent with previous decision-making, and almost by definition would affect the public to an insignificant extent. Indeed, our impression is that changes of that nature of scope would not require shareholder resolution as the QAC Board is likely to agree to those changes (indeed, that is effectively what was proposed at the 26 August meeting). The difficulty is that it does not appear that a majority of Councillors is prepared to support this approach.

Conclusion – next steps

- 27 The Council has complied with its legal obligations to date. It is now obliged as soon as practicable to either agree to the SOI or to take all practicable steps to require the statement of intent to be

modified. Determining what is practicable, and what timing is practicable depends on the scope of proposed modifications.

- 28 The most practicable approach is to facilitate the Councillors reaching a package of modifications that a majority of Councillors support and for Council officers to consider what steps are required to practicably and lawfully go about making those modifications.

Yours faithfully
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