BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 34

IN THE MATTER	of the Public Works Act 1981
AND	of an objection to take land under s 24 of the Act
BETWEEN	REMARKABLES PARK LIMITED
	(ENV-2013-CHC-016)
	Objector
AND	QUEENSTOWN AIRPORT CORPORATION LIMITED
	Respondent

Court:	Environment Judge J E Borthwick Environment Commissioner R M Dunlop Environment Commissioner D J Bunting
Hearing:	at Christchurch on 5 and 6 November 2018
Appearances:	R Somerville QC and R Ward for Remarkables Park Limited M Casey QC and R Tompkins for Queenstown Airport Corporation Limited
Date of Decision:	1 March 2019
Date of Issue:	1 March 2019

REPORT OF THE ENVIRONMENT COURT

Introduction

[1] On 29 November 2012 Queenstown Airport Corporation Ltd gave notice to Remarkables Park Ltd of its intention to take land for aerodrome purposes in the Queenstown Lakes District. Remarkables Park Ltd opposes the taking of its land.

[2] Being in receipt of Remarkables Park Limited's objection, the court placed the proceeding on hold pending the determination of a notice of requirement under the Resource Management Act 1991 for the same land. The Notice of Requirement was

confirmed by the Environment Court in March 2017, with the appeal against its decisions being finally determined by the High Court in March 2018.

[3] As this is an objection to taking of land, this decision takes the form of a report to the Queenstown Airport Corporation Ltd. While in written submissions Remarkables Park Ltd said the "sole issue" for determination was whether the taking was fair, sound and reasonably necessary in terms of s 24(7)(d)),[1] we heard arguments going beyond. Consequently, this report addresses the matters identified in ss 24(7)(a), (b) and (d). We begin by looking at s 24(7)(a).

QAC's objectives for taking land (s 24(7)(a) PWA)

[4] In this decision we refer to the land proposed to be taken as "the land" or "Lot 6". While the extent of land to be taken is now less than the area shown on the Notice to Take, no issue arises in relation to the description of the land.[2]

[5] In the Notice to Take[3] Queenstown Airport Corporation Ltd ("QAC") advises:

> The land is required for aerodrome purposes and it is intended to use the land for general aviation and helicopter activities including associated infrastructure, buildings, access, carparking and landscaping.

[6] The QAC elaborates by giving Remarkables Park Ltd ("RPL") the following reasons:

> (a) The land is required to provide for the continued safe and efficient functioning of Queenstown Airport (**Airport**) to meet projected passenger and operational growth at the Airport;
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> (b) The land is required to enable general aviation and helicopter activities to relocate from the south-western area of the Airport to provide for essential growth in airport operations and activities including:
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> (i) expansion of the passenger terminal;
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> (ii) provision of additional apron areas around the terminal for scheduled aircraft;
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> (iii) provision of additional carparking for public, staff and rental vehicles;

[1] RPL, submissions at [8].

[2] The extent of land was modified by the Environment Court in related NoR proceedings to amend Designation 2 of the Queenstown Lakes District Plan. In its amended objection dated 25 July 2018, RPL withdrew its complaint that QAC had not adequately described the land. The area of land to be taken is depicted in Annexure B to [2017] NZEnvC 46.

[3] Dated 29 November 2012.

(c) The land is required to enable the provision of additional grass and paved apron areas and space for hangars for general aviation and helicopter activities;

(d) The above activities can not be accommodated within Queenstown Airport Corporation Limited's existing Aerodrome Purposes designation, in particular, on the land south of main runway 23/05 as this land is required for the formation of a Code C taxiway parallel to and with adequate separation from that runway;

(e) Queenstown Airport Corporation Ltd has assessed a number of alternative locations for the above activities and has identified the subject of this notice as the most preferable for a number of reasons including reasons of safety and operational efficiency.[4]

[7] The parties agree the above reasons are the objectives of QAC.[5] The objectives complement those given by QAC in its Notice of Requirement ("NoR") for the land that was confirmed by the Environment Court in 2017.[6]

[8] Having ascertained the objectives, we are satisfied they pertain to activities which QAC, as an airport authority, is empowered under the Airport Authorities Act 1966 to carry out and in relation to which QAC may acquire land. The acquisition of land in furtherance of these objectives may, therefore, be pursued under the Public Works Act 1981 ("PWA").

Was adequate consideration given to alternative sites, routes, or other methods of achieving the objectives (s 24(7)(b) PWA)?

[9] QAC relies on evidence adduced in the NoR proceeding to satisfy the court that there has been adequate consideration of alternatives. In written submissions, RPL accepted QAC has satisfied the statutory test (s 24(7)(b)).[7] However, when addressing the court in oral submissions RPL's acceptance was qualified, with RPL stating that it is satisfied that QAC is presently consulting over its options to undertake work at different sites within the airport and that it supports this consultation continuing.[8]

[10] Thus the consideration of alternatives documented in the NoR proceeding and about which there is considerable evidence, and also the decisions of the High Court and

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[4] Notice to Take at [4].
[5] RPL, submissions at [84], QAC opening submissions at [9].
[6] *Re Queenstown Airport Corporation Ltd* [2017] NZEnvC 46.
[7] RPL, submissions at [84].
[8] Transcript (Somerville) at 29 and 40.

Environment Court,[9] does not appear particularly germane to the objection.

[11] We come back to this in our discussion from [60].

Is the taking of land fair, sound and reasonably necessary for achieving QAC's objectives (s 24(7)(d) PWA)?

[12] RPL objects to the taking, submitting that it is neither fair, sound nor reasonably necessary for achieving QAC's objectives. Indeed, RPL submits QAC would take Lot 6 for purposes other than those set out in the above objectives.

[13] RPL says the Environment Court's findings on whether QAC met the threshold test under s 171(1)(c) Resource Management Act ("RMA") in the related NoR proceeding, is not dispositive of whether the taking is fair, sound and reasonably necessary under s 24(7)(d) PWA. That is because the issues to be considered under s 24(7)(d) PWA are different from s 171(1)(c) RMA. Whereas the RMA is concerned about environmental effects, the PWA is directed at "private property rights and the effects of taking private land".[10] More particularly, the principle of "fairness" under s 24(7) PWA imports different considerations when compared to s 171 RMA. In the earlier NoR proceeding the consideration of fairness arose in the context of an assessment of effects on the environment, where fairness is ancillary to the satisfaction of s 171 RMA. In contrast, the PWA is concerned with substantive fairness to the owner of private land.[11]

[14] While RPL acknowledges there is some overlap between s 24(7)(d) PWA and s 171(1)(c) RMA, it submits QAC cannot rely on evidence led in the related NoR proceeding to satisfy its onus of proof.[12] In a submission closely aligned with its concerns in relation to the consideration of alternative sites, RPL says since the NoR was determined, things have moved on – indeed they were said to have "dramatically changed" and submits QAC is no longer in a position to "confirm that [the works are] even

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[9] See in particular *Re Queenstown Airport Corporation Ltd* [2012] NZEnvC 206, *Re Queenstown Airport Corporation Ltd* [2015] NZEnvC 222, *Re Queenstown Airport Corporation Ltd* [2017] NZEnvC 46. See also the High Court decisions of *Queenstown Airport Corporation Ltd & Anor v Queenstown Lakes District Council* [2013] NZHC 2347 and *Queenstown Airport Corporation Ltd & Anor v Queenstown Lakes District Council* [2018] NZHC 269.

[10] RPL, submissions at [35].

[11] RPL, submissions at [93]-[98].

[12] Admitted, by consent of the parties, under s 24(6) PWA. See RPL, submissions at [38].

to happen".[13] Consequently, there is now "absolute uncertainty"[14] about whether the terminal will expand at its current location thus requiring general aviation and helicopters to relocate south of the main runway as presented in the NoR proceeding.

[15] RPL further submits (correctly in our view) that the statutory tests in s 24(7) are to be applied to the facts as they exist at the time the objection is heard.[15] While the Environment Court has accepted evidence presented in the related NoR proceeding (s 24(6A) PWA), RPL's objection to the taking of land is not to be addressed as if it were simply a rehearing.[16] It is now known that the projected growth of future passenger movements through the airport, and the basis upon which QAC planned the airport redevelopment in the NoR, was significantly underestimated. While QAC is required to "continually plan how it will provide for future growth",[17] RPL submits expanding the terminal will not accommodate forecasted growth.[18] RPL says QAC's planning, based on outdated forecasts, is unsound and infers from the fact that in 2017 QAC was consulting on redevelopment options other than the one confirmed in the NoR, that there is no longer any certainty that the terminal will be expanded with general aviation and helicopter facilities ("GA") relocating to the south of the main runway.[19]

[16] RPL referred extensively to evidence given in the application for rehearing of the NoR decision by QAC's Chief Executive Officer, Richard Keel. In respect of the redevelopment approved by the Environment Court in the NoR proceeding,[20] RPL says Mr Keel deposed this development cannot be progressed until key constraining factors are resolved.[21] RPL says these factors *must* be resolved before the land can be taken.[22]

[17] RPL's legitimate expectation [we interpolate from the Environment Court's decisions that QAC would use its own land for airport purposes, and not RPL's land for undertaking the work[23] and that the subject land would remain a buffer zone][24] is

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[13] Transcript (Somerville) at 40.
[14] Transcript (Somerville) at 41.
[15] RPL, submissions at [24].
[16] RPL, submissions at [27].
[17] RPL, submissions at [120].
[18] RPL, submissions at [121].
[19] Transcript (Somerville) at 33.
[20] Identified as "option one" in the Master Plan Options document.
[21] Transcript (Somerville) at 76. See affidavit of Richard Colin Keel sworn 28 February 2018 at [35] where he lists the key constraints as noise, land availability and destination infrastructure.
[22] Transcript (Somerville) at 76.
[23] *Re Queenstown Airport Corporation Ltd* [2014] NZEnvC 244 at [69].
[24] *Re Queenstown Airport Corporation Ltd* [2014] NZEnvC 244 at [92].

particularly relevant to whether the taking is fair (both in substance and procedurally). Recalling QAC's previous contractual dealings with RPL and the expectations those dealings gave rise to, and recalling also the zoning of Lot 6 in the operative District Plan,[25] RPL says the taking of land is "extremely unfair".[26] QAC has essentially changed its mind and now wishes to take Lot 6 which it had previously exchanged with RPL for land in the north, while retaining the northern land holdings.[27] In oral submissions the argument was more finessed and we were told:

> Private land interest[s] do need to be taken into account and in order to, my learned friend said override but in order for the public interest to prevail it has to be established that the public work needs to prevail at this time, at the time of the taking.[28]

[18] Until QAC knows more about how it will respond to predictions concerning future growth in passenger numbers, RPL submits this court cannot determine whether the taking of its land is sound or reasonably necessary for the achievement of its objectives.[29] Moreover, it is procedurally unfair for the land to be taken when there is uncertainty whether it will be used to achieve those objectives.[30] To that end, RPL supports QAC continuing with its consultation over the development of the airport.[31] The process, for example, may conclude that the terminal should relocate to a new area within the existing airport designation in which case, land formally occupied by the terminal could accommodate GA. Were that to occur Lot 6 would not be required for GA.[32] In the meantime, counsel for RPL proffered if Lot 6 is required now, then it could be leased pending the conclusion of the consultative process.[33]

[19] RPL further contends QAC would take Lot 6 to free up the land on which the terminal is presently sited, and undertake commercial development on the same.[34] Not only would the taking of land for commercial purposes be beyond the purpose for which the powers are conferred under the PWA,[35] it would enable QAC to pursue its commercial

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[25] RPL, submissions at [45]-[63], [107]-[108].
[26] RPL, submissions at [78]-[82].
[27] RPL, submissions at [108].
[28] Transcript (Somerville) at 37.
[29] RPL, submissions at [133]-[136]. Transcript (Somerville) at 40-41.
[30] Transcript (Somerville) at 70-71.
[31] Transcript (Somerville) at 32, 35, 40, 60-61 and elsewhere.
[32] RPL, submissions at [137].
[33] RPL, submissions at [136].
[34] RPL, submissions at [112]-[114]. Transcript (Somerville) at 44.
[35] Transcript (Somerville) at 32.

development goals on its own land at the expense of RPL. Given its legitimate expectation, the taking would be substantively unfair and it is not in the public interest as the taking allows QAC to pursue its commercial development on land that is privately owned.[36] As an aside, we observe this final submission can also be regarded as a challenge to the QAC's objectives.

QAC response

[20] Given the findings of the court in this proceeding, what follows is a brief synopsis of the key points made in submissions.

[21] Mr Casey confirmed his client's commitment to the proposal approved by the Environment Court in the NoR proceedings.[37] QAC's Board of Directors and Executive also affirmed their commitment to the proposal through Chief Executive Officer, Mr Keel, in the 2018 rehearing proceeding.[38]

[22] QAC submits that RPL tenaciously sought to obstruct or prevent or delay the resolution of the designation.[39] During the years that it has taken for there to be a final determination on the NoR, the growth forecasts for passenger movements at the airport have changed.[40] QAC's exploration of options for accommodating the next phase of growth does not mean, however, that the acquisition of Lot 6 is unsound as contended by RPL. QAC's evidence is that the expansion proposal and its objectives remain unchanged since the NoR proceedings were commenced.

[23] QAC submits there is no uncertainty and no change in circumstances as contended for by RPL that would necessitate updating the NoR evidence.[41] It dismisses as unfounded speculation that the alternative development scenarios[42] outlined in the discussion document entitled "Master Plan Options: Let's start talking about tomorrow", will be progressed.[43] Indeed, the designation confirmed by the Environment Court is the

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[36] RPL, submissions at [114].
[37] Transcript (Casey) at 97.
[38] Affidavit of R C Keel at [36].
[39] Transcript (Casey) at 80.
[40] Transcript (Casey) at 80.
[41] QAC, reply at [3.5].
[42] Options 2 and 3.
[43] Transcript (Casey) at 98.

only option that QAC can progress.[44]

[24] QAC says RPL is attempting to relitigate matters disposed of by the High Court and most recently by the Environment Court in its decision refusing to rehear the NoR. In particular, RPL is challenging the Environment Court's finding that the discussion document was irrelevant to the NoR proceedings because:

> There is no change in circumstances because no decision has been made by the Airport to accommodate the greater demand or to relocate the passenger terminal.[45]

[25] The taking of Lot 6 is fair, sound and reasonably necessary for achieving QAC's objectives. RPL has not challenged the appropriateness of those objectives or the adequacy of the consideration given by QAC to alternatives sites, routes or other methods to achieve the same (s 24(7)(a) and (b)).[46] The matters raised by RPL in support of its submission on the test of fairness, soundness and reasonable necessity were mostly, if not conclusively, determined in the NoR proceeding.[47]

[26] While RPL may legitimately expect that QAC will use its own land for airport purposes, and not RPL's land for undertaking the work,[48] this does not mean RPL's expectation overrides the PWA statutory tests and purpose any more than it would override the RMA.[49] Citing *Seaton v Minister for Land Information*:[50]

> The meaning of s 16, "from its text and in light of its purpose", is, we think, tolerably clear: provided the land is reasonably required for the specified Government work, it may be taken.[51]

[27] QAC cannot relinquish or fetter under contract powers conferred under the PWA, RMA or as an airport authority under the Airport Authorities Act 1966.[52] The "purpose and object" of the RMA and Airport Authorities Act which give rise to the need to take the land are relevant to the assessment of whether the legitimate expectation overrides the

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[44] Transcript (Casey) at 104.
[45] *Re Queenstown Airport Corporation* Ltd [2018] NZEnvC 52 at [19].
[46] QAC, opening submissions at [5].
[47] QAC, opening submissions at [7], [20]-[36].
[48] QAC, opening submissions at [60] referring to [2014] NZEnvC 244 at [68]-[69].
[49] QAC, opening submissions at [66].
[50] *Seaton v Minister for Land Information* [2013] NZSC 42 at [48].
[51] The equivalent provision for local authorities is given in s 16(2) PWA.
[52] QAC, opening submissions at [64]-[70].

PWA power.[53] Provided that the land to be taken also meets the PWA test and achieves the purpose of the empowering provision, the land may be taken.

[28] As for QAC's ambitions to use terminal land for commercial purposes, QAC says that over the course of the NoR proceedings this submission had become "a bit of a trope".[54] Under the operative District Plan, land encompassing the terminal is already zoned mixed use. Under the proposed District Plan, retail and commercial activities associated with the needs of airport passengers (amongst others) are permitted in the same area. On appeal before the Environment Court, QAC is seeking to extend the zone in which these activities are located to include land in its entire designation and would modify the list of activities that fall within the permitted Airport Related Activities to include visitor accommodation.

[29] RPL suggests that QAC could lease Lot 6 from RPL, given the alleged uncertainty around QAC's expansion plans.[55] Mr Casey observes RPL offers no information as to the specifics of a lease or why, in the circumstances, a lease would be preferable to freehold acquisition.[56] He says that QAC's objectives are unchanged; the works required to achieve these objectives cannot be undertaken without the acquisition of Lot 6.[57]

[30] We address the Public Works Act next.

The Public Works Act 1981

[31] Pursuant to s 23 PWA, QAC gave notice to RPL of its intention to take Lot 6 for public works. RPL has objected to the notice.

[32] Upon receipt of an objection, the Environment Court inquires into the objection and the intended taking (s 24(3)) and is to submit its report and findings to the local authority – in this case Queenstown Airport Corporation Ltd – copying RPL into the same (ss 24(7)(f) and (9) PWA). More particularly, when reporting the Environment Court, pursuant to s 24(7), is to:

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[53] QAC, opening submissions at [72].
[54] Transcript (Casey) at 89.
[55] RPL, submissions at [132].
[56] QAC, reply at [16].
[57] QAC, opening submissions at [76].

(a) ascertain the objectives of the Minister or local authority, as the case may require:

(b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:

(c) in its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the court:

(d) decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:

(e) prepare a written report on the objection and on the court's findings:

(f) submit its report and findings to the Minister or local authority, as the case may require.

[33] The burden of proof is on QAC to show that it can satisfy the statutory tests for the taking of land: per *Brunel v Waitakere City Council* (Decision A082/2006) at [20]. No party sought to call fresh evidence and our determination is made having regard to the evidence presented at the NoR proceedings.

[34] We accept RPL's submission that this is a hearing de novo and that the court is, for the first time, deciding whether the taking of land is "fair, sound, and reasonably necessary" for achieving the objectives of the local authority (s 24(7) PWA). Following *Grace v Minister for Land Information*,[58] the relevant time for considering the threshold test in s 24(7)(d) is on the facts as they exist at the time the objection is heard. Judge Thompson held in *Grace v Minister for Land Information* that the court cannot ignore the relevant events that have occurred, or issues that have arisen, since the Notice to Take land was given: per *Grace v Minister for Land Information* at [5]. We agree. The approach in *Grace v Minister for Land Information* is consistent with that taken by the Environment Court (Judge Borthwick presiding) when determining that the works and designation in the related RMA proceeding were "reasonably necessary" if, inter alia, the land to be designated is able to be used for the purpose of achieving the requiring authority's objectives for which the designation is sought.[59]

[35] We do not presume, therefore, that the confirmation of the NoR means the taking of land is fair, sound and reasonably necessary under s 24(7)(d) PWA.

[36] RPL asserted there were differences in substance between the tests in s 171(1)(c) and s 24(7)(d) PWA – such that the NoR findings have limited relevance in this

[58] [2014] NZEnvC 82 at [5].

[59] *Re Queenstown Airport Corporation Ltd* [2017] NZEnvC 46 at [9].

proceeding. Those differences are said to be between the RMA's concern with the effects of proposed works on the environment and the PWA's focus on private property rights and the effects of taking private land.[60] We did not find the breadth of this submission helpful. Accepting that an objection to the taking of land is not a vehicle for pursuing concerns about the environmental effects of a requirement,[61] it does not follow that the court's findings under ss 171(1)(b) and (c) RMA are irrelevant to the determination of whether the taking is "fair, sound and reasonably necessary" under s 24(7) PWA. That is because, subject to Part 2 of the RMA, many of the NoR findings on ss 171(1)(b) and (c) are not findings on environmental effects *per se*, but rather are findings that have informed an effects assessment. We hold that it is for the court to decide what weight is to be given to the s 171 RMA findings and this will depend (at least) on their currency and their relevance to the issue whether it is fair, sound and reasonably necessary for land to be taken to achieve the local authority's objectives.

[37] That aside, it is not correct for RPL to say that in NoR proceedings "fairness" is ancillary to the satisfaction of s 171 RMA.[62] Rather, the correct position was stated by the High Court in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347 at [105], where Whata J held that Parliament is:

> ...presumed to legislate consistently with minimum standards of fairness, especially when dealing with coercive powers of the State. Moreover, the scheme of the Act dealing with designations is purpose built to secure a fair outcome having regard to the broad criteria specified at s 171 and in light of Part 2, with full rights of participation and then appeal rights on points of law.

[38] As with the RMA, fairness implores an outcome which is consistent with RPL's legitimate expectation, provided that the PWA statutory purpose and requirements are met. If the taking of the land is not for the achievement of the objectives stated in the Notice of Taking, this would be an unfair outcome.

Meaning of "reasonably necessary"

[39] RPL makes two further submissions of note:

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[60] RPL, submissions at [33]-[38].
[61] See *Bird v Nelson City Council* [2006] NZRMA 39 (EC) and *Wech v Minister for Land Information* Decision A112/2000, 19 September 2000 (EC).
[62] RPL, submissions at [33]-[38].

(a) "reasonably necessary" means "essential" under s 24(7)(d) PWA; and

(b) QAC must prove the taking of land is "essential" as stated in the notice.

Submission: "reasonably necessary" means "essential" under s 24(7)(d) PWA

[40] Mr Somerville submits the Court of Appeal in *Seaton v Minister for Land Information*[63] used the phrases "reasonably necessary" and "essential" interchangeably, an approach that he says was not criticised by the Supreme Court on appeal.[64] This interpretation was said to accord with the fact that the PWA authorises the compulsory acquisition of privately-owned land in the public interest.

[41] Our reading of the Court of Appeal's decision does not reveal the interchangeable use of words and phrases. In *Seaton* the senior courts are engaged with s 16 of the PWA and whether certain easements were "required" for Government work if the easements are only indirectly needed to enable that work. The Court of Appeal had regard to s 24(7)(d) when considering the term "required" as meaning "essential or reasonably necessary" rather than simply "desired".[65] The court held this interpretation reflected the idea of "reasonable necessity" and is a limit on the relevant power. The Court of Appeal then affirmed *Deane v Attorney-General,*[66] which found that "...powers of this kind are to be strictly construed; must be exercised in good faith and even-handedly".[67] All matters, we find, that are also relevant to whether it is unfair, in the circumstances, for QAC to act contrary to RPL's legitimate expectations which derive from the parties' contractual dealings.

[42] In their majority decision, the Supreme Court disagreed with the outcome in the Court of Appeal; finding that the easements were not required (whether directly or indirectly) for the Government's road-widening work. Instead, the easements were required for the work of conveying electricity.[68] The Supreme Court does not consider the meaning of "reasonably necessary" in s 24(7)(d) or discuss the Court of Appeal's interpretation of "required" as meaning essential or reasonably necessary.

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[63] [2012] NZCA 234.

[64] We note, Whata J in *Queenstown Airport Corporation Ltd & Anor v Queenstown Lakes District Council* [2013] NZHC 2347 at [96] makes the same observation as to the interchangeability of the words.

[65] At [31].

[66] [1997] 2 NZLR 180 at 191.

[67] At [53].

[68] At [21]-[22] and [56].

[43] We find neither the Court of Appeal nor Supreme Court decisions are authority for the proposition that "reasonably necessary", properly construed, means "essential". Rather, the Court of Appeal interprets "required" as meaning "essential **or** reasonably necessary" [our emphasis]. For the purposes of s 24(7)(d) we accept that if the taking is essential to achieve the local authority's objectives then it is also reasonably necessary. But it does not follow that for the taking to be "reasonably necessary" it must also be "essential". That would be to return to the threshold test as it was before the 1987 amending legislation was passed.[69]

[44] For completeness, we note RPL raised a similar argument on its first appeal to the High Court in the NoR proceeding. Observing that both the RMA and PWA conferred powers to derogate from private property rights, Whata J held the statutes should be interpreted in a consistent way. The High Court upheld as orthodox the threshold test applied by the Environment Court under s 171(1)(c) RMA, namely:

> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.[70]

[45] The PWA does not require a different construction of "reasonably necessary". The taking must be "reasonably necessary" in order for QAC to achieve its objectives, and this requires clear justification that the taking is more than mere expedience or desirability.

Submission: QAC must prove the taking of land is "essential" as stated in the notice

[46] RPL submits QAC must prove that the taking of land is "essential" for achieving its objectives because, this is what is stated in the Notice to Take land.[71] QAC disagrees.

[47] Up until 31 March 1987 the historical version of s 24 of the PWA contained the test "the proposed taking is fair, sound and essential". The relevant subsection, s 24(8), was repealed by s 8(1) Public Works Amendment Act (No 2) 1987 and the present-day test of "fair, sound and reasonably necessary" in s 24(7) was substituted.

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[69] Section 8(1) of the Public Works Amendment Act (No 2) 1987 repealed the former subsection, ss 8, which set as the threshold test that the taking was to be "fair, sound and essential".
[70] *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [94]-[95].
[71] Transcript (Somerville) at 36.

[48] QAC explains that it simply used the form in Schedule 1 of the Act to give notice of the taking of the land and the form has retained the word "essential" in the reasons to be given for the taking.

[49] We accept that by giving notice using the form set out in Schedule 1 of the Act, QAC is not asserting the taking of land is "essential", rather QAC contends the taking of land is fair, sound, and reasonably necessary for achieving its objectives (s 24(7)(d)). This is entirely consistent with how QAC pursued the requirement for the designation in respect of Lot 6.

[50] Following *Deane v Attorney-General*, before any agency may be allowed to derogate from private property rights, there is to be close scrutiny of the reasons given – in this case, for the taking of land (s 24(7)(d)). As with the designation of privately owned land, we will require clear justification for the taking.

The impact of future growth on master planning for the aerodrome

[51] At the heart of RPL's argument is the impact of future growth in passenger projections on the master planning for the aerodrome.

Application for rehearing

[52] We have carefully considered the evidence given by Mr Colin Keel in the rehearing of the NoR and referred to extensively by RPL. Mr Keel deposed that the travel tourism sector "is undergoing phenomenal growth" in the number of passenger flights worldwide. New Zealand, and especially Queenstown, is an increasingly popular visitor destination. Noting the master plan which underpinned the NoR was completed in 2008, he said QAC could not, and in his opinion should not, suspend its master planning pending a final determination of the NoR proceedings. Master planning for complex infrastructure, such as aerodromes, is continuously underway.[72]

[53] In 2010 the NoR projected growth in passenger numbers to be around 2 million passengers per annum (mppa) by 2037. Growth has exceeded expectations and in 2017 the airport received 2 mppa. Recent forecasts predict by 2025, 3.23 mppa; by 2035, 6.04

[72] Keel, affidavit sworn 28 February 2018 at [4] and [7].

mppa and by 2045, 7.07 million passengers will be moved through the airport each year.[73]

[54] Around 2017, QAC engaged consultants to identify options to accommodate growth for up to 5.0 mppa for the period out to 2045. This is less than the predicted growth of 7.01 mppa for the same period. The consultants were directed to disregard constraints on development which include the noise boundaries under Plan Change 35 (now operative); the sufficiency of destination infrastructure in Queenstown and the availability of land. Mr Keel noted a fourth constraint on development being the outputs of aeronautical, operational and safety assessments.

[55] In 2017 QAC released a discussion document entitled "Master Plan Options: Let's start talking about tomorrow" wherein three options were identified for the redevelopment of the airport. The options include works that are the subject of the NoR that enable up to 3.2 mppa (option 1). For the airport to enable 5.1 mppa, the discussion document identifies options based on the relocation of the terminal either north or south of the runway (options 2 and 3).

[56] Mr Keel deposed the forecasts raised important questions for the Queenstown community and for the wider region, such as the ability and desire to accommodate growth, and whether the community would agree that the benefits that would accrue outweigh the costs of growth.[74] While the discussion document notes QAC's view that about 5 mppa over 30 years is sustainable, QAC wanted to test that view with stakeholders and the community.[75] Mr Keel affirmed because of the effects on the community (e.g. noise) there was a degree of "tentativeness" around 5 mppa which is why QAC put the matter out to the community for discussion.[76]

[57] Mr Keel gave evidence the constraints outlined above, would need to be resolved "before any option can be progressed".[77] The air noise boundary in the operative District Plan, would constrain passenger movements to less than 3.2 mppa. As for the provision of destination infrastructure, the airport is but one element feeding in to broad scale future

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[73] Keel, affidavit sworn 28 February 2018 at [15].
[74] Keel, affidavit sworn 28 February 2018 at [27].
[75] Affidavit, A F Porter sworn 22 November 2017, Exhibit A: at 40.
[76] Rehearing Transcript ENV-2011-WLG-41, 4 April 2018 (Keel) at 94.
[77] Keel, affidavit sworn 28 February 2018 at [35].

planning of the district.[78] That said, he also confirmed that the QAC Board and Executive are committed to pursuing and progressing the NoR:

> It is the minimum required for addressing the growth needs of Queenstown Airport and the communities it serves. It has can [sic] be advanced without the constraints and delays that would be involved with either of the other identified options in the Discussion Document.[79]

[58] In the application for rehearing, the Environment Court (Judge Borthwick presiding) considered whether the discussion document constituted new and important evidence that may have affected the decision to confirm the NoR. Giving detailed reasons at paragraph [15] of the decision, the court found that the document was not material. Importantly, the court held that it was "...not engaged with a fact-finding exercise about which of the airport layouts [options 2 and 3 in particular] in the options document might ultimately find favour".[80]

[59] In the rehearing decision, the Environment Court rejected RPL's submission that the potential for relocating the passenger terminal to a new position was a change in circumstances. The court found there was no evidence to support the proposition that the terminal would be in a different location to the one considered in the NoR. Importantly, any alternative layout predicated upon 5.1 million passenger movements cannot presently be implemented.

Discussion

Consideration of alternatives (s 24(7)(b) PWA)

[60] RPL has assumed, without proof, that QAC will / must accommodate growth in passenger movements at Queenstown Airport beyond 3.2 mppa. We make no such assumption. We do not doubt that QAC will continue master planning for this important infrastructure. What we cannot do is direct QAC to consult on growth strategies or on the parameters of any future consultation. That would be to stand in the shoes of QAC's Board of Directors.

[61] On the evidence before us, we do not regard the further options identified in the

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[78] Rehearing Transcript ENV-2011-WLG-41, 4 April 2018 (Keel) at 95.
[79] Keel, affidavit sworn 28 February 2018 at [36].
[80] [2018] NZEnvC 52 at [16].

discussion document as alternatives to the development identified in QAC's objectives. The further options respond to growth exceeding 3.2 mppa, and these options cannot presently be implemented because of the operative noise boundaries and second, by the need to acquire additional land.

[62] Based on evidence adduced at the NoR hearing, we are satisfied that QAC has adequately considered alternatives to the works outlined in the objectives.

[63] We give weight to the fact that the Board of QAC and its Executive have affirmed, through their Chief Executive, QAC's commitment to the proposal as approved by the Environment Court in the NoR proceedings. This was confirmed on behalf of QAC in the present proceeding by Queens Counsel, Mr M Casey. Given that, we decline RPL's request to adjourn the proceeding with a direction that QAC provide "up-to-date information about the timing of the terminal expansion and the future use of the general aviation precinct land".[81]

Is the taking fair, sound, and reasonably necessary? (s24(7)(d) PWA)

[64] In *Brunel v Waitakere City Council*[82] the High Court held the tests of "fair, sound and reasonably necessary" are overlapping and, we find, they are to be considered both separately and in the round.

[65] Without overlooking anything RPL has said in support of its objection, two major themes run through its submissions: (i) QAC's uncertainty and the impact of uncertainty on master planning for the airport and (ii) RPL's legitimate expectation that QAC would use its own land, and not RPL's for airport purposes. The themes overlap and suffuse submissions on s 24(7)(d) and more tangentially, challenge QAC's objectives and the question of whether adequate consideration had been given to any alternatives.

[66] Given their importance to RPL's case we address next the first theme, returning later to legitimate expectation in the context of our discussion about fairness.

[81] RPL, submissions at [3].
[82] (EC) Decision A82/2006 21 June 2006 at [27].

Uncertainty and the impact of uncertainty on master planning

[67] RPL contends uncertainty around future planning makes the taking not "sound" in terms of s 24(7)(d). We do not share RPL's claimed uncertainty and we found no evidence to support a submission that these works cannot be progressed or that QAC does not intend to progress the same. Further, we have not found any constraints that preclude development of the proposal that is the subject matter of this proceeding and the NoR.[83]

[68] First, the noise boundary in the District Plan is a limiting factor on growth as or when passenger movements approach 3.2 mppa in 2025.

[69] Second, the capacity of infrastructure to meet increased tourism demand above the present day 2 mppa we regard as an externality; that is a cost – or benefit, that will be borne by the community. There is the possibility that further growth may be constrained by a lack of capacity in key infrastructure, including visitor accommodation. Whether or how the market responds to future demand, is beyond the purview of the PWA as this exercise does not derogate from a finding that the works are sound to accommodate predicted growth of up to 3.2 mppa.

[70] Third, the Director of Civil Aviation has deemed acceptable an aeronautical study of the proposed works. While there are further task specific safety cases to be undertaken, these safety cases do not need to be completed in order for the court to find that the justification for taking land is sound. The task specific safety cases are the mechanism Civil Aviation uses to ensure compliance with the aeronautical study.[84]

[71] The final constraining factor noted by Mr Keel concerned the availability of the land, since QAC does not own all of the land needed for the expansion of the airport. This is the subject matter of this proposed taking.

Soundness and reasonable necessity

[72] Given the complementarity of objectives under the RMA and PWA, we find the

[83] Option 1 in the Discussion Document entitled "Master Plan Options: Let's start talking about tomorrow".
[84] [2017] NZEnvC 46 at [55].

evidence adduced in the NoR pertaining to a development option to accommodate up to 3.2 mppa to be current and relevant to the PWA inquiry.

[73] We further find the taking of land required to accommodate the expansion of the terminal and relocation of GA south of the main runway is both sound and reasonably necessary (if not essential) to achieve QAC's objectives under the PWA because:

- QAC has a designation over the land that is permissive of the works;
- there is a close nexus between the works permitted under its designation and the achievement of the PWA objectives for the taking of the land;
- the spatial extent of land required is justified in relation to those objectives; and
- planning on the basis of enabling 3.2 mppa is sound and the land can be used for the purpose of achieving the requiring authority's objectives for which the designation is sought.

Fairness and RPL's legitimate expectation

[74] RPL's particular concerns with the fairness of the proposed taking arise from its contention that there is no longer any certainty that QAC will progress with the expansion of the terminal and second, the belief that the land is being taken in order for QAC to pursue commercial development.[85] RPL submits, having regard to its legitimate expectation, the taking in these circumstances would be both substantively and procedurally unfair.

[75] Given our findings on certainty above, we reject the submission on procedural fairness. Indeed, we have no evidence to suggest that the process has been anything but fair, albeit that it is a process thrust upon RPL and not one of its own making. In particular, we find QAC is acting in the public interest and with due regard to the interests of RPL.

[76] Turning to substantive unfairness, RPL draws attention to Activity Area 8 in the Remarkables Park Zone, which includes the land proposed to be taken. Recalling RPL's legitimate expectation that QAC would use its own land for airport purposes, and that the

[85] RPL, submissions at [114]; Transcript (Somerville) at 70-71.

subject land would remain a "buffer zone", under the operative District Plan only a limited range of activities are enabled within Activity Area 8.[86] Activities that may be undertaken are of a rural/recreational nature, infrastructural utilities and parking. In other words activities that are not sensitive to noise from the airport's operations.[87] While some of the activities that may locate in the aerodrome redevelopment are of the same ilk as those enabled under the District Plan, RPL's complaint is that its master planning for the whole of the Remarkables Park Zone relied on there being a buffer separating airport activities from commercial and residential activities in that zone.[88] This was the subject matter of extensive evidence in the NoR proceedings.

[77] The argument could be understood in one of two ways. First, RPL is concerned about the effects of airport activities on the balance of the Remarkables Park Zone. Second, RPL's legitimate expectation includes Lot 6 buffering the wider Remarkables Park Zone from airport activities and that RPL relied on this when developing its plans for the zone.

[78] As for the effect on the wider zone, this is not pertinent to the PWA proceedings. While activities within the Remarkables Park Zone will be affected by airport activities locating on the land to be taken, the designation is subject to robust conditions which address those effects.

[79] We address the submission on QAC's commercial aspirations together with RPL's expectation Lot 6 would buffer the balance of Remarkables Park Zone from airport activities together, as the arguments are interrelated. We surmise the purpose of the submission on QAC's commercial aspirations is not only to allege a substantive unfairness but also to strike at the heart of the empowering provision (s 16 PWA) by challenging the veracity of the stated objectives for the taking.

[80] As will be clear from the foregoing, it is our judgment that QAC is empowered under the Airport Authorities Act to acquire land for the objectives stated in the Notice to Take. Subject to meeting the statutory tests in s 24(7) PWA the land may be taken. We do not accept the imputation that the taking of private land is not for local work for which the Airport Corporation has financial responsibility. We observe the activities enabled by

[86] The court was not addressed on what provision the proposed District Plan makes for this area.
[87] Operative District Plan, Activity Area 8.
[88] Foster, EiC dated 13 December 2013 at [2.11]. Putt, EiC dated 13 December 2013 at [12].

the operative and proposed District Plan are not atypical for an airport and we find nothing remarkable in the relief sought by QAC on appeal to the proposed District Plan.[89] [For a useful discussion of how activities at aerodromes have evolved to meet international and domestic passenger demands see *M S McElroy & ors v Auckland International Airport Ltd*].[90]

[81] RPL's legitimate expectations arising from the parties' contractual dealings, do not prevail against statutory powers enabling airport authorities to acquire and to take land subject to meeting the statutory purpose(s) for the power was conferred and second, the relevant statutory tests. Its expectations do warrant, however, close scrutiny of the proposed taking. Indeed, as RPL acknowledged QAC's burden in these proceedings to establish the need for public work still prevails.[91] While the planning horizon has been brought back to 2025 (being the expected year passenger movements will reach 3.2 mppa), this does not detract from the soundness of the planned expansion of the terminal and relocation of GA in furtherance of QAC's objectives nor does it detract from the (continuing) reasonable necessity to take the land. It is our judgment that the taking is fair, as it is sound and reasonably necessary to achieve QAC's objectives and the power to take is not being exercised for the purpose of enabling commercial development of the passenger terminal site.

[82] Finally, we do not accept RPL's submission that until QAC has certainty whether the existing terminal will be expanded, then it should lease the land[92] or that, given RPL's legitimate expectation that QAC use its own land for airport purposes, a more proportionate response in the circumstances would be for QAC to lease the land.[93] As stated, we do not share RPL's claimed uncertainty. The objectives for taking the land are to carry out work which QAC, as an airport authority, is empowered under the Airport Authorities Act 1966 to undertake and in relation to which QAC may acquire land. The acquisition of land in furtherance of these objectives may, therefore, be pursued under the Public Works Act. [As an aside, counsel for RPL would not be drawn on whether RPL would actually agree to lease Lot 6 to QAC].[94]

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[89] Including the relief to extend the airport zone.
[90] CIV-2006-404-005980 Williams J dated 27 June 2008 (HC).
[91] Transcript (Somerville) at 37.
[92] RPL, submissions at [132].
[93] RPL, submissions at [136].
[94] Transcript (Somerville) at 49, 56-61.

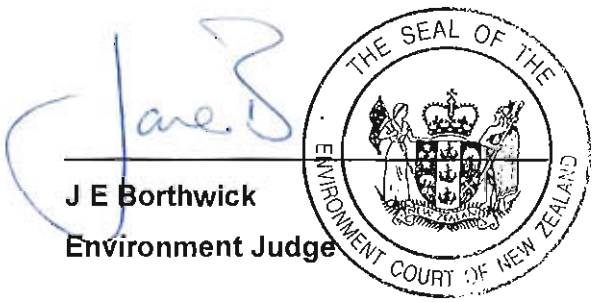
[83] QAC's objectives for the taking of land are to enable activities which it is empowered under the Airport Authorities Act to undertake and to acquire land for this purpose. We give weight to QAC's assurance that those objectives remain extant. We find that the taking is for local work for which QAC has financial responsibility (s 16 PWA). In furtherance of its objectives we find QAC has given adequate consideration to alternatives sites, routes, or methods for achieving its objectives (s 24(7)(b) PWA). The proposed taking is considered overall to be fair, sound and reasonably necessary (s 24(7)(d) PWA).

[84] Having found that the taking is for the purpose for which the statutory power was conveyed and second, that the taking satisfies the statutory tests we have found no reason why QAC should not proceed.

Costs

[85] Costs are reserved. Any application for costs is to be filed by **Friday 15 March 2019** with replies by **Friday 22 March 2019**. In the event no application for costs is made, the court's order will be (without further decision of the court issuing) that there is no order as to costs.

For the court:



J E Borthwick
Environment Judge