

Official complaint

to CEO Mike Theelen

by email

July 19, 2021

RE:

- **My official complaint to you dated June 29, 2021** [[link to complaint](#)]
- **Your response dated June 30, 2021** [[link to response](#)]

Tēnā koe Mike,

1. Context

I am concerned that your response shows you have entirely misunderstood the substance of my complaint dated June 29, 2021.

You directed your answer to the first clause in paragraph 5,¹ which deals with the measure of *significance* relating to the council's significance and engagement policy. In even a cursory reading of my letter to you, it should be clear that this was not the subject of my complaint.

Instead, I took issue and still take issue with the assertion in paragraph 5 that the council's agreement to the SOI is a necessary action "to enable QAC to be compliant".

This imperative is wrong. As I stated in my complaint, the act of council agreeing to the statement of intent *has no bearing on whether QAC is compliant with any of its obligations*. Nothing in your response to me has yet addressed this error in your advice to councillors.

2. Your responsibility

As CEO, it is your responsibility under the Local Government Act 2002 to advise councillors and ensure that all legal responsibilities, duties, and powers are correctly performed or exercised.²

There is no excuse for you not knowing the correct process, correctly advising councillors or correctly applying the legally mandated SOI process. Especially as we have for more than two years raised these concerns with you many times, explaining the issues and encouraging you to seek legal advice to inform your process.

Yet, under your management, councillors' legal authority to control QAC's objectives and the nature and scope of its activities continues to be undermined. You do this through the false constructs you impose on the SOI process, being:

1. **False imperative:** you advise councillors that QAC's legal compliance relies on the council agreeing to its statement of intent.
2. **Unnecessary urgency:** you advise that the council must agree to the SOI by July 1 for QAC to comply with its legal responsibilities.

¹ This refers to paragraph 5 of the Report For Agenda Item 3, being page 52 of [the agenda](#) for the full council meeting of June 30, 2021.

² [Section 42\(2\) \(b\) and \(c\)](#) of the LGA 2002, responsibilities of local authority chief executives.

3. **Incorrect procedure:** you circumscribe councillors' ability to modify the SOI by not using the mandated section 65(2)(b) of the LGA 2002.
4. **Incorrect purpose:** for the past two years, you have used the wrong purpose for local government when framing councillors' responsibility.

3. Councillor authority undermined

These false constructs that you impose substantially undermine councillors' decision process and their ability to modify QAC's statement of intent.

Therefore, they *subvert* the intent of the LGA 2002 where it gives local authorities control over their CCTOs. This then undermines the principal purpose of the council as required by Section 10 of the LGA 2002.³

4. External review

For two years, you have ignored these concerns that I and others have raised with you in our hope that good governance would secure good outcomes.

You leave me with no choice but to seek external review.

Yours sincerely,
Nāku iti noa, nā,



John Hilhorst

Attached:

The attached addenda provides evidence and explanation of how the Council's management of the statement of intent process continues to undermine councillors' authority over QAC.

³ [Section 10](#), LGA 2002, The purpose of local government is—

(a) to enable democratic local decision-making and action by, and on behalf of, communities; and
(b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

Addenda

The following addenda provide evidence and explanation of how your management of the statement of intent process undermines councillor authority over QAC. But first, it explains why this issue is so important.

5. A straightforward process

I note that the law governing the statement of intent process is in no way complex or challenging. [Section 65](#) is just eight lines of text. [Part 1 of Schedule 8](#) is just half a page with spaced lines.

6. QAC compliance with the SOI

As explained in my June 29 complaint, QAC is not dependent on any action by the council to fulfil its compliance responsibilities regarding its statement of intent. Schedule 8 of the LGA 2002 sets the requirements for QAC regarding its SOI, and I repeat them here:

1. it must deliver a draft statement of intent to its shareholders by March 1,
2. it must consider comments received from its shareholders in the period March 1 to May 1,
3. it must deliver the completed statement of intent to its shareholders before the financial year to which it relates, which in this case is before July 1, and
4. the SOI must contain all the information mandated in parts 2 and 3 of Schedule 8.

The four steps above constitute the total obligations QAC must fulfil for its statement of intent to be compliant with the LGA 2002. QAC had fulfilled these compliance obligations in each case before you asked councillors to agree to the SOI. Therefore, QAC was compliant with its SOI regardless of anything that the council might or might not do.⁴

The requirement for the council to agree to the SOI is an obligation on the council. It is not part of QAC's compliance regime, as I have explained in many previous communications to you, most recently in my official complaint dated June 29, 2021.

These are not semantic or frivolous points – they expose deeply troubling issues of subversion of the proper council process and incompetence.

7. Crisis point

The usurping of councillor authority over QAC comes at a time of crisis with substantial consequences.

The airport debate has been a forefront concern in the district for three years, with little sign of abating in the foreseeable future. Even amid the Covid lockdown, the council received over 80 airport-related submissions in its monthly meeting public forum.

⁴ As a matter of record, QAC was not compliant with either of the SOI's it delivered to Council last year, being the draft delivered as final to the Council meeting of April 23, 2020, or the one delivered to the council meeting of October 29, 2020. Neither of these included all the information mandated in Part 3 of Schedule 8. After being notified by me of this shortcoming on November 20, 2020, QAC delivered the missing information to QLDC and AIAL in letters dated January 14, 2021.

There are weighty issues at stake that strike deeply to the heart of the community. QAC has driven demand-led expansionary growth that directly conflicts with broad-based community calls to have that growth restricted.⁵

The pinch point where Queenstown Airport's air noise boundaries limit its further expansion has sparked a reckoning. It's become clear to many that the district is at a crossroads, and the decisions made in the next few years will lock in an infrastructural framework for generations, with far-reaching effects. Within the community, there are wide-ranging views that need to be understood and assessed.

For these reasons, robust and proper application of the law to the democratic process is crucial.

Yet, your advice and guidance for councillors fail on this essential need.

8. Effects

The false constructs you impose on the SOI process have substantial adverse effects. They severely obstruct and undermine the ability of the council to direct changes to QAC's final SOI.

This ineffectiveness to direct changes to QAC's SOI extensively limits councillors' ability to control QAC's objectives and the nature and scope of its activities.

This reduced control:

- Undermines the ability of council to ensure that QAC supports the council's purpose, being to enable democratic local decision-making and action on behalf of communities and promote its communities' well-being, for the present and future.
- It increases QAC's board and executive autonomy to pursue their business interests independently as a private company rather than as a council-controlled trading organisation.
- Has caused angst for councillors and the communities they serve.

The widespread debate triggered by proposed airport expansion in Queenstown and Wānaka has put substantial pressure on councillors from their constituents. For councillors in this current and past term, I imagine all would consider their work on the SOI to have been the most challenging, frustrating and stressful.

Similarly, a deep mistrust in the Council and QAC now pervades our communities on both sides of the hill. This mistrust stems, in my view, mainly because of the procedural failures of your false constructs that stymie councillors' ability to act on community concerns regarding the expansion of QAC.

With councillors' directive authority effectively neutered, QAC has pursued expansionist "demand-led" objectives, contrary to widely expressed community concerns regarding the impact of such expansion on community well-being.

9. Enough is enough

I have raised these concerns with you many times over several years to no effect.

⁵ QAC's public consultation on its proposed air noise boundary expansion in the Wakatipu received a record 1507 submissions with 92.5% opposed. The opposing submitters included five community associations and the Chamber of Commerce. Its plans for Wānaka Airport expansion galvanised that community into its most extensive ever campaign, cumulating in legal proceedings that saw QAC's lease over at Wānaka Airport quashed.

It was evident from the first occasion I observed the council's management of QAC's annual Statement of Intent process that it followed incorrect procedure.

For this reason, together with the chair of We Love Wakatipu, Cath Gilmour and others, I have often drawn your attention to the rules, explaining how you were not applying them correctly and asked that you rectify this.⁶ For example, from July 1 to July 14, 2019, we exchanged [seven emails](#) on the subject. Over more than two years and on multiple occasions, I have raised these concerns at the [public forum](#) of full council meetings and sent you many [emails](#) on the same topic.

Naïvely, I presumed that simply pointing the rules out would be sufficient to ensure future processes correctly followed them. But that has not been the case, and you chose to ignore our concerns. Your previous legal manager, Alice Balme, writing "*I don't intend to debate with you further the numerous matters of process set out in your email.*"

I hope you will consider this further complaint more seriously. Several recent judgements should give you cause to reflect on misplaced confidence in the council's processes.

10. Councillors undermined

Councillors are acutely aware of broad-based and deep-seated community concerns regarding QAC's objectives and the nature and scope of its activities. They are earnest in their endeavour to fairly balance the issues. Your incorrect assertion in paragraph 5 perpetuates a false imperative, unnecessary urgency, and incorrect procedure that subvert the democratic process by substantially undermining councillors' authority and ability to exercise governance control over QAC.

However good the communication between the council and the QAC board, however cooperative and trusting their shared vision, the council's legal authority to direct QAC to modify its SOI underpins the relationship and gives the council ultimate control.

Council and QAC's legal counsel made much of this authority in their submissions to the High Court judicial review of the Wānaka Airport lease. They argued that a 100-year lease did not constitute a sale of the airport because the council retained control over the land by controlling QAC through its directive control of QAC's SOI. Justice Van Bohemen's ruling agreed on this point.

This case highlights that Section 65(2)(b) is the crux of councillors' control over the airport.

11. False imperative and unnecessary urgency

On reading your advice in paragraph 5, a councillor would reasonably infer that QAC's compliance with the SOI was contingent on the council agreeing to it. But that is wrong. Thinking that QAC's compliance was at stake, a conscientious councillor would be reluctant to put this at risk, creating a false imperative.

This false imperative puts undue pressure on councillor decisions, undermining the conviction of any councillor who might otherwise have voted to not agree with the SOI. Or who might have needed more time to consider its contents or seek more information before deciding.

⁶ Our first communication sent to you and Mayor Boulton was on July 1, 2019. This was just four days after the council meeting where we first observed Council's SOI process.

You add to this false imperative an unnecessary urgency in your advice to councillors. Together with the mayor, you and your staff have consistently insisted that the council agree to QAC's statement of intent before July 1. This deadline is wrong.

By law, QAC could deliver the SOI at the close of business on June 30. It's absurd to suggest councillors would then have time to review the document, consider its contents, and be able to determine whether or not they agree to it, let alone schedule a meeting and pass a resolution.

It would be perfectly proper in the ordinary course of events to timetable the council's obligation under Section 65(2) for its July meeting.

Yet, both you and the mayor have frequently cautioned councillors that they must agree to the statement of intent – even though they had barely just received it – with no delay, or QAC would fail compliance on July 1 with dire consequences. For example, with your support:

*“The mayor acknowledged the Council’s concerns about the SOI but stated that he was equally conscious that **QAC could not operate** without a current SOI and the Council was legally obliged to receive⁷ the SOI by June 30.”⁸*

There are two errors in the mayor's argument: the false imperative that QAC's compliance is somehow contingent on the council's agreement with the SOI and the unnecessary urgency of requiring agreement before July 1.

The minutes of the same meeting record council CFO, Mr Burns, *“reminded the Council that QAC was required to have a current SOI **so the council needed to receive it before July 1**”*.

The implied threat of making Queenstown Airport operate illegally or potentially causing its imminent closure places extreme pressure on dissenting councillors, as evident in the minutes of that same meeting, which record:

*“**Whilst recognising that not receiving the SOI was contrary to the local government act, a number of members advised of their intention to vote against the motion.**”*

Such fortitude on the part of those councillors was extraordinary in the face of the extreme urgency and false imperative you directed. Other meetings regarding the SOI, including June 30, 2021, have been similarly fraught.

The false imperative and unnecessary urgency you create robs councillors of time to reflect, consider or collaborate. It restricts them from engaging with their communities to hear their concerns or feedback. In these ways, it undermines their decision making and subverts the democratic process, which is one of local government's two mandated purposes.

12. Incorrect procedure

Driven by the false imperative and unnecessary urgency, you guide councillors to incorrect procedure and outcomes at the meetings where they consider the final SOI.

An example is a resolution passed by the council on June 27, 2019, which read:

On the motion of the Mayor and Councillor MacDonald it was resolved that the council:

⁷ At this time, Council resolutions were still incorrectly using the meaningless term "receive" in place of the required "agree to".

⁸ Minutes of the June 27, 2019 council meeting.

1. Receive the Statement of Intent for 2019/20 for the Queenstown Airport Corporation subject to:
 - 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.

This resolution does not comply with the process set out in the LGA 2002. Council cannot qualify its agreement to the SOI with “subject to” conditions.

Section 65(2) presents a binary choice: either (a) council agrees to the statement of intent, or (b) it must use clause 6 of Schedule 8 to have it modified. There is no option (c). The above-quoted resolution appears to seek an impossible Harry Potter platform 9 ¾, somewhere between the two legal options. In doing so, it fails to comply with either (a) or (b) in Section 62(2)⁹.

Councillors have the right to exercise their individual vote for independent reasons. If the motion fails, the dissenting councillors would likely each have a different range of concerns. In the four days of receiving the 30+ page SOI within a meeting agenda that often extends many hundreds of pages covering a multitude of topics, councillors do not have the time or opportunity to develop a comprehensive communication to QAC that would satisfy all their separate concerns. Therefore, it is unreasonable to expect such a resolution could be drafted and agreed to at that same meeting.

Yet, this is the advice and direction in which you lead councillors, creating an additional barrier for any change to the final SOI. Without proper time or consultation opportunities, this incorrect procedure means councillors can at best achieve only minor change.

This avoidance of properly using Section 65(2)(b) subverts the democratic process by undermining the ability of councillors to reject QAC’s statement of intent, as explained below.

The straightforward legal process intended for councillors

On a motion to agree to the statement of intent, councillors should face a simple choice of yes or no.

If the motion fails, the LGA mandates clause 6 of Schedule 8 as the next step.

In the first instance, clause 6(3) of Schedule 8 requires the council to simply “*consult the board as to the proposed content of the resolution*” that the council might use to direct changes.

Council’s *consultation* with the board could take various channels, depending on the changes sought and their significance or contentiousness. It could be through Council’s CEO or the joint QLDC-QAC steering group. If contentious, it could involve a working group or full-council workshop, with the communication brought to a full council meeting for approval before being dispatched. Notably, this consultation period gives the QAC board an opportunity to itself modify and resubmit the SOI¹⁰ prior to Council formalising a directive resolution.

The process prescribed in the LGA 2002 allows councillors time and opportunity for reflective discussion, collaboration and debate. The opportunity for such thoughtful consideration is in stark contrast with the advice and guidance you give them.

⁹ Section 65(2): (a) reads: “*agree to, or*” and (b) reads: “*if [council] does not agree, take all practicable steps under clause 6 of schedule 8 to require the statement of intent to be modified.*”

¹⁰ Using the clause 5 process in Schedule 8, LGA 2002

The challenging hurdle you force on councillors

Under your guidance, when councillors do not agree to the SOI, you assist the mayor in guiding them to settle on some other counter resolution at that same meeting. This false procedure appears founded on the false imperative and unnecessary urgency previously discussed.

Instead of a simple yes or no vote, dissenting councillors have a Herculean task. In addition to reading and reflecting on the report, they feel obliged to bring a thoroughly worked alternative proposal to the council meeting in just four days. This expectation requires expert legal knowledge and wordcraft to draft an appropriate alternative and extensive consultation and collaboration within an impossibly short time frame. Fatefully, the challenge of coordinating an agreement on the strategy, intent and wording for a motion shared by all dissenting members within the four days invariably proves too hard.

It has been a source of inspiration to see many councillors try. Over the past three years of this airport debate, we have witnessed councillors striving to reflect the will of their communities. That they have fallen short is no reflection on them. Instead, it results from the false imperative, unnecessary urgency and incorrect procedure you impose.

13. Incorrect purpose

For the third time in two years, you and Corporate Services GM Meaghan Miller furnished councillors with false and misleading information on the purpose of local government in your Agenda Item 3 regarding the SOI for the June 30 meeting.

In addition to enabling democratic decision-making, the council's purpose is to promote the communities' social, cultural, economic and environmental well-being in the present and for the future.¹¹ But you repeatedly advise councillors that their purpose is *"to meet the current and future needs of the community for good-quality local infrastructure in the most cost-effective way for households and businesses."*

There is a substantial difference between these two purposes. The first's focus on well-being directs councillors to a wide array of considerations that could potentially result in constraining or capping airport growth if they consider that more appropriate for their communities' social, cultural, economic and environmental well-being.

In contrast, the second's focus on infrastructure provision would invariably shape councillors' mindset towards airport expansion.

Further, your advice has consistently omitted councillors' responsibility "to enable democratic local decision-making and actions by, and on behalf of, communities". This way, you lead them to believe they have the right to ignore their community's strong and consistent opposition to air noise boundary expansion and jet services at Wānaka, to instead favour claimed requirements of QAC in the SOI.

It took an official complaint from the chair of We Love Wakatipu¹² before you finally amended the agenda orally at this last meeting. However, it is notable that you insisted the same argument stood, despite the fundamental change in purpose. This continued inclusion of the wrong governing

¹¹ [Section 10, LGA 2002](#): the Purpose of Local Government was changed to the four wellbeings on May 14 2019.

¹² We Love Wakatipu Inc is a community group seeking to stop air noise boundary expansion. Read their official complaint [here](#).

purpose in your advice to councillors has insidiously reinforced the growth driven objectives of QAC and subverted the influence of community concerns.

14. Appendix

Below are listed the links used in this report.

Item	Description
Agenda Item 3	[June 24, 2021] Council agenda item 3, for Council meeting of June 30, 2021
Official complaint, JH	[June 29, 2021] The official complaint by John Hilhorst sent to Council CEO Mike Theelen regarding paragraph 5 of agenda item 3 or Council meeting June 30, 2021.
Mike Theelen response	[June 30, 2021] Council CEO Mike Theelen's response to John Hilhorst's complaint.
Official complaint, CG	[June 27, 2021] The official complaint by We Love Wakatipu Inc chair Cath Gilmour sent to Council CEO Mike Theelen regarding paragraph 5 of agenda item 3 or Council meeting June 30, 2021.
The sequence of 7 emails	[From July 1 to July 14, 2019] A sequence of 7 emails to the mayor Jim Boulton, CEO Mike Theelen and others. We challenge the process used by the council regarding the SOI, giving a detailed explanation of the mandated legal process.
Public forum talk	[August 8, 2019] An example of several presentations to the council public forum to challenge the incorrect process used by the council regarding the SOI in its previous meeting.
Email to CEO Mike	[August 27, 2019] An example of several emails to the council CEO Mike Theelen to challenge the incorrect process used by the council regarding the SOI in its previous meeting and explain the mandated legal process.
Video of council meeting	[April 23, 2020] Video of council meeting in which CEO Mike Theelen stated the SOI "... is the formal step that council needs to give life to the SOI... " [time stamp 1:31:16 to 1:32:48]. Councillors would infer from this advice that the SOI would be somehow dead or ineffective if they did not agree to it.
Section 10 , LGA 2002	This section states the purpose of local government.
Section 65 , LGA 2002	This section mandates that the council monitor QAC and either agree to its SOI or use clause 6 of schedule 8 to modify it.
Schedule 8 , LGA 2002	This schedule outlines the process and mandated content for the statement of intent required by council-controlled organisations. The six clauses of Part 1 set out the process.
Section 42 , LGA 2002	This section sets out the responsibilities of the Chief Executive of a local authority.