

**BEFORE THE HEARINGS PANEL
FOR THE PROPOSED QUEENSTOWN LAKES DISTRICT PLAN**

IN THE MATTER of the Resource Management Act 1991
(RMA)

AND

IN THE MATTER of a further submission to the Stage 1
Proposed Queenstown Lakes District Plan
by ZJV (NZ) Limited (**Further Submission
1370**)

LEGAL SUBMISSIONS FOR ZJV (NZ) LIMITED

**HEARING TOPIC 13 – QUEENSTOWN MAPPING
Stream 1A – Queenstown Business and Industrial**

14 July 2017

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

- 1.1 These legal submissions are filed on behalf of ZJV (NZ) Limited trading as Ziptrek Ecotours (**Ziptrek**). Ziptrek filed a further submission 1370 which opposed submission 574 by Skyline Enterprises Limited (**Skyline**). These submissions expand on the summary of legal submissions filed with the Panel on behalf of Ziptrek on 9 June 2017. We address the Commercial Tourism and Recreation sub-zone (**CTRSZ** or the **sub-zone**) sought by Skyline, as amended in the evidence of Sean Dent dated 9 June 2017.
- 1.2 The CTRSZ is sought to be introduced in parts of the Ben Lomond Reserve and Bob's Peak. It is proposed to include and considerably extend the footprint of the facilities currently operated by Skyline. It also includes Ziptrek's 'top treehouse' on Bob's Peak as well as the AJ Hackett Bungy Lease area. The sub-zone introduces liberal activity status controls for future development of buildings, passenger lift systems, commercial recreation activities, commercial activities, parking and forestry activity.
- 1.3 We submit that:
- (a) It has not been demonstrated under section 32 of the Resource Management Act 1991 (**RMA**) that the CTRSZ is an appropriate method;
 - (b) The CTRSZ is inconsistent with Part 2 of the RMA; and
 - (c) The CTRSZ promotes a level of activity and a lack of control that is inconsistent with the qualities of a Recreation Reserve (as defined in the Reserves Act 1977) and the Ben Lomond and Queenstown Hill Reserve Management Plan (**RMP**).

2. LEGAL FRAMEWORK

- 2.1 The legal framework for plan reviews is set out in sections 31, 32, 32A and 72 to 76 of the RMA. The mandatory requirements for district plans was set out comprehensively by the Environment Court in

Colonial Vineyard Ltd v Marlborough District Council¹. This test was adopted by Counsel for the QLDC in opening legal submissions on the PDP.²

- 2.2 In our submission the King Salmon judgment does not alter the **Colonial Vineyard** test with respect to the relevance of Part 2 of the RMA in the PDP review. We adopt the legal submissions of the QLDC in this regard³ and submit that the Panel is required to evaluate the CTRSZ against higher order planning instruments and Part 2 of the RMA.
- 2.3 To summarise the legal test, the Panel must evaluate and examine whether:
- (a) The CTRSZ will accord with and assist the QLDC carrying out its functions in order to achieve the purpose of the RMA;
 - (b) The CTRSZ is in accordance with Part 2 of the RMA;
 - (c) Rules in the CTRSZ achieve the objectives and implement the policies of the proposed plan; and
 - (d) The provisions of the CTRSZ are the most efficient and effective way to achieve the objectives of the proposed plan, having regard to the benefits, the costs and the risks of not acting.
- 2.4 In addition, the QLDC is required to have regard to the RMP when preparing its district plan under section 74(2)(b)(i) of the RMA.

3. INADEQUACY OF INFORMATION / SECTION 32 ASSESSMENT

- 3.1 In our submission Skyline have not provided sufficient information or assessment on the CTRSZ to support the relief it seeks. This has made it difficult for submitters to examine the potential effects of the proposal, including on their own interests, and creates concerns over

¹ [2014] NZEnvC 55 at [17].

² Opening Representation / Legal Submissions for Queenstown Lakes District Council, Hearing Streams 1A and 1B, 4 March 2016. The full extract from the Colonial Vineyard decision was attached at Schedule 1.

³ Legal submissions on behalf of Queenstown Lakes District Council as part of Council's Right of Reply, Hearing Stream 12 – Upper Clutha mapping, 10 July 2017, at section 3.

fulfilment of the duties under section 32 of the RMA. The lack of information and assessment of the CTRSZ has been acknowledged by multiple expert witnesses.⁴

3.2 Specifically, it is unclear:

- (a) What level and nature of further development Skyline proposes to pursue in the Ben Lomond Reserve;
- (b) What level of increased patronage and built development the CTRSZ might deliver;
- (c) What effects this future development is expected to have on the reserve, other users of the reserve and the wider area; and
- (d) How these effects are proposed to be avoided, mitigated or remedied.

3.3 It is also unclear whether Skyline have assessed the CTRSZ against other methods for delivering this future development. While section 32 does not require that the proposed method be the “superior” method, it does require an objective assessment as to what, on balance, is the “most appropriate” method.⁵ This assessment necessarily requires a consideration of other methods.

Traffic Network and Parking

3.4 We submit that potential traffic effects have not been adequately assessed or addressed.

3.5 Mr Dent proposes that the CTRSZ include a requirement for an Integrated Transportation Assessment to address parking issues as a matter of discretion for the QLDC when considering development within the sub-zone. Mr Dent concludes that the sub-zone is unlikely to have significant adverse effects on the transport network that cannot be addressed through a future consenting process.⁶ In coming to this

⁴ For example the rebuttal evidence of Ruth Evans on behalf of QLDC, 7 July 2017, at para 7.16-7.18 and the Rebuttal evidence of Jeff Brown on behalf of ZJV (NZ) Ltd, 7 July 2017, at section 4.

⁵ **Rational Transport Society Inc. v NZTA** [2012] NZRMA 298 (HC).

⁶ Statement of evidence, para 161.

conclusion, Mr Dent relies on the QLDC moving away from a GFA analysis in parking requirements to take into account alternative transport modes such as cycling and walking and the Queenstown Town Centre Transport Strategy.⁷

- 3.6 Mr Dent does not propose any matters of control or discretion to address road network effects. He has also failed to provide an assessment of how Skyline intends to effectively integrate alternative modes of transport for its guests in a manner that mitigates, avoids or remedies adverse traffic and parking effects.
- 3.7 The Environment Court found that car parking and traffic network issues were “fundamental” issues in Skyline’s resource consent application for its proposed gondola upgrade.⁸ It also found that Skyline’s initial proposal to limit car parking and rely on the QLDC’s Town Centre Transport Strategy was insufficient.⁹
- 3.8 The CTRSZ appears to go further than the consent application in terms of scale and breadth of development that it enables.¹⁰ We can therefore logically predict that the scale of traffic effects arising from the CTRSZ may be greater (although we must acknowledge that the specific development outcome is not known).
- 3.9 Wendy Banks for the QLDC has raised significant concerns with the uncertainty of the scale of future development that the CTRSZ could enable, and its associated traffic effects.¹¹ Ms Banks states “traffic effects from a commercial activity could potentially be significant depending on the scale and type which is unknown.”¹² Ms Banks disagrees with Mr Dent’s assessment that Integrated Transport Assessments should be exclusively relied upon, “especially without the

⁷ Paras 151-155.

⁸ ENV-2016-CHC-107, Minute dated 25 May 2017, para [4].

⁹ Ibid.

¹⁰ The difference in the scale between the consent application and the CTRSZ is addressed by Mr Brown in his rebuttal evidence, at para 2.1-2.2.

¹¹ Rebuttal Evidence of Wendy Banks on behalf of the Queenstown Lakes District Council, 7 July 2017.

¹² Rebuttal evidence, para 3.2.

certainty of a Transport chapter in the PDP and what it may or may not cover within this sub-zone.”¹³

- 3.10 The Environment Court in **Landco Mt Wellington Ltd v Auckland City Council**¹⁴ commented that it is not a developer’s responsibility to solve broader traffic problems that may exist in a district or area. The developer in the **Landco** decision, who sought a private plan change to facilitate a new residential development in Auckland, funded substantial work on the road network in those areas that experts modelled would be most adversely affected by the development. While this work could not completely mitigate expected traffic effects from the development (which were partly a product of existing traffic issues in Auckland), it went some way to address direct effects from the development and was accepted as appropriate by the Court.
- 3.11 It was also relevant that the development had a clear public utility in addressing the immediate and urgent pressure of Auckland’s housing shortage. Further, a possible effect was identified if the proposal was declined, in that potential residents would instead need to travel further and longer distances from less central housing.
- 3.12 It is acknowledged that Skyline is not expected to solve Queenstown’s wider traffic issues. However, it should attempt to solve issues generated by its proposal. Further, in our submission the CTRSZ does not address any urgent pressure of public utility, and therefore there is no reason to accept adverse traffic and network effects in an area that is already under significant strain.
- 3.13 It is submitted that Skyline’s analysis of traffic and transportation effects falls well short of what is expected by the proponent of a rezoning, and what is required to satisfy the relevant statutory tests (particularly section 32 (costs and benefits) and Part 2).
- 3.14 In addition, and as noted by Ms Banks, the absence of a Transportation chapter at this point in the PDP raises further uncertainties in how these effects will be addressed. In our submission, because of the critical importance of the issue:

¹³ Rebuttal evidence, para 3.9.
¹⁴ [2009] NZRMA 132.

- (a) As part of its proposed zone provisions, Skyline should have developed its own objectives, policies and rules to address traffic issues; or
- (b) The Panel must defer its decision on the sub-zone until the Transportation chapter is reviewed.

Evidence Before the Panel

- 3.15 Skyline called seven expert witnesses in proceedings for its recent resource consent application to expand its gondola and top and bottom terminal buildings. Witness from the following disciplines were called:
- (a) Acoustic;
 - (b) Economic;
 - (c) Traffic Engineering;
 - (d) Architecture;
 - (e) Landscape;
 - (f) Geology;
 - (g) Surveying; and
 - (h) Planning.
- 3.16 In support of its submission for the CTRSZ, Skyline has called only landscape and planning evidence.
- 3.17 While resource consent applications are different in nature from plan reviews (and with different tests under the RMA), the two proposals raise many of the same issues. In order to properly evaluate the CTRSZ against the requirements of the RMA, those issues need to be addressed by experts.

Costs and Benefits

- 3.18 Mr Dent has not provided a cost benefit analysis of the proposed sub-zone.¹⁵ Mr Dent’s assessment of benefits and costs in his evidence are centred on costs that Skyline has incurred in resource consent application processing¹⁶, but do not assess benefits and costs for Queenstown and other users of the Ben Lomond Reserve. Mr Dent concludes:¹⁷

I have identified that the proposed zoning and associated provisions are the most efficient and effective way to achieve the proposed Objectives and Policies. The costs and benefits of the proposal have been identified and my assessment contains a level of detail that corresponds to the scale and significance of the re-zoning proposal.

- 3.19 In our submission this costs benefit analysis is entirely misconceived. Consenting, monitoring and compliance costs can be relevant in the context of ensuring that plan provisions are readily understandable and not unnecessarily complex. However, the more common focus of the section 32 evaluation is on matters such as economic benefits (noting that there is no evidence on this matter) and, in this case, transportation network “costs” (again, noting that there is no evidence on this matter from Skyline). With that in mind, it is difficult to see how Mr Dent can conclude that “the costs and benefits of the proposal have been identified and my assessment contains a level of detail that corresponds to the scale and significance of the re-zoning proposal”..

4. INCONSISTENCY WITH PART 2 OF THE RMA

- 4.1 The Environment Court has acknowledged the sensitive receiving environment and the natural quiet values of the Ben Lomond Reserve.¹⁸
- 4.2 Amenity values are reflected in the description of a Recreation Reserve in section 17(2)(c) of the Reserves Act 1977:

¹⁵ Sections 32(1)(b) and 32(2).

¹⁶ Paras 224-225.

¹⁷ Para 219.

¹⁸ **ZJV (NZ) Ltd v Queenstown Lakes District Council** [2015] NZEnvC 205, for example at paras [178] and [188].

...every recreation reserve shall be so administered under the appropriate provisions of this Act that –

...

- (c) Those qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the reserve shall be conserved.

- 4.3 This description is also reflected in the definition of “amenity values” in section 2 of the RMA¹⁹. The Environment Court has found that, when making an assessment of amenity values, it is not bound by the opinions of landscape architects or what the local community thinks or values, but must apply the law objectively.²⁰
- 4.4 It is accepted (and has been accepted by the Environment Court²¹) that the environment of Bob’s Peak has been altered through the presence of commercial recreation operators. It does not follow, however, that the landscape is no longer ‘natural’ and that further development will not result in a degradation of ONL and amenity values.
- 4.5 As concluded by Dr Read, the anticipated site coverage of built form in the reserve that is contemplated by the sub-zone is “excessive and unlikely to be able to be executed without significant adverse effects on the landscape of the vicinity.”²² Mr Brown has also expressed concern that the CTRSZ “would pose risks to the amenity and landscape values of the reserve.”²³ In addition, while not an expert, Mr Yeo’s concerns regarding the value of amenity values in the reserve are relevant to the Panel’s considerations.²⁴
- 4.6 In our submission, when objectively assessing the provisions of the CTRSZ and the evidence adduced, it cannot be concluded that they maintain or enhance the amenity values of the reserve (which have been accepted by the Environment Court) and must, therefore, be

¹⁹ “...those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.”

²⁰ **Gisborne DC v Eldamos Investments Ltd** 26/10/05, Harrison J, HC Gisborne CIV-2005-485-1241, refer paras [36] to [42].

²¹ **ZJV (NZ) Ltd v Queenstown Lakes District Council** [2015] NZEnvC 205, for example at para [51].

²² Rebuttal evidence of Marion Read on behalf of the QLDC, 7 July 2017, para 4.7.

²³ Rebuttal evidence, para 3.5.

²⁴ Rebuttal evidence of Trent Yeo, 7 July 2017, section 3.

inconsistent with section 7 of the RMA. In addition, the evidence in support of the proposed sub-zone does not establish that the extent of development proposed is appropriate in the context of an ONL.²⁵

5. BEN LOMOND AND QUEENSTOWN HILL RESERVE MANAGEMENT PLAN

- 5.1 The QLDC is required to have regard to the Ben Lomond and Queenstown Hill Reserve Management Plan under section 74(2)(b)(i) of the RMA.
- 5.2 The phrase “shall have regard to” means that the RMP must be given material consideration²⁶, but the rules or policies that are in the specified document do not necessarily need to be followed.²⁷ The importance of any planning document relates to its relevance, and in our submission the RMP is highly relevant to the site of the proposed sub-zone because it a site-specific document that recognises the reserve status of the area. Regardless of the weight that should be afforded to it, Mr Dent has not provided genuine or material consideration of the RMP in his assessment of the CTRSZ.
- 5.3 In addition, while the RMP and the PDP are not required to be consistent, there are clear benefits in the RMA and the Reserves Act 1977 acting in complementary fashion. Mr Brown raises concerns of the difficulties that would arise should the PDP and the RMP be inconsistent.²⁸

Further, it would be very inefficient and create planning difficulties if the CTRSZ is not consistent with the RMP because, in addition to the duplication of processes, it could well be that one instrument may be enabling of a proposal but the other instrument may be disabling of the same proposal. This puts the Council and the other parties in a potentially conflicting position.

- 5.4 For the reasons already outlined, and those addressed in the evidence of Mr Brown, in our submission the CTRSZ is inconsistent with the RMP and the level of development and commercial activity that is anticipated by the Reserves Act 1977 for a recreation reserve.

²⁵ Section 6(b).

²⁶ **Winstone Aggregates Ltd v Papakura DC** EnvC A096/98

²⁷ As noted in the Rebuttal evidence of Ruth Evans for the QLDC, 7 July 2017, para 8.2.

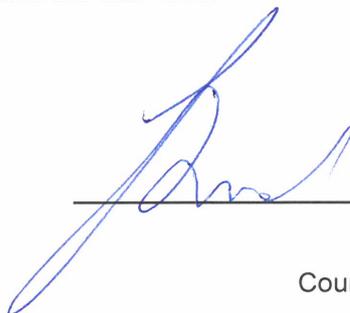
²⁸ Rebuttal evidence, para 3.6.

6. CONCLUSION

6.1 In our submission:

- (a) There is insufficient environmental assessment of the CTRSZ to grant relief;
- (b) Based on the information available, the CTRSZ does not promote sustainable management and is inconsistent with sections 6 and 7 of the RMA;
- (c) The CTRSZ is inconsistent with the RMP and the nature of recreation reserves anticipated in the Reserves Act 1977; and
- (d) The CTRSZ will not assist the QLDC in carrying out its functions to achieve the purpose of the RMA, most significantly because of the reduced control the QLDC will have over protection of the reserve within the sub-zone.

Dated: 14 July 2017



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