

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

**UNDER** the Resource Management Act 1991

**IN THE MATTER** of a submission on Stage 3 of the  
Queenstown Lakes Proposed District  
Plan

**BY** **TUSSOCK RISE LIMITED**

Submitter

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**LEGAL SUBMISSIONS ON BEHALF OF THE SUBMITTER**

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Dated: 7 August 2020

## **MAY IT PLEASE THE PANEL:**

### **Introduction**

- [1] These submissions are in support of the submission by Tussock Rise Limited (**TRL**) on Stage 3 of the Queenstown Lakes District Council Proposed District Plan (**PDP**).
- [2] TRL is the owner of land at Connell Terrace, Wanaka. TRL's land is adjoined to the west by land owned by Bright Sky Land Limited, which the two directors and shareholders of TRL are also the shareholders of. Bright Sky Land Limited's land is zoned Low Density Residential Suburban Zone.
- [3] TRL in its submission seeks its land along with adjoining properties to the north, south and east, and land on the other side of Ballantyne Road to the east, be rezoned as Business Mixed Use Zone (**BMUZ**), rather than the General Industrial Zone (**GIZ**) as notified.
- [4] It is submitted the proposed BMUZ sought by TRL is the most appropriate outcome for the land in terms of an analysis under s 32 of the Resource Management Act 1991 (**Act**), and will best accord with the Objectives and Policies of the BMUZ, the higher order provisions of the PDP, other relevant planning instruments, and Part 2 of the Act.
- [5] It is submitted the officers for the Queenstown Lakes District Council (**Council**) in recommending the submission be rejected and the notified GIZ be retained, have failed to have regard to the existing activities on the TRL land and surrounding sites, failed to have regard to the level of demand for industrial and non-industrial activities in this location, and failed to appreciate the surplus of industrial land in the Wanaka Ward and nearby townships of Queenstown and Cromwell.

### **Submission History**

- [6] TRL acquired its property in 2017. At that time, a submission had been lodged on Stage 1 of the PDP by the previous owner, the Gordon Family Trust, who sought a rezoning of its property from Industrial B (under the Operative Plan) to Low Density Residential Zone.

[7] That submission was ruled by the Hearings Panel to not be on Stage 1 of the PDP and was rejected. TRL appealed the decision and successfully defended an application by the Council to strike out its appeal,<sup>1</sup> with the Court making an award of costs in favour of TRL in respect of the strike out application.<sup>2</sup> The parties attended mediation of the appeal which was unsuccessful. The appeal is now on hold pending the outcome of TRL's Stage 3 submission.

## **Evidence**

[8] The following expert evidence has been filed in support of the submission:

- (a) Andy Carr (transport);
- (b) Jeremy Trevathan (noise);
- (c) John Ballingall (economics); and
- (d) Blair Devlin (planning).

[9] Evidence of Paul Miller, director of TRL, has also been filed in support of the submission.

[10] Mr Carr and Dr Trevathan's evidence assess the effects of development enabled by the proposed BMUZ and it is submitted based on this evidence there are no traffic or noise/reverse sensitivity reasons to decline the rezoning sought by TRL.<sup>3</sup>

[11] Mr Ballingall's evidence confirms:<sup>4</sup>

- (a) The BMUZ as sought will have no material impact on the supply of industrial land in Wanaka;
- (b) The BMUZ will be a more efficient use of the land and better provide for the economic wellbeing of Wanaka;

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<sup>1</sup> *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111.

<sup>2</sup> *Tussock Rise Limited v Queenstown Lakes District Council* [2020] NZEnvC 105.

<sup>3</sup> Statement of evidence of Andy Carr, 15 May 2020 at 73, Statement of evidence of Jeremy Trevathan, 29 May 2020 at 6.0.

<sup>4</sup> Statement of evidence of John Ballingall, 14 May 2020 at [8].

- (c) The notified GIZ will have adverse economic effects as it will prevent land that is suitable for a particular purpose from being used for that purpose; and
- (d) Any increase in the value of industrial land resulting from the BMUZ is not an adverse economic effect and simply represents the efficient allocation of resources.

[12] Mr Devlin's evidence, adopting the above conclusions, finds that from a planning perspective the BMUZ is the most appropriate zoning for the land. Mr Devlin carries out a thorough analysis of the proposed zoning under s 32AA of the Act, with the result of such analysis supporting the BMUZ as sought.<sup>5</sup>

[13] Mr Miller's evidence undertakes a ground-truthing exercise in relation to the existing activities on properties adjoining TRL's land. Mr Miller's ground-truthing confirms there is a wide mix of activities including industrial (19.3%), commercial (24.7%), residential (18.2%) and service (23.4%).<sup>6</sup> This variety of land uses suggests a flexible zoning is the most appropriate way to ensure the land is used efficiently, rather than a rigid GIZ which would render many of these activities as prohibited or at least non-complying.

[14] It is further noted the industrial activities identified by Mr Miller are light industrial in nature, with a florist being one such example of an activity being classified as an "industrial" activity.<sup>7</sup>

### **Council Planning Recommendation**

[15] The Council by way of the Section 42A Report by Mr Place has recommended rejection of TRL's submission.<sup>8</sup> Mr Place considers the notified GIZ is appropriate, on the basis that:

- (a) The ground-truthing undertaken by the Council finds that 53.3% of all recorded predominant activities in the Wanaka operative

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<sup>5</sup> Statement of evidence of Blair Devlin, 29 May 2020 at 14.

<sup>6</sup> Statement of evidence of Paul Miller, 29 May 2020 at [5].

<sup>7</sup> At [10].

<sup>8</sup> Section 42A Report, 18 March 2020 at 8.3-8.17.

Industrial Zone are service and light industrial activities, with non-industrial activities comprising 33.8%;

- (b) The economic evidence of Ms Hampson demonstrates if the land was zoned BMUZ this will significantly reduce the likelihood that the land will be used for industrial purposes; and
- (c) The diversification of land use enabled by the BMUZ will be contrary to the Strategic Direction of the PDP which seeks to manage the **District's** (emphasis mine) economy in a way that provides prosperity, resilience, and equity as well as for diversification.

[16] TRL does not accept the reasons identified by Mr Place in his recommendation.

[17] In regard to the ground-truthing, it is submitted Mr Miller's analysis is more relevant than that of Council's as it applies only to land that TRL seeks to be rezoned BMUZ, not land that will remain GIZ. In any event even if Mr Place's figures are adopted, it does not follow that a highly restrictive (if not prohibitive) GIZ should be imposed on the basis of a marginally predominate industrial land use (given as noted previously, many of these being very light industrial).

[18] The concern of Ms Hampson has been addressed in the evidence of Mr Ballingall, namely that the undesirability of BMUZ land being used for industrial purposes is not a negative consequence or market failure, but simply a reflection of the relative demand for such land use.<sup>9</sup> This is particularly so given the Council's own evidence demonstrates there is sufficient industrial zoned land in Wanaka (let alone in other parts of the District).

[19] Contrary to Mr Place's suggestion, the flexible zoning sought in the form of BMUZ is fully in accordance with the Strategic Direction in regard to the management of the District's economy as it will allow for a range of

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<sup>9</sup> John Ballingall evidence at [20].

uses rather than seeking to ‘engineer’ the market so as to only allow for one particular use to the exclusion of others.

- [20] Issues that might result from a variety of land uses, such as reverse sensitivity and traffic effects, have been addressed in the evidence of Dr Trevathan and Mr Carr.

### **National Policy Statement on Urban Development Capacity**

- [21] The National Policy Statement on Urban Development Capacity 2016 (**NPS-UDC**) is relevant to the issue of the rezoning of land for residential and business uses and forms the basis of the Council’s decision to notify the land as GIZ.

- [22] The Council in its legal submissions note that Ms Hampson’s evidence “demonstrates that overall, the Council’s proposed approach to industrial land... will give effect to the NPS over the short and medium term, as required.”<sup>10</sup>

- [23] The submissions then go on to explain how the Council must give effect to the NPS and ensure there is sufficient industrial land development capacity.

- [24] It is submitted the Council has not appeared to acknowledge there is already sufficient industrial land in Wanaka over the short and medium term. This means the NPS will be given effect to whether or not land such as that sought to be rezoned by TRL is zoned GIZ. Ms Hampson’s own evidence demonstrates the sufficiency of industrial zoned land supply is not materially affected in any way by the zoning of this land.<sup>11</sup>

- [25] It is further submitted in terms of the NPS, and as determined by Judge Jackson in the *Bunnings* decision, it is not appropriate to look solely at Wanaka when assessing the sufficiency of industrial land supply. Queenstown and Cromwell must also be considered.<sup>12</sup> When this wider area is looked at, the supply of industrial land increases even further.

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<sup>10</sup> Legal submissions for QLDC, 29 June 2020 at 7.4.

<sup>11</sup> M.E. Consulting, *Economic Assessment of Queenstown Lakes District’s Industrial Zones* (Appendix A to evidence of Natalie Hampson, 18 March 2020).

<sup>12</sup> *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59 at [128].

- [26] With this in mind, the issue of industrial land supply should not be seen as determinative in respect of the zoning of this land. Similarly, the fact there is a surplus of commercial and retail land in Wanaka means the issue of the supply of that land is also not determinative.
- [27] It is submitted rather than asking the question of what effect the GIZ or BMUZ will have on industrial vs. commercial/retail land supply, one must ask whether the GIZ or BMUZ is more appropriate in the specific context of this land given its characteristics and what is likely to be its most efficient use.
- [28] It is submitted when this question is asked and having regard to the variety of existing activities on the land and the obvious demand for such activities, it is clear that a more flexible zoning as sought by TRL is more efficient and appropriate.

### **Prohibited Activity Status**

- [29] The legal submissions for the Council, citing the Court of Appeal in *Coromandel Watchdog*,<sup>13</sup> address circumstances where it is appropriate to impose prohibited activity status for certain activities. They consider such circumstances to include:
- (a) When the activity should never be allowed;
  - (b) When the Council has insufficient information about a proposed activity and wants to take a precautionary approach;
  - (c) When the Council wants to ensure that new development occurs in a coordinated and independent manner; and
  - (d) When the Council wants to restrict the allocation of resources.
- [30] The *Coromandel Watchdog* principles are accepted. However, it is submitted they do not apply in this case as the proposed prohibition on commercial and retail activities by way of the GIZ will not ensure coordinated development (as evidenced by the fact so many existing

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<sup>13</sup> *Coromandel Watchdog of Hauraki Incorporated v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473.

activities will become prohibited), and whilst it may reflect an intention by the Council to restrict the allocation of resources, such restriction will lead to inefficiencies and unacceptable planning outcomes.

[31] Whilst there will always be contention between where the balance should be between the free market and regulatory intervention to achieve the best outcome, it is submitted a blanket prohibition on activities when such activities are already occurring on the land in question is far from finding the correct balance.

### **Existing Use Rights**

[32] The principle of existing use rights is found in s 10 of the Act.

[33] Section 10(1) provides land may be used in a manner that contravenes a rule in a District Plan or Proposed Plan if –

- (a) The use was lawfully established before the rule became operative or the proposed plan was notified; and
- (b) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified.

[34] Accordingly, notwithstanding the prohibited activity status, activities that were lawfully established prior to the notification of the PDP may continue to be undertaken provided the effects of such use do not increase in character, intensity, and scale.

[35] Whilst this protects existing uses, it may not allow the natural expansion of such uses, for example if an existing business operator was to take on more staff, or a change in use, for example if a similar but not identical business was to replace the premises of an existing business.

[36] Existing use rights are also extinguished if the activities cease for more than twelve months pursuant to s 10(2).

[37] For these scenarios to result in activities being prohibited is illogical given the effects of a slight expansion, a change in use to a similar but



not identical activity, or the resumption of an activity having ceased for twelve months will likely be negligible if not non-existent.

### **Section 32AA Resource Management Act 1991**

[38] The rezoning sought by TRL and the changes to the zoning as notified must be evaluated pursuant to s 32AA of the Act.

[39] An evaluation under s 32AA must be undertaken in accordance with s 32(1) to (4) and must:

- (a) Examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
- (b) Examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
  - (i) identifying other reasonably practicable options for achieving the objectives; and
  - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
  - (iii) summarising the reasons for deciding on the provisions; and
- (c) Contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal; and
- (d) Identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions.

[40] Mr Devlin's evidence on behalf of TRL undertakes the required analysis pursuant to s 32AA.<sup>14</sup>

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<sup>14</sup> Above n 5.

[41] It is submitted this analysis demonstrates the benefits of the proposed zoning will outweigh that of the zoning of the properties as notified.

[42] Other benefits that will result from the BMUZ is the increased variety and choice in regard to BMUZ in Wanaka, bearing in mind the proposed changes to the zoning of Three Parks, which is all in single ownership, and the limited opportunity in the only other BMUZ at Anderson Heights.

[43] In terms of effects on the Wanaka Town Centre resulting from BMUZ, it is submitted there is no evidence that development at Three Parks has had any such impact and it was not raised as a concern by the Council in its s 32 or s 42A Reports.

## **Part 2 Resource Management Act 1991**

[44] It is submitted the proposed BMUZ will:

- (a) Achieve the purpose of the Act (s 5) as it will promote the sustainable management of natural and physical resources. The RVZ will enable land to be used for a purpose with accords with market demand and the existing activities in the area;
- (b) No be contrary to the matters of national importance (s 6); and
- (c) Achieve the matters in s 7, in particular the efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the maintenance and enhancement of the quality of the environment, and the finite characteristics of natural and physical resources.

## **Conclusion**

[45] Based on the evidence filed in support of the submission and the analysis under s 32AA of the Act carried out by Mr Devlin, the BMUZ is the most appropriate and efficient zoning for the properties.

[46] The BMUZ will introduce a flexible zone framework that reflects the variety of activities being carried out on the land and will have economic and other benefits to both the submitters and the public generally, while ensuring these are not outweighed by adverse effects on industrial land

users or on the supply of industrial land in Wanaka, or issues such as reverse sensitivity or traffic that may result from a wider range of land uses.

[47] It is submitted the evidence for TRL should be preferred over that of the officers for the Council and their recommendation to reject the submission.

Dated: 7 August 2020



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G M Todd / B B Gresson  
Counsel for the Submitter