

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

**IN THE MATTER**

of the Resource  
Management Act 1991

**AND**

**IN THE MATTER**

of Resort Zone Hearing  
Stream 9 – Millbrook  
Zone

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**SYNOPSIS OF SUBMISSIONS ON BEHALF OF MILLBROOK COUNTRY  
CLUB LIMITED**

**15 February 2017**

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**Ian Gordon**  
Barrister  
Stout Street Chambers  
Wellington

Telephone: 04-472 9026  
PO Box 117, Wellington 6140  
Email: [ian.gordon@stoutstreet.co.nz](mailto:ian.gordon@stoutstreet.co.nz)

## **MAY IT PLEASE THE PANEL**

### **Introduction**

1. This synopsis of submissions is on behalf of submitter #696, Millbrook Country Club Limited (Millbrook) (also FS1306).
2. Millbrook has been seeking to expand its golf tourism opportunities from its present 27-hole operation to a full international tournament standard, 36-hole facility. To enable that it has purchased 66 hectares of rural land on its western boundary known as the Dalgleish Farm.
3. Rather than seek a private plan change to extend the Millbrook Resort Zone (the MRZ) across the additional land, Millbrook has worked with the Council to have its re-zoning aspirations included in this review of the Plan.
4. To that end consultants engaged by Millbrook prepared the bulk of the s 32 assessment.
5. In response to submissions by direct neighbours X-Ray Trust Ltd, #356 and Donaldson, #446, a revised structure plan and set of provisions which significantly reduces the effects raised by those submitters was prepared and lodged on 2 December 2016.
6. X-Ray Trust has acknowledged that the revised structure plan and revised provisions meet all of its concerns. For this reason, the s 42A report recommends that the X-Ray Trust submission be rejected.<sup>1</sup>
7. Despite very recent and continuing efforts, the same level of agreement has not yet been reached with the Donaldsons.
8. In preparation for this hearing and in light of submissions received, Millbrook has had landscape and planning elements of the original s 32 assessment and revised proposal reviewed by appropriate experts who have provided written statements of evidence to this hearing (Messrs Craig and Edmonds).
9. Additionally, the planning experts for Millbrook, X-Ray Trust and the Council have conferenced in accordance with the Practice Note in order to identify their differences, if any. It is envisaged that a joint report will be tabled and that they are close to agreement on all issues as between them.

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<sup>1</sup> Paragraph 8.9, page 13

10. The other witness statement lodged by Millbrook is the managerial statement by Mr Ben O'Malley who gives helpful background evidence about the operations that occur within this small special zone, expansion aspirations and engagement with issues raised by some submitters.

### The Law

11. The legal test of s 32 is well known and well traversed by various Court decisions. The issues were usefully described by the Court in its declaration decision in *Monk v Queenstown Lakes District Council* [2013] NZEnvC 156 as follows:

[47] That is a generic assessment of the amended plan change, but of course each provision will need to be assessed individually (to the extent necessary) under section 32. That means that one of the primary matters for the court to consider on a substantive hearing of the appeal on PC39 would be to compare:

- (a) the status quo (i.e. a Rural General Zoning) of the Arrowtown South land with
- (b) the PC39 proposal; or
- (c) the submissions on PC39; or
- (d) something in between (a), (b) and (c)

in the light of the relevant tests under the RMA for preparation of plan changes. In particular, as set out in *High Country Rosehip Orchards Limited v Mackenzie District Council*, that requires:

[...]

8. ... Each proposed objective in [the] ... plan ... change ... **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act;
9. The policies ... to **implement** the objectives, and the rules (if any) ... to implement the policies.
10. [Examination of] Each proposed policy or method (including each rule), ... **having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives of the district plan:

(a) **taking into account:**

- (i) the benefits and costs of the proposed policies and methods (including rules);

And

- (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods; ...

[...]

The ultimate issue for the substantive hearing would be which of the options (a) to (d) above better achieves, in respect to each objective, policy and rule, the purpose of the RMA when examined under those statutory tests.

12. As to the correct approach to be taken to s 32, the High Court has observed:<sup>2</sup>

*Section 32*

[44] Section 32 requires that, before adopting any proposed changes to policies, the Board must evaluate and examine whether, having regard to the efficiency and effectiveness, the changes are the most appropriate way of achieving the objectives of the Freshwater Plan.<sup>3</sup> In making that evaluation the Board had to take into account the benefits and costs of the proposed policies (ie “benefits and costs of any kind, whether monetary or non-monetary”);<sup>4</sup> and the “risk of acting or not acting, if there is uncertain, or insufficient information” about the subject matter of the proposed policies.<sup>5</sup>

13. That s 32 requires a value judgement “as to what on balance, is most appropriate, when measured against the relevant objectives” is not new. It is the approach that the Environment Court has consistently been taking as evident by cases such as:

- *Eldarmos Investments Ltd v Gisborne District Council*<sup>6</sup>
- *Long Bay-Okura Great Park Society Inc v North Shore City*<sup>7</sup>
- *High Country Rosehip Orchards Ltd v MacKenzie District Council*;<sup>8</sup> and
- *Waterfront Watch Incorporated v Wellington City Council*.<sup>9</sup>

14. It is submitted that the task for the Panel involves its overall value judgment as to whether a proposed policy appropriately achieves the objective(s) and whether methods – rules, standards, and assessment matters enable successful implementation of the policies.

15. Likewise, in *Colonial Vineyard* the Court acknowledged that:<sup>10</sup>

‘most appropriate’ in section 32 suggests a choice between at least two options (or, grammatically, three). In other words, comparison with something does appear to be mandatory.

16. Here, the choice is between rural zoning with rural activity on the Dalglish land, or zoning for the type of golf tourism activity that the MRZ enables - in the form of comprehensive development pursuant to a structure plan.

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<sup>2</sup> *Rational Transport Society Incorporated & Anor v NZTA* CIV-2011-485-002259

<sup>3</sup> Section 2(1)

<sup>4</sup> Section 2(1)

<sup>5</sup> Section 32(4)

<sup>6</sup> [2005] NZEnvC 198.

<sup>7</sup> EnvC A078/08, 16 July 2008.

<sup>8</sup> [2011] NZEnvC 387.

<sup>9</sup> [2012] NZEnvC 74.

<sup>10</sup> *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [64].

17. The overarching value judgement referred to above is whether the proposed provisions meet the purpose and principles of the Act. The final word on the Part 2 purpose and principles of the RMA is set out between paragraphs [21] to [30] of the Supreme Court's 2014 decision in *King Salmon*. No other interpretation is now available.
18. In this case, the three planning witnesses, Ms Evans for the Council, Ms Taylor for X-Ray Trust and Mr Edmonds for Millbrook, each conclude that the revised version of the MRZ structure plan and revised provisions is the preferred outcome for achieving the purpose and principles of the Act and the requirements of s 32. It is understood that no alternative expert view is to be offered up.
19. The carefully considered views of Mr Edmonds, Ms Taylor and Ms Evans are to be accorded significant weight given:
  - Their measured and holistic approach to the likely effects of the modified proposal;
  - Their outward looking approach to assessing effects beyond the Dalglish South site;
  - Their reliance on independent landscape experts; and
  - Their sensible acceptance that the purpose of the Act is able to be achieved by rezoning from rural to MRZ with scope for a sensitive golf tourism development which respects the surrounding landscape.
20. The only matter at issue between them is the methodology to be adopted to ensure that the enabled golf, residential and landscape components conform to the recommendations of the landscape experts, Mr Craig and Ms Ayres.
21. In this respect, Millbrook and X-Ray Trust are agreed that for the sake of certainty, the various critical design components should sit inside the MRZ rather than outside the Plan.
22. Whilst the plant species list could readily sit in an appendix, design elements such as maximum building heights, set-backs reflectivity, colour and type of building materials need to be in the zone either as assessment criteria, standards or additional appendices.
23. Without that degree of certainty, X-Ray Trust's concerns are not able to be met and cannot be said to be. But at the time of writing it is understood that

the respective planners are close to agreement as to final preferred methodology to achieve certainty for future development in the zone.

**Submitter # 446 - Donaldson**

24. This submitter has modified its submission by leave of the Panel. Millbrook reserves its position in respect of that change.
25. However, it is understood that no expert witnesses are to be called in support of that submission rather that Mr and/or Mrs Donaldson will speak to their concerns and legal submissions are to be made.
26. Millbrook respects the Donaldsons' situation and has historically worked with them to resolve concerns. For various reasons that has not been entirely possible this time around, but considerable goodwill remains.
27. It is understood that arguments for the Donaldsons will be along the lines that:
  - a. Effects on them should not be assessed only in terms of impacts on their single consented building platform, and
  - b. Millbrook is somehow estopped from approaching that assessment of effects on anything short of 15 dwellings in locations yet to be determined, on the basis of resource consents or zoning (and consents) yet to be determined, or
  - c. There is a real likelihood of up to 15 rural lifestyle dwellings being developed at some time in the future such that the existing environment should be deemed to include those dwellings, some or potentially all with views into the Dalgleish South site.
28. This approach introduces a level of uncertainty that is untenable for decision makers. It involves the same issue as in the High Court appeal by Foodstuffs on PC19 of the QLDC Plan.<sup>11</sup> The question there was whether the existing environment should be deemed to include consented activities - a supermarket and a hardware mega-store - when the likelihood of those activities actually occurring was unknown because they were subject to appeal.
29. In *Foodstuffs* Justice Fogarty observed:

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<sup>11</sup> *Foodstuffs (South Island) Limited v QLDC, CIV-2013-425-94, Fogarty, J. [110] - [135]*

"[118] Treated as a wholly practical issue, which is what I think Judge Borthwick's division did, the Court was faced with a very uncertain situation. It knew the resource consents were under appeal. As a result it found that they could not assess likelihood."

And

"[130] It would be very hard for Judge B to have to justify in the public interest, let alone against the efficient policy of the RMA, abandoning delivering a decision on PC19 while awaiting appeals on the Foodstuffs and Cross Roads resource consents through the appellate Courts. She did not.

...

[132] I consider that judge Borthwick's division had in fact no choice but to keep going."

30. In the High Court appeal of the *Colonial Vineyards* case Justice Goddard observed:

The reality is these changes are likely to be implemented at least to some extent in the future. However, the weight to be placed on those changes is a matter for the Environment Court, which carefully considered the plan changes and determined those alternatives were too uncertain to be the subject of reliable predictions."<sup>12</sup>

31. In this case the Donaldsons are yet to commence resource consent applications or even determine their preferred zoning and undertake a s 32 assessment.
32. Accordingly, the only certainty you have is that the Donaldson component of the existing environment is presently rural land with a single consented but undeveloped building platform that is visually removed from the Dalglish land, as per Ms Ayres and Mr Craig.
33. The Council and Millbrook are correct, therefore, to treat it as such for the purpose of assessing effects. To do otherwise would be to rely on a future possibility that could not be more uncertain; an approach which would be contrary to the High Court's finding in the *Foodstuffs* case.
34. Further, even if you could have regard to a possible proposal for another 14 house sites on the Donaldson land, the internal effects of such density would likely have considerably greater impact than the specific mixed use development enabled by the revised structure plan.

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<sup>12</sup> NZ Aviation Museum Trust & Another v Marlborough DC and Colonial Vineyard Limited [2014] NZHC3350, Goddard, J. [67]

### **Other Submitters**

35. It is understood that no submitters other than X-Ray trust and the Donaldsons wish to be heard in this Hearing Stream.
36. In any event, Millbrook adopts the evidence of Ms Evans in respect of the other submissions that have been made and respectfully submits that those submissions not be accepted.
37. With the exception of Ms Evans there is no expert evidence on the merits of other submissions. Her opinion should be upheld.

### **Conclusion**

38. The basis for re-zoning the Dalgleish land to MRZ is made out by the s 32 assessment. The revised structure plan and revised provisions were developed in direct response to cogent submissions on amenity issues that are able to be sensibly resolved, as set out in the expert evidence of Mr Craig, Mr Edmonds, Ms Taylor and Ms Evans.
39. The purpose and principles of the Act will be met by the revised re-zoning proposal.
40. The witnesses for Millbrook are:
  - Ben O'Malley – resort zone management;
  - Andrew Craig, landscape and
  - John Edmonds, planning.

**DATED** this 15th day of February 2017

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I M Gordon  
Counsel for Millbrook Country Club Limited