

**BEFORE THE QUEENSTOWN LAKES
DISTRICT COUNCIL**

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

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan

CLOSING SUBMISSIONS FOR:

Darby Planning LP (#608),
Soho Ski Area Limited (#610),
Treble Cone Investments (#613)
Lake Hayes Ltd (#763)
Lake Hayes Cellar Ltd (#767)
Mount Christina Limited (#764)

Hearing Stream 02 - Rural, Rural Residential and Rural Lifestyle, Gibbston
Character Zone, Indigenous Vegetation and Wilding Exotic Trees - Chapters 21,
22, 23, 33 and 34

27 May 2016

ANDERSON LLOYD
LAWYERS
QUEENSTOWN
Counsel: M A Baker-Galloway R E Hill
(maree.baker-
galloway@andersonlloyd.co.nz/
rosie.hill@andersonlloyd.co.nz)

Level 2
13 Camp Street
PO Box 201
QUEENSTOWN 9348
DX ZP95010
Tel 03 450 0700
Fax 03 450 0799

1. Introduction

- 1.1 At the close of the submitters' case there were still outstanding questions from the panel that were not able to be put to Mr Ferguson, due to time constraints. It was therefore agreed the outstanding questions from the Panel would be put in writing, and Mr Ferguson would respond in writing. These submissions accompany the supplementary response from Mr Ferguson to the written questions from the Panel, and addresses outstanding matters in closing.
- 1.2 The issues addressed in closing relate primarily to the SASZ provisions. Mr Ferguson also provides his response to 2 discrete questions from the panel in respect of the Rural Living Zone density and lot size issue.
- 1.3 These submissions also respond to a question from Commissioner St.Clair to counsel, on how bundling works when bundling a controlled activity and a restricted discretionary activity.

2. Ski Area Sub Zone provisions

Passenger lift systems – rule 21.5.28

- 2.1 Mr Ferguson explains the rationale behind exempting structures such as towers associated with the passenger lift systems within, or to, SASZ, from the definition of building.

Visitor Accommodation

- 2.2 In response to a question, Mr Ferguson proposes a new term and definition for "Ski Area Accommodation" for the Panel's consideration. The alternative would replace the approach advanced in evidence whereby the standard plan wide definition of Visitor Accommodation was used, and it was then specified in suggested rule 21.5.33 as a Standard that stay be restricted to no greater than 6 months.

- 2.3 Defining a new activity of "Ski Area Accommodation" along similar lines would also work and prove equally effective in terms of ensuring on mountain visitor and working accommodation is provided for in a restricted discretionary consenting framework.

Informal airports

- 2.4 Mr Ferguson confirms the basis on which he supports informal airports in SASZ being permitted activities.

Chapter 33 - Indigenous Vegetation and Biodiversity

- 2.5 On this issue, the submitters' objective is two-fold: firstly to ensure processes are efficient, consistent and avoid unnecessary duplication, and secondly, that this be achieved in a manner that enables the integrated and effective management of effects of the SASZ activities on indigenous vegetation and habitats, in a way that results in a positive outcome.
- 2.6 Where a SASZ is on public land administered by the Department of Conservation pursuant to a Conservation Management Strategy ("CSM") and when necessary a concession (such as a lease) for commercial activities is obtained, it is considered that Conservation Act's statutory framework will ensure appropriate protection and management of matters relating to both section 6 (c) for significant indigenous vegetation and significant habitats for indigenous fauna, as well as the requirement in section 31 (1) (b) (iii) that the council control land use activities so as to maintain indigenous biodiversity. Therefore, the suggested exemption, put forward as rule 33.3.4.4, is still sought by these submitters insofar as it relates to land management under the Conservation Act in accordance with a CMS or Concession.
- 2.7 Where the land is not administered by the Department of Conservation, the revised framework proposed by Mr Ferguson on behalf of the submitters in the attached supplementary evidence is intended to provide an opportunity for vegetation clearance associated with a ski area activity, to be granted as a controlled activity, in a form requires and Ecological Management Plan and that allows for consistency with any management plans relevant to indigenous vegetation prepared under any other legislation that applies to the land. The proposed new rule 33.4.4 allows for the Ecological Management Plan to address a range of matters to ensure an integrated approach to vegetation clearance and modification, under a Management Plan framework.

Capacity

- 2.8 There were questions from the panel at the hearing on whether it was necessary to include provisions in the PDP to control or cap the number of people taking part in Ski Area Activities, to control effects. The responses from both Mr McCrostie and Mr Ferguson were that a cap was not necessary.
- 2.9 As this is a key issue for the operation and development of SASZ, Mr Ferguson expands on this point further in the attached. Mr Ferguson details that there are several rules establishing standards or requiring consents, that act as a default control over the intensity of activity, the spatial distribution and location of activities, buildings and works, which practically control the scale of activities and therefore the

number of people that are able to be catered for. An additional cap on numbers of people is not required in combination with these other controls on intensity and scale.

3. Rural Living

- 3.1 In response to questions from the panel, Mr Ferguson confirms that an average density control, rather than minimum lot size, is the preferred method based on the evidence on which he relies, to enable rural living in the Rural Living zone while controlling effects on the character of that zone. He also confirms that the evidence on which he relies supports the requested average density of one residential unit per hectare for the Wakatipu Basin in particular.

4. Bundling Controlled and Restricted Discretionary Activities

- 4.1 In response to a question from Commissioner St.Clair this part of the submissions explain what will be the matters to which discretion is reserved, should a controlled and restricted discretionary activity be bundled and considered together (e.g. a controlled building and a restricted discretionary visitor accommodation proposal in a SASZ).
- 4.2 The criteria for when to decide to 'bundle' activity is set out in the Environment Court case of *Southpark Corporation Limited v Auckland City Council*,¹

"... a consent authority can consider a proposal in the round, not split artificially into pieces, that approach is not appropriate where:

(a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and

(b) the scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and

(c) the effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application, but are distinct."

- 4.3 The three limbs of the test above are conjunctive. Given the overlap between the matters of control for buildings in SASZ under rule 21.5.27 (that includes location, earthworks, landscaping) and matters submitters are suggesting for reserved discretion for vegetation clearance under suggested rule 21.5.3 for Visitor Accommodation (including location, landscape and ecological values) bundling is likely in that scenario.

¹ *Southpark Corporation Limited v Auckland City Council* [2001] NZRMA 350 at [15]

4.4 Much of the case law on when bundling is appropriate is considered in the context of notification decisions (as in *Urban Auckland* above), rather than consent decisions. In *Urban Auckland* the High Court did not make a finding as to the validity of the consent decisions because of its findings on the invalidity of notification – it was therefore unnecessary to decide on the validity of the decisions.² Assistance for the latter can however be taken from the purpose of bundling as discussed by the Court of Appeal in *Bayley*;

"The consent authority should direct its mind to this question and, where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces".³

4.5 The intent is the assessment 'in the round' that applies at both the stage of notification as well as decision making. To assess the activity as a whole and in the round, all relevant criteria of the bundled activities in question will be relevant for consideration.

4.6 Furthermore, bundling consents together under different planning instruments is now well accepted law, as discussed above in *Urban Auckland* and in the High Court in *Newbury Holdings Limited v Auckland Council* [2013] NZHC 1172:

"The High Court in Tairua Marine Limited v Waikato Regional Council confirmed that:

It is a longstanding principle that where there is an overlap between two consents so that consideration of one will affect the outcome of the other it will generally be appropriate to treat the application as one requiring overall assessment on the basis of the most restrictive activity...

[60] I see no reason why this principle, which has been consistently applied to bundle together different activity consents, cannot apply to bundle together activity consents from different council plans, as long as there is the requisite overlap between the plans. Furthermore, there is also some precedent for the bundling together of not only different activity consents, but consents from different plans..."⁴

(footnotes omitted)

4.7 The key from the above is the aspect of 'overall assessment' one could not apply a bundling approach across different plans for example by only considering assessment matters from the most restrictive activity class in one plan and call that an overall assessment. All matters of discretion remain relevant.

² *Ibid*, at [158]

³ *Bayley v Manukau City Council* [1991] 1 NZLR 568 461 (page 17)

⁴ *Newbury Holdings Limited v Auckland Council* [2013] NZHC 1172 at [59]-[60]

4.8 Should a controlled building in the SASZ be bundled with the restricted discretionary Visitor Accommodation, the matters over which could will be able to reserve discretion are the combination of both controlled and restricted discretionary rules.

Dated this 27th day of May 2016

A handwritten signature in cursive script, appearing to read "Maree Baker-Galloway".

Maree Baker-Galloway

Counsel for Darby Planning LP (#608) et al