

**BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL HEARINGS PANEL**

**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of the review of parts of the Queenstown Lakes District Council's District Plan under the First Schedule of the Act

**AND**

**IN THE MATTER**

of submissions and further submissions by **ZJV (NZ) LIMITED**

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**MEMORANDUM OF COUNSEL FOR ZJV (NZ) LIMITED REGARDING NOTIFICATION PROVISIONS IN THE OPEN SPACE AND RECREATION ZONE**

**STAGE 2, HEARING STREAM 15**

Dated: 27 September 2018

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## MAY IT PLEASE THE PANEL

### Introduction / Background

1. This memorandum is filed on behalf of ZJV (NZ) Limited (**Ziptrek**) and responds to a question that arose during hearings on Stage 2 of the Queenstown Lakes Proposed District Plan on 25 September 2018. The Panel asked for counsel's views on whether Rule 38.12.2 in the Open Space and Recreation Zone is legal, in light of amendments that were made to the Resource Management Act 1991 (**RMA**) by the Resource Legislation Amendment Act 2017 (**RLAA**).
2. Rule 38.12, as notified, reads:

#### **38.12 Rules – Non-notification of Applications**

All applications for controlled and restricted discretionary activities shall not require the written approval of other persons and shall not be notified or limited-notified, except for the following:

- 38.12.1 Restricted discretionary activities within the Informal Recreation Ben Lomond Sub-Zone; and
- 38.12.2 Controlled activities within the Informal Recreation Ben Lomond Sub Zone shall not be publicly notified but may require the written approval of affected persons or give limited notification to affected persons.

3. The RLAA replaced section 95B of the RMA and precludes the limited notification of controlled activities, except where "special circumstances" arise. Section 95B, as amended, reads:

#### **95B Limited notification of consent applications**

- (1) A consent authority must follow the steps set out in this section, in the order given, to determine whether to give limited notification of an application for a resource consent, if the application is not publicly notified under section 95A.

*[Step 1 not relevant]*

*Step 2: if not required by step 1, limited notification precluded in certain circumstances*

- (5) Determine whether the application meets either of the criteria set out in subsection (6) and,—
  - (a) if the answer is yes, go to step 4 (step 3 does not apply); and
  - (b) if the answer is no, go to step 3.
- (6) The criteria for step 2 are as follows:

- ...
- (b) the application is for a resource consent for either or both of the following, but no other, activities:
    - (i) a controlled activity that requires consent under a resource consent under a district plan (other than a subdivision of land):
    - (ii) ...

*[Step 3 not relevant]*

*Step 4: further notification in special circumstances*

- (10) Determine whether special circumstances exist in relation to the application that warrant notification of the application to any other persons not already determined to be eligible for limited notification under this section (excluding persons assessed under section 95E as not being affected persons), and,—
    - (a) if the answer is yes, notify those persons; and
    - (b) if the answer is no, do not notify anyone else.
4. The amended section 95B of the RMA came into legal effect on 18 October 2017, prior to notification of Stage 2 of the PDP on 23 November 2017.

### **Analysis**

- 5. Section 77D of the RMA permits local authorities to make rules specifying activities for which a consent authority: must give public notification; is precluded from giving public notification; or is precluded from giving limited notification. No ability is provided to local authorities to make rules specifying activities for which a consent authority must give limited notification.
- 6. Counsel considers that the notified Rule 38.12.2 of the PDP appears to be *ultra vires* the QLDC. Rule 38.12.2 requires limited notification of controlled activities in the Ben Lomond Sub-Zone, while this is precluded by section 95B(6)(b)(i).
- 7. Notwithstanding the above, Ziptrek remains of the view that limited notification of controlled activities within the Ben Lomond Sub-Zone may be appropriate for the reasons outlined in counsel's legal submissions on Stage 2, dated 21 September 2018. Counsel considers that the wording of Rule 38.12.2 may be amended in order to reflect the special nature of the reserve while remaining consistent with the RMA.

## Proposed Amendment

8. Ziptrek considers that Rule 38.12.2 should be amended so as to retain the Council's discretion to apply section 95B(10) of the RMA to controlled activities. In addition, we submit that an Advice Note should be added to indicate that further development within the Ben Lomond Reserve is likely to give rise to 'special circumstances' pursuant to section 95B(10) of the RMA.
9. We propose the following wording:

### 38.12 Rules – Non-notification of Applications

All applications for controlled and restricted discretionary activities shall not require the written approval of other persons and shall not be notified or limited-notified, except for the following:

- 38.12.1 Restricted discretionary activities within the Informal Recreation Ben Lomond Sub-Zone; and
- 38.12.2 Controlled activities within the Informal Recreation Ben Lomond Sub Zone shall not be publicly notified but may require the written approval of affected persons or give limited notification to affected persons where special circumstances exist.

#### Advice Note:

The following factors may contribute to special circumstances for applications in the Informal Recreation Ben Lomond Sub-Zone:

- the scale and significance of the proposed activity; and/or
- the proximity of the proposed activity to existing recreation and commercial recreation activities; and/or
- the potential for the proposed activity to adversely affect existing recreation and commercial recreation users.

10. The Court of Appeal has described a "special circumstance" as something "*outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique. A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification.*"<sup>1</sup> An essential question is whether notification would result in receipt of further relevant information.<sup>2</sup>

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<sup>1</sup> **Far North District Council v Te Runanga-a-iwi o Ngati Kahu** [2013] NZCZ 221 at 36-37.  
<sup>2</sup> **Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council** [2015] NZRMA 113 (HC). Cited with approval in **Urban Auckland v Auckland Council** [2015] NZHC 1382. We note that these authorities were in the context of public notification, prior to the RLAA.

11. Evidence for the Council has described the Ben Lomond Reserve as “unique” (above the threshold for a ‘special circumstance’).<sup>3</sup>
12. We submit that the Advice Notice proposed above is appropriate, and consistent with case authority on circumstances, because of the exceptional, abnormal or unusual (even unique) combination of factors evident in the Ben Lomond Reserve, including:<sup>4</sup>
  - a. The fairly unique mixture of tourism operators on the reserve;
  - b. The significant investment in physical infrastructure that has been made by the Bob’s Peak operators;
  - c. The fact that the landscape itself forms the backdrop to the Queenstown town centre, forms part of the visual identity of Queenstown and is recognised as an ONL on the PDP maps;
  - d. The fact that there are very few opportunities for expansion and further development given the geographic landform at Bob’s Peak, and the likelihood for future competition between operators for development rights and space.
13. Because of these factors, notification is likely to result in receipt of relevant further information and be more important than in other parts of the Open Space and Recreation Zone. While we accept that these factors could be considered under section 95B(10) without the Advice Note, we submit that the Advice Note provides a safeguard to ensure these important factors are properly considered by a processing planner when considering a consent application on the reserve.

### **Conclusion**

14. Counsel thanks the Panel for the opportunity to further consider and provide submissions on Rule 38.12.2 of the PDP. Having considered the matter alongside the changes to the notification provisions introduced through the RLAA, counsel considers that Rule 38.12.2, as notified, is *ultra vires*.
15. For the reasons outlined in counsel’s legal submissions, and touched on briefly in this memorandum, Ziptrek considers that the Ben Lomond Sub-Zone constitutes a unique environment in which notification is likely to be more appropriate than other areas of

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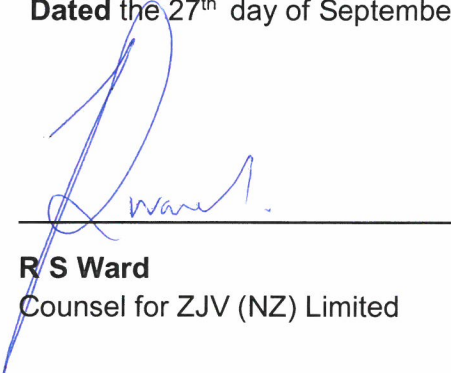
<sup>3</sup> Statement of Evidence of Jeannie Galavazi on behalf of QLDC, Open Space and Recreation Zones: Planning, 23 July 2018, para 7.2.

<sup>4</sup> Ibid.

the Open Space and Recreation Zone. We submit that the amendment proposed in this memorandum should be adopted in order to reduce conflict on the reserve and ensure the quality enjoyment of recreation values on the Ben Lomond Reserve.

16. Should the Panel not be minded to adopt Ziptrek's proposed amendment, Ziptrek seeks that 'Passenger Lift Systems' and 'Forestry Activity' have a Restricted Discretionary activity status (rather than Controlled).

**Dated** the 27<sup>th</sup> day of September 2018



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**R S Ward**

Counsel for ZJV (NZ) Limited