Before Queenstown Lakes District Council

In the matter of	The Resource Management Act 1991
And	The Queenstown Lakes District Proposed District Plan Topic 11 Ski Area Subzones Mapping

LEGAL SUBMISSIONS (Part Two) FOR

Mt Cardrona Station Limited (#407)

Dated 05 May 2017

Solicitors:
Warwick Goldsmith | Rosie Hill
Anderson Lloyd
Level 2, 13 Camp Street, Queenstown 9300
PO Box 201, Queenstown 9348
DX Box ZP95010 Queenstown
p + 64 3 450 0700 | f + 64 3 450 0799
Warwick.goldsmith@al.nz | rosie.hill@al.nz

anderson lloyd.

MAY IT PLEASE THE PANEL

1 This document comprises Part Two of Legal Submissions lodged on behalf of Mt Cardrona Station Limited (**Submitter**). The Part One Submissions dated 28 March 2017 amended Submission #407 to restrict the relief requested to a relief relating to only passenger lift systems. These Part Two Submissions address legal issues arising from the evidence lodged and the Council's s42A Report.

2 From the Submitter's point of view this hearing is limited to requested extensions to the Ski Area Sub Zones (SASZ) with particular reference to an extension to the Cardrona SASZ requested by the Submitter in its original Submission #407. The Submitter, in Part 2.8 Planning Maps, requested an extension to the Cardrona SASZ as shown on the plans which form part of Submission #407 (**MCS Extension**). The extension requested is approximately 400m long and approximately 200m wide and is intended to link the existing Cardrona SASZ with the Mount Cardrona Station Special Zone (**MCSSZ**). The exact dimensions of the requested extension are detailed in Attachment F to Mr Brown's evidence dated 28 March 2017.

3 Attached to these Submissions is a copy of Appendix 1 to Mr Espie's landscape evidence dated 28 March 2017 for the Submitter (**Appendix 1**), for reference purposes in relation to some points made in these Submissions.

Case Law Background

4 It is important for the Panel to appreciate that a primary factor behind the Submitter's request for the MCS Extension is the case law history relating to the consenting of skifield related gondolas within the Queenstown Lakes District, with particular reference to the fact that the District Plan does not provide for gondolas, the complexity of plan provisions relating to gondolas, and the consequential significant time and expense involved in consenting a gondola. All these factors are evidenced by the two successful applications for gondola consents which are referenced in the s42A Report documentation (both of which Counsel was involved in).

5 Snowline Holdings Ltd's consent application for a gondola at Treble Cone (RM060587) was lodged on 07 July 2006. The application was publicly notified in August 2006, and hearings were conducted November 2006 and October 2008. The final decision granting consent was issued in December 2008. This consent expires in December 2018. A copy of Decision RM060587 accompanies these submissions.

6 One Black Merino Ltd's consent application for a gondola at Snow Park Farm (RM070610) was lodged in July 2007. The application was publicly notified in July 2007, and hearings were conducted October 2007. The final decision granting consent was issued in May 2008. This consent expires in May 2018. A copy of Decision RM070610 accompanies these submissions.

7 Both of the consent processes referred to above were long and expensive. They were both ultimately successful, perhaps due to the overriding obvious logic of providing gondola access from adjacent valley floors to skifield areas (as is the case with many overseas skifields[1]). The current Operative District Plan provisions, which do not anticipate or provide for gondolas, are a highly inefficient method of dealing with an important infrastructural activity in a district in which skifields are a significant, and increasingly important, economic activity.

8 Put very simply, the Submitter seeks, through this Review process, to achieve an outcome where the consenting of a gondola in this particular location will be anticipated by the District Plan and will be facilitated by the District Plan, subject to appropriate control being retained by the Council over necessary considerations.

Factual Background

9 The essence of the case for the Submitter can be best explained by reference to Appendix 1 which shows an indicative future gondola route running from within the MCSSZ (at the bottom) up to the existing base buildings of the Cardrona Skifield (at the top). That indicative gondola would have a route of 5.1 km long [Note: This figure is a correction to the figure of 3.8 km contained in Mr Brown's evidence at paragraph 2.13.]

10 The majority (upper) portion of that indicative gondola route would, assuming the recommendations of the s.42A Report are accepted by the Panel, have controlled activity status. The shorter (lowest) portion of that indicative gondola route, within the MCSSZ, would also have controlled activity status assuming the current private plan change to the MCSSZ[2] if completed as anticipated (which is highly likely). However the approximately 400m central portion, marked '12' on Appendix 1, would have restricted discretionary activity status. That would have the planning consequences described in Mr Brown's evidence. The outcome would be little improvement on the current situation. Because of the bundling doctrine, an entire gondola proposal along that route would change to restricted discretion activity status. There would be no certainty of obtaining consent. To make matters worse, three different planning regimes would apply to the three sections of the gondola route.

11 The outcome described in the previous paragraph is precisely what the Submitter seeks to avoid. What the Submitter seeks to achieve is that the 400m central section also have controlled activity status to match the controlled activity status of the upper and lower sections.

12 The case for the Submitter is based upon circumstances which are unique to the proposed MCS Extension. Those unique factors fall into two parts:

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[1] From Counsel's personal experience (which can be checked by online viewing of sk field websites and maps) that includes Vail, Breckenridge, Aspen, Telluride, Mammoth, Whistler, Wengen, Grindelwald, Kitzbuhul, Chamonix, St. Anton.

[2] Refer Mr Brown's evidence dated 28 March 2017 at paragraphs 2.3-2.5.

(a) The planning status situation described above, with the upper and lower sections having controlled activity status;

(b) Location of this gondola route within the activity node described in Mr Espie's evidence[3] and detailed in Appendix 1.

13 I submit that the s.42A Report, and in particular the rebuttal evidence of Ms Banks, significantly fails to recognize these unique factors and, as a consequence, fails to properly assess the MCS Extension.

Comment on Evidence

14 I submit that the evidence of Mr Espie and Mr Brown is significantly more accurate and more thorough than the equivalent evidence of Dr Read and Ms Banks and should be preferred over the evidence of Dr Read and Ms Banks. I will not comment on the evidence of Mr Espie and Mr Brown which can be judged on its merits. My comments below highlight significant deficiencies and credibility issues in the evidence of Dr Read and Ms Banks.

Dr Read's Evidence

15 Rather than quote from Dr Read's primary evidence dated 10 March 2017, I refer the Panel to the very short section of that evidence relating to the MCS Extension contained in paragraphs 5.17-5.25 on pages 12-15. I submit that it is clear from a reading of that evidence that Dr Read:

(a) Is concerned about the potential range of development activities which could be enabled through the proposed MCS Extension (prior to the amendment to the requested relief referred to in paragraph 1 above);

(b) Concludes that the enabling of that wide-range of activities within the MCS Extension could have 'moderate adverse effects' on the landscape of the vicinity;

(c) Concludes that the MCS Extension has little ability to absorb development other than the anticipated gondola;

(d) Expresses little or no concern about effects of the anticipated gondola, which the relief requested by the Submitter is now limited to.

16 In paragraph 4.1 in page 11 of his evidence, Mr Espie states '*…Dr Read does not raise any issue in relation to cumulative effects, indeed she appears comfortable with a gondola as enabled by the relief sought by the submission…'* That statement correctly reflects Dr Read's primary evidence.

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[3] Refer evidence of Mr Espie dated 28 March 2017 at paragraph 2.5.

17 In her rebuttal evidence at paragraph 6.3 on page 11, Dr Read responds to paragraph 4.1 of Mr Espie's evidence. Dr Read again expresses an opinion that possible development within the SASZ extension including a gondola will have an adverse cumulative effect on the landscape of the vicinity. However she still does not express any concern about the effects of a gondola on its own, particularly as now limited to exclude any buildings or terminal structures. Therefore the only landscape evidence assessing what is actually proposed to be enabled by the MCS Extension is the landscape evidence of Mr Espie.

18 In the event that my understanding of Dr Read's evidence as expressed in the previous paragraph is incorrect, and Dr Read is in fact expressing an opinion about the effects just of a gondola, I make the following comments about Dr Read's evidence:

(a) She does not respond to the detailed assessment of Mr Espie and therefore does not in any way challenge Mr Espie's opinions;

(b) She does not even consider, let alone address, the fact that the proposed gondola would be located within the node of activity referred to by Mr Espie and detailed in Appendix 1, comprising the Cardrona Village and the range of activities in the vicinity of the point where the Cardona Skifield access road meets the Cardona Valley State Highway.

(c) She fails to consider the relevance of the existing Cardona Skifield access road when considering the potential effects of a gondola located in the same corridor running up the Mt Cardrona mountainside;

(d) She fails to address Mr Espie's Appendix 1, and in particular the relevance of the red lines along the State Highway (which depict those areas from which the overall gondola would be visible) compared to the much shorter blue area (which depicts the part of the State Highway from which the MCS Extension would be visible);

(e) References to '…*adverse cumulative effect*…' in paragraph 6.3 of her rebuttal evidence fail to assess the extent of any such adverse cumulative effects, and whether they are minor, moderate, significant or very significant. This failure is particularly significant, given the detailed extent to which Mr Espie addressed this issue in paragraphs 4.1-4.4 of his evidence.

19 When one compares the evidence of the two landscape witnesses, taking into account the above matters, I submit that the evidence of Mr Espie should clearly be preferred.

Ms Bank's Evidence

20 In paragraph 2.25 on page 14 of her Second Statement of Evidence dated 10 March 2017 (**Second Statement**), Ms Banks states that the evidence of Dr Read is that '…*the visual effects of development from [the MCS Extension] may be significant*…' Dr Read actually does

not make that statement, and the word '*significant*' does not appear in Dr Read's evidence relevant to the MCS Extension.

21 In paragraph 2.30 on page 15 of her Second Statement Ms Banks states:

> '*…there is no evidence to confirm that a gondola is feasibly or commercially viable in this location…*'

Ms Banks appears to be unaware of case law applicable to the issue of the relevance of the commercial viability of a proposal. Members of the Panel will be aware that that is not a relevant consideration. In case it may be necessary or of assistance, a more detailed analysis of this legal issue is contained in Appendix 2 to these Submissions.

22 In her paragraph 2.31 on page 15 of her Second Statement Ms Banks refers to existing consent RM070610 which provides for a gondola link to Snow Farm Park. She confirms that this consent will expire in May 2018. She then states:

> '*This resource consent has not been given effect to, and while I am not aware of the reasons why, I consider that it would be inappropriate to provide for a second gondola link in this location which may lead to cumulative effects on the landscape…*'

23 The first comment to be made about the statement quoted above is that there is no assessment of the extent of such cumulative effects, nor is there any conclusion that any such cumulative effects would be adverse. There is no consideration, for example, about the number of people who might find two gondolas in this location to be a matter of interest in the landscape rather than causing adverse effects to their experience of the landscape.

24 Potentially the more important point about the statement quoted above is the assumption that the Snow Farm Park consent RM070610 is a relevant consideration regardless of the likelihood of that consent being given effect to. There is no attempt to assess that likelihood. This ten year consent expires in one year's time. No evidence has been led which would suggest that there is any intention of the relevant landowner giving effect to this consent. Absent any evidence that the consent is likely to be implemented, this cannot be a relevant consideration. Again in case it may be necessary or of assistance, a more detailed analysis of this legal issue can be found in Appendix 3 to these Submissions.

25 I note in passing on the above point that, because Dr Read and Ms Banks both presumed that the existing consent RM070610 is a relevant consideration, Mr Espie and Mr Brown were both instructed to prepare their evidence on that assumption that it is a relevant consideration. However it remains my submission that it is not a relevant consideration.

26 In her paragraph 2.31 Ms Banks also states:

> '*…Also, given there are three possible alignments for a gondola suggested or potentially enabled by the rezonings, it is more appropriate that adequate analysis of*

the alternative route options is undertaken (via an approval process) before such a proposal is pre-empted by a zone entitlement…'

27 The first point to be made in respect of the statement quoted above is that Schedule 4 of the Act (AEE requirements) only requires an assessment of alternatives if it is likely that significant adverse effects will arise. No evidence has been presented for this hearing which would justify a conclusion that a gondola in this location would give rise to significant adverse effects on the environment. There can be no assumption that the restricted discretionary activity status contended for by Ms Banks would result in any analysis of alternative route options.

28 The second point to be made is that it is very unlikely to be feasible to carry out such an analysis of alternative route options as part of the consideration of a particular application for consent for a gondola. Any such consent application involves detailed analysis of a wide range of factors. For example, one such factor is geological stability. No gondola proposal could be presented for consent without detailed geological analysis which is relevant to both the general route of the gondola and to the specific locations of individual pylons – which in turn is potentially relevant to an assessment of relevant landscape considerations.

29 The three alternative route options referred to by Ms Banks are across land in three different landownerships. No applicant would wish to go to the expense of carrying out such detailed analyses of three different route options, two of which are of no interest or benefit to that applicant. That applicant may not even have access to the land across which the other two route options might run in order to carry out such analyses.

30 However the primary point being made on behalf of the Submitter on this issue is that the proposed MCS Extension should be, and can be, judged on its merits on the evidence presented. It is contended for the Submitter that the evidence justifies and supports the appropriateness of the MCS Extension in order to achieve controlled activity status of a gondola in this location.

31 In paragraph 2.35(c) on page 16 of her Second Statement, Ms Banks returns to the issue of potential cumulative effects. However now Ms Banks appears to be concerned about the potential cumulative effects of the approved Snow Farm gondola together with an MCS Extension gondola together with two other possible gondolas – a total of four. Putting to one side the likelihood of the Snow Farm gondola being implemented, which I have addressed above, Ms Banks provides absolutely no evidential basis which could support a conclusion that there might be three gondolas constructed on Mt Cardrona. I submit this concluding statement has no credibility.

32 In her rebuttal evidence at paragraph 3.14 on page 8, Ms Banks refers to evidence lodged by Mr Ferguson (for SoHo and Treble Cone) and Mr Brown (for MCS). She comments that each statement of evidence seeks to extend the SASZ for the purpose of enabling a gondola alignment extending down to the valley floor. She then states:

'*…Although different planning methods are proposed to achieve this by each planning witness, I wish to respond to these matter together, and to clarify the reasoning for my unchanged positions on these rezoning proposals.*'

33 With respect to Ms Banks, I submit that her approach in treating all three proposed SASZ extensions together significantly undermines the value and credibility of her subsequent comments. In particular as far as the MCS Submission is concerned, she fails to take any account of the specific factual matters which distinguish the MCS Extension from other proposed extensions - factual matters which are carefully detailed and addressed in the evidence of Mr Espie and Mr Brown. That failure to examine the facts relevant to each separate SASZ Extension is exacerbated by the fact that, in her Second Statement, Ms Banks included a section (commencing page 42) headed '*Rezoning Assessment Principles for the SASZ*.' Under that heading, at paragraph 13.11 on page 43, Ms Banks stated:

'***Local context factors***

13.11 The Rezoning Assessment Principals identified above should also be considered in the context of the particulars of a site or geographic area. These context factors are likely to influence the support (or not) of change to a zone or overlay mapping.'

34 I could critique Ms Bank's rebuttal evidence at length in relation to the above matter. I limit that critique, by way of example, to one paragraph.

35 In her paragraph 3.19 on page 10 Ms Banks defends restricted discretion any activity status for a gondola passing through Rural land outside an SASZ. She states:

'*…However, the Council's restricted discretionary status for passenger lift systems outside of an SASZ recognises that for a gondola that extends through the Rural zone, greater consideration to effects is necessary because such infrastructure:…*'

36 Following the statement quoted above Ms Banks lists five factors which, in her opinion, justify restricted discretionary activity status. I quote each factor below in italics. I then comment on that factor in relation to the MCS Extension.

37 *[such infrastructure] could span a significant distance and a large receiving environment could experience effects*

Comment: The MCS Extension gondola would only span approximately 400m. The very limited receiving environment which would experience the effects of the MCS Extension is identified by a blue line on Appendix 1.

38 *[such infrastructure] would extend to lower elevations of the valley*

Comment: The MCS Extension is a 400m section comprising only about 7.8% of a total potential gondola length. The lower part of the gondola, below the MCS Extension, will almost certainly have controlled activity status under PC52.

39 *[such infrastructure] entails a broader range of potential consequential environmental and operational effects such as greater levels of vehicle movements and parking demand, greater volumes of earthworks and large scale construction activity*

Comment: The MCS Extension is limited to pylons and moving parts of a gondola or chairlift system and specifically excludes terminal buildings and other such major components which would generate such operational effects.

40 *[such infrastructure] is of a scale that an inherent assumption for approval under a controlled status, and exclusion from landscape assessment matters, is not appropriate*

Comment: In relation to the MCS Extension, this factor would only apply to the 400m middle segment comprising 7.8% of the total route.

41 The Council's recommended SASZ framework does not anticipate or adequately manage the range of possible environmental effects and considerations that would otherwise be necessary through a resource consent.

Comment: Ms Banks gives no explanation as to how this factor is relevant to consideration of a 400m length of gondola comprising just pylons and the moving parts of a gondola.

42 In her concluding paragraph 3.22 (in relation to the MCS Extension) on page 11 of her rebuttal evidence, Ms Banks states:

> '…*I also do not consider a zone or sub-zone framework as an efficient or effective way of enabling a single item of linear infrastructure such as a gondola*…'

43 Again with respect to Ms Banks, she cannot possibly come to a reasoned conclusion of that nature without actually assessing the MCS Extensions, and in particular, the factual circumstances applicable to the MCS Extension.

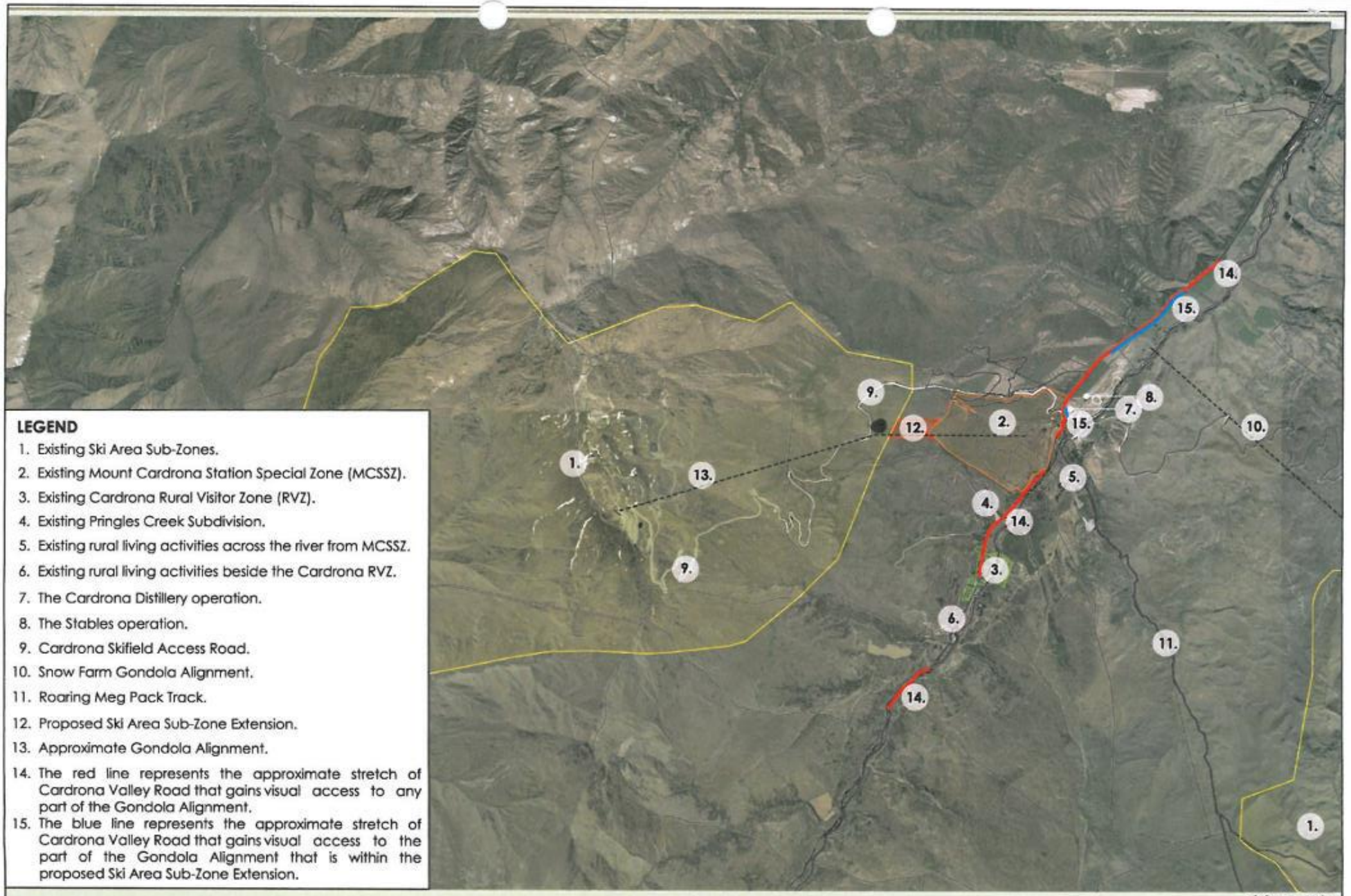
44 In paragraphs 13.9-13.13 of her First Statement of Evidence dated 10 March 2017, Ms Banks sets out her recommended approach to assessing the SASZ Extensions. She fails to apply that approach when assessing the MCS Extension. In particular Ms Banks fails to consider the factual circumstances specific to the MCS Extension. In comparison, Mr Brown's evidence specifically applies the assessment approach recommended by Ms Banks and he assesses the MCS Extension in the context of its specific factual circumstances. I submit that the evidence of Mr Brown should be preferred over the evidence of Ms Banks.

Dated 5 May 2017

Warwick Peter Goldsmith

Counsel for Mt Cardrona Station Limited

Appendix 1 – Ben Espie's Appendix 1


LEGEND
1. Existing Ski Area Sub-Zones.
2. Existing Mount Cardrona Station Special Zone (MCSSZ).
3. Existing Cardrona Rural Visitor Zone (RVZ).
4. Existing Pringles Creek Subdivision.
5. Existing rural living activities across the river from MCSSZ.
6. Existing rural living activities beside the Cardrona RVZ.
7. The Cardrona Distillery operation.
8. The Stables operation.
9. Cardrona Skifield Access Road.
10. Snow Farm Gondola Alignment.
11. Roaring Meg Pack Track.
12. Proposed Ski Area Sub-Zone Extension.
13. Approximate Gondola Alignment.
14. The red line represents the approximate stretch of Cardrona Valley Road that gains visual access to any part of the Gondola Alignment.
15. The blue line represents the approximate stretch of Cardrona Valley Road that gains visual access to the part of the Gondola Alignment that is within the proposed Ski Area Sub-Zone Extension.
REF: 1022 - APP 1
DATE: 27.03.2017
SCALE: NOT TO SCALE
APPENDIX 1:
Existing and Proposed Activities within the Cardrona Valley
Cardona Ski Area Sub-Zone, Cardrona
vivian+espie

APPENDIX 1

Appendix 2 - Financial Viability under the RMA

1 The Section 42a Report for this hearing refers to the uncertain commercial viability of a gondola link as proposed by MCS as one reason why, in the report writer's opinion, a gondola link in this location is considered inappropriate.

> *I consider that the location of rezoning proposed by MCSL may be the most logical location for a gondola link in terms of integrating with future land use, infrastructure and built forms. However, this is from a theoretical basis only, and there is no evidence to confirm that a gondola is feasible or commercially viable in this location;*[4]

2 It is submitted that the comment made by Ms Banks is based on a misunderstanding of the relevance of 'economic wellbeing' and 'commercial viability under the Act. Economic wellbeing under the Act must be considered within the definition of sustainable management with reference to the proposal's impact on the community, and cannot be limited to narrow considerations of financial viability. It is Council's role to ensure the wellbeing of the community is provided for and enabled, rather than directing individuals how to conduct their own proposals.

3 There is considerable case law which addresses the appropriateness of considering the financial viability of a proposal when considering its overall merits or appropriateness, as compared to assessing the positive economic benefits which relate more broadly to the receiving environment as a result of a proposal:

4 Justice Greig's seminal decision in the case of *NZ Rail v Marlborough District Council* began this line of case law by determining that:

> *Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s 5 (2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7 (b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104 (1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are*

[4] Para 2.30, Second Statement of Evidence of Kim Banks on behalf of Queenstown Lakes District Council Ski Area Subzones – Mapping, Annotations, and Rezoning requests, dated 10 March 2017

matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.[5]

5 This issue was addressed more recently by Judge Borthwick in respect of Queenstown Airport's proposed Notice of Requirement, which was opposed by parties on the basis of, among other matters, the efficient use of resources under section 7(b) of the Act. Judge Borthwick noted:

> *"Decisions on costs and economic viability, of profitability or a project are not matters for the court. As Justice Wild in Friends and Community of Ngawha Inc and Others v Minister of Corrections said, these matters should:*
>
> > *…sensibly be regarded as decisions for the promoter of the project. Otherwise, the Environment Court would be drawn into making, at least second-guessing, business decisions. That is surely not its task."*[6]

6 In the context of the preparation of a district plan, the Environment Court in *St Lukes v North Shore CC* considered the appropriateness of provisions of a proposed plan seeking to maintain commercial viability and vibrancy of retail zoned areas:

> *Encouragement of viable centres within the City is considered relevant to help ensure that the "focal and availability" factor as above is commensurate with contemporary living standards and expectations of the City's inhabitants, hence enabling them to provide for their wellbeing. We see nothing inherently wrong with that line of reasoning for the purpose of formulating a broad planning approach to sustainable management of the City's natural and physical resources, given the openness of the language employed in encapsulating the Act's purpose.*[7]

7 The approach to ensuring zoned land is not commercially undermined in the future by other development is a very different determination compared to considering the internal commercial viability of a specific proposal. Commercial viability is essentially concerned with profitability and the Courts in this context have never been concerned with profitability, as compared to concerns for the general social and economic implications on the environment.

8 'Efficiency' and 'benefits and costs' are however relevant to the evaluation required under s 32(1)(b)(ii) of the Act which requires an assessment of the 'efficiency and effectiveness of provisions in achieving the objectives', and

> *32(2)An assessment under subsection (1)(b)(ii) must—*

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[5] *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at page 22.

[6] *Re Queenstown Airport* [2012] NZ EnvC 206 at [211], and upheld on appeal by the High Court in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347.

[7] *St Lukes Group Ltd v North Shore City Council* [2001] NZRMA 412 at [59].

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced;..

9 The above matters for consideration reflect 'external' costs and benefits on the environment, rather than 'internal' commercial viability concerns. Whilst it is acknowledged that the requisite assessment of benefits and costs is not to be made only in monetary terms[8], it is clear that the Council's s.42A planning report and its s32 analyses are deficient in consideration of the particular factors identified in s32(2)(a)(i) and (ii). The only recognition of the economic benefits of the SASZ extension proposal is referred to in general terms in the s42a Report and only in relation to CARL and NZSki's proposals only (paras 4.23, 5.22, and 2.11).

[8] *Port Otago Limited v Dunedin City Council* Environment Court C004/02 Judge Smith

Appendix 3 – Receiving Environment

1 At para 2.31 of Ms Banks' Second Statement, she considers the existing consented gondola route to the Snow Farm Park, and its relevance to the PDP submitted rezonings:

> *I note that an existing resource consent (RM070610) provides for a gondola link to Snow Farm Park, providing access to the Waiorau Pisa SASZ. This consent was approved in May 2008 and expires in May 2018. This resource consent has not been given effect to, and while I am not aware of the reasons why, I consider that it would be inappropriate to provide for a second gondola link in this location which may lead to cumulative effects on the landscape. Also, given there are three possible alignments for a gondola suggested or potentially enabled by the rezonings, it is more appropriate that adequate analysis of the alternative route options is undertaken (via an approval process) before such a proposal is pre-empted by a zone entitlement.*

2 The existing consent is again referenced in the concluding para 2.35(c) as a reason why the MCS Extension is not supported.

3 To avoid unnecessary repetition, I refer the Commission to my earlier legal submissions made in respect of the future environment in a district plan review, submitted in Hearing Stream 02.[9] Those Submissions, at section 4, refer to High Court and Environment Court authority which support the notion that a territorial authority, when preparing its district plan under ss 31 and 32 of the Act, should do so with reference to the future environment as considered in *Hawthorn Estate Ltd.*[10]

4 A critical element of the *Hawthorn* test in considering the receiving (future) environment is to establish whether resource consents granted are 'likely' to be implemented or not. This element was also the subject of scrutiny by the High Court in *Shotover Park v Queenstown Lakes District Council*[11], in which Justice Fogarty considered the Environment Court's earlier predicament in determining how to account for unimplemented consents which were the subject of contemporaneous higher court appeals. In that case, the unimplemented consents in question were the subject of appeals, the outcome of which were uncertain, but could potentially result in those resource consents not being granted. Justice Fogarty considered that, given this uncertainty, the Environment Court had no choice but to 'keep going'[12], but also left the door open for future decisions of that Court to take into account the consents in the receiving environment, if reinstated, as 'likely to be implemented'.[13]

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[9] S0430-Ayrburn Farm Estate -T02-GoldsmithW-Legal Submissions

[10] *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424

[11] *Shotover Park Limited v Queenstown Lakes District Council* [2013] NZHC 1712

[12] Ibid, at [132]

[13] Ibid, at [134]

5 It is submitted that Ms Banks' assessment of the existing Snow Park Gondola Consent cited above fails to take into account the 'likelihood' test required when assessing the receiving environment. Applying *Hawthorn's* assessment of likelihood as a 'matter of fact' and *Shotover Park's* interpretation that this is to be a 'real world analysis'. Absent that 'likelihood' assessment, cumulative effects of multiple gondolas in one location referred to by Ms Banks is not a valid consideration in this plan review.

Appendix 4 – Height Limit Issue

1 In her rebuttal evidence dated 20 April 2017, Ms Banks considers the evidence of Mr Brown in respect of the height limit applied to Passenger Lift Systems by virtue of the Rural General Zone general standards for buildings as follows:

> *3.29…I consider it impractical for passenger lift systems to trigger a restricted discretionary noncompliance status under Rule 21.5.17, for pylons that are more than 8m, noting that these systems are a controlled activity within the SASZ. While the practical difference would be limited to passenger lift systems outside of the SASZ (which are restricted discretionary anyway), I consider it misleading to suggest that pylons of these systems are expected to comply with an 8m height limit. Therefore, I recommend the following exemption be added under Rule 21.5.17, however limited to pylons only and not passenger lift systems generally (which may involve other types of "buildings" that should be limited to the 8m height limit):*
>
> *Except this rule shall not apply for passenger lift system pylons*[14]

2 Rule 21.5.17 ('Building Height') is only triggered when the activity in question falls within the definition of a 'building' as provided in the Definitions Chapter 2. Chapter 2 of the PDP provides the following definition for 'building':

> *Shall have the same meaning as the Building Act 2004, with the following exemptions in addition to those set out in the Building Act 2004:*
> *• fences and walls not exceeding 2m in height.*
> *• Retaining walls that support no more than 2 vertical metres of earthworks.*
> *• Structures less than 5m² in area and in addition less than 2m in height above ground level.*
> *• Radio and television aerials (excluding dish antennae for receiving satellite television which are greater than 1.2m in diameter), less than 2m in height above ground level.*
> *• Uncovered terraces or decks that are no greater than 1m above ground level.*
> *• The upgrading and extension to the Arrow Irrigation Race provided that this exception only applies to upgrading and extension works than involve underground piping of the Arrow Irrigation Race.*
> *• flagpoles not exceeding 7m in height.*
> *• Building profile poles, required as part of the notification of Resource Consent applications.*
> *• Public outdoor art installations sited on Council-owned land.*
> *• Pergolas less than 2.5 metres in height either attached or detached to a building. Notwithstanding the definition set out in the Building Act 2004, a building shall include:*
> *• Any vehicle, trailer, tent, marquee, shipping container, caravan or boat, whether*

[14] Rebuttal Evidence of Kim Banks on behalf of Queenstown Lakes District Council, dated 20 April 2017

fixed or moveable, used on a site for residential accommodation for a period exceeding 2 months.

3 The minor amendments made to the above definition by way of Council's right of reply in Hearing Stream 10 will not achieve their objective. A Passenger Lift System does not fall within any of the exceptions identified in the above PDP definition. The definition of a building within the Building Act 2004 ("**Building Act**") itself also consists of exclusions, as set out below:

> ***8 Building: what it means and includes***
>
> *(1) In this Act, unless the context otherwise requires,* ***building****—*
>
> *(a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and*
>
> *(b) includes—*
>
> *(i) a mechanical, electrical, or other system; and*
>
> *(ii) any means of restricting or preventing access to a residential pool; and*
>
> *(iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis; and*
>
> *(iv) a mast pole or a telecommunication aerial that is on, or forms part of, a building and that is more than 7 m in height above the point of its attachment or base support (except a dish aerial that is less than 2 m wide); and*
>
> *(c) includes any 2 or more buildings that, on completion of building work, are intended to be managed as one building with a common use and a common set of ownership arrangements; and*
>
> *(d) includes the non-moving parts of a cable car attached to or servicing a building; and*
>
> *(e) after 30 March 2008, includes the moving parts of a cable car attached to or servicing a building.*
>
> *(2) Subsection (1)(b)(i) only applies if—*
>
> *(a) the mechanical, electrical, or other system is attached to the structure referred to in subsection (1)(a); and*
>
> *(b) the system—*
>
> *(i) is required by the building code; or*
>
> *(ii) if installed, is required to comply with the building code.*
>
> *(3) Subsection (1)(c) only applies in relation to—*
>
> *(a) subpart 2 of Part 2; and*

(b) a building consent; and

(c) a code compliance certificate; and

(d) a compliance schedule.

(4) This section is subject to section 9.

9 Building: what it does not include

*In this Act, **building** does not include—*

(a) a NUO system, or part of a NUO system, that—

(i) is external to the building; and

(ii) is connected to, or is intended to be connected to, the building to provide for the successful functioning of the NUO system in accordance with the system's intended design and purpose; and

(iii) is not a mast pole or a telecommunication aerial that is on, or forms part of, a building; or

(ab) a pylon, free-standing communication tower, power pole, or telephone pole that is a NUO system or part of a NUO system; or

(ac) security fences, oil interception and containment systems, wind turbines, gantries, and similar machinery and other structures (excluding dams) not intended to be occupied that are part of, or related to, a NUO system; or

(b) cranes (including any cranes as defined in regulations made under the Health and Safety at Work Act 2015); or

(c) any of the following, whether or not incorporated within another structure:

(i) ski tows:

(ii) other similar stand-alone machinery systems; or

(d) any description of vessel, boat, ferry, or craft used in navigation—

(i) whether or not it has a means of propulsion; and

(ii) regardless of what that means of propulsion is; or

(e) aircraft (including any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth); or

(f) any offshore installation (as defined in section 222 of the Maritime Transport Act 1994) to be used for petroleum mining; or

(g) containers as defined in regulations made under the Health and Safety at Work Act 2015; or

(h) magazines as defined in regulations made under the Health and Safety at Work Act 2015; or

(i) scaffolding used in the course of the construction process; or

(j) falsework.

4 From the above, there is potential uncertainty as to the inclusion or exclusion of the parts of a Passenger Lift System (other than pylons) which are not included in Ms Banks' proposed exclusion. Section 8(b)(i) includes 'a mechanical, electrical, or other system; where that system is attached to a stucture as defined, and requires compliance with Building Code, rather unhelpfully, provides a circular interpretation such that compliance is required for a 'building work' which refers back to the construction, alteration, etc of a 'building' as defined in the Building Act.

5 Section 8(e) also specifically includes the moving parts of a cable car attached to or servicing a building. Cable Car is separately defined in the Building Act as follows:

cable car—

(a) means a vehicle—

(i) that carries people or goods on or along an inclined plane or a suspended cable; and

(ii) that operates wholly or partly outside of a building; and

(iii) the traction for which is supplied by a cable or any other means; but

(b) does not include a lift that carries people or goods between the floors of a building

6 It is noted that a similar debate in respect of what parts of a passenger lift system constituted a building or not occurred in relation to the Snowline Holdings Ltd consent application RM060587 for a gondola at Treble Cone. That application was assessed

under a previous version of the Building Act, which provided the following exclusion to a building:

> *"(c) Cablecars, cableways, ski tows, and other similar stand-alone machinery systems, whether or not incorporated within any other structure; or..."*[15]

7 In that consent decision, the Commission considered it appropriate that the gondola cabins be included in the definition of a cablecar (as defined), and after some debate:

> *That the support pylons can and should be regarded as part of a cableway or other similar stand-alone machinery system (or both) and is therefore not a building in terms of the District Plan and therefore not subject to the 8 metre height limit.*

8 'Cable car' has gone full circle through the subsequent amendments of the Building Act, from being specifically excluded from a building to now being expressly included, including its moving parts. The previous reference to a 'cableway' has also now been removed from the current definition.

9 It is submitted that the whole of a Passenger Lift System, including suspended cables, pulleys and cabins, would now fall within the definition of a 'building' by virtue of the inclusion of cable cars and their moving parts attached to structures. This amendment is assumed to have been included to cover the safety considerations of such moving structures which carry people and goods. This also is a more logical conclusion than equating a gondola to a 'ski tow or similar standalone machinery system' (section 9(c)(ii)), which suggests a system of a similar scale and nature to a pulley rope or conveyor whereby a skier is usually conveyed on the ground. If parliament had intended to exclude ski field gondolas from being considered as a building it would have included a broader definition of a 'ski tow' or a narrower definition of a cable car.

10 It follows from the above that the amendment proffered by Ms Banks to only exclude the pylons of a Passenger Lift System will not achieve what it intends to achieve because, although a pylon over 8m will not breach the height limit, the moving parts of a passenger lift system supported by that pylon will breach 8m height limit. This issue can be addressed simply by amending Ms Banks proposed amendment as follows (amendments underlined):

> *~~'Except~~ 'except this rule shall not apply to ~~for~~ passenger lift system pylons or to the moving parts of a passenger lift system'*

[15] Section 3 of the Building Act 1991