

Before the Queenstown Lakes District
Council

In the matter of the Resource Management Act 1991

And **The Queenstown Lakes District Proposed District Plan –
Topic 15**

Legal Submissions for

Kiwi Birdlife Park Limited (#2569)

Dated 26 September 2018

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**anderson
lloyd.**

May it please the Panel

Introduction

- 1 These legal submissions are presented on behalf of Kiwi Birdlife Park Limited (**KBP**) (Submitter #2569). KBP lodged a submission and further submission on the proposed district plan (**PDP**).
- 2 KBP operates a wildlife park from 51 Brecon Street, and leases the land under certificate of title 795902 (**Land**). The Land is zoned Open Space and Recreation 'Informal Recreation – Ben Lomond SubZone' under the PDP (**IRZ**).
- 3 Under the Operative District Plan (ODP) the Land is identified on Planning Map 35 as High Density Residential overlaid with Designation 214 Kiwi Park 'Recreation Reserve (B).
- 4 KBP is a commercial enterprise however, as set out in the evidence of Mr Paul Kavanagh a significant proportion of the activities it carries out fall within the categories of education, community, wildlife and nature conservation. This enterprise directly contributes to and facilitates communities' wellbeing and development while providing an efficient use of land.
- 5 In its submission KBP supported the explanation in the policy suite for the Informal Recreation Zone which recognises existing activities in the Ben Lomond Subzone, including the kiwi birdlife park operation, and that further development is contemplated:

The Informal Recreation Ben Lomond Sub Zone recognises and manages the existence and extent of commercial and informal recreation activities in the Ben Lomond Recreation Reserve. This site is of particular importance because of its close proximity to the Queenstown Town Centre and its popularity with visitors and residents. The Ben Lomond Recreation Reserve is also unique in terms of the breadth of activities present, which include a gondola and restaurant, luge, Zipline, helicopter flights, parasailing, management of forestry, wildlife park and trails used for both commercial and informal recreation. Further development is contemplated where it is undertaken in a manner that is sensitive to other occupiers and users, and where it will maintain the overall landscape values, visual amenity values and recreation experiences of users of the sub zone.
- 6 KBP noted in its submission that it is concerned that the objectives and policies do not sufficiently support commercial activities such as the KBP which, actively supports wildlife and education and tourism while at the same maintaining or enhancing the landscape and amenity values. KBP sought greater support for this type of activity in the objectives and policies for the zone.
- 7 Certain development rights were afforded under the ODP provisions which are proposed to be replaced by Chapter 38. KBP sought a greater degree of support

in the provisions for future development of the Land where it is directly related to its current purpose.

8 The Skyline terminal adjacent to the Land is proposed to be re-zoned 'Ben Lomond SubZone - Lower Terminal'. KBP has entered into agreements with Skyline regarding its current development proposals but it is concerned that the extent of potential development which could occur in the Lower Terminal Sub Zone will have adverse effects on the environment including the KBP site.

9 KBP supports proposed Policy 38.4.1.5 which provides a directive about the adverse effects of activities in this Zone on the surrounding environment. This is an important outcome for KBP as it seeks to protect the interface with the adjacent Lower Terminal Subzone:

Limit the intensity of activities to minimise adverse effects such as noise, glare and traffic on amenity values, peace and enjoyment of the Informal Recreation Zones and surrounding environment.

10 However, KBP seeks greater protection in the zone provisions to protect the interface between the Lower Terminal Subzone and KBP operations.

Summary of Submission Relief

11 In its submissions KBP supported the proposed provisions subject to the amendments sought in its submission:

(i) Amend objective 38.4.1 related policies and any associated District Wide objectives and policies to provide direct support for commercial activities that enhance wildlife and nature conservation values.

(ii) Amend policy 38.4.1.2 to encourage commercial activity not only commercial recreation activity, for example the KBP operations.

(iii) Amendments to the activity table to provide for commercial, retail and restaurant/cafe activity ancillary to the KBP operation as a permitted activity. Amendments to the height rule to enable 10m buildings, this would enable the construction of bird aviaries on the Land.

(v) Amendment to the fencing rules to allow fences over the height restriction for wildlife protection.

(vi) Amendments to increase maximum gross retail floor space where it is ancillary to permitted activities.

(vii) Amendments to the provisions to further protect the interface between KBP and the Skyline Lower Terminal.

(viii) All necessary amendments to the provision to provide for and support KBP activities on the land including associated building development required for its operations.

Further submission

- 12 KBP lodged a further submission in respect of the submission by Skyline Enterprises Limited (#2493). Skyline proposed amendments to the planning map to include a new area for a helipad and the 'informal airports' rule was opposed on the basis that an informal airport in this area (provided for as a restricted discretionary activity) could have a significant impact on amenity and KBP's conservation activities, which are consistent with the purpose of the zone.
- 13 The further submission noted that KBPL's opposition can be addressed by amending the proposed provisions to limit flights over the KBP to the following:
- *4 flights on any day, with only two flights within any fifteen minute period (on five occasions per annum, when larger pre-booked groups are flown to the helicopter landing area there may be up to three flights in any fifteen minute period provided that the operator shall advise KBPL at least 48 hours in advance of the date and time during which the multiple flights will occur).*
 - *The operation of all helicopters at the helipad shall be managed in accordance with a Helicopter Management Plan.*
 - *All flights will occur between the hours of 10am and 7pm.*
- 14 These restrictions are consistent with Environment Court Decision No. [2016] NZEnvC 90 referred to in the submission attached to Mr Kavanaghs evidence.

Evidence

- 15 Paul Kavanagh, the KBP Park Manager, filed evidence in relation to KBP's key aspects of concern.

Amendments to building height rules to provide for bird aviary enclosures

- 16 The Council's S42A Report rejects the KBP submission seeking an increase from 6m to 10m in height limit for aviary enclosures. The reasons for the author's opposition are:
- Increasing the maximum height has the potential to result in adverse effects on character and amenity, shading, dominance and visual effects.¹*
- 17 Mr Kavanagh addressed this matter in detail in his evidence however Ms Edgely remained unconvinced.
- 18 Ms Edgely notes that Rule 38.11.1 requires a resource consent for a restricted discretionary activity for any new building or extension. She notes that as any building would require a resource consent anyway, it will be possible to assess any proposed additional height in the same application with no additional

¹ S42A Report, at [11.38].

consenting requirements. She also notes that the KBP site is not within an ONL/ Outstanding Natural Feature (**ONF**) or Rural Character Landscapes (**RCL**), therefore the landscape assessment matters in 38.15 would not be triggered. Overall it is her view that the notified provisions are more efficient than including a site-specific exemption.

- 19 We do not accept this rationale. Ms Edgley has failed to acknowledge that a breach of the height restriction will trigger a discretionary consent which is a more stringent requirement than a restricted discretionary consent. Accordingly, the application and consenting process will be more onerous, costly and potentially uncertain. It cannot be considered to be more efficient as suggested by Ms Edgley.

Amendments to fencing height rules necessary for predator protection

- 20 Mr Kavanagh gave evidence justifying the need for a fence height of 2.2m for predator protection and requests an exemption from the rule on height for fencing for the KBP site.
- 21 Ms Edgley states in her rebuttal evidence that Rule 38.10.7.2 only applies to fences erected on the boundary of the zone, so internal fencing would not be affected and existing use rights would apply for the replacement of any existing fencing (providing that this was legally established). She also notes that the matters of discretion for a resource consent for this rule include functional constraints, so Mr Kavanagh's points in paragraphs 22 to 25 would be able to be taken into account. Likewise with building height, she considers that the provisions as notified are more efficient than having a site-specific exemption.
- 22 We do not agree with this position. Fencing on the KBP site has been erected in some cases, 30 years ago. There is no easy or cost effective way to establish that it was lawfully established. If the absence of being able to prove this point a consent would be required and the fence proposed would be well in excess of the permitted 1.2m. KBP would have to establish a case to justify the increased height which cannot be said to be a more efficient process than a site specific exemption.

Increases in retail space ancillary to permitted activities

- 23 KBP sought in its submission to increase the GFA for retail activities ancillary to permitted activities from the current 100m² / 10% limitation, as well as amendments to the activity table to provide for commercial, retail, and restaurant / café activity ancillary to the KBP operation as a permitted activity.
- 24 As noted in Mr Kavanagh's evidence KBP has invested significantly into its retail facilities onsite which provide a diverse offering, including ticketing and

admissions, the Honey Bee Centre, souvenir shop, gallery and café. These facilities directly support the operations of the park and enhance the overall visitor experience as well as providing a necessary diversification of income streams.

- 25 KBP does not necessarily oppose the 100m² limitation above; so long as it is clear that the established park operations would fall to be a permitted activity in table 38.1. Currently this is not entirely clear as the example activities are broad categories and Mr Kavanagh seeks an amendment to Rule 38.9.26 to identify that the species conservation work that KBP undertakes is a permitted activity within the IRZ.
- 26 In rebuttal evidence Ms Edgely considers that the term “species protection and conservation management works” in Rule 38.9.26 as notified cover the KBP operations and that further wording is not necessary.
- 27 As outlined in Mr Kavanagh's evidence the KBP currently carries out a broad range of activities and associated retail activities, I wants to ensure these activities are captured as that appears to be the intention. We consider that wording proposed Mr Kavanagh puts the matter beyond doubt and accordingly is the better and more efficient approach.

Policy support relating to the interface between KBP and Skyline sites

- 28 KBP sought in its submission to provide better protection of the interface between the KBP site and the Skyline lower terminal. As outlined in the introduction to my evidence, KBP's main concerns stem from its objectives to protect wildlife within its enclosures from adverse external effects.
- 29 As noted in Mr Kavanagh's evidence The s42A report considers that such changes are not necessary, and that KBP would be considered as part of any resource consent application as an affected neighbour. Mr Kavanagh notes that this is potentially inconsistent with the amendments to Rule 38.12 (non-notification) included in the same Report. The amendments to this Rule seek to remove the following:
- 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.*
- 30 The removal of this rule is of concern to KBP in that controlled activities provided for can have adverse effects on KBP and without sufficient policy support relating to the interface of the two sites, there would be little protection against proposals which had adverse effects on its wildlife.
- 31 Furthermore, any notification for particular activities would be an effects- based assessment, which does not guarantee KBP's involvement in all future consent applications. The requirement to obtain written approvals is not an onerous one

and encourages good communication and participation between parties. This is particularly important in the Subzone which has diverse activities and needs and will lead to better community and integrated planning outcomes.

- 32 As noted above policy support is required to ensure that all new proposals do not have adverse effects on established operations. This is particularly important for the Ben Lomond Subzone, which hosts a diverse range of activities and operations. This could be appropriately provided for within the proposed new suite of policies specific to the Subzone at 38.4.1.7 - .8.4.1.9, as set out in Mr Kavanagh's evidence:

Within the Ben Lomond Sub Zone

...

38.4.1.10 Ensure that the establishment of new activities does not create adverse reverse sensitivity effects on existing and planned land uses or activities that could be subject to effects including from increased noise, use, and light spill, or which could affect the amenity values of the surrounding area.

- 33 In rebuttal Ms Edgely acknowledges Mr Kavanagh's request for greater protection for KBP from neighbouring activities, including the new BLSZ policy to specifically address reverse sensitivity effects and the reinstatement of the requirement for written approvals for controlled activities in the BLSZ.
- 34 Ms Edgely considers that there are sufficient district wide and IRZ policies that deal with effects and conflicts between uses but does not specifically reference the provisions. Despite Mr Kavanagh's details of the sensitive nature of the park's operations and sensitivity of kiwi to noise and vibration in particular, she remains of the opinion set out in the S42A report that as controlled activities any adverse effects on neighbours are able to be addressed through conditions of consent and that the approach is consistent with the 2017 RMA amendments on notification.
- 35 Although the approach is generally consistent with RMA amendments on notification, in these circumstances it unlikely the true extent and impact of the effects of development on the KBP site will be able to be determined by QLDC without the involvement of KBP and its expertise in wildlife protection. Without KBP involvement it is also unlikely that QLDC will have the expertise to determine the conditions required to suitably mitigate effects. Accordingly it is entirely appropriate in this instance to retain the rule as notified.

Increased heights for carparks and activity status within the Skyline site

- 36 As discussed in para 11.28 of the S42A report, Skyline sought that parking within the Lower Terminal Area of the Subzone be permitted, rather than controlled, and an increase in height limits from 17m to 20m.

- 37 KBP opposes those increases to permitted standards for parking buildings within the Lower Terminal area.
- 38 These increased allowances have the potential to create adverse impacts on KBP, such as through increased noise, light spill, and other adverse amenity effects on the park.
- 39 KBP supported the Council's conclusions on these matters, at 11.28 and 11.29 of the S42A Report, opposing the increase in height and the permitted activity status.
- 40 However in rebuttal evidence Ms Edgely states Skyline has supplied landscape evidence from Ms Snodgrass in support of their request to increase the height from 17 metres to 20 metres in the Lower Terminal Area of the BLSZ. She noted that in the S42A report she recommended increasing the height in this area to 17.5 metres, however this recommendation was not carried through to the Recommended Chapter in Appendix 1.
- 41 She acknowledges Mr Dent's evidence where he states that the original height limits were proposed based on the height of future buildings in that area, and now that more refined building heights are known it is appropriate to increase the height limits in recognition of buildings likely to be developed. She understands Mr Dent's reference to likely future buildings in the Lower Terminal Area to be those proposed by resource consents RM160647 and RM171172 for a new lower terminal building (18.3 metres above original ground level) and multi-level car park building (19.918 metres above original ground level), respectively. The application RM160647 had an interim decision issued by the Environment Court in 2017. The Environment Court has not made a final decision on RM171172.
- 42 Ms Edgely remains of the view that the increase in height to a maximum of 20 metres to reflect the application currently before the Environment Court should not be accepted, but considers that the maximum height limit could be increased to reflect the maximum height of the lower terminal building in the interim decision on RM160647 of 18.5 metres. KBP agrees with Ms Edgely that the 20 metre height sought by Skyline is reliant on a specific design that is, at the time of writing, before the Environment Court. If it were to be consented, Skyline is entitled to rely on the consent to enable the building to the higher height proposed. A large proportion of the Lower Terminal Area is located within an ONL and KBP agrees that a discretionary status should be applied in order to assess the proposal against the landscape assessment matters under 38.15, as well as any relevant objectives and policies.
- 43 KBP supports the conclusion in Ms Edgely's rebuttal evidence regarding the request for a permitted activity status where she states:

Following my recommendation to remove the other matters of control in the S42A report, the only matter left for consideration under this rule is landscaping. While I agree with Mr Dent at paragraph 172 that there is a history of car parking in this area and that vegetation screens the western and northern areas while the Kiwi Birdlife Park (KBP) boundary is currently being planted, there is no requirement to retain the trees on the KBP site (as evidenced by recent tree removal on that property) and the forest to the west and north could be removed. On this basis, I recommend that this matter, and rule, be retained.

Extension of the Ben Lomond Subzone; and Informal airport activities within the Skyline site

- 44 KBP does not necessarily oppose the extensions of the Subzone sought by Skyline, as long as the amendments sought by KBP in its submissions and as addressed in Mr Kavanagh's evidence are included to address concerns around the interaction of different operations and activities within the area.
- 45 Skyline has sought that informal airport activities become a restricted discretionary rather than discretionary activities within the Subzone and including the Skyline extension area sought. KBP supports the discretionary activity status being maintained for informal airport activities. This is consistent with Ms Edgely's rebuttal evidence.
- 46 Ms Edgely states in rebuttal that she is still of the opinion that the Rural Zone is the more appropriate zone for the Department of Conservation land to the north of the BLSZ. She is also of the view that the informal airport rule as notified (i.e. discretionary activity in all open space zones) is more appropriate. She considers if the purpose of the proposed rules and the northern zone extension is to provide for a single informal airport in the future, a resource consent application under the Rural Zone provisions is more efficient than the addition of two rules (one of which is site-specific and would presumably also require a mapping annotation or overlay of some kind, although this is not expanded on in Mr Dent's evidence) and a new policy.
- 47 Should the Commission be minded to accept the Skyline submission and impose a restricted discretionary activity status, then KBP request the following specific amendments to address concerns relating to amenity effects on the park:

A limitation to maximum 4 flights on any day, with only two flights within any fifteen minute period (on five occasions per annum, when larger pre-booked groups are flown to the helicopter landing area there may be up to three flights in any fifteen minute period provided that the operator shall advise KBPL at least 48 hours in advance of the date and time during which the multiple flights will occur);

The operation of all helicopters at the helipad shall be managed in accordance with a Helicopter Management Plan;

All flights will occur between the hours of 10am and 7pm.

48 These restrictions are consistent with Environment Court Decision: *ZJV (NZ) Ltd v Queenstown Lakes District Council* [2016] NZEnvC 90, a copy of which is attached as **Appendix A** to Mr Kavanagh's evidence.

Dated this 26th day of September 2018

A handwritten signature in black ink, appearing to be 'VJ Robb', written in a cursive style.

VJ Robb

Counsel for Kiwi Birdlife Park Limited