

Before the Queenstown Lakes District Council Hearings Panel

In the Matter of the Resource Management Act 1991 (**Act**)

And

In the Matter of the Proposed District Plan Stage 2 - Hearing
Stream 15 – Visitor Accommodation

Legal Submissions on behalf of Coherent Hotels Limited

Dated 20 September 2018

Jeremy Brabant

Barrister

PO Box 1502, Shortland St

Auckland City

Mob: 021 494 506

Email: jeremy@brabant.co.nz

MAY IT PLEASE THE PANEL:

Introduction

1. These legal submissions are presented on behalf of Coherent Hotels Limited (**Coherent**) in relation to submissions lodged on the Queenstown Lakes Proposed District Plan – Stage 2 (**Proposed Plan**).¹
2. Coherent owns a number of properties in Fernhill comprising 139 Fernhill Road, 10, 12, 14 and 16 Richards Park Lane, and 18 and 20 Aspen Grove. These properties are collectively referred to in these submissions as the **Site**. For the reasons set out in the planning evidence of Mr Grala,² the Medium Density Residential Zone (**MDR**) can be treated as the operative zoning for the Site.³
3. Part of Coherent’s landholding (139 Fernhill Road) is occupied by the Aspen Hotel. The remaining properties are either vacant or contain single dwellings. As set out in the planning evidence of Mr Grala,⁴ it is anticipated that those parts of the Site currently vacant or containing single dwellings will be developed for either an extension to the Aspen Hotel or as a new, standalone, hotel in the future.

Submission – Stage 2

4. Coherent’s submission was generally supportive of the relevant Proposed Plan provisions. In summary the submission:
 - a. Sought the retention of the Visitor Accommodation Sub-Zone (**VASZ**) as notified on 139 Fernhill Road and 18 Aspen Grove;
 - b. Sought the extension of the VASZ to include:
 - i. 10, 12, 14 and 16 Richards Park Lane; and

¹ Submitter reference 2524.

² Statement of Evidence, paragraph 12. Refer s86F of the Act.

³ Excluding 18 Aspen Grove, refer Mr Grala’s SoE, at paragraph 12 and footnote 1. 18 Aspen Grove is zoned Low Density Residential.

⁴ Statement of Evidence, paragraph 4.

- ii. 20 Aspen Grove.
- c. Largely supported the provisions of the VASZ,⁵ subject to specified amendments to the zone descriptions, objectives, policies and matters of discretion; and
- d. Supported the approach taken in the proposed Variation to Stage 1 PDP Chapter 2 – Definitions to separate the treatment of Visitor Accommodation, Homestay and Residential Visitor Accommodation activities.

Summary Position

- 5. The evidence of Mr Grala and that of Ms Devlin and Ms Bowbyes on behalf of Council are generally in agreement.
- 6. The remaining areas of disagreement relate to:
 - a. Ms Devlin’s recommendation that a Building Restriction Area (**BRA**) of 4.5m be applied to a portion of the southern Site boundary; and
 - b. The zone purpose statements for the LDR and MDR zones.

Legal Framework – Plan Review

- 7. The matters requiring consideration in law will be well known to the Commissioners, and I presume will have been canvassed in detail before the Panel earlier in the process. I do not propose to address them.

Visitor Accommodation Sub-Zone

- 8. The section 42A Report for Visitor Accommodation Subzones – Mapping prepared by Ms Devlin recommends the requested extension of the VASZ to apply to all the Site be accepted, subject to the imposition of a BRA along the southern extent of the zone adjoining 18 Richards Park Lane and 22 Aspen Grove.⁶

⁵ Applying to the MDR and Low Density Residential Zone.

⁶ Section 42A Report, paragraphs 39.9 and 39.11.

9. Mr Grala and Ms Devlin agree that it is appropriate for the VASZ to be extended to include all the Site. Mr Grala is of the opinion that the VASZ is appropriate because:
- a. It would provide an opportunity for a large site that is that is in single ownership to be redeveloped for visitor accommodation on an integrated basis;
 - b. It would be a logical extension of the proposed VASZ (which is already located over a portion of the Site under the notified Proposed Plan) to the north and east;
 - c. Visitor accommodation within the VASZ is still subject to the underlying zone (including bulk and location controls) that will ensure that any visitor accommodation development would not inappropriately affect the residential character of the surrounding Fernhill area;
 - d. An extension of the VASZ would assist in protecting the legally established and existing use of the Site;
 - e. The Site is not located within any landscape protection overlays under either Stage 1 or Stage 2 of the Proposed Plan;
 - f. The Site is located within the Urban Growth Boundary;
 - g. It would be consistent with the Strategic Direction of the Proposed Plan by:
 - i. Implementing the goals, objectives and policies under section 3.2 of Chapter 3 by positively contributing towards the Queenstown economy; and
 - ii. Implementing Objective 3.2.1.4 and Policy 3.2.1.4.1 of Chapter 3 by allowing the opportunity for tourism activities.
10. For these reasons, Coherent submits that the section 42A Report recommendation to extend the sub-zone be adopted.

Building Restriction Area

11. Coherent does not support Ms Devlin's recommendation that a BRA be imposed on the Site.
12. I note that as originally worded, the proposed BRA standard applied to both visitor accommodation and residential development. Ms Devlin has subsequently acknowledged that this was an unintended consequence of her recommendation⁷ and has suggested an amendment to the effect that the BRA would only apply on this Site to buildings for visitor accommodation.⁸
13. The implication of the above control means that locating any building (or part of a building) for visitor accommodation within 4.5m of that portion of the southern Site boundary would infringe the rule, requiring resource consent as a non-complying activity. This is a significant increase from the 1.5m setback required by the underlying MDR zone and results in a change in activity status from restricted discretionary to non-complying.
14. Coherent submits that the imposition of the BRA is not the most appropriate way to achieve the relevant objectives of the Proposed Plan. In summary that is because there are other methods in the Proposed Plan which more efficiently and effectively achieve the relevant objectives. The BRA imposes unnecessary costs upon the Site (by virtue of limiting development opportunity and flexibility), which are not counterbalanced by associated benefits.

Nature of the method proposed

15. The BRA is a simple built form restriction. It in effect imposes an increased yard. It does not respond to the nuances of any given proposal. As a planning method, it is a blunt tool – a hammer rather than a scalpel.

⁷ Rebuttal evidence, paragraph 6.2.

⁸ If Coherent's position that a BRA should not be applied to the Site were rejected by the Panel, then Coherent would support in the alternative the amendment proposed.

Fit for purpose?

16. Whether the BRA is appropriate requires consideration of what effects it is intended to avoid or manage, and its ability to meaningfully do so. In summary, there is no evidence establishing that the simple blanket setback the BRA imposes has any material benefit for adjoining sites in the context of managing a range of potential adverse effects, other than a relatively crude limitation on building location. Building location and the boundary interface is already better and more appropriately controlled by other rules.

What effect(s) is the BRA intended to address – and does it do so?

17. The section 42A report suggests that the effects of a visitor accommodation development on an adjoining site could be quite different to a residential development in regard to residential character.⁹ This assertion is baldly stated. It is not clear which effects are of concern or are intended to be directly avoided or mitigated by the BRA. It is likely true to say that the effects could be quite different. However, in my submission an assessment of the appropriateness of any planning solution requires more detailed consideration.
18. At the time of writing there is no application for consent for development of the Site before Council which could be used to assess particular potential adverse effects. Even if there were:
 - a. This is a plan change process rather than assessment of an application for resource consent;
 - b. In that context assumptions with respect to development need to be carefully considered. Appropriate planning methods for the Site must be appropriate for all potential development scenarios.¹⁰
19. In line with the above observations, the section 42A report properly acknowledges that a range of outcomes are possible, and that the extent of

⁹ paragraph 39.9

¹⁰ and therefore, a singular focus on the submitter's current stated development plans for the Site would not be appropriate

adverse effects which could be generated are not known.¹¹ The section 42A report goes on to identify that the matters of discretion through the resource consent process specifically enable potential adverse effects to be “suitably addressed” to “limit the impact” on adjoining residential activities. This paragraph of the report concludes that the matters of discretion “should ensure a good outcome for neighbours”. These observations align with the evidence of Mr Grala.

20. The section 42 A report also includes some specific observations regarding built form and associated effects:¹²
 - a. Only one internal boundary of 18 Richards Park Lane would be potentially affected by a VA development.
 - b. Given the topography of 18 Richards Park Lane, any VA development to the north would not hinder lake views.
 - c. In terms of sunlight access or shading, a residential development on 16 Richards Park Lane could result in similar effects to a VA development. That is because from a bulk and location perspective VA development faces the same constraints as a residential built form.
21. A similar built form and associated effects assessment for 22 Aspen Grove was not undertaken in the section 42 A report, but the same observations apply.
22. In short, the section 42A report does not illustrate any shortcomings in the methods in the Proposed Plan (i.e. methods other than the proposed BRA) which manage built form outcomes on the Site. Accordingly, it is difficult to find justification for the subsequent assertion that a BRA is both required and appropriate.
23. Mr Grala’s evidence¹³ identifies:

¹¹ paragraph 39.3

¹² paragraphs 39.6 – 39.8

¹³ Grala, paragraphs 23 – 28

- a. A different and more restrictive activity status applies to Visitor Accommodation.
 - b. The Council has discretion in the context of Visitor Accommodation to address the location, nature and scale of activities and the external appearance of buildings. That enables consideration of issues such as zone interface and boundary treatment.
 - c. There are a range of other methods in the Proposed Plan governing bulk and location (including building height, building coverage, height relation to boundary, boundary setback and building length).
24. Thus, he concludes a BRA restriction is not necessary or appropriate. Other rules in the Proposed Plan address issues such as noise and traffic.
25. In rebuttal, Ms Devlin has maintained her position, despite agreement with Mr Grala that adverse effects on residential amenity are appropriately addressed through the restricted discretionary activity status.¹⁴ With respect, that agreed position should settle matters in favour of the position taken by Coherent.
26. In paragraph 6.5 of her rebuttal Ms Devlin in effect gives three reasons why in her view a site-specific response is required:
 - a. She refers to the notified VASZ being extended into an established residential neighbourhood;
 - b. The submitter is planning either an extension to the existing hotel or a new stand-alone hotel in the future (and potential adverse effects created by a hotel a more significant than those from smaller scale VA units);
 - c. Two submitters sought that the VASZ not be extended over any properties on Richards Park Lane.
27. Consequent on these identified effects, Ms Devlin states that the BRA is a

¹⁴ Ms Devlin's rebuttal evidence at paragraph 6.4.

“necessary counterbalance” to ensure that the VASZ extension is appropriate.

28. The position taken by Ms Devlin appears, if taken literally, to suggest that the VASZ extension would not be appropriate absent the BRA.
29. In my submission the extension to the VASZ is appropriate for reasons identified elsewhere in the section 42A report, and in the submission lodged by Coherent. This conclusion is not contingent on a BRA.
30. A specific focus on the submitter’s current indicated development plans is not helpful. As already canvassed in these submissions, the appropriate response is to adopt methods which can successfully address and manage the range of potential development outcomes which might occur on the site.
31. A BRA is a blunt and limited tool which is not required to manage potential built form issues on the Site given the discretions available. Further there is no evidence that it is effective in managing any other potential adverse effects.
32. That brings us back to the agreement between Ms Devlin and Mr Grala that adverse effects on residential amenity are appropriately addressed through the restricted discretionary activity status for visitor accommodation in the VASZ.¹⁵ The matters for discretion set out at rule 8.4.30 are limited to:¹⁶
 - i. The location, nature and scale of activities;
 - ii. The location, provision, and screening of parking and access;
 - iii. Landscaping;
 - iv. Noise generation and methods of mitigation (through design and management controls);
 - v. Hours of operation, including in respect of ancillary activities; and
 - vi. The external appearance of buildings, including design, materials and external lighting, and design measures to limit the impact on adjoining residential activities.
33. Furthermore, visitor accommodation activities are:

¹⁵ Ms Devlin’s rebuttal evidence, paragraph 6.4.

¹⁶ Notified VASZ Rules, MDR new Stage 2 PDP Provisions.

- a. Anticipated and provided for by the VASZ; and
 - b. Managed by the proposed rules (including assessment criteria) within the VASZ and the underlying residential zone.
34. The proposed VASZ does not introduce any additional or more enabling built form controls. The underlying MDR zone will continue to manage the interface (including character and amenity) between the Site and adjoining properties. The MDR manages (relevantly):
- i. Building height;
 - ii. Building coverage;
 - iii. Density;
 - iv. Recession planes; and
 - v. Setbacks.
35. In light of the above, residential and visitor accommodation activities do not change the built form interface controls. The VASZ's response to different activities by imposing additional matters of assessment and control is wholly appropriate from a resource management perspective. In my submission there is little, if any, resource management benefit to be gained from imposing a site-specific control in circumstances where the underlying zone provisions appropriately manage adverse amenity effects.
36. It is inappropriate, in the absence of a resource consent application, for Council to assume that a hotel located next to residential properties will result in significantly different effects than a "small scale" visitor accommodation. There is no evidence to support that assumption.
37. The proposed additional objectives and policies¹⁷ provide for visitor accommodation in the MDR VASZ. Those objectives and policies explicitly refer to ensuring visitor accommodation is of a location, scale, character intensity that maintains the residential character of the underlying zone. In my submission these objectives and policies are already reflected in the additional matters of control for VA activities. In these circumstances it is

¹⁷ New Stage 2 PDP provisions added to Stage 1, Chapter 8 MDR at 8-1.

inappropriate to impose the BRA.

38. For the reasons outlined above, I submit that the VASZ can be extended without the imposition of an additional site-specific setback control.

Visitor Accommodation Provisions – Zone Description

39. The remaining area of disagreement between Mr Grala and Ms Bowbyes is whether the provisions should recognise the importance of visitor accommodation to the district.

40. Coherent’s submission seeks the following amendment to the MDR¹⁸ and LDR¹⁹ zones:

“Well designed and appropriately located visitor accommodation has an important role in the district, providing socioeconomic benefits and contributing to a prosperous, resilient and equitable economy.”

41. Mr Grala’s evidence addresses why the inclusion is appropriate. Ms Bowbyes’ rebuttal evidence retains her opposition to the proposed amendments.

42. Ms Bowbyes states that “it is important not to overstate the significance of VA activities in these zones because the zones have the principal purpose of providing for residential activities”.²⁰ The subtext of that observation must be that the proposed wording inappropriately elevates the significance of VA activities, and does so in a way which undermines the principal purpose of the zone. In my submission, that is simply not the case. The proposed wording is balanced. It does not and cannot erode the primary purpose of the zone.

43. The proposed additions to the zone descriptions reflect the proposed objectives and policies providing for (limited) visitor accommodation activities in the residential zones. The amendments as worded better implement the strategic direction of the District Plan and improve the linkages between the objectives and policies.

¹⁸ Provision 8.1.

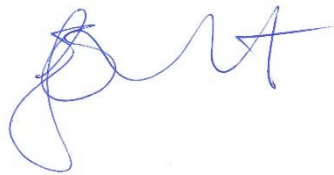
¹⁹ Provision 7.1.

²⁰ Ms Bowbyes rebuttal evidence at paragraph 4.3.

Conclusion

44. For the reasons set out above, I submit that the planning evidence before the Panel on behalf of Coherent establishes that the extension of the VASZ to the Site is appropriate and any adverse effects arising from future visitor accommodation activities will be appropriately managed through the restricted discretionary status of the activity which negates the need for a site-specific BRA.

45. Further, in my submission the proposed amendments to the residential zone descriptions are appropriate, give effect to the Plan's strategic direction chapter and are in line with good resource management practice.



Jeremy Brabant
Counsel for Coherent Hotels Limited

Dated 20 September 2018