

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**

SUBMISSIONS OF COUNSEL ZJV (NZ) LIMITED

STAGE 2, HEARING STREAM 15

Dated: 21 September 2018

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MAY IT PLEASE THE PANEL:**1. INTRODUCTION**

- 1.1 These legal submissions are made on behalf of ZJV (NZ) Limited (**Ziptrek**) and relate to the proposed 'Open Space and Recreation Zone' and the 'Ben Lomond Sub-Zone' (**BLSZ**) notified in hearings on Stage 2 of the Queenstown Lakes Proposed District Plan (**PDP**).
- 1.2 At a high level, Ziptrek considers that the Queenstown Lakes District Council (**QLDC**) has provided insufficient s32 analysis to justify the need for additional development capacity in the Ben Lomond Reserve. The BLSZ appears to be driven by one commercial operator's desires for further development, rather than as the output of a comprehensive assessment of options for further recreation development across the district.
- 1.3 Ziptrek's submissions on the PDP seek that the notified BLSZ be amended to:
 - a. Impose tighter restrictions on the level and intensity of development that can occur on the Ben Lomond Reserve;
 - b. Modify policies and rules to promote efficiency in the provisions;
 - c. Amend the spatial extent of the BLSZ – Bob's Peak Area and Corridor Area; and
 - d. Add further matters of discretion for development in the BLSZ – Bob's Peak Area.
- 1.4 Experts on behalf of the QLDC recommend several amendments to the provisions of the BLSZ that were proposed in the planning evidence of Jeffrey Brown on behalf of Ziptrek. Several issues remain outstanding, however. These submissions focus on those outstanding issues, which fall under the following broad headings:
 - A. The approach of the PDP to further development in the Ben Lomond Reserve, including Ziptrek's proposed amendments to policies and rules;
 - B. Notification for Controlled Activities in the BLSZ; and
 - C. The spatial extent of the BLSZ.
- 1.5 Before addressing these issues directly, we:
 - a. Describe the background to Ziptrek's submissions and development of the Open Space and Recreation Zone;

- b. Address the legal framework for the district plan review; and
- c. Summarise the planning evidence of Jeff Brown on behalf of Ziptrek.

2. BACKGROUND

- 2.1 In Stage 1 of hearings on the PDP, Skyline Enterprises Ltd (**SEL**) made a submission seeking a new 'Commercial Tourism and Recreation Sub-Zone' in the Ben Lomond Reserve.¹ Ziptrek made a further submission opposing this relief², broadly on the basis that the submission lacked detail and analysis and that the provisions were too permissive to be appropriate in the Reserve. Ziptrek presented evidence³ and legal submissions⁴ in support of its further submission in Stage 1 hearings.
- 2.2 In evidence presented to the Hearings Panel, evidence on behalf of the QLDC recommended that SEL's relief be declined, broadly for the same reasons as Ziptrek (permissiveness of the rules around commercial and commercial recreation activities and a lack of assessment in relation to traffic and transportation effects, in particular).⁵
- 2.3 The Panel did not make decisions on these submission points as part of its decisions on Stage 1 of the PDP, as the Council advised the Panel and submitters of its intention to notify the Open Space and Recreation Zone (and the Ben Lomond Sub-Zone) as a variation to the Stage 1 Rural zone as part of Stage 2 of the PDP. Skyline's submission and Ziptrek's further submission were deemed to be submissions against the variation to the Rural Zone and were transferred to Stage 2 of hearings on the PDP.⁶
- 2.4 As well as Ziptrek's further submission on Stage 1 of hearings on the PDP, Ziptrek also filed submissions and further submissions on the Council's proposed Open Space and Recreation Zone (and the Ben Lomond Sub Zone) in Stage 2.⁷

¹ Submission number 574.

² Submission number 1370.

³ Statement of Evidence of Jeffrey Andrew Brown on behalf of ZJV (NZ) Limited, Hearing Topic 13 – Queenstown Mapping, Stream 1A, 9 June 2017.

⁴ Legal Submissions for ZJV (NZ) Limited, Hearing Topic 13 – Queenstown Mapping, Stream 1A, 14 July 2017.

⁵ Section 42A Report / Statement of Evidence of Ruth Evans on behalf of QLDC, Hearing Stream 13, Group 1A Queenstown Business and Industrial, 24 May 2017, section 8. Supplementary Reply of Ruth Evans on behalf of QLDC, Group 1A, 11 October 2017, Section 2.

⁶ Supplementary Legal Submissions for QLDC as part of Right of Reply, Hearing Stream 13, 11 October 2017, paras 2.1 - 2.3.

⁷ Submission Number 2485 and Further Submission number 2778.

3. LEGAL FRAMEWORK

3.1 Counsel for the QLDC described the legal framework against which the Panel must evaluate the district plan review and submissions on it. Those general submissions are accepted, in particular counsel for the QLDC's reference to the mandatory requirements for the preparation of district plans described in **Colonial Vineyard Ltd v Marlborough District Council**⁸ and amended by the Resource Management Amendment Act 2013 and the Resource Legislation Amendment Act 2017.⁹

3.2 A concise summary of those requirements was set out in **A & A King Family Trust v Hamilton City Council**:¹⁰

“[9] The legal framework for plan reviews is set out in sections 31, 32 and 72-76 of the RMA. The matters that need to be addressed were comprehensively set out by the Court in *Colonial Vineyard Ltd v Marlborough DC* and *Reiher v Tauranga City Council* as follows:

[10] In examining a provision under the Act, including Section 32, we must consider:

- (a) Whether it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act;
- (b) Whether it is in accordance with Part 2 of the Act;
- (c) If a rule, whether it achieves the objectives and implements the policies of the plan; and
- (d) Whether having regard to efficiency and effectiveness, the provisions are the most appropriate way to achieve the objectives of the proposed plan, having regard to the benefits, the costs and the risks of not acting.

[11] In doing so the Court must take into account the actual and potential effects that are being addressed to consider the most appropriate provisions, if any, to respond to this.

[10] As well, s 74 of the RMA requires a territorial authority to prepare and change its district plan in accordance with its functions under s 31 (among other things). These functions include the establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district.”

3.3 The Court in **A & A King Family Trust** also commented in relation to section 32 of the Act:

“[12] The test under s 32 has been considered in many decisions of the Environment Court, including *Gisborne District Council v Eldamos Investments Limited*, *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*, *Colonial Vineyard Limited v Reiher* referred to above to name a few. As well, the High Court considered it in *Shotover Park Limited and Remarkables Park Limited v Queenstown Lakes District Council*. In *Shotover Park Limited*, the term *most appropriate* was applied as follows:

[57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(2)(a) and (b). The phrase "the most appropriate" acknowledges

⁸ **Colonial Vineyard Ltd v Marlborough District Council** [2014] NZEnvC 55.

⁹ Opening Representations / Legal Submissions for Queenstown Lakes District Council, Stream 15, 31 August 2018, at Appendix 1.

¹⁰ **A & A King Family Trust v Hamilton City Council** [2016] NZEnvC 229.

that there can be more than one appropriate way to achieve the purpose of the Act. The task of the territorial authority is to select the most appropriate way, the one it considers to be the best.”

4. OUTSTANDING ISSUES

A. Approach to Development in the Ben Lomond Reserve

- 4.1 Ziptrek accepts that the Ben Lomond Reserve and the Bob’s Peak area is, in many ways, unique in Queenstown and that a bespoke sub-zone could be appropriate. In particular, there is high concentration of existing commercial recreation development within a relatively small area, high numbers of visitors and limited opportunities for growth and further development.
- 4.2 Ziptrek considers that these factors necessitate a careful approach to further development on the reserve, acknowledging that the reserve is an Outstanding Natural Landscape, is highly prominent from the Queenstown Town Centre, and that its amenity values contribute to the operation and success of existing commercial recreation activities.
- 4.3 In general, Ziptrek supports the BLSZ but seeks amendments to the sub-zone provisions to better recognise that further kinds of development and substantial growth in visitor numbers may not be appropriate, where that growth will have adverse effects on amenity and landscape values, as well as on safety for reserve users.

Policies - BLSZ

- 4.4 Ziptrek seeks amendment to Policy 38.4.1.7 as follows:

~~Control~~ Ensure that the visual impact of buildings, passenger lift systems, earthworks and infrastructure associated with commercial and commercial recreation activities are designed to minimise adverse effects on landscape and amenity values

- 4.5 The proposed amendment provides greater policy direction by establishing a baseline from which to assess the visual impact of buildings (and other works) against.
- 4.6 Mr Brown, in planning evidence for Ziptrek, recorded his view that the amendment better aligns the BLSZ with higher order provisions including in Chapter 3 Strategic Direction, for example:

Strategic Objectives

3.2.5 The retention of the District’s distinctive landscapes

3.2.5.1 The landscape and visual amenity values and the natural character of Outstanding Natural Landscapes and Outstanding Natural Features are protected from adverse effects of subdivision, use and development that are more than minor and/or not temporary in duration...

...

Strategic Policies

3.3.30 Avoid adverse effects on the landscape and visual amenity values and natural character of the District’s Outstanding Natural Landscapes and Outstanding Natural Features that are more than minor or not temporary in duration.

Forest Harvesting

4.7 Ziptrek seeks several amendments to provisions managing Forestry Activity in the BLSZ. Namely, Ziptrek seeks:

- a. Refinement of Rule 38.11.4 to clarify that it does not apply to day-to-day forestry management tasks such as pruning small branches for safety purposes;
- b. Related to this relief, the addition of a new Permitted Activity 38.9.30A “*Management of existing forestry, limited to pruning and other minor works required for safety purposes*”;
- c. That Forestry Activity (excluding of the kind mentioned above) be assessed as a Restricted Discretionary activity (rather than a Controlled activity) in Rule 38.11.4;
- d. The addition of a Matter of Discretion in Rule 38.11.4 “*effects on the amenity values of the forest and on other users of the reserve*”; and
- e. The addition of a new Policy 38.4.1.10 to provide policy basis for these amendments, as follows:

Ensure that forest harvesting takes into account effects on amenity values and other users of the reserve environment, and enable day to day forest management.

4.8 Ziptrek’s proposed amendments are considered appropriate because:

- a. They recognise that some forestry management tasks are minor in nature, require regular attention, and should not require a resource consent. For

example, Ziptrek is regularly required to prune branches where they intrude on a zipline path and have the potential to create significant safety hazards. This kind of minor forestry work needs to be done immediately after a hazard is identified.

- b. In contrast, other forestry activity is more significant in its nature and effects, for example harvesting entire trees or groups of trees. These kinds of works can have significant adverse effects on the amenity values of the reserve, for example the 'enclosed' feeling of a relatively dense forest may be jeopardised, and works could be highly noticeable from the town centre. These works can also have adverse effects on other uses of the reserve, either directly (for example harvesting a tree that Ziptrek may need for a zipline) or indirectly (through adverse effects on the amenity in the reserve). It is entirely appropriate that this kind of activity is (at least) notified to potentially affected commercial operators and (preferably) assessed as an RD activity.
- c. We acknowledge the point made by Christine Edgley, in her evidence for the QLDC, that if the activity status for Forestry Work is amended to RD, the work would be limited notified and the effects on other uses of the reserve would not be required as a matter of discretion.¹¹ However, notification does not preclude the requirement for the effects on other reserve users to be considered by Council officers. In addition, the QLDC recommends that Controlled activities should be assessed without notification.
- d. Ms Edgley argues that Ziptrek does not have scope to reduce the breadth of Rule 38.11 so as to exclude general day-to-day forestry maintenance activities.¹² In response:
 - i. Ziptrek's submission on Stage 2 of the PDP opposed the Open Space and Recreation Zone and the BLSZ in its entirety, and sought that the Rural General Zone provisions in the operative District Plan be reinstated.¹³
 - ii. One of the reasons provided for this submission was that the BLSZ could potentially obstruct, hinder or prevent Ziptrek's existing and future

¹¹ Rebuttal Evidence of Christine Melissa Edgley on behalf of QLDC, Chapter 38 Open Space and Recreation – Text and Mapping, 23 July 2018, para 4.10.

¹² Ibid, para 4.14.

¹³ Submission 2485, para 2.2.

commercial recreation activities for which it holds resource consent and has entered into commercial arrangements.¹⁴

- iii. It is submitted that this submission provides broad scope for refining the BLSZ provisions in order to better accommodate Ziptrek's existing operations. Day-to-day maintenance work on trees is a core part of Ziptrek's operations.

Treehouse Structures

4.9 Ziptrek seeks the addition of a new activity (d) in Rule 38.11.4 providing structures for the purposes of supporting ziplines up to 20 metres in height as a Discretionary Activity. The proposed rule would require that any such structure is attached to and wholly supported by tree(s) and has a platform floor area of no greater than 10m². It is submitted that these kinds of structures should be allowed to a greater height in the reserve because:

- a. There is a clear distinction between the visibility of Ziptrek's treehouse structures (which blend into and form part of the natural forest environment) and other kinds of buildings in the Bob's Peak Area (which clearly stand out as human made structures);
- b. Ziptrek's treehouse structures have a low impact on the amenity of the reserve and have very low (to no) visibility from the Queenstown Town Centre. This justifies a higher height limit for treehouse structures;
- c. Ziptrek's treehouse structures are able to be removed without disrupting the existing forest environment;
- d. Other existing commercial recreational activities are specifically recognised in the rule, for example SEL's passenger lift systems and lower terminal building. It is appropriate and fair that Ziptrek's facilities are also recognised.

¹⁴ Submission 2485, para 2.2, 5th bullet point.

Informal airports

- 4.10 Ziptrek agrees with the planning evidence provided by Sean Dent on behalf of SEL that an informal airport is more appropriately located on the northeast part of BLSZ in the vicinity of 'fire pond' than in its current location.¹⁵ The proposed area for informal airports is separated from existing activities and areas where visitors to the reserve congregate and is therefore more appropriate in terms of amenity and safety. Ziptrek also agrees with the additional Rule 38.11.8 proposed by Mr Dent clarifying that only one informal airport may exist in the Reserve.¹⁶ I.e. the current informal airport will be decommissioned if the area proposed by Mr Dent were to be accepted by the Panel.
- 4.11 Helicopter activity will still impact other users of the reserve, including Ziptrek, from the relocated position (if accepted by the Panel). The extent of these effects will depend of the flight path and frequency of helicopter activity. Noise has considerable effects on Ziptrek's operations as safety briefings are an important part of its business. To help minimise these effects, Ziptrek seeks an additional matter of discretion in Rule 38.11.7 as follows:¹⁷

location of proposed flight path, landing / takeoff procedures, and effects of these on existing sensitive activities.

B. Notification

- 4.12 Ziptrek considers that notification of proposed works is important in the Ben Lomond Reserve because of the high concentration of existing commercial and commercial recreation activities within a relatively small area and the consequent potential for development and works to adversely affect neighbouring reserve users.
- 4.13 QLDC experts recommend deleting Rule 38.12 in the notified Open Space and Recreation Zone which required Controlled activities in the BLSZ to be limited notified. It is accepted that Controlled activities are often appropriately assessed on a non-notified basis. However, in the BLSZ, a broad range of activities have a Controlled activity status. Passenger lift systems,¹⁸ in particular, are significant developments with potentially significant adverse effects on other reserve users.
- 4.14 Ziptrek seeks that the notified Rule 38.12 be retained.

¹⁵ Statement of Evidence of Sean Dent on behalf of Mount Crystal Ltd, NZSki Ltd and Skyline Enterprises Ltd, 6 August 2018, paras 146-148.

¹⁶ Ibid, para 149.

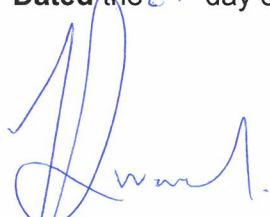
¹⁷ Statement of Rebuttal Evidence of Jeffrey Brown on behalf of Ziptrek, Stream 15, 22 August 2018, paras 5-6.

¹⁸ Rule 38.11.2.

C. Spatial Extent of BLSZ

- 4.15 Ziptrek considers that the boundaries of the proposed 'Gondola Corridor Area' within the BLSZ are unreasonably and unnecessarily wider than the existing physical gondola infrastructure. The scale of this area combined with the proposed Controlled activity status (and non-notification) for new passenger lift systems within the corridor area create the ability for significantly greater development to occur in the Ben Lomond Reserve with relatively little control and discretion from the Council.
- 4.16 This level of additional development has the potential to change the character and scale of development on the reserve and is inappropriate for an Outstanding Natural Landscape. Ziptrek considers that there has been insufficient s32 analysis to justify enabling this level of development.

Dated the 21st day of September 2018



R/S Ward
ZJV (NZ) Limited