

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

Books & Toys Wanaka Limited (#2510)

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 Books & Toys Wanaka Limited (**Books & Toys**).
- 2 Books & Toys lodged a submission (#2501) and further submission on Chapter 31 Signs which sought changes with respect to signage platforms, sale signage and display signage.
- 3 Ms Erin Quin lodged planning evidence on behalf of Books & Toys¹.

Background

- 4 In summary, evidence and submissions for Books & Toys relate to the matter of plan interpretation and efficiency. The reason Books & Toys is so concerned with these matters is because of a previous experience it had with the QLDC regarding the interpretation of signage rules.
- 5 Books & Toys operates the Paper Plus store on the corner of Helwick Street and Dunmore Street, Wanaka. Approximately 8 years ago Books & Toys were threatened with abatement notices and infringement notices regarding signage erected on its site. Following a protracted period (approximately two years) and just prior to the matter proceeding to an Environment Court hearing, QLDC agreed that its interpretation of the QLDC signage rules was incorrect. Legal costs of approximately \$35,000.00 were incurred by Books & Toys in respect of this matter, and it is not an experience the company wants to repeat.
- 6 Books & Toys is also particularly concerned about the shop front display rules because these displays are fundamental to the operation of its business.
- 7 The Paper Plus store is a franchise, and as a franchise the business must adhere to the national marketing strategy. The operators receive promotional material (including shop front display items and posters) and are told when the display must be exhibited (the dates and number of days). If the operators do not adhere to these requirements they are in breach of the franchise agreement. Therefore, practicality and certainty regarding display signage rules are directly relevant to the successful and compliant operation of the business.

¹ Dated 6 August 2018

Signage Platforms

- 8 The Books & Toys submission notes that it supports "grandfathering" that ensures signs within previously assessed and approved "signage platforms" are permitted activities in key commercial zones, including the Wanaka Town Centre Zone and that any change of signage within those platforms is a permitted activity provided it complies with conditions of approval.
- 9 The submission also noted that Book and Toys is concerned that due to the drafting and the restructure of the notified provisions within proposed Chapter 31 the application of the proposed "grandfathering" provisions is unclear and that the provisions promoted have an element of uncertainty.
- 10 The relief sought was:
- All necessary amendments being made to proposed provisions to ensure that any change in signage within approved "signage platforms" (including changes to the type, size and colour of the wording) will not require additional consents provided that the change in signage complies with any conditions of approval.*
- 11 In her evidence Ms Quin notes that in part 10.5 of Ms Leith's report she recommended an amendment to Rule 31.5.1 to exclude the signage types listed as permitted and controlled activities within Tables 31.7 – 31.9, based on Submissions #2510 (Books & Toys) and #2128 (Wanaka Flooring Xtra) which argued that the notified rules were ambiguous.
- 12 Ms Quin supported Ms Leith's view that the rule should be amended; however found the proposed amendment was also ambiguous. She concluded that further clarification would ease practical interpretation of the rule for approved signage platforms.
- 13 Ms Quin noted in her evidence that the wording of 31.7.7 states that any sign or signage platform that does not comply with Rules 31.7.1 to 31.7.6 is discretionary. It remains unclear if signs replaced within an approved signage platform need to comply with Rule 31.7.7, which also means they must comply with 31.7.1 to 31.7.6 in order to retain permitted status.
- 14 For clarity, Ms Quin recommended that an amendment to Table 31.5 be made specifically for signage within an approved signage platform to be a permitted activity².
- 15 Ms Leith's rebuttal evidence³ addresses the matters raised by Ms Quin in respect of signage platforms and the requirement for an additional rule to be included to

²Planning evidence dated 6 August, Paragraph 2.5

address an ambiguity with replacement signage within an approved signage platform (which arises as a result of s42A Rule 31.5.1).

- 16 Ms Leith does not agree that s42A Rule 31.5.1 as amended is ambiguous because it expressly excludes the signage types listed as permitted, controlled or restricted discretionary within Tables 31.7 – 31.9. She notes that within these tables, s42A Rules 31.7.2 and 31.9.10 both permit the installation of all new and replacement signage located within an approved signage platform. Consequently, she does do not agree with Ms Quin’s recommendation in this regard.
- 17 Despite Ms Leith's comments we remain of the view that there is an element of uncertainty due to the inclusion of Rule 31.7.7. For the avoidance of doubt and the reasons I discuss later in my submissions (general principles of plan drafting) the amendment to Table 31.5 as proposed by Ms Quin should be adopted.

Sale signage

- 18 In its submission Books & Toys opposed notified Rule 31.6.5:

Sale signs must be located on the site of the temporary sale, shall be limited to 1 sign per temporary sale and shall be erected or displayed for a maximum of 4 occurrences per site, per year and each occurrence shall not exceed 14 days (56 days total). If a temporary sale sign does not comply with this, the activity will be a discretionary activity.

- 19 This differed from the operative district plan which did not limit the number of signs per temporary sale or occurrences.

- 20 Ms Quin supports the recommendation from Ms Leith that an amendment be made to Rule 31.7.5(c) based on Submissions #2510 and #2518 with respect to sale signage. Ms Leith states in 11.4 of her report;

In my opinion, the length of time a sale sign is displayed on a site for a promotion is an easier standard to monitor and enforce than the limitation on the number of occurrences that the signage can be in place for across a year. If the number of occurrences per site per year is removed from Rule 31.6.5, then the potential adverse effects resulting from the display of the sale signage would be limited to a two week period (as per the notified Chapter 31) which is considered to be a suitable temporary timeframe for promotional signage.

I also consider that it is necessary to identify a minimum time period between each two week period that sale signage can be displayed. For ease of monitoring, I recommend a two week period be required between the display of sale signage. I consider that the

³ Dated 22 August 2018 Paragraph 4

Books & Toys (Wanaka) Ltd (2510) and Wanaka Flooring Xtra (2128) submissions which oppose the restriction on the limitation of sale signage to four occurrences per year provides scope for this recommendation.

21 Ms Quin and Books & Toys supports Ms Leith's findings and the amendment stated in 11.7 of her report which seeks deletion of Rule 13.6.5(c) subject to the insertion of a requirement of a minimum two week break between the display of sale signage which in my opinion is a reasonable interim break period between sale signage as suggested where any potential adverse effects of such signage is restricted to a two week duration.

22 One matter that does appear to have been overlooked is the request by Books & Toys not to restrict the number of temporary sale signs to 1 sign per temporary sale.

23 The relief sought by Books & Toys was:

Deletion of the part of Rule 31.6.5 that restricts the number of temporary sale signs.

24 The reason for this is that the Paper Plus store occupies a corner site and it has windows on both street frontages. Accordingly if there is a sale it needs to erect sale signs on both sides of its shop. There appears to be no clear rationale for the limit to 1 sign per temporary sale.

Display Signage

25 Books & Toys opposed Rule 31.7.5(b) in relation to the restriction placed upon signage located within the interior of the building which is visible from a public place. Wanaka Flooring Xtra (2128) also opposed the rule capturing merchandising that can be seen through a window as the rule does not achieve the proposed objectives of the Proposed District Plan.

26 Notified Rule 31.7.5(b) states:

"b. signs shall not exceed 50% coverage of glazing. This applies to individual or partitioned glazed areas located within the ground floor area. Signs not attached to glazing that are sited within the enclosed interior of a building and are not directly visible from a public place, are not subject to part (b) of this rule."

27 This differs from the operative district plan, where signs not attached to glazing or sited anywhere within the enclosed interior of a building, and visible or not, were not subject to the rule. The new rule means that signs which are located in the interior of the building and are visible from a public place are subject to the rule above. This provision is vigorously opposed by Books & Toys.

28 The relief sought was:

Amendment of Rule 31.7.5 so that signs sited within the enclosed interior of buildings visible from a public place are not subject to 31.7.5(b)

29 Ms Leith addressed both submissions and considered that displays within premises intended to attract shoppers within the building should not be captured within this rule.

30 Ms Leith found that upon her observations shop window displays are usually around 1m in "width" adjoining the shop front⁴. She concluded that Rule 31.7.5(b) be amended to only apply to interior signage "within 1m of shopfront glazing". This terminology of "width" and "within" is confusing in itself. It appears from Ms Leith's conclusion her intention is only to capture signs not attached to glazing that are located within 1m from the shop front. The s42A amended rule attached to Ms Leith's evidence states:

"Signs not attached to glazing that are sited more than 1 metre inside the enclosed interior of a building and are not visible from public places are not subject to part (b) of this rule".

31 The mark up does not reflect the conclusion as Ms Leith has not deleted the underlined text above.

32 In evidence Ms Quin notes that she supports Ms Leith's findings that shop front displays which present physical goods should not be captured by Chapter 31, however corresponding promotional posters of goods on display are not discussed and therefore this point is ambiguous (refer to the photos attached to Ms Quin's evidence). She recommended an amendment to the proposed amended definition to also exclude display posters in bold as follows;

*any external name, figure, character, outline, display (**excluding a display of posters of physical goods or physical products available for sale on the premises**), delineation, announcement, design, logo, mural or other artwork, poster, handbill, banner, captive balloon, flag, flashing sign, flatboard, free-standing sign, illuminated sign, moving signs, roof sign, sandwich board, streamer, hoarding billboard or any other thing of a similar nature which is:*

i) intended to attract attention; and

ii) visible from a road or any public place;

⁴ Evidence dated 22 August, paragraph 12.5

33 She also recommended clarification in Rule 31.7.5(b) with respect to specifically excluding window product displays on the basis that product displays which have corresponding promotional posters as part of the display are not excluded as part of Ms Leith's recommendation. The proposed amendment to Rule 31.7.5(b) in bold underline is as follows;

*"b. signs shall not exceed 50% coverage of glazing. This applies to individual or partitioned glazed areas located within the ground floor area. **Window product and temporary poster displays not attached to glazing and signs not attached to glazing that are sited within the enclosed interior of a building and are not directly visible from a public place, are not subject to part (b) of this rule.**"*

34 In her rebuttal evidence Ms Leith considers Ms Quin's recommendation to change the definition of 'sign and signage' and an addition to Rule 31.7.5(b), in relation to the display of posters. She does not support the requested relief as 'posters' are already specifically included in the definition of 'sign and signage' and therefore the proposed relief could result in confusion. She also considers that the potential effects of large posters within a shopfront display could be the same as a sign (being a two dimensional static drawing) and should not be treated the same as a display of physical products.

35 Book and Toys does not accept Ms Leith's reasoning or that the amendments she has proposed are the most appropriate way of achieving the objectives and policies of the proposed district plan for the reasons set out in Ms Quin's evidence and summary. As acknowledged by Ms Leith quality window product displays can enhance the amenity of the street environment. The rule is overly restrictive in a business sense and could lead to the perverse outcome of shop owners and operators locating their displays 1.1m back from the shop front to avoid non-compliance.

36 Despite Ms Leith's comments it is Books & Toys strong view that window product and temporary poster displays not attached to glazing should be specifically excluded from Rule 31.7.5(b).

General principles of plan drafting

37 It is a general principle of plan drafting in accordance with section 76 of the Act, that rules should be drafted clearly and precisely so that those who administer the plan, or are affected by it, should be able to identify without difficulty the provisions which apply. This general principle was considered in the Court of Appeal case of *Sandstad v Cheyne Developments Limited*, where the Court considered the intended meaning of the word 'adjoin' in a proposed planning instrument. The Court held that the importance of certainty warranted:

... that those who administer or are affected by or have to advise on the restrictions prescribed by a town planning ordinance should be able to identify without difficulty the properties to which it relates.⁵

- 38 That general proposition has subsequently been applied in numerous cases.⁶ The consequence of poor plan drafting, is that a rule which is unclear may in the future be considered as void for uncertainty.⁷
- 39 On a topic particularly relevant to this hearing, the Environment Court in *Haskett Investments Limited v Waimakariri District Council* considered that certain rules relating to signage were found to be void for uncertainty because they were so vague. The vagueness of the rule in question appeared to centre on subjectivity of the rule referencing signs that would be 'obtrusively visible from the residential zone'.⁸
- 40 With respect to who should be the subject of consideration when determining whether a particular provision is sufficiently 'clear' or 'certain', it is submitted this should be the ordinary and reasonable member of the public, rather than a consultant with expertise in resource management. That principle is inferred in the *Sandstad* Court of Appeal case above, where reference is made to planning provisions being able to be identified by 'those who are affected by [it]' (i.e. this could include property owners). This principle was also specifically addressed in the High Court in *Christchurch City Council v Aidanfield Holdings Limited* where the Court held that because heritage listings would affect the rights of land owners, there must be clear and accurate record on any listing to which the landowner and other interested parties can turn, and interpretation must be considered through the lens of the 'ordinary and reasonable member of the public'.⁹
- 41 In light of all the above, it is submitted that the debate centred on the clarity and applicability of these signage rules among experienced resource management practitioners is evidence in itself that the rules are ambiguous. The particular nature of the signage rules, being applicable to smaller scale and low cost proposals also means that in the future such rules will be used by lay persons

⁵ *Sandstad v Cheyne Developments Limited* (1986) 11 NZTPA 250 (CA), at page 8.

⁶ Including *Mobil Oil NZ Ltd v Dunedin City Council*, Planning Tribunal, 7 April 1992, C20/92; *Allen v Auckland Council*, Planning Tribunal, 3 May 1991, A28/91.

⁷ *Murray v Tasman District Council*, Planning Tribunal, W058/94; *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* (1993) 2 NZRMA 497 (PT), at p 80, applying *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362.

⁸ *Haskett Investments Limited v Waimakariri District Council*, Environment Court, C079/98, at page 3.

⁹ *Christchurch City Council v Aidanfield Holdings* [2010] NZRMA 92 (HC), at [50] – [58].

rather than consultants, in this instance clarity of drafting should be therefore a paramount consideration.

Dated this 26th day of September 2018

A handwritten signature in black ink, appearing to read 'V J Robb', written in a cursive style.

V J Robb

Counsel for Books & Toys (Wanaka) Limited