

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2016] NZEnvC 74

**IN THE MATTER** of the Resource Management Act 1991

**AND** of appeals pursuant to clause 14 of the First  
Schedule of the Act

**BETWEEN** WELL SMART INVESTMENT  
HOLDING (NZQN) LIMITED (formerly  
REID INVESTMENT TRUST)

(ENV-2015-CHC-70)

MAN STREET PROPERTIES LTD

(ENV-2015-CHC-72)

Appellants

**AND** QUEENSTOWN LAKES DISTRICT  
COUNCIL

Respondent

Court: Environment Judge J R Jackson  
(Sitting alone under section 279 of the Act)

Hearing: In Chambers at Christchurch

Submissions: G M Todd/S Buchan for the appellants  
J C Campbell/B A Watts for the respondent  
W J Goldsmith for J Thompson (section 274 party)  
(Final submissions received 15 April 2016)

Date of Decision: 29 April 2016

Date of Issue: 29 April 2016

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**PROCEDURAL DECISION**

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- A: Under section 279(1) of the Resource Management Act 1991 the Environment Court refuses leave for the appellants Well Smart Investment Holding (NZQN) Limited and Man Street Properties Limited to amend their notices of appeal.
- B: Under section 281 of the Resource Management Act 1991 the Environment Court refuses to waive the delay in lodging an amended notice of appeal by each of the two named appellants.
- C: Costs are reserved. Any application and submissions in support are to be lodged within 25 working days, and any reply within a further 15 working days.

## **REASONS**

### **Introduction**

[1] Well Smart Investment Holding (NZQN) Limited (“WSL”) and Man Street Properties Limited (“MSP”) are appellants in appeals to the court in respect of decisions of the Queenstown Lakes District Council (“QLDC”) made on submissions to Plan Change 50 (“PC50”) of the Queenstown Lakes District Council operative district plan (“the operative plan”).

[2] The appellants seek leave of the court to amend their appeals and for waiver of time for lodging a late notice of appeal. The procedural applications are opposed by the Council and by Mr J Thompson (an adjacent landowner and section 274 party). All other parties abide the decision of the court.

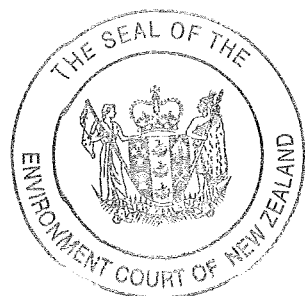
### **Background**

[3] The appellants filed their respective notices of appeal with the court on 14 August 2015. Both of the appeals sought the following relief<sup>1</sup>:

That the appellant’s submissions be accepted as being on the Plan Change and the Queenstown Town Centre Transition sub-zone be deleted.

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<sup>1</sup> ENV-2015-CHC-70 Well Smart Investment Holding (NZQN) Limited notice of appeal at para [8]a, and ENV-2015-CHC-72 Man Street Properties Limited notice of appeal at para [8]a.



[4] The respondent challenged the appellants' right to file the appeals. A decision concerning the jurisdiction for the court to hear the appellants' submissions was subsequently issued<sup>2</sup>. In brief the court found that the submissions were not 'on' PC50 and ruled that the following parts of the appellants' appeals should be struck out:

- WSL: "the part seeking deletion of the Town Centre Transition Zone and rezoning as Town Centre Zone and/or changes to the rules affecting its land";
- MSP: "the parts seeking removal of the Transitional zoning, substitution of a Queenstown Town Centre Zoning and changes to the relevant rules affecting its land".

In fact, no changes to rules were sought in the notices of appeal.

[5] The appellants have appealed that decision to the High Court<sup>3</sup>. Any directions given under this decision (if I grant the applications or one of them) would be conditional upon a higher court determining that there was jurisdiction to lodge the appeals in the first place. One consequence of this approach is that I must treat persons not before the court as if they have received valid notices of appeal.

[6] I should also record that in the meantime the parties have sought to resolve the parts of the appeals that seek the deletion of the Queenstown Town Centre Transition sub-zone ("TCTZ") by a conditional consent order: the parties have agreed that if this court's decision as to jurisdiction is ultimately overturned, then the TCTZ notation can be deleted in relation to the block to the south of and opposite the Isle Street West sub-zone<sup>4</sup>. However, and this is important for the issue now before the court, nothing<sup>5</sup> in the proposed consent order changes the height limits for the land in the TCTZ, most of which is owned by MSP and WSL.

<sup>2</sup> *Well Smart Investment Holding (NZQN) Limited v Queenstown Lakes District Council* [2015] NZEnvC 214.

<sup>3</sup> *Man Street Properties Ltd and others v Queenstown Lakes District Council*, CIV-2016-425-000009.

<sup>4</sup> Memorandum of the parties in support of draft consent order Man Street and Well Smart, 1 April 2016.

<sup>5</sup> Submissions of Mr Goldsmith 12 April 2016 at para 2.1.



[7] There is one final important piece of contextual information: the Council notified Part 1 of its proposed new district plan (“the PDP”) in 2015. The submission process has been completed and hearings commenced in March 2016. The PDP covers the Queenstown Town Centre Zone (“QTCZ”) of which the TCTZ is part. Various submissions on height within the QTCZ have been made, and I understand from Mr Goldsmith’s submissions<sup>6</sup> that the maximum height sought in this part of QTCZ is 11 metres above the benchmark 327.1 masl. Further, while MSP has made a submission on the operative plan, it has not sought any increase above that level.

*The Queenstown Town Centre and the Town Centre Transition sub-zone*

[8] When identifying the values of the Queenstown Town Centre the operative plan states that the Queenstown Town Centre is divided into three parts<sup>7</sup>:

- a special Character Area comprising three Precincts
- the Queenstown Bay Waterfront
- the sloping land bound by Shotover, Duke, Man and Hay streets, including the Town Centre transition sub-zone.

[9] The ODP then explains in relation to the third area<sup>8</sup>:

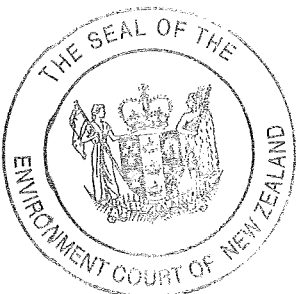
The unique character of this area derives largely from its topography which, unlike the rest of the Queenstown Town Centre, is relatively steep, forming something of an amphitheatre around the historic parts of the Town Centre. Due to the slope of the area; the fact that it is located between an established residential area and the views of the lake and mountains; and is elevated well above the rest of the town, development within the area has the potential to affect views and the amenity, scale, and streetscape of the Town Centre more than in any other area of the zone. Therefore, special bulk and location rules and rules relating to the area’s role at the interface of the residential area have been applied in the area in order to avoid or mitigate adverse effects.

(The TCTZ is outlined on Map 36, a copy of the relevant part of which is attached).

<sup>6</sup> Submissions of Mr Goldsmith 12 April 2016 at para 5.5(c).

<sup>7</sup> Para 10.2.2 Values [QLDP p 10-12].

<sup>8</sup> Para 10.2.2 Values [QLDP p 10-12].



[10] There are no specific objectives or policies relating to the TCTZ but there are site and zone standards in relation (amongst other controls relating to different classes of activities) to building and façade height within the zone.

[11] At the risk of oversimplifying, the height regime in this area under the operative plan (and disregarding PC50) is as follows:

- (1) uphill of Man Street, zoned residential, the height limit for buildings is 8m above ground level;
- (2) downhill of Man Street and within the TCTZ the height limit is 8m above “original ground level”<sup>9</sup>;
- (3) below the TCTZ’s southern boundary (which is parallel to Man and Shotover Streets) there are complicated height rules which allow buildings up to 14m as a controlled use provided they do not exceed certain heights (1.5m and 4m respectively) above the nearest point of Man Street<sup>10</sup>.

(I will call these “the height rules”).

[12] The effect of these rules is shown in Appendix 4 to the operative plan. For ease of understanding, Interpretative Diagrams from 7(a) – Profiles A and B – are attached marked “B”.

#### The WSL and MSP submissions and appeals

[13] It is common ground that the original submissions of the appellants (or their predecessors) sought both deletion of the TCTZ and amendments to the height rule in their submissions.

[14] The Hearing Commissioners did not accept those submissions.

[15] The notice of appeal by MSP sought<sup>11</sup> the following, much briefer, relief:

<sup>9</sup> Apparently this is the effect of Zone Standard para 10.6.5.2 (i)(a), first bullet point: (although I confess I can find no “specific area” on Map 36 which shows a maximum height of 8m or any other height; indeed I can find no reference to height at all) [QLDP p 10-35].

<sup>10</sup> Site Standard 10.6.5.1 (xi) [QLDP p 10-34] and Zone Standard 10.6.5.1 (i) [QLDP p 10-35].

<sup>11</sup> Notice of appeal dated 14 August 2015 in ENV-2015-CHC-72 at para 8.



- a) That the appellant's submission be accepted as being on the Plan Change and the Queenstown Town Centre Transition sub-zone be deleted; or
- b) That the decision on the Plan change to rezone any additional land Queenstown Town Centre Zone be reversed; or
- c) That the decision on the Plan Change be reversed so as to enable the merits of the rezoning of the land the subject of the Plan Change to be considered as part of the forthcoming review of the Queenstown Lakes District Council Operative District Plan which is due to be notified in August 2015; and
- d) An order for costs.

The notice of appeal by Reid Investment Trust (predecessors of WSL) used identical words<sup>12</sup> but omitted para (c).

[16] It will be noted that the appellants did not seek the same specific relief in their notices of appeal. In particular, no changes to rules was sought. That omission has given rise to the applications before the court.

[17] The particular difficulty for the appellants is that if the TCTZ notation is simply deleted from Map 36 – so that the MSP and WSL land simply becomes part of the QTCZ – then because the land is also within the Man/Brecon/Shotover/Hay block it would be subject to the 1.5m and 4m height rules (10.6.5.1(xi)(a) and (b) and 10.6.5.2(i) fourth and fifth bullets) which means the height limits on their land would be lower than at present.

#### The applications for waiver and amendment

[18] In more detail the appellants have sought the leave of the court to amend the appeals first so that the relief will also seek to remove an exclusion within Site Standard 10.6.5.1 xi(a) and Zone Standard 10.6.5.2 (i)(a) bullet point 4 of the operative plan (“the excluded standards”) so that the standards apply to the appellants’ land as to the rest of the area bound by Man, Brecon, Shotover and Hay Streets. Currently the excluded standards expressly omit the TCTZ and that land legally described as sections 23, 24, 25 and 26 Block IX Town of Queenstown from applying.

<sup>12</sup> Notice of appeal dated 14 August 2015 in ENV-2015-CHC-70 at para 8.



[19] Second, MSP seeks leave to amend the relief sought by its appeal to change the restrictions on height to a 12 m height limit for all of the land within the TCTZ, with height measured from 327.1 masl for the Man Street car park site<sup>13</sup>.

[20] Out of an abundance of caution, the appellants have also applied for a waiver from the court under section 281 of the Resource Management Act 1991 (“the Act”) in respect of the appellants’ obligation to file their respective appeals with the court within 30 working days of being served with the decision to be appealed. The appellants argue that under section 281(1), no party is unduly prejudiced by the application for waiver.

[21] Mr Todd, counsel for the appellants, submits that:

... the appellants’ evidence that has been produced in relation to the appeals by Mr Williams, and subsequent discussions between the parties concluding with the joint memorandum in support of the draft conditional consent order, have been on the basis that the height restrictions in relation to the appellants’ land would be based on the 12 metre height limit established for land zoned Queenstown Town Centre. Given such evidence and discussions, it would be disingenuous for a party to assert that it considered the appeals to be advanced on the basis that if the relief sought was obtained, then the excluded standards would still apply and any buildings on the appellants’ land could not have any part more than 4 metres higher than the nearest point of the legal boundary of Man Street, and that the MSL land would not be measured from 327.1 masl for the Man Street car park site.

*Prejudice to persons not before the court*

[22] On the south side of the MSP and WSL land there are various landowners and occupiers with frontage to Shotover Street (and beyond) who may be affected by the changed relief if that is allowed. In particular, their properties may be shaded by development on the appellants’ land. Those persons are not before the court. I must treat these persons as if they had notice of the appeals. That is because this ruling is proceeding on the assumption that a superior court will hold that the original submissions were ‘on’ PC50, whether on the Clearwater test or on a ‘fair and reasonable in the circumstances’ test (or otherwise).

<sup>13</sup> Evidence of T Williams, February 2015 at para [7.22].



[23] Were those persons entitled to read the notices of appeal, see that neither contained any specific relief seeking a change in the rules of the operative plan, nor even a claim for consequential relief (let alone a “Lord’s Prayer” claim) and deal with the notices of appeal on their faces? The answer must be “yes”. Consequently those persons would be quite substantially prejudiced if the court allowed amendment to the relief at this stage. As matters stand if the court were to allow the amended relief then neighbours of the proposal would find that instead of a reduction in the height allowed from 8 m to 4 m which is what the notices of appeal seek on their face, WSL and MSP are now seeking an increase to at least 12 m.

*Prejudice to Mr J Thompson*

[24] Mr Thompson owns land uphill and to the north of WSL and MSP’s land. Views from his property could be affected by the height to which development is allowed on the appellants’ land. Conversely of course, they are potentially shaded by development on his land.

[25] Mr Goldsmith submits for Mr Thompson<sup>14</sup>:

- 5.9 The reality of the interrelationship between PC50 and the DPR is now that the height limits applicable to PC50 land have been determined independently of height limits applicable to the TCTZ land. That is not an adverse outcome, as height limits applicable to the Queenstown Town Centre (“QTC”) can now be determined against a background of known height limits applicable to the PC50 land. However the relief now requested by the Appellants seeks to further splinter the determination of appropriate height limits applicable to the QTC.
- 5.10 If the relief now requested is refused, height limits applicable to all parts of the TCTZ (and the block containing the TCTZ) will be determined through the DPR, in a holistic manner, along with height limits for other parts of the QTC adjacent to the TCTZ (with the exception of the PC50 land above where height limits will be known).
- 5.11 If the relief now being requested is granted, the Environment Court will be required to determine appropriate height limits only for the TCTZ land, without the benefit of a Council decision on that issue, and without being able to determine at the same time the appropriate height limits applicable to adjacent lands as those height limits will not be subject to that Environment Court hearing.

<sup>14</sup> Mr Goldsmith submissions 12 April 2016 at paras 5.9-5.11.





**Result**

[26] I consider there would be undue prejudice to Mr Thompson. There would also be prejudice to persons not before the court which I can take into account in my general discretion.

[27] In some situations the court might allow the appellants' problems to be addressed by giving directions under section 293 of the RMA. That would enable the Council to consult with potentially affected neighbours. However, in this particular case that would merely delay PC50 without a commensurate gain, because these matters are currently being considered in relation to the PDP anyway. I take into account in my discretion that the appropriate height limits and other standards for the appellants' land under the proposed new district plan are to be considered in an holistic way by the Council's hearing panel on the PDP. I consider that is the more appropriate forum for these matters to be resolved in.

[28] Leave to amend the appeals will be refused, as will be any waiver for late lodgement of an amended notice.

  
**J R Jackson**  
**Environment Judge**

**Appendices:**

- A: Map 36 (reduced to A4) from the Queenstown Lakes District Plan.
- B: Interpretative Diagrams 7(a), Profiles A and B [Appendix 4 pp A4-1].



"A"

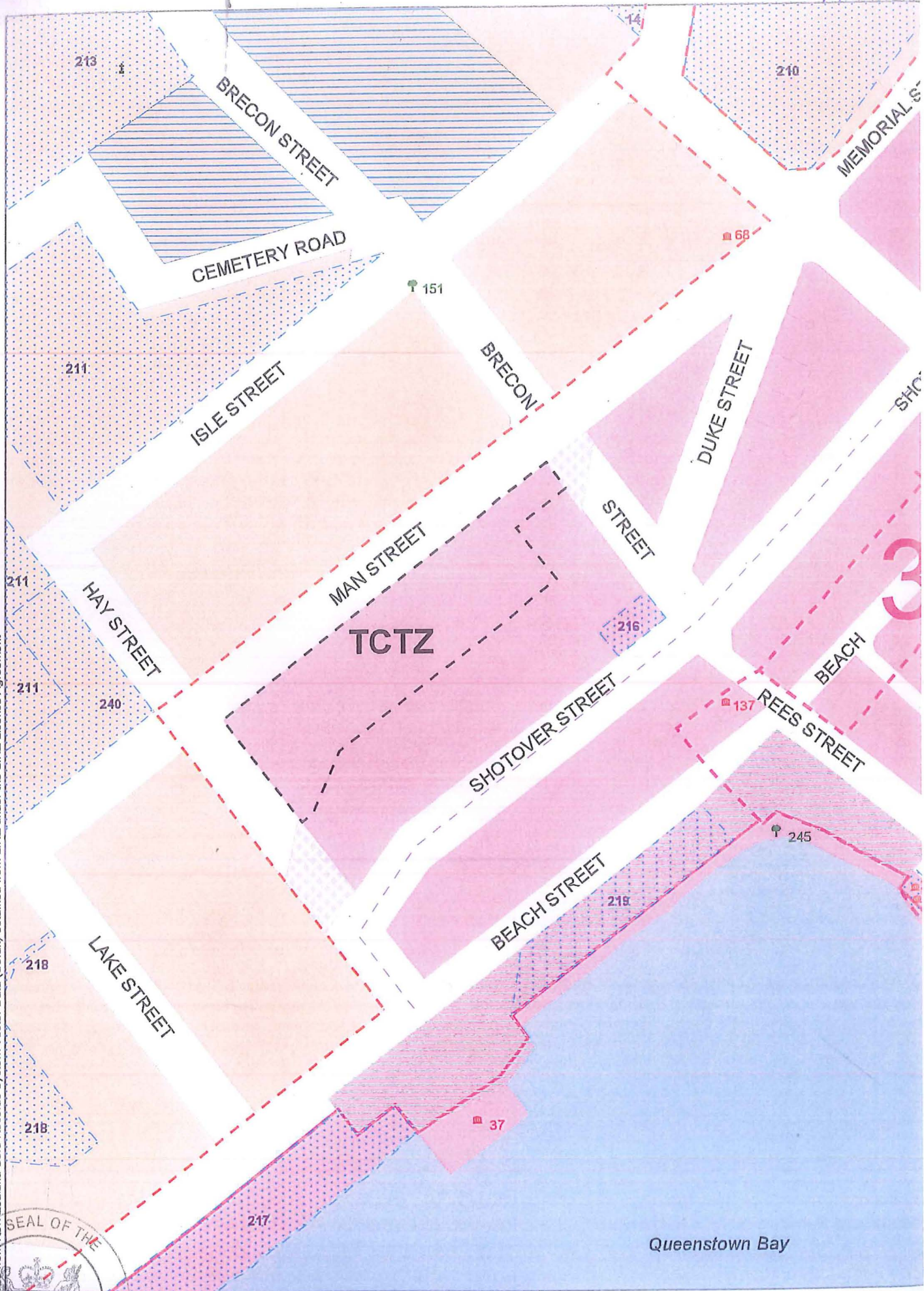
Parcel boundaries derived from New Zealand Core Records System Vector Data (Corax) obtained from LINZ under the LINZ Licence Agreement

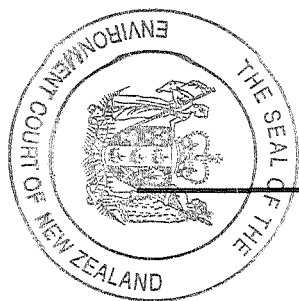


# Queenstown Lakes District Council District Plan Maps

Queenstown Central

36

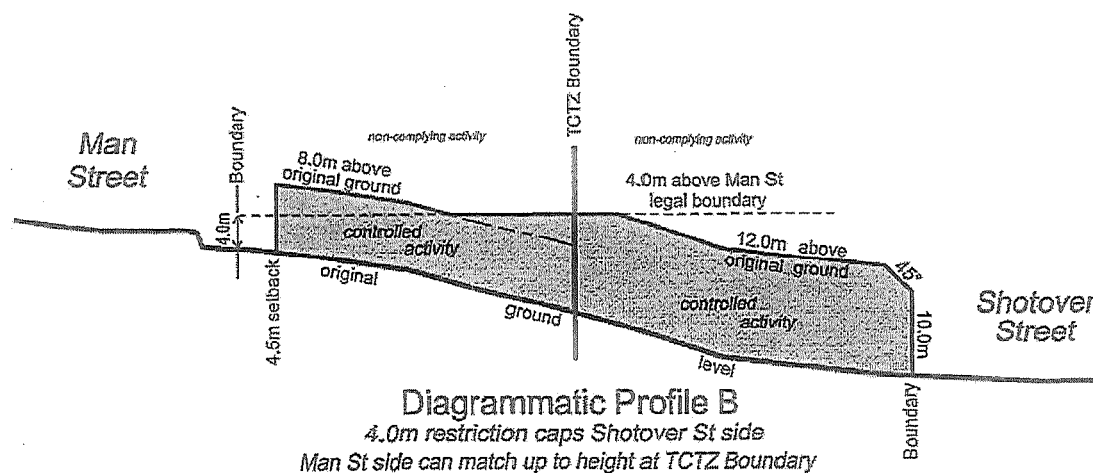
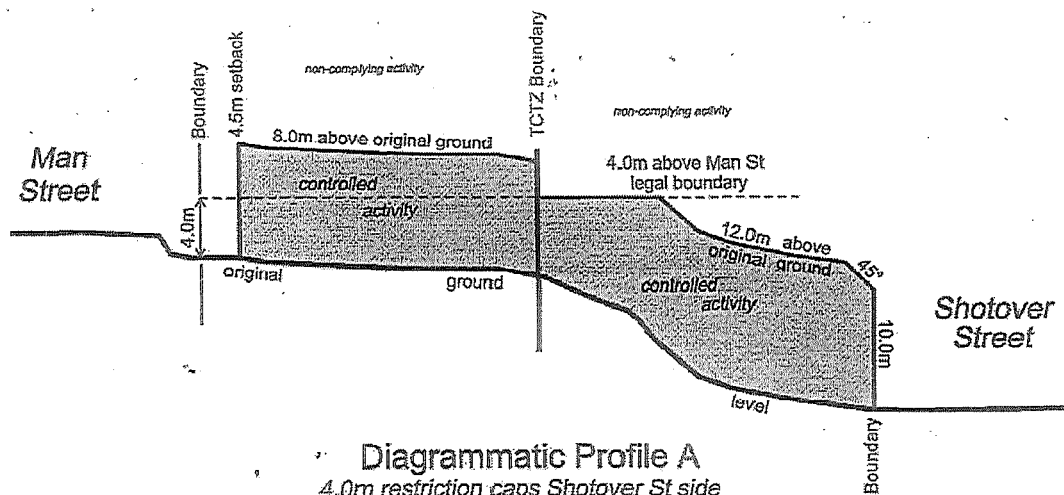




# INTERPRETATIVE DIAGRAMS

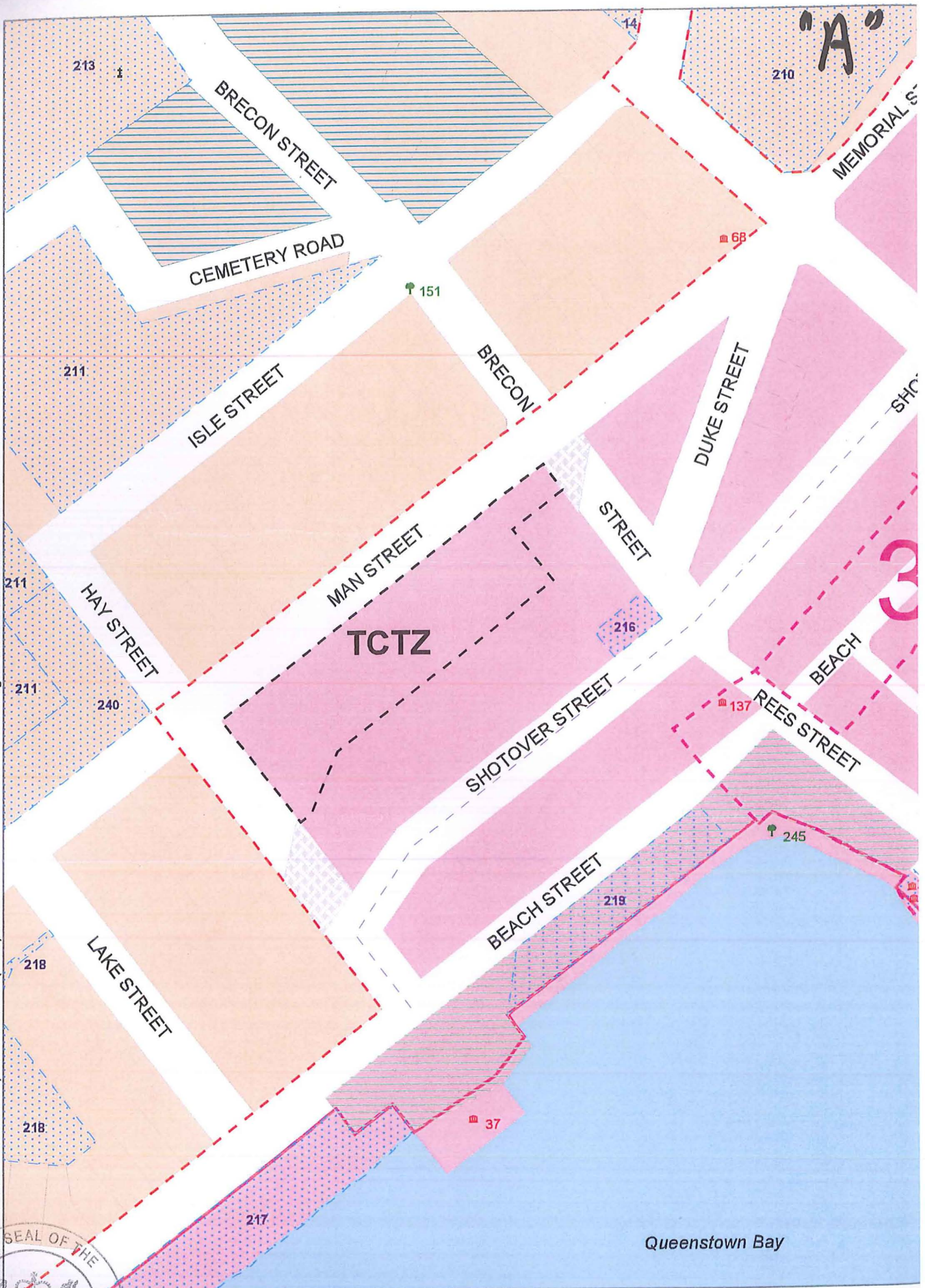
A4

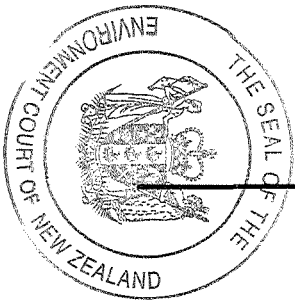
## 7 (a) Measurement of Height on Land Bounded by Man, Hay, Brecon & Shotover Streets



B



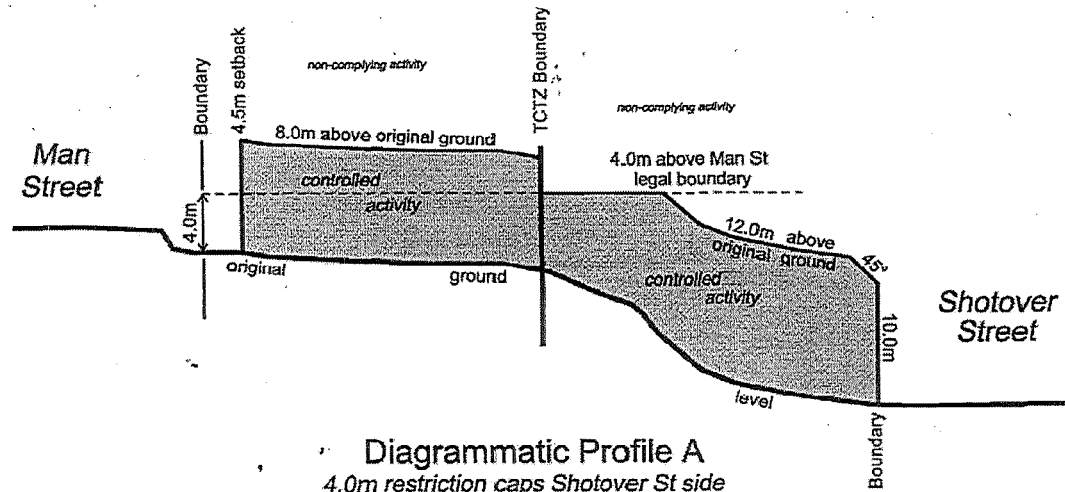




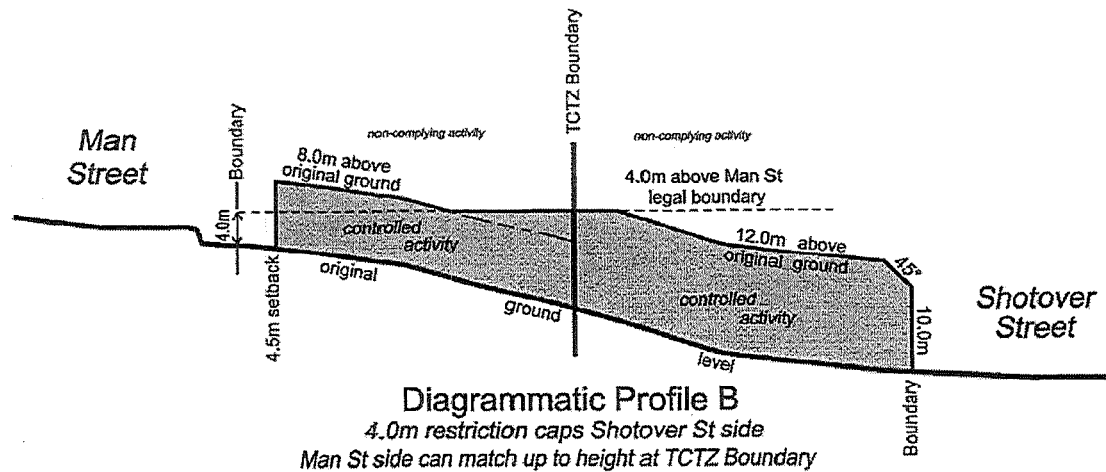
# INTERPRETATIVE DIAGRAMS

A4

7 (a) Measurement of Height on Land Bounded by Man, Hay, Brecon & Shotover Streets



Diagrammatic Profile A  
4.0m restriction caps Shotover St side



Diagrammatic Profile B  
4.0m restriction caps Shotover St side  
Man St side can match up to height at TCTZ Boundary

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