

**BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of Hearing Stream 11 –
Ski Area Sub Zones

**OPENING REPRESENTATIONS / LEGAL SUBMISSIONS FOR
QUEENSTOWN LAKES DISTRICT COUNCIL**

Hearing Stream 11 – Ski Area Sub Zones

4 May 2017

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION AND SCOPE

1.1 These legal submissions are made on behalf of Queenstown Lakes District Council (**Council**) in respect of Hearing Stream 11 on the Proposed District Plan (**PDP**). The Stage 1 hearings on submissions relating to what is the most appropriate text in the PDP have now concluded. The remaining Stage 1 hearings are concerned with submissions on planning map annotations such as landscape lines and zone boundaries, for land that has been notified in Stage 1. This hearing on submissions relating to extensions to the notified Ski Area Sub Zones (**SASZ**) is the first of the Stage 1 rezoning or mapping hearings, which are being heard in groupings by geographic area.

1.2 The land subject to the rezoning submissions that make up the scope of this hearing are located near or adjacent to four existing Ski Area Sub Zones (**SASZ**) within the Rural Zone:

- (a) Coronet Peak SASZ;
- (b) Remarkables SASZ;
- (c) Cardrona SASZ; and
- (d) Treble Cone SASZ.

1.3 These opening submissions address the following matters:

- (a) strategic overview of SASZ;
- (b) application of the landscape policy framework to SASZ;
- (c) Ski Area Activity (**SAA**) related definitions;
- (d) earthworks in the SASZ;
- (e) Council's reliance on its Right of Reply position;
- (f) relevance of case law on existing environment and permitted baseline to plan reviews;
- (g) specific issues relating to individual SASZs; and
- (h) evidence called in support of Council's position.

1.4 The Council refers to and adopts the opening legal submissions presented at the Strategic Direction hearing, in terms of Council's functions and statutory obligations (section 3) and relevant legal

considerations (section 4).¹ Those submissions are not repeated here, but in summary, the Environment Court gave a comprehensive analysis of the mandatory requirements in *Long Bay-Okura Great Park Society v North Shore City Council*.² Subsequent cases have updated the *Long Bay* summary following amendments to the RMA in 2005, the most recent and comprehensive of which was provided by the Environment Court in *Colonial Vineyard Limited v Marlborough District Council*.³ This same test applies to the question of what is the most appropriate zone for an area of land.

1.5 Following *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*,⁴ there is a presumption that where higher order planning documents are established (in the case of *King Salmon*, the New Zealand Coastal Policy Statement 2010), they can in certain circumstances be assumed to be in accordance with Part 2. Since district plans are at the end of the chain of statutory planning documents, it could be argued that the findings of *King Salmon* imply that the focus of a district plan review should be on giving effect to the provisions of documents further up in the hierarchy (where those documents are established and settled), rather than on Part 2.

1.6 In the Queenstown context, the relevant higher order regional planning document is under review (being the Otago RPS). Relevant objectives are identified in Ms Banks' strategic evidence, and none of these are directive (in the *King Salmon* sense) in the context of the issues at hand. The proposed RPS remains under appeal, and therefore is not an established higher order planning document. This distinguishes the current situation from the *King Salmon* principle (namely, that resorting to Part 2 is not appropriate in giving effect to a higher order document, unless one of the three exceptions⁵ apply). The NZCPS is irrelevant to the District, and other national policy is of little relevance to this hearing. In any event, the applicability of the *King Salmon* findings depends on the particular wording of the higher

1 Opening Representation / Legal Submissions for Queenstown Lakes District Council, Hearing Streams 1A and 1B - Strategic Chapters in Part B of the Proposed District Plan, dated 4 March 2016, at parts 4 and 5.

2 *Long Bay-Okura Great Park Society v North Shore City Council* Auckland A078/08, 16 July 2008 at [34].

3 *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

4 [2014] NZSC 38 at [85].

5 Where there is illegality, incomplete coverage of an issue, or uncertainty of meaning in a higher order planning document, Part 2 will still be relevant. See *King Salmon* at [88].

order national planning documents, and the current ones are generally not worded in the same manner as the NZCPS.

2. STRATEGIC OVERVIEW OF SKI AREA SUB ZONES

- 2.1 The SASZ is a planning mechanism that provides for a sub zone located within the primary Rural Zone. The notified extent of the SASZ zone boundaries in the PDP have been rolled over from the ODP, both unchanged and unchallenged in their location.
- 2.2 The SASZ provides an alternative regulatory framework to enable SAA to occur in defined locations, as well as some limited activities via a consenting approach that balances the economic benefits of this tourism offering to the District with environmental considerations.
- 2.3 At a strategic level, the purpose of the SASZ is to enable continued development of skiing and activities ancillary to skiing within its boundaries, recognising the importance of these activities to the economy of the Queenstown Lakes District (**District**).⁶ The scope of the sub zone's purpose was recommended to be broadened through the Rural Hearing, to recognise the SASZ as providing year round destinations for ski area, tourism and recreational activities. This broadening was made in isolation from considering the effects of expanding the geographic extent of the SASZ, which is now the question for this hearing. The purpose of the expansion of what the SASZ enables was to effectively recognise that current operations occurring within some of the existing SASZs have already expanded into 'all season' commercial recreation facilities, offering activities outside of winter. Importantly, provisions seek to consolidate SAA within the SASZ.
- 2.4 In short, expanding the notified extent of the SASZ boundary, is a different concept to expanding the broader purpose of the notified sub zones located in alpine environments.
- 2.5 The matters of national importance set out in section 6 represent values that must be recognised and provided for when considering

6 Strategic section 42A report of Ms Kim Banks, at paragraph 11.16.

appropriate locations for zones. One method for representing these section 6 values are Outstanding Natural Landscape (**ONL**) overlays on the planning maps. It is therefore of direct relevance that, apart from a part of the rezoning requested by NZSki on the lower slopes of the Remarkables, all of the requested SASZs are located entirely within various ONLs, and you will hear evidence from Dr Read on the effects of extending the SASZs over these ONLs.

2.6 The planning evidence for the various submitters has been provided by three different witnesses and three bespoke planning frameworks have been proposed to attempt to address the concerns raised in Council's evidence in chief (in addition to the bespoke frameworks being pursued through submissions with no supporting evidence). This in itself demonstrates that the SASZ is not designed for the areas of land being pursued by submitters. A common theme is the refined relief seeking bespoke corridors or further sub zones or overlays within what is already a SASZ, in order to allow a Passenger Lift System (**PLS**) (as defined), or gondola. Ultimately, these submitters are now using one SASZ rule (controlled activity PLS) and hanging that rule off the SASZ objectives and policies, in order to justify what is submitted to essentially be a bespoke rule within the Rural zone. The core activities permitted under the existing SASZs are excluded from the bespoke provisions, further demonstrating the complexity of the planning framework being pursued.

2.7 Council's position on the rezonings following filing of rebuttal evidence can be summarised as:

- (a) Coronet Peak – oppose. NZSki has advised through its evidence that it accepts the Commissioners' findings in respect of the re-zoning for Coronet Peak based upon the Council's evidence;
- (b) Remarkables – through its rebuttal planning evidence, one rezoning request known as 'Area 1' is recommended to be accepted, although with the qualifier that the submitter's proposed 'no build area' remains zoned Rural. In preparing for the hearing however, it has come to the Council's attention that NZSki has based their submission on GIS

boundaries, rather than the planning map boundaries. The GIS boundary of the District is incorrect in that it includes a slither of land within the Central Otago District, and as a result the component of the 'Area 1' rezoning submission that Ms Banks recommends be accepted, is in fact located within the neighbouring District, and is therefore not within the jurisdiction of QLDC nor this hearing; and

- (c) otherwise the 'no build' area within Area 1 at the Remarkables (which Mr Skelton for NZSki has recognised is too vulnerable to landscape degradation), the remaining NZSki request also located at the Remarkables, the four rezonings sought at Cardrona by Mount Cardrona Station Limited (**MCSL**), Cardrona Alpine Resort Limited (**CARL**), Soho Ski Area Limited and Blackmans Creek NO 1 LP (**Soho**) and the Anderson Branch Creek, are opposed.

2.8 In addition to the two rezonings at Coronet Peak, no evidence has been filed in support of the CARL or Anderson Branch Creek submissions located at Cardrona. This means for these four sites, the Council's expert evidence is not disputed, and the Panel's recommendations should be to reject the respective submissions.

3. APPLICATION OF LANDSCAPE POLICY FRAMEWORK TO SKI AREA SUB ZONES

3.1 Mr Ferguson has asserted in his evidence⁷ that the Council's position on the application of the landscape categories to the SASZs is unclear. This has been addressed in Ms Banks' strategic evidence⁸ and rebuttal evidence,⁹ but to assist the Panel, an explanation of how this framework applies specifically to the SASZ is provided in the following paragraphs. References are to Council's right of reply provisions.

3.2 Chapter 6 of the PDP creates three classifications for the District's landscapes: Outstanding Natural Feature (**ONF**), ONL, and Rural Landscape (**RL**). Chapter 6 also contains an objective and policies

7 For Soho Ski Area Limited (610) and Treble Cone Investments Limited (613) at paragraph 5.16.

8 At paragraphs 11.7-11.14.

9 At paragraphs 3.1-3.13.

addressing the SASZs, as discussed in Ms Banks' strategic evidence.¹⁰ The landscape assessment matters for ONF and ONL are located in Rule 21.7.1.

3.3 Ms Banks' strategic evidence did not discuss the detail of Policy 6.3.7.3. This policy sets the framework for enabling activities within identified SASZ and is a basis for buildings and ski infrastructure in the SASZ to be controlled, and for corresponding Implementation Method 6.4.1.3(a). Mr Ferguson has noted that Policy 6.3.7.3 was recommended to be retained by the reporting officer in hearing stream 1B.¹¹ Mr Ferguson also noted his view that this position could not be easily reconciled with the changes proposed to Implementation Method 6.4.1.3.

3.4 6.4.1 sets out how the landscape provisions apply. Implementation Method 6.4.1.3 provides a limited exemption from Rule 21.7.1. Under Rule 6.4.1.3(a), the landscape assessment matters do not apply to SAA within the SASZ. In her rebuttal evidence, Ms Banks explains in detail why she considers Mr Ferguson's view on Policy 6.3.7.3 and Implementation Method 6.4.1.3 to be incorrect.¹² She notes that the landscape categories continue to apply to SASZ geographic areas as they are located within the Rural Zone, and trigger the application of the landscape assessment matters to non-SAA within the SASZ. The landscape classifications define matters identified within sections 6 and 7 of the RMA and specifically identified for management within the Rural Zone. These classifications have been purposefully identified irrespective of the SASZ, which is an overlay over the Rural zoned land.

3.5 Ms Banks has stated that it was not the Council's intention that non-SAA located within the SASZ should have the same benefit of exemption from landscape assessment matters, since landscape effects are relevant and are an important consideration for other activities seeking to locate within the SASZ. It is also relevant that any SAA outside the SASZ is not captured by the exemption in Rule

10 At paragraphs 11.10-11.12.

11 For Soho Ski Area Limited (610) and Treble Cone Investments Limited (613) at paragraph 6.13. See also paragraph 5.16 (though the Council notes "Policy 6.8.7.3" appears to be a typographical error that was intended to refer to Policy 6.3.7.3).

12 At paragraphs 3.1-3.13, in particular paragraphs 3.5-3.8.

6.4.1.3, and so the landscape assessment matters in Rule 21.7.1 would apply.

3.6 For SAA within the SASZ that require consent on a controlled or restricted discretionary basis, the landscape objectives and policies of Chapter 6 can be considered in implementing the matters of control or discretion, although the scope of the application of the Chapter 6 objectives and policies is limited by the breadth of the relevant matter of control or discretion.

3.7 Otherwise, Council's rebuttal evidence has addressed submitter evidence where incorrect statements have been made about how they understood the landscape categories and assessment matters apply to SASZs and SAAs.

4. SKI AREA ACTIVITY RELATED DEFINITIONS

Ski Area Activities

4.1 In the Rural hearing stream 2, Mr Craig Barr recommended amending the definition of 'Ski Area Activities'.¹³

4.2 The amended definition of SAA specifically includes PLS (discussed further below), avalanche safety, ski patrol, formation of snow trails and terrain, and installation and operation of snow making infrastructure.

4.3 Ms Banks has noted that a possible interpretation of this definition is that avalanche control, ski patrol, and formation of snow trails and terrain are non-complying outside of the SASZ, and that this interpretation was not intended. She therefore recommends a minor clarification to Rule 21.4.19 to clarify that avalanche control, ski patrol, and formation of snow trails and terrain outside the SASZ are permitted activities.¹⁴ Ultimately, the parties are agreed on this point, but there appears to be a residual area of disagreement in terms of the best way to represent this in the planning framework.

13 Section 42A Report of Mr Craig Barr for Chapter 21 – Rural, at paragraphs 14.17-14.21 [CB41].
14 Strategic section 42A report of Ms Kim Banks, at paragraphs 12.32-12.33.

Passenger lift systems

- 4.4 In the Rural hearing, Mr Barr recommended a new definition of 'Passenger Lift Systems' in response to the submission of MCSL.¹⁵ Within the SAA definition, PLS replaces "*chairlifts, t-bars and rope tows to facilitate commercial recreational activities*". The recommended PLS definition specifically excludes base and terminal buildings (of the mechanical system used to convey or transport passengers within or to a SASZ, including chairlifts, gondolas, T-bars and rope tows).
- 4.5 Mr Barr's Rural right of reply acknowledged that the recommended definition includes "*structures to enable the embarking and disembarking of passengers*", but Mr Barr recommended excluding base buildings due to the wide range of activities they could enable.¹⁶
- 4.6 The Council's position remains that base buildings and terminal buildings should be excluded from the definition of PLS. Any inclusion could only occur if the relevant rules and matters of discretion were expanded in scope and redrafted to cover the wider range of effects that could occur through these activities. In any event, the default status for buildings in the Rural zone (discretionary) is submitted to be appropriate to manage the range of scales of such buildings, and consideration of alternative locations and consequential effects such as landscape, servicing and traffic.
- 4.7 Ms Banks has recommended some minor changes to clarify the rules that apply to SAA and more specifically, to a PLS. Although a PLS falls within the definition of SAA, there are specific controlled or restricted discretionary rules for some types of SAA within Table 7, including PLS. Ms Banks explains that the intention behind the new definition of PLS was to accommodate a gondola as a controlled activity under Table 7. She has suggested that this be resolved by a minor clarification to amend Rule 21.4.18, to add a qualifier that SAA are permitted in the SASZ "*unless otherwise identified*".¹⁷ In

15 #407. Right of Reply of Mr Craig Barr for Chapter 21 – Rural, at paragraphs 14.1-14.9 [CB42].

16 [CB42] at paragraph 14.6.

17 At paragraphs 12.35-12.38.

response to Mr Brown's evidence, Ms Banks has also recommended a minor change to Rule 21.5.17 so that the 8m height limit in that provision does not apply to passenger lift system pylons.¹⁸ This was overlooked in the Council's Rural right of reply [CB42].

5. EARTHWORKS IN THE SKI AREA SUB ZONES

- 5.1** Under Rule 22.3.2.1(c) of the ODP, SASZs are completely exempt from the provisions of Chapter 22 (Earthworks). The exemption applies to the entire SASZ and is not limited to particular activities within that geographic area. Of course, when this earthworks exemption in the ODP went through the Schedule 1 process, it was in the context of the SASZ boundaries as included in the ODP. Any extensions to the SASZ were not under contemplation.
- 5.2** Council has resolved to review the ODP earthworks chapter through Stage 2 of the District Plan Review.¹⁹ It is unknown at this point in time whether the substantive content of the chapter will be revised as it applies to the SASZ (notified and/ or the areas sought to be extended and supported through Council recommendations), or whether an equivalent rule to the ODP exemption will be proposed, as that is ultimately a decision for Council, and will need to be made under relevant statutory tests including a section 32 evaluation.
- 5.3** Ms Banks' approach has been that it is reasonable to assume that the exemption may be carried over into the notified SASZ in Stage 2 (as these align with the ODP SASZ boundaries), but not necessarily for any extensions to the boundaries of the notified SASZ into new locations, without carefully assessing the likely effects and appropriateness of doing so.²⁰ Ms Banks considers that it would be inappropriate for a blanket exemption from earthworks controls to apply to any extensions to the SASZ, and if any rezonings for the SASZ are accepted, the effects of earthworks above a certain threshold should be considered via a resource consent process.²¹

18 Rebuttal evidence of Ms Kim Banks, at paragraph 3.29.
19 Strategic section 42A report of Ms Kim Banks, at section 5.
20 At paragraph 5.5.
21 At paragraph 12.17.

- 5.4** It is submitted that Ms Banks' approach to earthworks in the SASZ is a fair and logical response, given it is not possible to be entirely certain at this stage about the earthworks framework that will ultimately apply to the SASZs and the lack of any information assessing the effects of uncontrolled earthworks in these areas.
- 5.5** In this respect, I refer to Mr Dent's evidence which suggests that earthworks should be a restricted discretionary activity within his proposed Ski Area Sub-Zone B at the Remarkables.²² Should any rezonings be recommended by the Panel, the Council opposes duplicating earthworks provisions in the Rural Zone (or any other zone) and any standards should be located within the Earthworks chapter, to be notified in a later stage of the review.
- 5.6** Dr Read's evidence is that, of the possible effects of activities within the extended SASZ, earthworks have the potential for significant adverse effects on landscape character and would diminish existing qualities of 'naturalness'.

6. COUNCIL'S RELIANCE ON COUNCIL'S RIGHT OF REPLY POSITION

- 6.1** Council has used its recommended right of reply position on the strategic chapters, and Chapters 6 (Landscape), 21 (Rural zone including the SASZ provisions) and 33 (Indigenous Vegetation and Biodiversity), as its 'position' in order to compare and make recommendations as to what is the most appropriate zone for the areas under consideration.
- 6.2** In his evidence for NZSki,²³ Mr Dent comments on this, stating he has received legal advice that the Council's Rights of Reply are not binding, and he considers the most appropriate assessment is one that addresses the notified provisions.
- 6.3** Mr Dent is correct in that the Council's Reply recommendations are not binding. However, they represent Council's current position and it is both logical, efficient and the best approach for Council's experts to refer to and rely on Council's most up to date position. The Council's

22 At paragraph 145.

23 #572. Evidence at paragraphs 17-18.

position takes into account the evidence that has been filed by both the Council and submitters during Hearing Streams 01-10. This is easily demonstrated by the fact that the notified provisions do not support the Council's position, nor Mr Dent's client's position, and therefore the approach suggested by Mr Dent would not allow a true and transparent comparison of whether the provisions that are actually being recommended and are supported by the evidence before the Panel, would be most appropriate.

6.4 Further, if the rezoning submissions were heard at the same time as submissions on the text (which was the case in the Christchurch plan review), the Council would have logically and appropriately considered its recommended provisions when considering what zone is the most appropriate for a certain area of land. This approach has been taken by both the Auckland Council and Christchurch City Council plan reviews.

6.5 Ironically, Mr Dent has taken his recommended changes to the notified text into account, in coming to the conclusion that extensions to the SASZ are appropriate.²⁴

7. RELEVANCE OF CASE LAW ON EXISTING ENVIRONMENT AND PERMITTED BASELINE

7.1 The landscape evidence of Mr Espie for MSCL²⁵ notes that a gondola to the Snow Farm has been enabled by RM070610 and assesses this unimplemented consent as forming part of the environment of the Cardrona Valley. Mr Brown's evidence also for MSCL agrees with Mr Espie's conclusion that it is possible to mitigate the cumulative effects of a second gondola to the Cardrona SASZ, in addition to the effects of the unimplemented Snow Farm consent.²⁶ Mr Dent for NZSki Limited has also asserted that the existing consented environment is of relevance.²⁷

7.2 The Council is required, in making a district plan rule under section 76(3) of the RMA, to have regard to the actual or potential effect on

24 For example, see paragraphs 144-146, 151-153, and 156-160.

25 Evidence of Mr Benjamin Espie for Mount Cardrona Station Limited (407), at paragraph 4.3.

26 Evidence of Mr Jeffrey Brown for Mount Cardrona Station Limited (407), at paragraph 3.1(g).

27 Evidence of Mr Sean Dent for NZSki Limited (572), at paragraphs 42-45.

the *environment* of activities including, in particular, any adverse effect. The Council submits that any consents that have been granted but not yet implemented, are not required to be considered as part of the 'environment'. The High Court in *Shotover Park Ltd v Queenstown Lakes District Council*²⁸ is authority for the point that the '*existing environment*', as defined in *Queenstown Lakes District Council v Hawthorn Estate Ltd*²⁹ (which includes unimplemented consents) does not apply to plan changes. The High Court held that *Hawthorn* was intended to involve a real world analysis for resource consent applications, rather than applying to the plan appeal context.

7.3 There is no reason to distinguish the plan change context in *Shotover Park*, from the section 79 plan review which leads to Schedule 1 of the RMA in any event. Consequently, it is submitted that the Council is not obliged to interpret '*environment*' as '*existing environment*', as defined in *Hawthorn*.

7.4 In a similar vein, in *A & A King Family Trust v Hamilton City Council*³⁰ the Environment Court held that unimplemented consents should not be used as a springboard for further activities (through a plan review), and also confirmed that the permitted baseline is not a relevant consideration for a plan change appeal.³¹

8. REMARKABLES SKI AREA SUB ZONE

8.1 NZSki seeks two extensions to the Remarkables SASZ, referred to in Ms Banks' evidence as 'Area 1' (at the upper eastern margin of the notified SASZ above Curvy Basin and Lake Alta) and 'Area 2' (at the base of the access road). As mentioned above, Ms Banks in her rebuttal evidence³² supported the rezoning of Area 1, subject to the area identified as a no-build zone by NZSki being entirely excluded from the extended SASZ. The component of 'Area 1' supported for rezoning, has now been identified as being located within the Central Otago District (due to the District Boundary being incorrect in

28 *Shotover Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712 at [4] and [115]-[117].

29 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

30 *A & A King Family Trust v Hamilton City Council* [2016] NZEnvC 229 at [78].

31 Although it is relevant in terms of considering whether an activity should be permitted within a certain zone, and what standards should be applied, as ultimately that permitted activity can be used to argue what is the permitted baseline in a certain zone

32 Rebuttal evidence of Ms Kim Banks, at paragraph 4.3.

Council's GIS, but correct on the planning maps), and therefore that component of the rezoning submission is outside the scope of this hearing and the Council's jurisdiction.

- 8.2** While also outside the scope of this hearing, there is a submission point³³ seeking an expansion of the Remarkables SASZ into the Doolans, and/or the renaming of that extended SASZ to "Remarkables Alpine Recreation Area". This is being heard in the Queenstown Mapping hearing stream 13. Although the relief sought is related to the SASZ, it is also inherently related to the submitter's request for a new "Queenstown Park Special Zone", which would include a gondola link between the new zone and the Remarkables ski field. All submission points related to the request for a new "Queenstown Park Special Zone" are being heard together in the Queenstown Mapping hearing. This approach has been confirmed with, and agreed by the submitter.³⁴

33 Queenstown Park Limited (#806), replacement submission dated 30 October 2016.

34 Strategic section 42A report of Ms Kim Banks, at paragraph 3.10.

9. WITNESSES

9.1 The Council will be calling the following evidence in relation to its position on the various rezonings:

- (a) Mr Ulrich Glasner, Infrastructure;
- (b) Dr Marion Read, Landscape Architect;
- (c) Mr Glenn Davis, Ecologist (extensions at Cardrona and Treble Cone);
- (d) Dr Kelvin Lloyd, Ecologist (extensions at Coronet Peak and Remarkables); and
- (e) Ms Kim Banks, Senior Planner, in relation to her strategic, specific evidence/section 42A report and rebuttal evidence.

DATED this 4th day of May 2017



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District Council