BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND in the matter of the Queenstown Lakes Proposed District Plan, Submissions and Further Submissions on Chapter 21 Rural

BY QUEENSTOWN RAFTING LIMITED

Submitter

SUBMISSIONS OF COUNSEL FOR QUEENSTOWN RAFTING LIMITED

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INTRODUCTION

1. Queenstown Rafting Limited ("QRL") filed a submission on the Proposed District Plan ("PDP") (#167). QRL submitted that all commercial boating activities be assessed as fully discretionary activities. QRL sought:

   (a) the deletion of Rule 21.5.39 (relating to restricted discretionary ("RD") status for commercial non-motorised boating activities); and

   (b) that the discretionary status contained in Rule 21.5.43 apply to all commercial boating activities (motorised or otherwise).

ISSUES FOR CONSIDERATION

Relevant Statutory Criteria

2. The provisions of the Resource Management Act 1991 ("the Act") relevant to QRL's submission are sections 31(1)(e), 87A(3) and 104C.

3. Section 31(1)(e) provides as follows:

   (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

   ...

   (e) the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:

4. Section 87A(3) provides as follows:

   (3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—

   (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the

matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and

(b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

5. Section 104C provides as follows:

104C Determination of applications for restricted discretionary activities

(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

(2) The consent authority may grant or refuse the application.

(3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

QRL's Concerns

6. QRL's concern with Rules 21.5.39 and 21.5.43 of the PDP (as notified) is two-fold:

(a) by restricting the exercise of its discretion Queenstown Lakes District Council ("QLDC") is precluded in its consideration of other relevant effects; and

(b) there is a lack of justification for different treatment between motorised and non-motorised commercial boating activities.

Legal effect of QLDC restricting its discretion

7. The legal effect of restricting its discretion is to preclude QLDC from having regard to matters that may be relevant in Part 2 of the Act. This interpretation was recently confirmed by High Court in *Lambton Quay Properties Nominee Ltd v Wellington City Council*[1].

8. There are other potentially relevant matters contained in Part 2 of the Act that are not listed in Rule 21.5.39 which QLDC would be unable to consider if the restricted discretionary regime is adopted. For example, the Planning Tribunal held in *Glentanner Park (Mount Cook) Limited and others v Mackenzie District Council*[2] that effects on the economic well-being of the community can be environmental effects of the purposes of s 5 of the RMA[3]. Economic effects are not listed as a matter for consideration under Rule 21.5.39.

9. The Planning Tribunal observed at page 9 of *Glentanner*[4]:

> *"We have formed the conclusion from the evidence we have heard that those living and working in and about the National Park boundaries such as Mount Cook, the Mount Cook Airfield, and the Glentanner Park, with its associated airfield are a community...."*

10. And again at pages 9 and 10[5]:

> *"...If there was an air accident involving the loss of tourist lives we are satisfied from the evidence that such an accident would have an effect upon the communities to which we refer in an economic sense. The evidence showed that following a similar accident in the Milford Sound area tourist operators and in particular the Mount Cook Group suffered a substantial economic loss caused by the reluctance of Japanese and other tourists to use*

[1] [2014] NZHC 878. Paragraphs 97-100 in particular.
[2] PT Decision W50/94
[3] Pages 9, 10 and 18 in particular. Glentanner was also considered by the High Court in *Dart River Safaris Limited v Kemp* [2001] NZRMA 433 (Paragraphs 37 to 41 in particular).
[4] Page 9, Third paragraph
[5] Page 9 last paragraph and page 10, first paragraph.

tourist aircraft. There is thus a potential "effect" on the "environment" with particular reference to the economic well-being of the community..."

11. Applying the same logic, accident(s) in respect of commercial non-motorised boats could have a potentially catastrophic effect on the community in an economic sense (i.e. economic loss caused by the reluctance of tourists and locals alike to engage in such activities). RD status does not go far enough, and ought not just be limited to effects "on the water". Mr Boyd addresses these wider concerns in his Statement of Evidence (which includes an examination of the impact of historical incidents on the community and the wider economic effect[6]).

12. Building on the concerns that not all relevant matters will be taken into consideration in a RDIS rule, Mr Boyd acknowledges[7] that safety is a matter over which discretion is restricted in Rule 21.5.39.

13. "Safety" is mentioned in two contexts in the rule;

- "Congestion and safety, including effects on other commercial operators and recreational users"
- "Parking access, safety and transportation effects."

14. The context in which "safety" is interpreted in the rule is influenced by the words that appear with the term. The grouping of "Congestion and safety" in my submission, could result in safety being examined narrowly in the context of other users on the river, including the number and type of other users. Where it appears with "parking, and access....transportation", the context is one of getting to the waterbody, as opposed to safety effects whilst on the waterbody itself.

15. Queenstown Rafting's submission for a fully discretionary regime is supported by the potential for this narrow interpretation of safety. Safety of the river resource itself, and to threats or dangers to that resource are arguably not within the ambit of the matters over which discretion is restricted in Rule 21.5.39.

[6] Paragraphs 4.1 to 4.5
[7] At paragraph 3.1 Statement of Evidence

16. That safety of the river resource itself is relevant can surely not be disputed. It is part of the river environment and the broader safety issues. I note that Queenstown Rafting holds several resource consents from the Otago Regional Council[8] authorising the carrying out of safety and navigation improvement works. Changing river and operating conditions are all matters that can be considered under a fully discretionary rule.

Lack of justification for distinction between motorised and non-motorised commercial boating

17. The justification for applying a different activity status between motorised and non-motorised commercial boating activities contained in the s 32 Report is inadequate and most unusually appears to lack the support of (nor any reference to) the District's harbourmaster. Mr Barr notes at page 9 of his s 32 Report that:

> *"Non-motorised boating activities generally have a lower magnitude of effects on the environment, such as less noise, boat wake, vibration, lighting and passenger numbers, and there is more certainty over the type and scale of adverse effects that can arise from non-motorised commercial activities, than motorised. Accordingly it is considered that the rules relating to non-motorised boat activities could be amended to provide for these as a restricted discretionary activity. This still enables Council to undertake an assessment of the potential effects, notify and decline applications if necessary. However, the restricted discretionary regime provides an applicant a more defined scope of the issues that may need to be addressed. This may encourage potential operators to set up small scale tourism activities. The potential impacts from non-motorised activities are more predictable, and not likely to be as variable or have the same potential to be as widespread as motorised boating activities."*

18. In my submission:

(a) Using Mr Barr's argument that the effects of non-motorised boating activities are more predictable etc, should it therefore not be easier for an applicant to

[8] Mr Boyd's evidence at paragraph 3.5 and attachments

secure consent, even under a discretionary regime? i.e. it will be easier for QLDC to process/approve as scope of effects more palatable/certain?

(b) With respect to "defining" the scope of issues, could this not also be achieved through QLDC providing a practice note or guidance, as they currently do in respect of other activities? Further, the QLDC's Application Form for a Resource Consent For a Water-Based Activity provides helpful direction in this regard.

(c) The effects of incidents on the community will be of the same magnitude whether motorised or not, as demonstrated in Mr Boyd's evidence.

(d) I question the "encouragement of more small scale operators to set up operations" as being a legitimate resource management reason for supporting a RDIS rule over a fully discretionary rule. There is a hint of trade competition / motivation in that proposition.

CONCLUSION

19. In light of the background set out in Mr Boyd's Statement of Evidence, I submit that QLDC should adopt a precautionary approach and apply the same fully discretionary standard to resource consent applications for all commercial boating activities, no matter whether they are motorised or not.

Jayne Macdonald
Counsel for Queenstown Rafting Limited

18 May 2016

Vance Boyd

From: Marty Black [Marty.Black@smsl.co.nz]
Sent: Monday, 10 August 2015 12:22 p.m.
To: Craig Barr
Cc: matthew.paetz@qldc.govt.nz; lee.webster@qldc.govt.nz
Subject: RE: Proposed District Plan, Major Safety Concerns 8/8/15

Importance: High

Hi Craig

Many thanks for your response however given the safety issues on the Shotver River as I detailed in my email to Mathew surely the same then must apply as with regards to motorized craft.

While a policy like this for the likes of Lake Hayes maybe relevant it is quite different to the Shotover River where the risks are three fold so to speak and safety is such a key factor.

In the discussion paper on the Plan page 6 it states it may encourage potential operators to set up small scale tourism activities, as the costs of obtaining an R/C should be less prohibitive, you say Council can at it's discretion fully notify an application if it see fit on reports etc.

If this is the case then is there really any reason to change and keep any applications for all rivers the same as motorised craft.

We need to discuss this further please?

Regards Marty

From: Craig Barr [mailto:Craig.Barr@qldc.govt.nz]
Sent: Monday, 10 August 2015 9:27 a.m.
To: Matthew Paetz; Marty Black
Subject: RE: Proposed District Plan, Major Safety Concerns 8/8/15

Hi Marty

I believe Matthew has addressed the main issues, but to reiterate,

The only change is that non-motorised commercial operators require a restricted discretionary type of resource consent. There are no changes relating to the ability for the council to notify an application, serve notice on specific persons, such as iwi or other operators, or decline an application.

The matters of discretion are:

21.1.1	**Commercial non-motorised boating activities** Discretion is restricted to all of the following: • Scale and intensity of the activity. • Amenity effects, including loss of privacy, remoteness or isolation.	RD

	◦ Congestion and safety. ◦ Waste disposal. ◦ Cumulative effects. ◦ Parking, access safety and transportation effects.	

As you will see, the council will be able to assess the intensity of the activity, congestion and safety and cumulative effects, both in terms of safety and amenity.

The main reason for the change is that the effects of non-motorised activities have more certainty than motorised.

If any person has suggested to you that a restricted discretionary activity type of resource consent does not allow the ability for full scrutiny or the ability to notify the application then they are wrong.

We are happy to discuss the breadth and scope of the matters of discretion.

Regards

Craig

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QUEENSTOWN LAKES DISTRICT COUNCIL
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From: Matthew Paetz
Sent: Saturday, 8 August 2015 5:23 PM
To: Marty Black
Cc: David Wallace; Craig Barr
Subject: Re: Proposed District Plan, Major Safety Concerns 8/8/15

Hi Marty

I am not sure where you are getting the idea from that rafting operators do not have to go through a full consent process under the proposed provisions? They do. From reading your whole email though I am assuming you mean rather that they don't automatically have to go through a notified process under the proposed rules? Which is correct.

However the rules do not prevent notification and one of the assessment matters is safety so I believe that if a consent planner (and presumably you with input into the assessment if the application) considers potential safety effects to be more than minor notification should occur.

I have cced in Craig Barr who has been a lot more closely involved in this work and would appreciate his comment.

Regards
Matthew

Sent from Samsung Mobile

-------- Original message --------
From: Marty Black
Date:08/08/2015 15:37 (GMT+12:00)
To: Matthew Paetz
Cc: David Wallace
Subject: Proposed District Plan, Major Safety Concerns 8/8/15

Hi Matthew

Draft document page 5.

I see that I have been consulted with regard the Plan on 4/3/13, however in reading especially the last paragraph on page 5 it appears the recommendation that is going out for Public comment has changed which means a new rafting operator as an example does not have to go through the full R/C process. Further comments on the following page first sentence state that this may encourage potential operators to set up small tourism activities as the costs of obtaining a R/C would be less prohibited.

This is turning the clock back over twenty years in that there were 6 to 10 companies operating, non of whom were making any money which meant safety was being compromised. Despite having new stronger Bylaws in place in the early 1990s to 2000 we lost 6 people on the Shotover River.

Following on from these deaths Maritime New Zealand then introduced a new Jetboating and Rafting Rule Part 80 (now Rafting is part 81 and Jetboating part 82) which was a copy of the Council's Bylaws nation wide, however while this meant better systems with SOPs, all Companies Audited etc and high qualifications/training of Guides once the Company passes an audit and is issued with a Certificate of Compliance then the Company is clear to operate. There is no control on the numbers of companies. It is simply a matter of fact, the more small Companies safety then becomes compromised, none of whom make any money hence safety standards drop.

On a dynamic river like the Shotover safety is always the first priority, as an example Companies must run a minimum of two rafts plus a safety kayaker, small Companies cannot always guarantee to have enough clients to fill two rafts which means they then have to link by agreement with the other Company, this then rises a number of legal issues in that one Company is then responsible for the others clients and vis versa.

It should be noted that Queenstown rafting over the years have bought and taken over all the main rafting Companies from the old days, the standard to which this Company operate to is be commended, to put simply I've no wish to go back to those days in which I personally was taken to Court for two of the deaths, on daily bases there was issues with the Companies with me as Harbourmaster trying to ensure safety on the Shotover River.

Also I am aware currently there is a small rafting operator who wants to start operating on both Shotover/Kawarau Rivers, he cannot afford to go through the full R/C process and wants his application to go through non notified, this really proves my point in that it must be a level playing field, if he can't afford the R/C how can he have the resources to maintain and run a safe operation.

All water based R/C applications must be fully notified for all parties in put and if need be restrictions in place on permitted numbers on safety grounds.

Can we met and discuss please?

Regards Marty

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