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BARRISTER

15 July 2021

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By email:alexander.erceg@epa.govt.nz

Dear Alex

RE: Northbrook Retirement Village

Part A – Access to Sticky Forest:

Introduction

1. You have asked me to comment on suggestions as to a condition of the proposed subdivision consent under the COVID-19 Recovery (Fast-Track Consenting) Act 2020 (**FTA**) ensuring that legal access to the adjacent (immediately to the west) landlocked Sticky Forest land is achieved.

2. The Minister for the Environment decided that the application met the FTA criteria for referral to an expert panel and added:

> I will also direct the expert consenting panel to consider whether this project is a legitimate opportunity to resolve access issues to landlocked Sticky Forest.

3. Apparently as the result of an oversight there is no formal direction yet leaving the Minister's letter as the best evidence of his intention. You have confirmed that the Panel is grappling with this issue as if it had been directed to do so.

4. The Minister for Treaty of Waitangi Negotiations (Minister Little) has requested that the Panel "…consider favourably any condition proposed which would provide the greatest level of certainty for securing legal access to the … Sticky Forest which is set aside under the Ngai Tahu Claims Settlement Act 1998."

5. The applicant has asserted that this is best achieved by way of a condition requiring a Private Plan Change of the Northlake Special Zone (**NSZ**) with a modified structure plan, which it advocates.

6. The Council has remonstrated that this would be an uncertain and complex process by comparison to a condition requiring an easement in gross in favour of the Council. This is supported by some commentors with beneficial interests in the Sticky Forest

land who have, through their counsel,[1] suggested that certainty could be better achieved by such a condition requiring an access easement across the balance lot to the existing street network.

7. The Applicant has responded to the Sticky Forest interests rejecting the easement proposal and promoting a refined Sticky Forest Access Condition as to its preferred private plan change methodology. Counsel for the applicant concedes that the issue of access is complex and that, "...it cannot be resolved by one step alone."[2]

8. The future zoning of the Sticky Forest land is uncertain. Through the present review of the district plan it has been identified as being zoned Rural but appeals were lodged seeking scope for some residential development. Those appeals are yet to be resolved,[3] and the extent to which the Sticky Forest land is likely to be developed is unclear.

Analysis

9. Conditions of resource consents for subdivision are the subject of sections 108, 108AA to 112, and 220 Resource Management Act 1991 (**RMA**).

10. The FTA picks up and imposes all but one of those sections.[4] The sole exception is s 108 AA:

> (1) A consent authority must not include a condition in a resource consent for an activity unless—
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> (a) the applicant for the resource consent agrees to the condition; or
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> (b) the condition is directly connected to 1 or both of the following:
>
> (i) an adverse effect of the activity on the environment:
>
> (ii) an applicable district or regional rule, or a national environmental standard; or
>
> (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.
>
> (2) Subsection (1) does not limit this Act or regulations made under it.

11. Section 108AA was promulgated in 2017, some 10 years after the Supreme Court judgement in *Waitakere City Council v Estate Homes Ltd* [5] and in part, gives effect to it with the requirement for a logical connection to an adverse environmental effect in the absence of applicant agreement. The exclusion of s 108AA from the FTA is

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1 Greenwood Roche for Bunker and Rouse and Te Rūnanga o Ngāi Tahu.
2 Memorandum of Counsel for WPL, 1 July 2021, at [5].
3 Mediation of relevant appeals is 'on hold' while this application is determined.
4 FTA, sch 6 cl 35.
5 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

coupled with a wide discretion to "…grant a resource consent subject to the conditions it considers appropriate."[6]

12. On the face of the FTA it appears that expert panels are to have a wider discretion to impose conditions and that the need for landowner agreement or a direct connection to environmental effects are not critical to achieving the dual purposes of the FTA.

13. Section 220(1)(f) RMA enables a subdivision consent to include a condition "requiring that any easements be duly granted or reserved".

14. On an evidenced-based approach to s 220(1)(f) the courts have allowed conditions for easements in subdivision consent applications in a variety of circumstances. Assessing the validity of a proposed condition under s 220(1)(f) has been less a question of whether the condition is specifically lawful, and more a question of whether the condition meets the "logical connection" test of *Estate Homes.*

15. Under ss 108AA and 220(1) RMA any condition included in a subdivision consent must be directly or logically connected to the effects of the development, and not related to external or ulterior concerns unless there is landowner agreement – although, this has not meant that the condition must be required for the purpose of the subdivision.[7]

16. Following *Estate Homes* the Environment Court approach to s 220(1) is relatively broad, saying the question is less to do with the strict lawfulness of any condition, and more to do with whether the condition meets the "logical connection" test.[8] Further, the Environment Court has observed that there is no reason conditions relating to land use cannot be approved under s 220(1), including easements which, "always, by definition, relate to land use".[9] The Court has also said that the purpose of s 220(1) appears to be to ensure that:

> "…when a subdivision of land takes place all the land use matters which:
>
> (a) need definition to create enforceable rights in land under the Land Transfer Act 1952; and/or
>
> (b) need to be imposed on public interest grounds
>
> — are properly attended to…"[10]

17. In *Brooklands TMT Partnership v Auckland Council* [2012] NZEnvC 239, the Court allowed conditions that simply required that "all necessary easements" be granted and that "suitable easements…shall be provided as necessary" for water supply and

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6 FTA, sch 6 cl 35(2).
7 *Waitakere City Council,* above n 5, at [66].
8 *Lakes District Rural Landowners Soc Inc v Queenstown Lakes District Council* [2001] NZEnvC 200.
9 At [35].
10 At [43].

network utilities services respectively. This suggests that it is not necessary for easement conditions be prescriptive. But again, these easements were also in respect of land that was being subdivided, rather than adjacent land.

18. On the issue of adjacent land, the court has upheld a condition on a subdivision consent allowing an easement in gross in favour of a nearby quarry in respect of noise and dust created by work at the quarry.[11] However, in that case the consent applicant agreed to the condition, which is not the case here.

19. Agreement to provide access was also a feature of an unspecified easement condition in a Rotorua case where the court approved a condition of a subdivision consent creating an easement, in favour of iwi and others, over one lot of a subdivision to another lot containing a lagoon in the crater of Mount Tarawera, which was of importance to Ngāti Whakaue.[12] Again, the grant was confined to land within the same subdivision proposal where there was a degree of agreement between the parties.

20. The features of this present case are that the landlocked land is not part of the proposed subdivision and the applicant does not agree to the grant of an access easement to it. Here the applicant agrees in principle to access being provided, but its willingness is confined to a condition requiring a private plan change to be lodged within 6 months of the subdivision consent being granted.

21. For the Sticky Forest access conundrum to be unlocked by a condition as to an easement across adjacent land pre-the FTA, it would have needed to meet the s 108AA RMA tests derived in part from *Estate Homes*. A logical connection to the effects of the subdivision proposal would have required necessary, rather than external or ulterior concerns.

22. This retirement village proposal includes an application for subdivision, the purpose of which appears to enable the proposed village to have its own title. Apart from the balance lot sharing a common boundary with the Sticky Forest land, the only hint of crossboundary connectivity is an indicative pedestrian walkway/cycleway nib to provide a future connection. The proposal does not depend on amenity or recreation benefits of the Sticky Forest land and there is no call for a street network anywhere near the Sticky Forest land to be designed as part of the application.

23. However, under the FTA there is a deliberately lower threshold for connection between the adverse (and positive effects) of a subdivision and the conditions that might be imposed on it.

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[11] *Rowell v Tasman District Council* [1997] NZRMA 241.

[12] *Crater Lake Parks Ltd v Rotorua District Council* [2010] NZEnvC 170 at [18]-[20]. See also condition 1.5 of the subdivision consent.

24. In this case two Ministers of the Crown, the Council, the applicant and the beneficial owners of Sticky Forest all favour a condition which goes some distance to unlocking the land under this FTA process. That amounts to a public interest connection in itself with a positive environmental effect, at least to the extent required under the FTA with its lower threshold and wider discretion for a panel to impose such conditions it considers appropriate.

25. But for the FTA's relaxation of the tests, it would be difficult on these facts to establish a sufficiently direct connection in the face of landowner resistance. However, if the Panel were minded to impose a condition as to an easement in gross in favour of the Council to be fleshed out and given effect to as the Council sees fit,[13] that would be available to the Panel. It could reasonably impose such a condition within the discretion available under cl 35 of sch 6, FTA which would satisfy the wishes of the Ministers and the Council, and be defendable.

26. That said, it is also open to the Panel to conclude that the private plan change condition offered by the applicant will advance the process of unlocking the Sticky Forrest land to the extent that it is necessary at this time. In my view, that would achieve less certainty than the Crown, the Council and beneficial owners are hoping for and may be deemed inappropriate for that reason, but it is also within the discretion available to the Panel.

27. A further alternative could be to impose no condition at this time, but to signal an expectation that a roading connection to the Sticky Forest boundary ought to be considered by Council at such time as a plan comes forward for consent of a street network on the balance land.

Part B – Status of Proposed Plan Provisions:

28. You have also asked me to comment on an assertion by Queenstown Lakes District Council (the Council) as to the applicability of any District Wide Rules and where they are said not to apply (as in the Transport Chapter) whether district-wide objectives and policies might nonetheless apply.

29. In its comment on the application, the Council stated:

> Status of Proposed District Plan Rules
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> The Council as part of its implementation of both an Operative District Plan and Staged Proposed District Plan obtain legal advice, which has been reinforced by the Environment Court that states that the District Wide Rules in the Proposed District Plan apply only to land that has been notified as part of the Proposed District Plan.

[13] Any such easement need not be so specific as to meet the locational preference of Bunker and Rouse and Te Rūnanga o Ngāi Tahu

> In this case, the Northlake special zone has not yet been included in the Proposed District Plan, and therefore it is considered that its District Wide Rules including the provisions of Chapter 29 – Transport are not relevant to the proposal. It is considered that consent is required under the Operative District Plan only.

30. In discussing this issue, it was observed that the Operative District Plan (**ODP**) included an avoidance policy which might impact on this application. Given that the objectives and policies of the NSZ are not subject to review in the Proposed District (**PDP**) Plan processes, I am also asked to comment specifically on the status and effect of that avoidance policy.

Context

31. The Council's implementation of its District Plan Review is being rolled out in stages. Presently, the NSZ is not included in any of those stages, and it seems unlikely that a special zone such as the NSZ, which was reviewed by way of Plan Change 53 just three years ago in 2018, will be included in a later stage of the Plan Review.

32. The Northbrook application similarly asserts that exclusion of the NSZ from the Plan Review means that only ODP provisions bite in the assessment of its application. I understand that no commenter has submitted otherwise.

33. Specifically, you have asked whether District Wide Rules, including the provisions of Chapter 29 – Transport, are relevant to the Northbrook proposal. You have referred me to the Environment Court's decision on Topic 1, Stage: 1 *Darby Planning Partnership v Queenstown Lakes District Council* [2020] NZEnvC 156 which the Court describes as the first substantive decision on appeal against Stage 1 of this Plan Review.

34. At the commencement of that decision, there is specific mention of the fact that the Council's review of its ODP is technically a *partial review* because it resolved to carve out and exclude certain provisions relating to zones and special zones which have recently come into effect through the resolution of appeals. The Court referred to resolutions of the Council in April 2014 and later in 2015 (Resolution A and Resolution B). Resolution B specifically identified exclusion of the land covered by:

> (b) Plan Change 45: Northlake Special Zone
>
> …
>
> (g) Any subsequent plan changes to the Operative District Plan.

35. Plan Change 53 notified in January 2018 as an extension of the NSZ created by the earlier Plan Change 45. Therefore, the land within PC 53 is caught by specific exclusions at (b) and (g) referred to above.

36. It is clear that the Council has actively sought to exclude the NSZ from the current Review. It follows that the Council intended the objectives and policies of the NSZ, and the Rules to implement them, as not needing review at this time. In part that is why the Court described the review as partial.

37. The question then arises as to the impact of the any District Wide Rules that have been promulgated under the PDP process for planning and development within the NSZ. By way of example, you have identified a chapter on Transport and query whether the Rules from that section of the Plan are applicable in the NSZ and to the current application by Northbrook.

38. The introduction of the PDP identifies the chapters that are intended to apply across the Plan:

> The way the District Plan seeks to assist achievement of the purpose of the Act is through setting out higher level objectives and policies in Chapters 3-6, which are supported by the more detailed objectives, policies and rules in the balance of the Plan.

39. Chapter 3 deals with overarching strategic direction while Chapters 4 and 5 provide more detailed objectives and policies for urban development and tangata whenua. Chapter 6 provides more detailed policies for landscapes and rural character. The Plan stipulates that Chapters 3 - 6 apply to all land reviewed or to be reviewed.[14]

40. On this issue the Council has pointed to further explanatory text now confirmed by the Court for the introductory section of the Proposed Plan[15]:

> …..
>
> d. Chapters 3, 4, 5 and 6 have encompassed the 2007 District Plan Section 4 (District Wide Issues) with the exception of the following two objectives:
>
> Natural Hazards Objective 4.8.3(1) and Policies 1.1 to 1.7 (Section 4.8), which still applies as a relevant district wide objective to Volume B zones.
>
> Affordable and Community Housing Objective 1 and Policies 1.1 – 1.3 (section 4.10), which still applies to both Volume A and Volume B zones. …

41. What seems intended by the text of the PDP is the zones to be excluded from review are to be read subject to the new strategic direction provisions in chapters 3 -6.[16] The alternative, that they remain subject to the 2007 original strategic direction is

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[14] PDP at 1.1B: "The District Plan consists of two volumes, separated by geographic area, and these areas are categorised by way of separate zones that fall into one of Volume A or Volume B. Volume A is the land that has been reviewed (for convenience referred to as the proposed district plan, until such time it is made operative), while Volume B contains land that to date has not been reviewed."

[15] Letter from QLDC to EPA 13 July 2021

[16] See paragraph 35 above.

counterintuitive and cannot have been intended, but there may be scope for inconsistencies if the new provisions are not able to be seamlessly retrofitted as intended. In that event, the logical alternatives are that the zones excluded from this review are to be standalone, without the need for support from overarching strategic direction **or** that they can sit alongside the new strategic direction provisions to the extent that they complement each other. This latter alternative is preferable.

42. Any environmental bottom lines are more likely to be in specific zones rather than in general or directional provisions and where any inconsistencies arise, they could be readily resolved by employing the statutory interpretation aid *generalia specialibus non derogant* to the effect that a later general provision will not displace an earlier specific provision.

43. On this basis, the Transport Chapter and other districtwide provisions, as reviewed and to the extent inviolable, would apply only to the extent that they are complementary to the urban development objectives, policies and rules of the NSZ.

44. Also, in the same vein, there is nothing in a reading of the decisions on Chapters 3–6 that would seek to displace the policy framework of the NSZ including the specific avoidance policy as to the location of a future retirement facility in the NSZ.

The Avoidance Policy

45. You have asked me to include brief discussion of the avoidance policy in the NSZ provisions in the context of *King Salmon*.[17]

46. The policy reads:

> 1.7 To provide for small scale neighbourhood retail activities to serve the needs of the local community within Activity Area D1 and <u>to avoid</u> visitor accommodation, commercial, retail and community activities and retirement villages within Activity Areas other than within Activity Area D1. [emphasis added]

47. The purpose would seem to be the clustering of the commercial/service activities of the zone in one area together with any retirement village so that agglomeration and proximity benefits can be optimised, and non-residential activity impacts constrained locationally. It is one of several policies to achieve the Residential Development objective of, "A range of medium to low density and larger lot residential development in close proximity to the wider Wanaka amenities."

48. While the NSZ provisions appear to be competently prepared with an overarching purpose of providing for low density urban development that does not encroach on

[17] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] NZLR 593.

or diminish existing amenities, including established vegetation in the direction of the Clutha River and the so-named Outlet Track on its true right bank, they do not specifically identify environmental effects to be avoided. There is no environmental bottom line as such.

49. In saying that, I observe that the structure plan has considerable building restriction areas in the direction of the river and that the proposed location of the Northbrook core buildings is sandwiched between two such areas where the C2 AA is identified for low density, low rise, large lot residential development.

50. Following *Davidson*, decisions under s104 RMA are not precluded from addressing Part 2 matters, and in some cases are required to do so.[18] The Court of Appeal noted two restrictions when referencing Part 2:

> First, such reference may add little in circumstances where there is a "coherent set of policies designed to achieve clear environmental outcomes".[19]
>
> Secondly, Part 2 may not be used to subvert clear restrictions, for example those found in the NZCPS.[20]
>
> In the context of this application, reference to Part 2 is something of a cross-check to satisfy the consent authority that the objectives and policies of the NSZ Chapter appropriately reflect the provisions of Part 2 and the higher order documents.

51. Does the NSZ have a "coherent set of policies designed to achieve clear environmental outcomes" and is its structure Plan intended to implement those policies?

52. The purpose of the NSZ is to provide for a predominantly residential mixed use neighbourhood,[21] in a manner that reflects the zone's landscape and amenity values. An identified issue is the location of the zone "…within a landscape which contributes to the amenity of the wider Wanaka area." And specifically, "the urban edge needs to be located to preserve the landscape values enjoyed from Lake Wanaka and the Clutha River."

53. The relevant NSZ objectives and policies read:

> **12.33.2 Objectives and Policies**
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> **Objective 1 – Residential Development**

[18] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] NZLR 283 at [82].
[19] At [74]-[75].
[20] *Davidson*, above n 16, at [71] and [82].
[21] NSZ r 12.33.

A range of medium to low density and larger lot residential development in close proximity to the wider Wanaka amenities.

Policies

1.1 To establish a mix of residential densities that will provide a residential environment appealing to a range of people.

1.2 To enable medium density living within the less sensitive parts of the zone in order to give Northlake a sense of place and to support a neighbourhood commercial and retail precinct

1.5 To enable and encourage larger residential lot sizes within Activity Areas C1 – C3.

1.6 To enable and encourage medium density residential activities within Activity Area D1.

54. These policies suggest that AA D1 is the least sensitive area and that AA C2, towards the river, is where larger lots should occur. In its letter of 13 July 2021, Council asserted that the policies which direct lower density development in the AA C2 (including the avoidance policy) should be respected in order to preserve the character of the surrounding area, the integrity of the zone:

> These types of activities outside AA D1 (and within AA C2) has the potential to adversely affect the character and amenity of the Activity Area and may compromise the overall integrity of the zone and how it relates to the surrounding environment.

This seems a reasonable interpretation. It is the potential impacts of density and over height buildings on the "…character and visual amenity of the adjacent Clutha River and its margins" that is the overarching concern. But it is a question of potential adverse impact, and if the Panel concludes that such impacts are capable of being minor, taking into account conditions to be imposed as to height or bulk and location, then alignment with these policies could be achieved.

55. Landscape and visual amenity are the subject of other NSZ objectives and policies:

Objective 4 – Landscape and Ecology

Development that takes into account the landscape, visual amenity, and conservation values of the zone.

Policies

4.1 To identify areas where buildings are inappropriate, including ridgelines, hilltops and other visually prominent landforms, and to avoid buildings within those areas.

4.2 To maintain and enhance the nature conservation values of remnants of indigenous habitat, and to enhance the natural character of the northeast margin of the zone.

4.4 To ensure that trees within the Tree Protection Areas are retained, and that any individual trees that are removed or felled within TPA3 or TPA4 are progressively replaced with non-wilding species so as to ensure development is reasonably difficult to see from the Deans Bank trail (northern side of the Clutha River), to retain a predominantly treed foreground when viewed from the Deans Bank trail, and to retain a predominantly treed background when viewed from Outlet Road.

56. The Zone Standards require development to be in accordance with the Structure Plan and activities falling short of this standard are non-complying in most activity areas, including C2. This is as robust as the rules get for the purpose of implementing the avoidance policy, 1.7.

King Salmon

57. Case law has confirmed that avoid generally means avoid and not some more flexible test. However, it is instructive to observe that the Supreme Court in *King Salmon* backed off an effective prohibition in circumstances where the magnitude of environmental effects was not great:[22]

> [144] Third, it is suggested that the approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and the definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.
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> [145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development." Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of

[22] *King Salmon,* above n 15.

> the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

58. The Supreme Court is saying that avoid does not mean prohibit if the adverse effects of the activity are minor or transitory.

59. Whether that is the case here is a matter for the Panel which will have a better grasp of the AEE and the characteristics of the site.

60. However, if the Panel concludes that dimensional aspects of the buildings to be located outside the D1-AA are so at odds with what is intended for the C2-AA that they need to be reduced say, to maintain visual amenities from Deans Bank, Outlet Road or elsewhere, that would not be consistent with minor or transitory effects. For example, if the proposed building height would have such adverse effects as to call for reduction, the exception to the avoidance policy would not reasonably be available **unless** that reduction in height could reasonably be achieved by way of conditions.

61. I am happy to respond to any queries arising out of this advice.

Yours sincerely

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