BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC124

	IN THE MATTER	of the Resource Management Act 1991
	AND	of a direct referral under section 87D of the Act
	BETWEEN	SKYLINE ENTERPRISES LIMITED
		(ENV-2016-CHC-107)
		Applicant
	AND	QUEENSTOWN LAKES DISTRICT COUNCIL
		Consent Authority

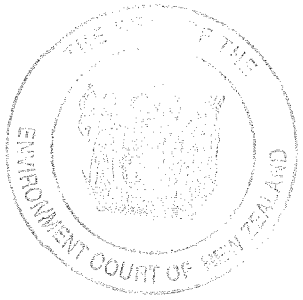
Court:	Environment Judge J J M Hassan Environment Commissioner W R Howie Environment Commissioner C J Wilkinson
Hearing:	at Queenstown on 22, 23, 24 and 25 May 2017
Appearances:	G Todd and B Gresson for the applicant J Leckie for the consent authority R Somerville QC for ZJV (NZ) Limited A Logan for Otago Regional Council P Maclean for Queenstown Preschool & Nursery B Walker appears in person (s 274 party)
Date of Decision:	15 August 2017
Date of Issue:	15 August 2017

INTERIM DECISION OF THE ENVIRONMENT COURT

A: Findings made on specified issues.

B: Directions made at [287].

REASONS



Introduction

[1] The 'gondola' is a well-established feature of the Queenstown landscape and a significant part of the Queenstown and New Zealand tourism industry, attracting some 790,000 domestic and international visitors per annum.[1] In 1964 a chalet, as it was then called, was opened on Bob's Peak but was accessible only by road. In late 1967, the multi coloured 'Poma'[2] gondola started operating. In 1987, it was replaced with the present Doppleymayr gondola (with four seater cabins) as part of a redevelopment that included refurbishment of the Upper Terminal restaurant and the Lower Terminal.[3]

[2] Skyline Enterprises Limited ('Skyline') seeks resource consent for a further redevelopment of its facilities. This would include replacing the existing gondola with a 10 seat car system and significantly redeveloping the Upper and Lower Terminal buildings ('proposal'/'proposed upgrade'). The budget for the redevelopment is in excess of $100m.

[3] Skyline's application is before this court because it has been assigned to what is termed the 'direct referral' track. In essence, at Skyline's request and with QLDC's approval, the application has been referred directly to the court for determination instead of being determined by the Queenstown Lakes District Council ('QLDC' or 'the Council').[4]

[4] As communicated to the parties by various Minutes,[5] this Interim Decision does not determine the ultimate question of whether or not, and on what basis, consent is granted ('ultimate question'). In essence, that is because:[6]

(a) the notified application did not make any provision for additional carparking but, in response to concerns raised in expert evidence for the Council and in various submissions,[7] Skyline now proposes to progress a companion resource consent application for a facility that would provide

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1 Mr Colegrave evidence-in-chief for Skyline, at [10].
2 'Poma' is the affectionate name for the Pomagalski bubble cars it carried.
3 Notified application, pp 16, 17.
4 The direct referral provisions of the RMA are more fully described at ss 87D-87I RMA.
5 25 May 2017 and 14 June 2017 Minutes.
6 For example, as explained in the 14 June 2017 Minute.
7 Dr Turner, evidence-in-chief for QLDC, at [3], [5], rebuttal for QLDC at [14]; Mr McKenzie, rebuttal for Skyline, at [6], [9]; the various submissions are addressed at [249]-[295].

something in the order of 350 carparks[8] (which it may or may not request be assigned to the direct referral track);

(b) Skyline also seeks further time to resolve an appropriate method for stormwater management, a matter in respect of which the Otago Regional Council ('ORC') has made a submission (and presented evidence); and

(c) those outstanding matters (in (a) and (b) above) pertain to how the ultimate question is determined.

The proposal

[5] The notified proposal is detailed in the application's Assessment of Environmental Effects ('AEE').[9] Skyline made some changes in response to QLDC's further information requests (as noted in QLDC's report on the application under s 42A, RMA). It made further changes as a result of negotiations with some submitters prior to the hearing. These are as described in the evidence of its planning witness, Mr Dent. In due course, we will require a full set of up to date plans and specifications for the purposes of our final decision (should that be to grant consent). However, drawing from Mr Dent's evidence for the purpose of setting context for this Interim Decision, the proposal can be summarised as follows:[10]

(a) a modified and significantly expanded Upper Terminal building with expanded restaurant, conferencing and other facilities ('Upper Terminal'/'Modified Upper Terminal');

(b) a new gondola with 10 seater cars (in place of the existing four seater car gondola), including ten new pylons;

(c) a new Lower Terminal building just over double the size of the existing one (which it would replace);

(d) associated landscape planting and treatment and signage; and

(e) associated earthworks and construction works (including some helicopter operations) subject to various restrictions specified in proposed conditions.

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8 Memorandum of counsel for Skyline, dated 6 June 2017.

9 Assessment of Environmental Effects i.e. assessment of the activity's effects on the environment, as required by s 88 and Sch 4, RMA. The notified proposal is described at 4.1-4.8, pp 18-31, AEE.

10 Measurements provided in the application and evidence, while precisely specified, are taken as approximations. The following is summarised from Dent evidence-in-chief for Skyline, at 4.1-4.47.

Submissions, evidence and reports

[6] We have considered all written submissions made on the application, together with QLDC's evaluation of these in its s 42A report. Schedule 1 lists those submitters who were heard (and the evidence called) and those who simply made a written submission. From [214], we set out our findings on particular matters raised in written submissions. We have also had regard to the s 42A report and other information provided by QLDC under s 87G, RMA.

Proposed conditions for this Interim Decision

[7] QLDC's closing submissions included (in its App 1) a set of proposed conditions on the matters covered by this Interim Decision[11] ('QLDC conditions'). These showed tracked changes against the conditions proposed by Skyline in Exhibit S2. As we have noted, Exhibit S2 was offered in refinement of the conditions initially recommended in QLDC's s 42A report. Each of these versions has been prepared with appropriate input from planners (and consideration by legal counsel). As such, we find that the QLDC conditions are generally sound in technical drafting terms.

[8] Skyline's closing submissions record that several amendments to its conditions proposed by the QLDC are "relatively minor" and Skyline has "no objection" to them, subject to identified areas of remaining difference.[12] We proceed on the basis that Skyline accepts the various additional constraints that the QLDC conditions impose as modifications to its notified proposal (except where it specifies otherwise).

Statutory framework[13]

[9] Under s 87G(6), we are directed to apply ss104-112 as if the court is a consent authority.[14] The provisions of most relevance are:

(a) s 104D as to non-complying activities;
(b) ss 104 and 104B, respectively on consideration of applications and

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11 Leaving aside transport and stormwater and reserving capacity to seek amendment for the purpose of the court's final decision.

12 Skyline closing submissions, at [34].

13 The recent amendments to the RMA by the Resource Legislation Amendment Act 2017 do not apply to the matters before us, given the direct referral was made before those amendments came into force: RMA Sch 2, cl 16.

14 Section 87G(6) also references s 138A which is not relevant as it concerns coastal permits for dumping and incineration.

determination of discretionary and non-complying activities; and

(c) s 108 on conditions of resource consents.

Section 104D threshold

[10] The treatment of the proposal under rules of the existing Queenstown Lakes District Plan ('existing plan') is relatively complex. A source of that complexity is the fact that the subject site sits within various zones (Rural General, High Density Residential Sub-Zone A, with Commercial Precinct overlay, Low Density Residential). Further, different components of the proposal have different activity classifications (discretionary, restricted discretionary, non-complying). It is well established that we must treat the proposal holistically according to the most restrictive of these different classifications.[15] As such, it is not a matter of dispute that the proposal is to be considered as a non-complying activity under the RMA.[16]

[11] Therefore, unless we are satisfied of one or the other of the following, we must decline consent:

(a) adverse environmental effects of the activity will be minor (other than any effect on a person who has given written approval); or

(b) the application is for an activity that will not be contrary to the objectives and policies of the existing and proposed district plans.

'Not contrary to' the objectives and policies

[12] This limb applies to the objectives and policies of each of the existing and proposed plans (i.e. notwithstanding that public processes for the formulation of the proposed plan is in their early stages).

Determining if a proposal is 'contrary to' objectives and policies

[13] 'Contrary to' contemplates being opposed to in nature, different or opposite to the objectives and policies: *NZ Rail Ltd.*[17] The proper interpretation and application of all relevant objectives and policies of both the existing and proposed plan is required. Finessing out qualifiers of one objective by looking at another, to reach some overall

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15 *Aley v North Shore City Council* [1999] 1 NZLR 365; (1998) 4 ELRNZ 227; [1998] NZRMA 361.

16 Notified application, at p 35.

17 *NZ Rail Limited v Marlborough District Council* [1994] NZRMA 70 at 80.

conclusion, would not reflect Parliament's intention: *Queenstown Central.*[18] The exercise calls for proper contextual application of the relevant objectives and policies, e.g. *Calveley.*[19] For example, a proposal could fail this alternative threshold under s 104D by being found contrary to a confined set of significant objectives and policies, even if it accords with several others, e.g. *Akaroa Civic Trust.*[20]

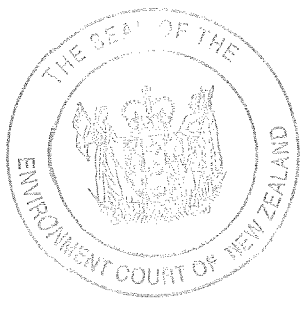
[14] In this case, the evidence demonstrates the high significance of carparking and traffic management to the context. Hence, while we make findings on several matters concerning existing and proposed plan objectives and policies, we do not in this Interim Decision determine whether or not the proposal satisfies s 104D.

Considerations under s 104

[15] Section 104(1) specifies various matters we must, subject to pt 2, have regard to in considering the application and submissions. In terms of the proposal, those are:

(a) any actual and potential effects on the environment of allowing the activity;
(b) any relevant provisions of the statutory instruments listed in s 104(1)(b); and
(c) any other matter the court considers relevant and reasonably necessary to determine the application.

[16] When forming an opinion for the purposes of s 104(1)(a) (i.e. as to environmental effects), we may disregard an adverse effect of the activity on the environment if, in this case, the existing plan permits an activity with that effect. We must not have regard to trade competition or its effects (s 104(3)(a)(i)). We must not have regard to any effect on a person who has given written approval to the application (s 104(3)(a)(ii)).



18 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817, at [37]-[39].
19 *Calveley v Kaipara District Council* [2014] NZEnvC 182.
20 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [74].

'Subject to Part 2'

[17] In circumstances where there is only an existing plan, the High Court's decision in *Davidson*[21] is authority that resort to pt 2 is only required where there is ambiguity, incompleteness or illegality in the district plan. The parties generally proceeded on that basis and did not specifically address pt 2 in opening submissions.

[18] However, a matter the court raised with counsel was that there is a point of distinction here from *Davidson* in that there is a proposed plan. Fundamental to the reasoning in *Davidson* is that the plan had already given substance to the principles in pt 2.[22] However, where there is also a proposed plan that has not been fully tested by reference to pt 2 (as here), the position would appear materially different. That is particularly given that, once a proposed plan is made operative, it will supersede the existing plan. On that basis, therefore, we have also considered matters with reference to pt 2, but on the basis of acknowledging the relevant existing plan provisions that bear on our consideration of pt 2.

Relevant statutory instruments and weighting

[19] The relevant statutory instruments we must have regard to under s 104(1), RMA are:

(a) the existing plan and the QLDC proposed district plan ('proposed plan'); and

(b) the existing and proposed Otago Regional Policy Statements[23] ('existing RPS'/'proposed RPS').

Overall discretion in s 104B and conditions under s 108

[20] If the s 104D threshold is passed, our overall discretion is to refuse the application, grant the consent, or grant it subject to consent conditions under s 108 (s 104B). Our exercise of that discretion, including in the consideration of matters raised by submissions, is to be in accordance with s 104.

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21 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [76], applying *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195. For completeness, it is noted that the Court of Appeal granted leave to appeal in *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194 (23 May 2017) and the decision on that appeal is awaited at the date of writing this decision.

22 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [76]-[77].

23 Regional Policy Statement for Otago, October 1998; Proposed Regional Policy Statement for Otago Council Decisions Version, 14 February 2017.

Issues addressed by this Interim Decision

[21] Given the presently outstanding carparking/traffic and stormwater management matters, this Interim Decision leaves reserved the ultimate question of whether or not and, if so, on what conditions, consent will be granted for the proposal. Related to the carparking/traffic matters, the decision leaves reserved any cumulative effects issues that could be associated with Skyline establishing a carpark on land it has indicated interest in adjacent to the proposed Lower Terminal (including any effects on the interface with Brecon Street).

[22] However, as set out in the 29 May and 14 June 2017 Minutes, there are a number of issues on which we are now able to make findings on the evidence before us. We have refined the framing of these issues in light of the closing submissions received. Those issues, and the order in which we set out our findings on them, are as follows:

(a) what is the appropriate response to fire risk ('Issue A')?
(b) is the proposal appropriate in terms of effects on landscape, streetscape and visual amenity values ('Issue B')?
(c) should there be a condition as to relocation of the helipad ('Issue C')?
(d) should there be a condition as to management and other uses of the reserve ('Issue D')?
(e) what conditions should be specified to mitigate for construction business disruption for ZJV ('Issue E')
(f) are the proposed operational noise and construction noise and vibration measures appropriate ('Issue F')?
(g) are various settlements reached with submitters appropriately addressed ('Issue G')?

[23] We observe that no expert considered any of those issues were such that consent should not be granted. Differences on those issues were on confined matters concerning conditions that should be included in any consent we grant. A similar position is reflected in closing legal submissions.

[24] As recorded in the court's 14 June Minute, this Interim Decision:

(a) makes findings on a properly comprehensive basis, including as to relevant statutory requirements, related plan and other provisions and appropriate consent conditions; but

(b) reserves for a later decision the question of whether or not the proposal satisfies the requirements of s 104D and pt 2, RMA insofar as the court is not presently in a position to determine those matters.[24]

What is the appropriate response to fire risk ('Issue A')?

[25] Fire risk was raised by ZJV and Mr Walker. On the evidence, we readily find that this is a s 5 issue. That is, unless we can be satisfied that fire risk is properly managed, we cannot be satisfied that granting consent would promote the RMA's sustainable management purpose.

[26] The issue between parties concerns appropriate consent conditions on fire risk.

[27] Skyline and QLDC submit that the following of the QLDC conditions are sufficient:

> 63. Prior to the commencement of any works on site or within three months of the date of this consent being granted, whichever is sooner, the consent holder shall arrange and facilitate a meeting with all licensed commercial operators utilizing the Ben Lomond Recreation Reserve with the requirement to achieve a joint Fire Risk and Evacuation Management Plan for Ben Lomond Recreation Reserve.
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> *Note this plan will not replace the commercial operator's individual fire plans but will collaborate [sic] them and ensure a consistent approach to fire risk management and evacuation understanding for all Reserve users and applicable statutory bodies.
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> 64. Prior to commencement of any works on site or within six months of the date of this consent being granted, whichever is sooner, the consent holder shall submit the Fire Risk and Evacuation Management Plan referred to in (a) above [sic] to the Manager Resource Consents, Queenstown Lakes District Council for certification. This plan shall provide for the following requirements:
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> a. a detailed management strategy for the control of fire risk over the reserve; and
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> b. submission of an agreed action plan by the Otago Rural Fire Authority governed by the Queenstown Lakes District Council consistent with achieving the strategy in (a) [sic] above.

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24 Minute dated 14 June 2017, at [15].

65. The consent holder shall arrange and facilitate meetings with all commercial operators in the Ben Lomond Recreation Reserve on an annual basis on each anniversary of this consent to incorporate updates, revisions and new operators (if any) into the Fire Risk and Evacuation Management Plan. Each revised Fire Risk and Evacuation Management Plan shall be submitted to the Manager Resource Consents, Queenstown Lakes District Council within two months of being updated.

[28] ZJV seeks the following further condition in the event that we grant consent:[25]

> Prior to commencing construction on the upgrade project, the consent holder and the Queenstown Lakes District Council shall work with Aurora Energy (the line owner) to underground the power lines running from Brecon Street to the Skyline upper terminal.

[29] The particular focus of ZJV's condition is an overhead Aurora Energy Limited ('Aurora') powerline that serves the Skyline facilities ('powerline'). The powerline runs up Bob's Peak, from Brecon Street (in the vicinity of the Lower Terminal) over an extensive, mainly Douglas Fir, plantation. In the event that a tree or tree branch was to fall onto and break or damage the powerline, there would be an associated risk of sparking and ignition of the significant quantity of fuel stored in the trees.[26]

[30] ZJV called evidence from the Deputy Principal Rural Fire Officer with the Otago Rural Fire Authority ('ORFA'), Mr Graeme Still. As part of his evidence, Mr Still produced a copy of a fire risk assessment that his predecessor, Mr Jamie Cowan, had prepared for Skyline in 2016 ('Skyline Gondola Risk Plan 2016'/'SGRP'). Mr Cowan was not called as a witness by Skyline.

[31] Mr Still explained his brief and opinion as follows:[27]

> Ziptrek have asked me to provide an assessment of the fire risk in the Ben Lomond Reserve, and to assess any increase in risk arising from the Application and suggested mitigation measures. ...

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25 ZJV also submitted that then proposed condition 62 be reworded to make it clear that the preparation of a joint Fire Risk and Evacuation Plan for the reserve be a requirement, rather than an 'intention'. That specific point, accepted by Skyline, is reflected in the above revised proposed wording of [64] in the QLDC conditions. However, we return to the matter of condition wording at [67].

26 Transcript, p 172, l 24-32, p 173, l 1-10.

27 Mr Still evidence for ZJV, at [2.1]-[2.3].

I did not have the time available to visit the site or prepare a comprehensive assessment for Ziptrek. I therefore provide brief comments on Mr Cowan's previous assessment at a general level only, based on my experiences in dealing with fire risk and mitigation in the Otago region.

While I have not undertaken a comprehensive risk assessment of my own, the conclusions in Mr Cowan's report are consistent with my expectations, given my experiences managing fire risk in the Otago area and on similar sites. As a general principle, where a risk of fire exists, this is usually exacerbated by an increase in activity within an area. This increases the likelihood of fire as well as the challenges in evacuation.

[32] Mr Cowan's recommendations to Skyline in the SGRP were, in summary:[28]

1	**The creation of a firebreak on the slopes below the facility** ... would need to be 100m wide ... on a bad day ... 180m wide .... Anything is better than nothing ... remove or modify fuel working from the Bob's Peak facility out as opposed to a mid-slope horizontal firebreak."
2	**The removal of fuel and expansion of the width of the vertical Gondola line path** ... Removal of conifers, fencing the area and keeping it well grazed would be the best option however given the scenic nature of your site perhaps a combination of grazing and planting fenced "islands" of low flammability natives ...
3	**Removal or modification of fuel directly around the Bob's Peak facility** The removal of flammable species ... Conifers, tussocks etc ... around the building will provide the best fire risk mitigation .... I would recommend that trees be thinned out to allow approx. 6m between crowns, and the lower branches removed ...
4	**Building materials and external sprinklers** .... large open areas under your building ... should be covered in completely or ... with a fine mesh to stop embers .... External sprinklers ... should be investigated ...
5	**Powerlines** Powerlines are a major cause of fires and you have lines running directly under the hill on the town boundary and up the hill to your facility. I see these as major risks that really should be removed. I have worked with the lines company to try and keep the bottom lines well cleared but clearances don't go all the way back into the fall zone of the surrounding trees. Burying the cables would eliminate your risk, I have suggested this to the lines company however I was told it is very expensive and as such has not been carried out.
6	**Evacuation procedures and warning systems** ... We need to do a review of your 'action in the event of fire' procedures to make sure they are up to date ...

[28] All taken from the copy of Mr Cowan's report in Attch A to Mr Still's evidence for ZJV.

[33] In response to questions in cross-examination on behalf of QLDC, Mr Still made the sobering comment that if a fire ignited at the bottom of Bob's Peak, it would take approximately eight minutes to get to the Upper Terminal area (given the approximate 35° slope).[29]

[34] When questioned by QLDC on what the response to this risk would be, he explained that there would be an "air attack" on the vegetation, but basically the response would be evacuation. He explained that the tactical plan for this involved evacuating people from the Upper Terminal, as this was the only method possible in a scenario of fire moving up the hill.

[35] The tactical plan Mr Still referred to is called the 'Red Zone Management Plan'[30] ('RZMP'). In cross-examination for Skyline, Mr Still confirmed that the RZMP was originally developed following the 2005 Closeburn fire.[31] With reference a copy of the Red Zone map, he explained that the RZMP area extends well beyond the face of Bob's Peak, running west some 14km along the Queenstown-Glenorchy road and east as far as Arthurs Point. It encompasses the residential areas of Fernhill and Sunshine Bay, as well as Queenstown Hill.[32] He explained that, following the development of the RZMP, a comprehensive tactical plan was developed for a fire on Bob's Peak. He agreed that the plan did not differentiate, in terms of guests and staff, between Skyline and Ziptrek. He confirmed he was aware that Skyline had its own associated plan, but had not seen and was not aware whether or not ZJV had such a plan, although he assumed ZJV would have been asked to have one.[33]

[36] Mr Still conceded that, within the RZMP area, there are "a lot more overhead powerlines" and that another power company, Delta, has line maintenance responsibility for three of them. He acknowledged that ORFA had a responsibility to advise people on their hazards but he did not know whether or not it had advised Delta about the hazard presented with their overhead lines. In clarification, he confirmed that, in his role at the ORFA, he would know if such advice had been given by ORFA.[34] He confirmed that Delta has a regular maintenance programme that is designed to

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29 Transcript, p 163, l 8-17.
30 Exhibit Z1.
31 Transcript, p 168, l 10-30, Exhibit 21.
32 Transcript, p 166 l 1-34, p 167 l 1-5.
33 Transcript, p 168, l 15-28.
34 Transcript, p 167, l 1-28, p 168, l 1-3, p 169, l 1-32.

overcome the risks of trees falling on the line, and that he had no concerns about its programme.[35] He also confirmed that he had not made any recommendations to "the local authority here in Queenstown" concerning the lines that run around the base of the Ben Lomond Reserve.[36]

[37] Mr Still explained that he considered that putting the powerline underground would be the most practical and effective way of eliminating the ignition risk in that it would remove the potential for it to be hit by a falling tree or branch.[37] However, in answer to the court, Mr Still confirmed that the normal precaution for powerlines in forestry areas is to clear trees from lines and that the landowner was responsible for maintaining that clearance. He was not aware of who owned the powerline (although those at the bottom are owned by Delta).[38]

[38] As noted, rather than calling Mr Cowan as a witness, Skyline called rebuttal evidence from its planner, Mr Dent. He explained that, in terms of the various recommendations in Mr Cowan's report to Skyline:[39]

(a) QLDC, as the responsible designation requiring authority, has an Outline Plan approval (under s 176A, RMA) to remove the conifer trees either side of the gondola cable way (RM160956). This work would be completed before the expanded and refurbished restaurant building is ready for occupation and use and will reduce the potential intensity of a fire that establishes beneath the gondola building;

(b) Skyline's landscape expert, Ms Snodgrass, had suggested changes to the density of native tree planting that Mr Denney recommended, so as to reduce fuel load and the intensity and spread of fire;

(c) Skyline is the point of contact for reports of fire in the area and has the role of alerting others in Ben Lomond Reserve; and

(d) he recommended and supports proposed conditions 63-65 of the QLDC conditions.

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35 Transcript, p 170, 1-8.

36 Transcript, p 170, l 26-33.

37 Transcript, pp 163-164.

38 Transcript, p 171.

39 Mr Dent rebuttal evidence for Skyline, at [8.4]-[8.10].

[39] In its closing submissions[40] in support of its proposed undergrounding condition, ZJV submits that the evidence establishes that:

(a) the proposal is in a known high fire risk zone. Response management would be limited to evacuation. Given the high numbers of people in the reserve at any one time, there could be serious consequences should a fire occur;[41]

(b) the potential for a tree to fall on the powerline (which serves Skyline's operation not ZJV's) causing ignition is a major source of fire risk;[42] and

(c) the most practical way to eliminate that risk is to underground the powerline.[43]

[40] ZJV criticises Skyline's consent application AEE for not including an evaluation of the risk, its probability and consequences (despite Skyline having commissioned the SGRP). It submits that we should also factor in the responsibilities borne by QLDC and Skyline under the Health and Safety at Work Act 2015 ('HSWA'). In particular, it submits that the HSWA requires QLDC and Skyline to each take reasonable steps to understand relevant hazards and risks and have available resources and processes to eliminate or mitigate them.[44]

[41] ZJV submits that fire risk is a relevant consideration (in terms of both proposed plan policy 21.2.1.8 and s 5 RMA). In terms of legal principles on RMA risk evaluation, it submits that we should apply the approach taken by the Environment Court in *Long Bay*[45] and *ZJV (NZ) Ltd v Queenstown Lakes District Council* (to which we refer as *ZJV (NZ)* to avoid confusion with the submitter in this case).[46]

[42] In summary, it submits:[47]

> ... while it appears that the probability of fire occurring in the reserve is low, potentially the greatest consequence is loss of human life or serious injury. A precautionary approach is required, particularly given the large visitor numbers and the limited egress options should

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40 ZJV closing submissions, at [17], [18].
41 ZJV closing submissions, at [21], [25].
42 ZJV closing submissions, at [21]-[23].
43 ZJV closing submissions, at [24].
44 ZJV closing submissions, at [34].
45 *Long Bay – Okura Great Park Society Inc v North Shore City Council* A078/08, 16 July 2008.
46 *ZJV (NZ) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 205.
47 ZJV closing submissions, at [37], [38].

> a fire occur.
>
> As a risk management measure, ... this is a clear case where the risks should be avoided or eliminated by the inclusion of a condition of consent that specifically requires the undergrounding of the power lines before the proposed redevelopment commences.

[43] The essence of QLDC's submission opposing an undergrounding condition is that, as the proposal does not seek to change the location or operation of the powerline, the line does not introduce any additional risk of fire as a result of the application. As such, it submits that the direct referral is not the proper forum for assessing and managing the risk that the powerline presents. It also points out that, under cl 6 the Electricity (Hazards from Trees) Regulations 2003 ('EHFTR'), lines company Aurora Energy Limited ('Aurora') is responsible for maintaining appropriate vegetation clearance from the lines as they are located within Ben Lomond Recreation Reserve. It reports that QLDC is not aware of having received any hazard warning notice (under cl 8, EHFTR) from Aurora or any requests to access the reserve to cut or trim the trees.[48]

[44] QLDC's closing submissions explain that the QLDC conditions are supported by the three planning experts, Mr Dent (for Skyline), Mr Brown (for ZJV) and Ms Sinclair (for QLDC). It also explains that the final version of the landscape planting conditions recommended by Mr Denney now address fire risk matters.[49]

[45] QLDC also submits:

> ... the amended conditions above, the forest clearance objectives sought by the Ben Lomond and Queenstown Hill Forestry Plan ... and subsequent Outline Plan of Works for the Gondola cableway corridor fire break, and the Red Zone Plan will appropriately mitigate and manage fire risk and fire evacuation in the Ben Lomond Recreation Reserve in relation to the effects of the Application.
>
> Council has heard the wider concerns raised by submitters regarding fire risk and intends to analyse them further outside of the consideration of the application.

[46] Skyline submits that the proposed redevelopment would not create or exacerbate the risk the powerline presents.[50] As such, in terms of *Long Bay*, it says there is no causal relationship between the activity and the fire risk matters that could

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48 QLDC closing submissions, at [35]-[37].
49 QLDC closing submissions, at [28]-[34].
50 Skyline closing submissions, at [18].

arise from the powerline.[51] Irrespective of whether consent is granted, the line exists and it and the risk would remain. It submits that the risk presented by the powerline is no different from that presented by other lines running around the base of Ben Lomond, totally unrelated to Skyline's operations.[52] As for ZJV's submissions on the implications of the HSWA duties, it submits that there is no nexus between those duties and Skyline's redevelopment proposal in that any HSWA obligations would exist irrespective of the redevelopment and extend to all workplaces on the reserve, including ZJV's.[53] Skyline also points out it is "actively addressing" the other mitigation measures suggested by Mr Dent in his rebuttal evidence.[54]

Relevant principles concerning the evaluation of fire safety risk

[47] It is now well-established that risk can be a relevant RMA consideration, arising from the definition of 'effect' in s 3, RMA (i.e. particularly in its reference to probability and matters of scale, intensity, duration, and frequency). We find *Long Bay* and *ZJV (NZ)* of assistance on the relevant principles for the evaluation of risk. The evidence demonstrates that the probability of fire occurring in the reserve is low. However, no party argues that this makes it irrelevant. Rather, s 3 defines 'effect' to include 'any potential effect of low probability which has a high potential impact'. Self-evidently, and again it is undisputed, loss of human life through fire is such an impact. We readily accept ZJV's submission that the proper management of fire risk is a matter going to s 5, RMA. That is in the sense that, unless we can be satisfied that fire risk is properly managed, we cannot be satisfied that granting consent to the proposal would promote the RMA's sustainable management purpose.

[48] However, that does not lead us to an inevitable conclusion that we should impose a condition to require that Skyline procure the underlining of the powerline (whether the condition proposed by ZJV or some other condition). We must also be satisfied that any such condition would fulfill a proper resource management purpose, fairly and reasonably relate to the authorised development, and not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have imposed it: *Newbury*.[55]

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51 Skyline closing submissions, at [17], referring to *Long Bay*, at [14].

52 Skyline closing submissions, at [19].

53 Skyline closing submissions, at [20].

54 Skyline closing submissions, at [21].

55 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731; *Housing NZ Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

[49] In terms of those '*Newbury* principles', our application of 'fairly and reasonably relate to the authorised development' is according to the Supreme Court's direction in *Estate Homes,*[56] i.e. that the Court of Appeal's expression of this as requiring a causal link between the condition imposed and the effects of the proposed subdivision is overly strict and, in the context of the discretion in s 108, RMA, we are to ensure that the conditions we impose "are not unrelated to" the proposal. That does not require that we find that the condition is required for the purpose of the proposal.[57]

[50] Therefore, we do not accept Skyline's and QLDC's submission that it is necessary to show a causal link between the activity and the hazard for a fire hazard condition to be legally valid condition. Nor do we accept that *Long Bay* is authority for such a proposition (bearing in mind, in any case, that it is a decision on the facts before it).

[51] If the evidence were to persuade us that the powerline presented an irresolvable and unacceptable risk to the operation of the Skyline, it would be clearly open to us to decline consent altogether, given s 5. It logically follows, as *Estate Homes* clarified, that it is clearly within our jurisdiction to set conditions that satisfy us that such a risk will be effectively addressed.

[52] However, while a causal nexus is not a necessary prerequisite for a legally valid condition, the matters raised by QLDC and Skyline are relevant to whether we can be satisfied that the undergrounding condition sought by ZJV would fulfill a proper resource management purpose. What constitutes a proper resource management purpose will usually be a question of degree, inherently calling for judgment on the properly principled evidential basis.

[53] *ZJV (NZ)* sets out a series of steps for a process of risk management. These are drawn from the expert evidence the court heard in that case on the application of the Australian/New Zealand Standard ISO 31000:2009 *Risk Management – Principles and Guidelines* ('ISO 31000').[58] However, we did not receive evidence on ISO 31000 and the document does not have status as a RMA standard or policy direction. In the

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56 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, (2006) 13 ENRNZ 33, [2007] NZRMA 137 (SC).

57 *Estate Homes*, at [64]-[66].

58 *ZJV*, at [101]-[103].

circumstances, whilst we find *ZJV (NZ)* offers helpful guidance on how to manage risk, we do not treat it as necessarily definitive for our purposes on steps in the process of risk management. Nor do we understand that to have been the court's intention in that decision. Rather, as it records:[59]

> The final step for the consent authority is to assess all of the risks, together with the other considerations identified in section 104 and/or Part 2 of the Act, and to decide where the public interest lies. We evaluate those matters in Part 5 of this decision.

[54] As this low probability risk is nevertheless a risk to human life, we must be satisfied under s 5, RMA that it is appropriately addressed.

Consideration of ZJV's undergrounding condition

[55] ZJV's submission that this proposed condition is the "most practical" means of mitigating the ignition risk relies on Mr Still's evidence.

[56] One difficulty we have with Mr Still's evidence about that point is that his answers were not informed by any inquiries as to whether undergrounding would be a practicable option. Indeed, in answer to the court, he said he did not know who owned this line.[60] By contrast, the SGRP, produced by Mr Still, explains that Mr Cowan made such inquiries and had been told that undergrounding was "very expensive and as such has not been carried out".

[57] Given what the SGRP says, and the lack of any evidence on the potential cost or feasibility of undergrounding the powerline, we do not accept Mr Still's evidence that it would be practicable to do so. We also take judicial notice of the fact that ZJV has not itself procured the undergrounding of the powerline despite its resource consent RM071053 providing for this (leaving aside the dispute as to whether this implied any obligation to do so).

[58] As we are not in a position to find that undergrounding the powerline would be practicable, we also find that ZJV's proposed condition could potentially frustrate the consent. That is in the sense that it would rely on Skyline securing suitable arrangements with a third party, Aurora, that may prove impracticable. In addition, we

59 *ZJV*, at [104].
60 Transcript, p 171, l 10-12, 30-31.

observe that the condition, as worded, would purport to bind a third party, QLDC. As such, it would likely also be ultra vires.

[59] A further difficulty we have with Mr Still's evidence is that he did not appear to consider the relative practicality of trimming or removing trees that could come into contact with the powerline. However, when questioned by the court, he agreed that the normal precaution for powerlines in a forestry area is to clear and maintain the clearance of the line and it is up to the landowner to do that. Ultimately, he explained:[61]

> Yes. So basically, what I'm saying to you guys is, to the people here is that they're a hazard, its' the power line. Now, you've asked the question. All I'm here is to give you evidence that from my perspective the power line is a hazard. How you mitigate that power line that's for you guys to decide.

[60] There are relevant statutory powers and responsibilities in regard to tree trimming and removal, both for protection of powerlines and formation of fire breaks. Importantly, these can require action to be taken by the responsible landowner, in this case QLDC.

[61] The EHFTR specifies a range of powers and duties in relation to the cutting or trimming of trees that endanger powerlines (termed 'conductors'). If a tree is getting within a certain specified distance of a conductor, Aurora can issue a hazard warning notice to the landowner to take action. We accept QLDC's closing submission that it is not aware of having received any hazard warning notice from Aurora or any requests to access the reserve to cut or trim the trees. If Aurora becomes aware that a tree is encroaching what is termed the 'growth limit zone' in respect of one of its conductors (for an 11 kV conductor, a distance in any direction of 1.6m), it must give a notice to the tree owner in effect to require the cutting or trimming of trees within the prescribed time limits (in the range of 10 – working 45 days depending on the circumstances) (cls 8-10). There are associated offences (cls 26, 27).

[62] FENZA establishes Fire and Emergency New Zealand ('FENZ'). FENZ has various powers to require landowners to take action for the purpose of fire control. 'Landowner' is defined in terms that would include QLDC.[62] For example, FENZ can

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61 Transcript, p 171, l 13-25.

62 The definition in s 62(3) refers to "...any person having a lawful right to use or occupy any land for an unexpired period of not less than 10 years, including any rights of extension or renewal".

give notice to a landowner to make and clear any firebreak on the landholder's land 'if FENZ reasonably considers it necessary for the purpose of fire control' (s 62). 'Fire control' encompasses preventing, detecting, controlling and putting out fire and protecting persons and property from fire (s 6, FENZA). A landowner can appeal against a notice (and a dispute resolution regime applies in such an event) (s 63, FENZA). Subject to that, the landowner must comply with a notice within 1 month of receiving it (s 64, FENZA).

[63] Therefore, both the EHFTR and FENZA provide legislative frameworks that can require QLDC, as the owner of the trees, to take action to mitigate both the risk to the powerline itself and the wider fire risk.

[64] As Mr Dent explained, QLDC has already secured a designation outline plan to remove the conifer trees either side of the gondola cable way and it plans to complete this work before the expanded and refurbished restaurant building is ready for occupation and use. Provided that there is a suitably worded related condition, we find that the present low probability risk of an ignition event endangering the Skyline facilities would be significantly further reduced by this intended work.

[65] As for any further tree removal in the vicinity of the powerline, we find this is also most appropriately a matter for QLDC, rather than Skyline. Entities with relevant interests in the safe operation of the line and proper management of fire risk have the statutory capacity to force further action by QLDC, if they consider it necessary. Of course, further RMA approval may be necessary for significant tree clearance. However, such approval could not be by way of our imposition of a condition on any consent we grant to Skyline, in that its proposal did not extend to tree removal in the vicinity of the powerline.

[66] Therefore, we find that it would be unreasonable and not serve any valid resource management purpose to impose a condition requiring undergrounding of the powerline or the culling or removal of trees.

Consideration of the QLDC conditions

[67] We find that the QLDC conditions are soundly compatible with the related legislation we have referred to.

[68] The conditions would sit well with the RZMP (which will continue in effect)[63] and with FENZ's fire control planning responsibilities (s 21). Specifically, that is in the sense that the QLDC conditions would provide for the following:

(a) the cooperative formulation of a joint Fire Risk and Evacuation Management Plan ('FREMP') for Ben Lomond Recreation Reserve;
(b) the certification of that FREMP by QLDC according to specified principles of risk management;
(c) the periodic review of the FREMP to account for changes in circumstances (in particular, changes in operators within the reserve); and
(d) compliance with the FREMP.

[69] Inherently, effective management of fire risk within the environment of Ben Lomond Reserve calls for such an integrated and collaborative approach. On this theme we now raise an issue that puzzles and concerns us, as to the relationship between Skyline and ZJV.

[70] At one level, their different enterprises appear synergistic. Specifically, the evidence indicates that some 95% of ZJV's customers travel to and from the Ziptrek on Skyline's gondola, as ordinary paying customers of Skyline. Yet, there is a history of litigation between them and an adversarial approach taken by each of them before us. It is, of course, the prerogative of parties how they run their cases (subject of course to abiding our directions and other duties to the court and other parties about which we have no concern). Rather, our concern is as to whether the adversarial approach displayed before us signals a need for caution in how consent conditions on this topic are framed. Putting the matter as directly as we can, we are anxious to avoid any scenario where the resource management purpose sought to be served by the conditions we may endorse is defeated by 'bad blood' or other relationship difficulties. That is relevant because the presently framed conditions as proposed by QLDC and Skyline could be defeated were there to be a lack of necessary cooperation between Skyline and ZJV. In particular, we bear in mind that we cannot compel a third party to do anything via a consent condition.

[71] If necessary, we consider it would be readily possible to fine-tune the conditions further such as to overcome any impasse risk. For instance, this could be done by

63 Section 195, sch 1, cl 38.

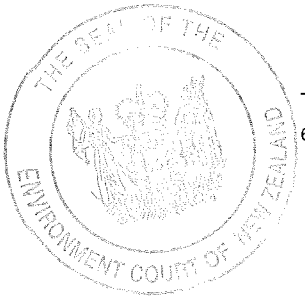
framing certain obligations (such as to arrange meetings or achieve a joint FREMP) on a best endeavours basis and/or to allow for a FREMP to be certified notwithstanding any hold out issue.

[72] However, we consider the more constructive approach in this Interim Decision is to allow Skyline and ZJV further opportunity, with QLDC, to work towards a mutually acceptable set of conditions for a joint FREMP. Specifically, we are optimistic that this would allow for a better outcome, in the sense of joint ownership. However, we respect the fact that a consent condition can only legally bind a consent holder. As noted, if necessary, we will determine this matter in due course even in the absence of any agreement.

[73] In addition, given that QLDC intends to complete its programme of clearance of conifer trees either side of the gondola cableway prior to Skyline's occupation of the Upper Terminal, we see merit in having that reflected in a suitably worded condition. In particular, if the completion of the clearance programme was specified as a prerequisite for occupation of the upgrade Upper Terminal, this would give assurance that this intended mitigation would be in place in time. We make a direction on this matter.

[74] We find that package of conditions would also be compatible with relevant HSWA duties that would be borne by Skyline, QLDC, ZJV and others as 'PCBUs'.[64] Specifically, that is in the sense that cooperative formulation of the FREMP should assist to ensure the health and safety of workers and other persons (s 36). However, the HSWA duties are overarching and provide an additional measure of management of fire risk that we take judicial notice of.

[75] Having considered this matter in terms of proposed plan policy 21.2.1.8, for the reasons we have given, we find that the QLDC conditions on fire risk are sufficient and appropriate, subject to our findings at [70]-[74]. In particular, we find that this amended package of conditions would, together with other the legislative duties and powers we have discussed, effectively enable effective and safe provision against fire risk.



[64] Under the HSWA, a PCBU is a 'person conducting a business or undertaking'.

Is the proposal appropriate in terms of effects on landscape and visual amenity values ('Issue B')?

[76] On these matters we heard from Skyline's architect (Mr Wyatt), QLDC's urban design expert (Mr Jolly), and those parties' landscape architects (Ms Snodgrass for Skyline, Mr Denney for QLDC) and planning experts (Mr Dent for Skyline, Ms Sinclair for QLDC).

[77] Those experts all supported the proposal in landscape and visual amenity terms, subject to some very confined differences. ZJV's planning expert, Mr Brown, briefly commented on an aspect of the proposed landscape plan condition relevant to ZJV's interests (and this is noted at [119]). As the closing submissions for the parties made clear, those differences between experts were primarily with regard to whether certain proposed conditions should be imposed in the event that consent is granted,[65] i.e:

(a) whether the risk of glare from the Upper Terminal should be addressed by a condition;
(b) whether or not consent conditions should specify colour controls for construction hoardings and/or temporary buildings (QLDC seeking such controls,[66] Skyline opposing this);[67] and
(c) what consent conditions should specify for construction lighting (Skyline seeking a more flexibly worded condition than QLDC proposes).[68]

[78] No other party called expert evidence on these matters. However, Mr Walker raised some concerns in his submission and evidence.[69] While Mr Walker also commented that he "did not oppose the Interim Decision on matters of ...Visual Coherence and Landscape pertaining to the Top terminal", we understand him to mean that he did not oppose this matter being the subject of this Interim Decision (rather than being a statement that he no longer had the concerns he expressed in evidence).[70]

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65 Ms Snodgrass (landscape and visual) and Mr Dent (planning) for Skyline; Mr Denney (landscape and visual) and Ms Sinclair (planning) for QLDC.
66 QLDC closing submissions, at [9](b).
67 Skyline closing submissions, at [7]-[8].
68 Skyline closing submissions, at [9]-[11].
69 Mr Walker evidence, [1]-[21].
70 Email from Basil Walker to court's case manager (Ms McKee), dated 30 June 2017, and headed 'Closing Submissions from Basil Walker' ('Mr Walker's closing submissions').

[79] ZJV's closing submissions did not address this Issue B.[71] ZJV's position on the cumulative effects of any adjacent carparking building is reserved.

[80] We have also considered related aspects of the s 42A report and the fact that some submitters have resolved earlier concerns in settlements with Skyline which are now reflected in its current proposal.

Existing landscape environment and assessment matters

[81] The existing gondola and Upper Terminal and the proposed upgrades to them are within the existing plan's Outstanding Natural Landscape (Wakatipu Basin) ('ONL') (and also in the identified ONL under the proposed plan). As the relevant experts addressed, there are several related objectives, policies, and assessment matters under the existing and proposed plans. In addition, we consider ss 6(b) and 7(c) and (f) on matters in relation to landscape and visual amenity values also relevant and we take them into account in our findings.

[82] As the experts agreed, an important matter of context is that the existing gondola and Upper Terminal are a long-established part of the existing landscape environment of Bob's Peak. The Upper Terminal is located on a prominent slope[72] and is very visible from many viewing points in the town centre and well beyond.[73] It breaks the line and form of the ridgeline[74] it appears to perch on. The gondola (including pylons) are also prominent. That is accentuated by the fact that the gondola runs up the middle of wide cleared swathe between the Douglas Firs. QLDC's landscape expert, Mr Denney, fairly characterised the existing facilities as an 'anomaly' within the context of the ONL.[75]

[83] The existing plan (at [87]) gives the following direction as to the consideration of whether the visual effects of a proposed development would be more than minor:

> In considering the potential visibility of the proposed development and whether the adverse visual effects are minor, the Council shall be satisfied that:

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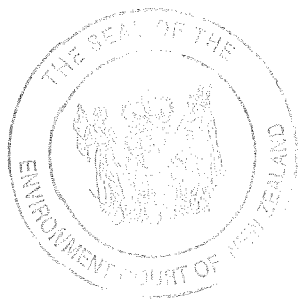
71 Submissions of ZJV (NZ) Ltd, dated 30 June 2017 ('ZJV closing submissions').
72 QLDC s 42A report (unpaginated) under heading 'Visual Coherence and Integrity of Landscapes'.
73 Mr Denney, evidence-in-chief for QLDC, at [11].
74 QLDC s 42A report (unpaginated) under heading 'Visual Coherence and Integrity of Landscapes'.
75 Mr Denney, evidence-in-chief for QLDC, at [14].



(i) the proposed development will not be visible or will be reasonably difficult to see when viewed from public roads and other public places ...

[84] The proposed development is of an already highly visible facility. As such, we consider this as a matter of incremental change to that visibility. Also, we consider this matter on the basis that the consensus expert opinion is that future extent of visibility of the development will be softened over time by the landscape planting.

[85] The existing plan identifies several assessment matters on landscape and visual amenity values. These were thoroughly traversed by Mr Denney[76] and his related assessment informed Ms Sinclair's evaluations of relevant objectives and policies.[77]

Effects on openness of landscape (existing plan 5.4.2.2(1)(a))

[86] We have considered and accept Mr Denney's evidence on these matters. That includes his opinion that the topography achieves a degree of natural containment and effects are also mitigated by the presence of the Douglas Firs (but noting that these trees can be felled under Designation #373 and several are programmed to be felled). We accept Mr Denney's evidence in finding that the proposal as notified would adversely affect open space values of the site and surrounding landscape to a moderate degree. That is because of the increased prominence it would give to built form, increased modification to natural landform and increased domestication of the ONL landscape. We also accept his evidence that this would be mitigated by the more extensive and intensive indigenous planting now proposed, design controls on built form, and use of green technologies for retaining structures.[78]

Effects on visibility (5.4.2.2(1)(b))

[87] We accept Mr Denney's evidence[79] that the site has a broad viewing catchment extending across public and private land of the town centre, several residential areas (including Queenstown Hill and Kelvin Peninsula), Gorge Road and northwards, Coronet Peak Road and Remarkables Ski Field Access Road, Jacks Point, several parts of the waters of the lake, several parts of the skyline ridge and the Ben Lomond scenic and recreation reserves. The existing level of development within the site is

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76 Mr Denney, evidence-in-chief for QLDC, at [70]-[108].
77 Ms Sinclair, evidence-in-chief for QLDC, at [180]; Mr Dent, for Skyline, at [6].[102].
78 Mr Denney, evidence-in-chief for QLDC, at [54].
79 Mr Denney, evidence-in-chief for QLDC, at [81]-[82].

visually prominent and the proposal will also be easily visible in public and private views.

[88] As to whether the proposal would dominate or detract "from public or private views otherwise characterised by natural landscapes", we also accept Mr Denney's opinion that, outside of the Ben Lomond Reserve, this would be only slightly beyond what already occurs with the existing facility. We also find this would be further moderated, but not eliminated, by the updated planting regime (as noted, a matter on which the experts now have only confined differences). We also accept Mr Denney's opinion that the proposal would be "overtly more obvious" within the reserve and the site, as a result of both building expansion and excavations. The experience within such close proximity would be that buildings would dominate natural landscape to a moderate to high degree.[80] We also accept Mr Denney's evidence that the natural topography would allow for modifications to the access road (including retaining structures) to be effectively absorbed, supported by his recommended 'green engineering solutions' and increased planting of indigenous species (such as to ensure the landscape retains the prominence of natural character).[81]

[89] As to the reference in the assessment matters to whether the proposal 'can be appropriately screened or hidden from view', it is self-evident that it cannot be hidden. On this matter, however, we accept Mr Denney's opinion as to the ability to ensure the proposal "is integrated into the ONL setting" through the proposed landscape treatment.[82]

[90] Para (v) of this assessment matter as to effects on visibility is:

> ... the proposed development is not likely to adversely affect the appreciation of landscape values of the wider landscape (not just the immediate landscape).

[91] On this matter, we accept Mr Denney's evidence that the gondola and Upper Terminal are an acknowledged part of the Queenstown landscape.[83] An aspect of this is the fact that it is recognised in QLDC policy and the Ben Lomond Reserve Management Plan ('RMP'). More broadly, it is an important tourist destination and a

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80 Mr Denney, evidence-in-chief for QLDC, at [85].
81 Mr Denney, evidence-in-chief for QLDC, at [86].
82 Mr Denney, evidence-in-chief for QLDC, at [87].
83 Mr Denney, evidence-in-chief for QLDC, at [89].

long-established and accepted part of Queenstown. It is, in those respects, an accepted quirk within the ONL. That does not, of course, give license to undertake further development regardless of its nature and scale. We agree with Mr Denney that there are limits to how much built form and modification of the site could be absorbed without imperiling the ONL values.[84] However, in view of our finding that the proposal is properly designed and scaled (and can be appropriately conditioned) we also find that it is not likely to adversely affect the appreciation of landscape values. We find that to be the case for the wider landscape as well as the immediate landscape within Ben Lomond Reserve itself. Our finding as to the immediate landscape takes cognizance of the fact that it will be overtly more obvious and dominant within the reserve and the site. However we find that, overall, this would not be such as to adversely affect people's appreciation of the landscape values of the ONL, given the historical context we have described.

[92] Para (vi) under this heading is:

> the proposal does not reduce neighbours' amenities significantly.

[93] Mr Denney notes some effects on the amenity values of the neighbouring ZJV and AJ Hackett sites. AJ Hackett is not a party before us. In any case, we have considered the various matters noted by Mr Denney (primarily shading) and his opinion that the effect "would not be comparatively significant although it would be high".[85] In any case, within the context of this assessment matter, we presume the reference to 'amenities' is to visual amenity values. We find that the proposal would not significantly reduce neighbours' amenity values.

Visual coherence and integrity of landscape (5.4.2.2(1)(c))

[94] As to the matters in (i), we accept Mr Denney's evidence the proposed modification and expansion to the Upper Terminal and the new pylon structures for the gondola "would break a skyline ridge and prominent slope within a broad viewing catchment" but "within [the] similar context and nature of existing breaches".[86]

[95] As to the matters in (ii), we accept Mr Denney's evidence that the greatest effect

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84 Mr Denney, evidence-in-chief for QLDC, at [89].
85 Mr Denney, evidence-in-chief for QLDC, at [90]-[92].
86 Mr Denney, evidence-in-chief for QLDC, at [93].

that earthworks (including for the access road) would have is in those places where large retaining structures are required. On the basis of his evidence, we find that earthworks would have only a small adverse effect on the naturalness of the landscape other than in those relatively isolated locations. With the proposed mitigation, we find the overall effect appropriate. We agree with Mr Denney that (iii) as to proposed new boundaries is not relevant.

Nature conservation values (5.4.2.2(1)(d))

[96] We accept Mr Denney's evidence that the proposal would have negligible effects on such values.[87]

Cumulative effects of development on the landscape (5.4.2.2(1)(e))

[97] As to (i), we accept Mr Denney's evidence that the existing Upper Terminal and gondola have already compromised the visual coherence and naturalness at a prominent location in the landscape.[88]

[98] As to (ii), we agree with Mr Denney that the question of whether the site has reached a 'threshold' with respect to the site's ability to absorb further change is to some extent related to what viewers would tolerate. Related to that, we agree with Mr Denney that the site's ability to absorb the redevelopment is helped by the fact that the redevelopment would occur in a relatively contained lower part of the clearing on the ridge and in close proximity to the already prominent existing Upper Terminal development. Whilst we accept with Mr Denney's opinion as to the importance of careful design and mitigation (including for landform modification),[89] we do not agree that it is necessary to impose any condition on glare (for the reasons we give from [123]). As such, we find on the evidence that the extent of mitigation now proposed in the QLDC conditions would be sufficient for ensuring the proposal does not represent 'a threshold with respect to the site's ability to absorb further change'.

[99] As to (iii) and (iv), as Mr Denney points out, the proposal adds to and extends the established Upper Terminal and gondola. Those existing facilities already present elements that are inconsistent with natural character and the surrounding landscape,

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87 Mr Denney, evidence-in-chief for QLDC, at [98]-[100].
88 Mr Denney, evidence-in-chief for QLDC, at [101].
89 Mr Denney, evidence-in-chief for QLDC, at [102].

for the reasons explained by Mr Denney. While the proposal will, to a degree, further compromise that character and landscape (particularly in terms of increased visual prominence and domestication), we find on the evidence that, as mitigated by proposed conditions, the change would be tolerable.

Positive effects (5.4.2.2(1)(f))

[100] In terms of the listed types of positive effects on landscape and natural character values, we accept Mr Denney's evidence that these are essentially confined to some limited visual mitigation, a small enhancement to indigenous biodiversity and a limited contribution to restoration of ecological values. We also agree with Mr Denney that these limited positive effects do not warrant the imposition of covenants or other such protective measures.[90]

Other related assessment matters

[101] As part of his thorough approach to assessment of landscape and visual amenity effects, Mr Denney also considered various more general assessment matters. For the reasons he has set out, which we accept, we find:

(a) temporary noise and visual effects of helicopter movements would have an overall 'small' adverse effect on landscape (and we find it does not warrant any response by way of mitigation);
(b) our above findings sufficiently address relevant considerations under the assessment matters for earthworks in 22.4 iv(a)(i) and (iii), and (b)-(e); and
(c) the landscape coverage proposed for the Lower Terminal, as provided for under the QLDC conditions, would properly and sufficiently address the assessment matter for landscape coverage in the higher density residential zone (7.7xxi(1)(a)).

Bulk and location, design and appearance of the Upper Terminal and the gondola upgrade

[102] We record that none of QLDC's experts (or witnesses for any other party) recommended any changes to the proposed Upper Terminal development in terms of its bulk and location, design and appearance. Similarly, no expert recommended any

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90 Mr Denney, evidence-in-chief for QLDC, at [104]-[108].

changes to the design or location of the additional gondola pylons and other modifications. Rather, for these aspects, the focus was primarily on the nature and extent of landscape planting (where differences were also very confined, as we explain at [114]-[120]).

[103] On the evidence, we find that the Upper Terminal development would temporarily detract from visual amenity values within Ben Lomond Reserve. That effect would be present during construction and for a period of years after completion of the Upper Terminal development. That is in the sense that, during that period, the Upper Terminal development would be materially more prominent than the existing Upper Terminal (when viewed from the reserve, i.e. rather than being 'reasonably difficult to see'). Given the inherent relationship between the visibility of a proposal and its effect on landscape values, there would be a corresponding temporary adverse effect on landscape values. There would also be a corresponding temporary detraction from the open space values of the site and surrounding landscape. That would occur through the temporarily higher impacts of the additional built form, increased modification to natural landform and increased domestication of the ONL landscape during this transitional period.

[104] The visual and associated landscape effects of the changes to the gondola, (including the change to 10 seater cars and the additional and differently located gondola pylons), would be comparatively much less significant. In essence, that is because of the already obvious clearing through which the existing gondola runs.

[105] However, all these effects would progressively and relatively quickly diminish with time, as people grow accustomed to the development and the landscape planting matures. We find that, within a relatively few years, effective integration of the redevelopment into the landscape would have occurred.

[106] Mr Walker expressed concern that almost doubling in size of the existing building in the ONL would not effectively be absorbed into the landscape.[91] While noting those concerns, we find that the strong consensus of expert opinion gives us a sound and proper basis for concluding that the Upper Terminal is appropriate in its bulk and location, design and appearance (and the gondola upgrade is similarly appropriate).

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91 Mr Walker evidence, [1], [2]. Our findings on other matters raised by Mr Walker are at [277]-[285].

[107] In reaching those findings, we have considered the fact that, as the responsible requiring authority, QLDC intends to clear Douglas Firs in the vicinity of the gondola under its designation.

Bulk and location, design and appearance of the Lower Terminal

[108] On the matter of the bulk and location, design and appearance of the Lower Terminal redevelopment, we heard evidence from Skyline's architect, Mr Wyatt, and QLDC's urban design expert, Mr Jolly.

[109] Mr Wyatt explained how he had adjusted aspects of the design in response to comments made by QLDC's urban design expert Mr Jolly in the s 42A report. Specifically, those comments were as to whether the building would make a positive contribution to the amenity of the public space.

[110] One aspect of this was visual clutter in the original design caused by canopies along the entry path. Mr Wyatt deleted the canopies. Mr Wyatt also made some adjustment to the position of stone walls in relation to the road entry, to improve awareness of the proximity of traffic and pedestrians to each other.[92]

[111] A further issue raised in the s 42A report was whether the proposal provided attention "to the human scale in terms of street level experience". An aspect of this was a concern that the glazing height would be intimidating. The s 42A report invited consideration of the introduction of a horizontal break in the glazing to address this. Mr Wyatt raised concern that this would diminish the appreciation that an outside observer would get of the interior volume of the building (i.e. an architectural positive in Mr Wyatt's opinion). That is, on this aspect of glazing, Mr Jolly and Mr Wyatt simply hold different professional opinions on good architectural design. However, this prompted Mr Wyatt to address the originally proposed large flat windowless walls that would face Brecon Street and the Kiwi Birdlife Park, and give a somewhat industrial appearance. To soften this, he proposed the addition of a layer of powder coated aluminum panels in three shades of grey in a "crazy paving pattern",[93] so as to add visual interest. With those changes, Mr Wyatt was satisfied that his design would also "provide visual interest and ... appropriate architectural treatments, materials, detailing, and

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92 Mr Wyatt rebuttal for Skyline, at p 2.

93 Mr Wyatt evidence, at [11].

appropriate landscape elements" (a further matter queried in the s 42A report).[94]

[112] Mr Jolly explained that, with these adjustments to design, he was largely satisfied (leaving aside the issues reserved in relation to carparking and traffic and the interface with Brecon Street).

[113] QLDC noted Mr Jolly's support for the Lower Terminal from an urban design perspective.[95] We accept the evidence of Mr Wyatt and Mr Jolly in finding the Lower Terminal appropriate in terms of bulk, location, design and appearance.

Skyline's proposed landscape planting plan

[114] Of particular significance for our consideration of the landscape and visual effects of the proposal, all of the experts supported Skyline's finally proposed landscape mitigation planting plan. Related to this, as noted, the experts ultimately differed only on confined matters of appropriate consent conditions.

[115] As was explained by Ms Snodgrass for Skyline, the chronology was as follows:[96]

(a) Ms Snodgrass prepared the Landscape Report that formed part of Skyline's consent application AEE. This Report included separate Landscape Concept Plans ('LCPs') for the Upper Terminal and Lower Terminals. For the Upper Terminal, the LCP denoted areas for planting of native beech, native ground cover, and grass. For the Lower Terminal, the LCP denoted a combination of native ground cover, a bollarded paved area with pockets of ground cover planting and a design of seating, and an area of raised planters behind a retaining wall (for native species including native beech);[97]

(b) Mr Denney prepared his own landscape assessment as part of the s 42A report. This went much further than reviewing Ms Snodgrass's report.[98] It included Mr Denney's assessment of the site and landscape, including in

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94 Mr Wyatt rebuttal for Skyline, at pp 2, 3.

95 Closing submissions for QLDC, dated 30 June 2017, at [23], referring to Mr Jolly's evidence-in-chief for QLDC, at [9].

96 Ms Snodgrass, evidence-in-chief for Skyline, at [5]-[27].

97 Consent application AEE Landscape Report.

98 S 42A Report, Attch C, Landscape Assessment (Richard Denney).

terms of the landscape values and criteria specified in the existing plan (and also with regard to the Ben Lomond and Queenstown Hill Reserve Management Plan). It included an extensive set of recommendations for what consent conditions should address, should consent be granted. His recommendations for the extent of landscape planting went further than was proposed in the AEE Landscape Report's LCPs. For example, it recommended that conditions:

(i) address glare risk, lighting arrangements and external paint finishes (including as to reflectivity);

(ii) require contouring and shaping and other measures in regard to earthworks;

(iii) provide for significantly more extensive and intensive planting (particularly involving additional indigenous trees, grasses and shrubs) for the Upper and Lower Terminals, and more prescriptive and restrictive associated controls, including as to maintenance of landscape planting.

(c) Ms Snodgrass then revised her originally proposed LCPs[99] in response to Mr Denney's recommendations. Her relevant description was:

> The revised planting included indigenous groundcover, shrub and tree planting to the north to the top of the bank below the Luge track, north below the luge lift line; west to roughly the lease boundary; south west to the Ziptrek site and southern lease boundary, and south along the edge of the luge track that skirts the southern side of the building. Groups of indigenous trees, namely native beech (Lophozonia menziesii, Fuscospora cliffortioides, and Fuscospora fusca) are proposed on the bank on the north western site of the building, to the east, west and south to soften views of the base of the new top terminal and restaurant, provide a degree of scale, and enhance the natural character. The groundcover and shrub species have been chosen from 'Appendix One: Ecology Report' from the 'Ben Lomond and Queenstown Hill Reserve Management Plan' where they are available from plant nurseries, and where they will not cause excessive shading on footpaths and luge tracks.
>
> The landscape effects of the revised planting will be a significant increase in the natural character and potential ecology because of the size of the area to be planted, 5,400m^2, and the variety of species. The planting will also

99 Ms Snodgrass references these as Revised Plan 05052016 Skyline Gondola New Base Building Landscape Concept Plan CP1b dated 29 August 2016 (Attch B to her evidence-in-chief), and Revised Plans 05052016 Skyline Gondola New Top Terminal Building Landscape Concept Plan CP4d to CP4e, dated 17 March 2017.

provide a continuous native context.

(d) Ms Snodgrass also informed us how Skyline's updated proposed conditions responded to each of Mr Denney's recommendations. As we have noted, and address at [77], this has meant that remaining differences between QLDC and Skyline on proposed conditions are confined to the matters of glare, colour controls for construction hoardings and/or temporary buildings, and aspects of construction lighting.

[116] We are satisfied that the changes made through this chronology are within scope and we treat them as part of the proposal. In light of those changes QLDC's experts, Mr Denney and Ms Sinclair both expressed support for the proposal in landscape and visual amenity terms. We observe at this point that we are indebted to Mr Denney for his thorough and constructive approach in these matters, and to Ms Snodgrass for her professional approach in acknowledging and responding to Mr Denney's recommendations. It is fair to observe that Mr Denney has been instrumental in remedying what was an inadequate initial approach on the part of Skyline in these matters.

[117] A minor remaining point of difference between Ms Snodgrass and Mr Denney during the hearing concerned landscape planting treatment at the base of rock faces. Ms Snodgrass explained that Skyline's landscape plan did not extend to cut faces given the rock substrate.[100] Mr Denney said there are a range of design solutions available.[101] In cross-examination, Ms Snodgrass conceded that.[102]

[118] In any case, we assume earlier differences are otiose, given that Skyline does not seek any particular exemption in conditions. If we are wrong about that, we record that we accept the evidence of Mr Denney in finding that planting at the base of cut rock faces is practicable and necessary. In particular, cut rock faces are an obvious source of visual impact within the ONL. Self-evidently, it would assist mitigation. As such, it better accords with related existing and proposed plan objectives and policies and s 6(b).

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100 Ms Snodgrass evidence-in-chief for Skyline, at [24].
101 Mr Denney, summary statement of evidence for QLDC, at [11].
102 Transcript, p 43, l 11-22.

[119] Planner for ZJV, Mr Brown briefly noted his support for the following part of Skyline's proposed condition 10 (condition 13(a)(iv) of the QLDC conditions) as enabling avoidance of any potential adverse effects on Ziptrek (i.e. ZJV's operations):[103]

> ... planting in the vicinity of the Ziptrek reception platform shall be designed in consultation with Ziptrek to ensure planting does not excessively shade or visually block the access to their top tree house platform.[104]

[120] We accept his evidence on that. We accept the evidence of Mr Denney and Ms Snodgrass in finding the now proposed landscape planting and treatment appropriate.

Appropriateness of proposed conditions for Issue B

[121] The substantial impetus for Skyline's updated proposed conditions to B was the thorough work of Mr Denney, commencing with his s 42A Landscape Assessment.

[122] Skyline was the only other party to address consent condition wording in closing submissions on this Issue B. As we have noted, Skyline records that most of the amendments in the QLDC conditions are "relatively minor and Skyline has no objection to such with the exception of those identified above" (i.e. on the matters of glare, construction hoardings and temporary buildings and construction lighting).[105] We now address those points of difference.

Glare (and reflectivity) in relation to the Upper Terminal

[123] In relation to the Upper Terminal development, QLDC seeks the following glare condition:[106]

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103 Mr Brown evidence for ZJV, at [2.18] and [2.19].

104 The court observes that Mr Brown's actual expression of this condition differs slightly in his evidence in that, rather than the words "...the access to their top tree house platform", he says "... the access to the platform and the platform". We assume that was a typographical error in his evidence and he intended to quote the above.

105 Skyline closing submissions, at [34].

106 QLDC closing submissions, at [9](a).

> 6. A glare report prepared by a suitably qualified person shall be submitted to the Manager Resource Consents, Queenstown Lakes District Council prior to construction of the upper terminal/restaurant building extension, to identify the extent of any adverse effects, if any, from glare and shall identify the means to mitigate such effects. Mitigation measures if required shall be incorporated into the building and/or landscape design and shall be certified by Council prior to construction.

[124] Skyline questions the justification for such a condition but indicates a willingness to accept an appropriately worded condition.[107]

[125] In essence, this matter comes back to what the evidence reveals as to the glare risk presented by the modification proposed to the Upper Terminal.

[126] Mr Denney explained that there was a potential for increased glare and sunstrike from the increased extent of glazing across the building. He explained his concern was that this may potentially highlight the presence of the building in the wider landscape.[108] Ms Sinclair relied on Mr Denney's opinion in supporting this proposed condition.

[127] Skyline relied on the evidence of its architect, Mr Wyatt. He explained that the similarity in orientations that the face of the building and the fact that the glass intended to be used would also be similar (not silvered reflective glass of any kind). Having been a resident of Queenstown more than 40 years, he had "never encountered any glare or heard of any concerns about glare with regard to the existing top terminal".[109] He noted that the angle of the sun "changes with each minute of the day and each day of the year". When cross-examined, he remained firm in his opinion that a glare report was unwarranted, pointing out the fact that it would rely on "so many station points that you could choose, so many days of the year and so many times of the day" and hence, was of limited use. He reiterated that reflective glass would not be used.[110]

[128] Skyline submits that there is "little evidence to suggest that there is an existing glare issue". It also raises a concern as to the uncertainty as to who would be

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107 Skyline closing submissions, at [5]-[6].
108 Mr Denney, evidence-in-chief for QLDC, at [82].
109 Mr Wyatt evidence for Skyline, at [15]-[21].
110 Transcript, p 29.

considered "a suitably qualified person" in QLDC's proposed condition.

[129] The greater the glazed surfaces, the greater the reflection of sunlight. However, it does not follow that there is an associated material risk of glare effects warranting a condition. Whether a condition would be warranted depends on the magnitude of any risk that sunlight reflection would occur such as to detract from related landscape or visual amenity values and/or give rise to glare nuisance.

[130] The existing Upper Terminal already has extensive glazed surfaces and the proposal would significantly increase the extent of glazing. Were the evidence to show that there are adverse glare effects associated with the existing Upper Terminal, that would strongly support the imposition of a glare condition as sought by QLDC. However, we did not receive any evidence the existing glazing caused any such glare effects. In the absence of evidence of an existing glare problem, there is not a sound evidential basis for determining a problem would arise with the expansion and modification of the Upper Terminal. As such, there is no sound evidential justification for a condition in terms of related plan objectives, policies and assessment matters (or pt 2, RMA).

[131] There are related issues as to whether any such condition would be sufficiently certain in its operation. We accept Mr Wyatt's evidence in finding that there could be significant uncertainty associated with determining the locations for assessment of sunlight reflection, as well as determining whether reflection in those locations was 'adverse' glare. In particular, whilst the glazing is fixed, sunlight is not, and hence, any reflection consequences would be constantly moving. As such, there would be significant potential for dispute as to methodology for assessment and any mitigation consequences.

[132] For completeness, we have also considered and dismiss as unwarranted a condition prohibiting use of reflective glass. That is because we are satisfied that reflective glass is not what Skyline seek, nor would have any cause to seek. As such, imposing a condition of this effect would again have no resource management purpose.

[133] On the evidence we find any risk of glare so low as to not warrant any response by way of a condition. That finding does not mean that there would be no available RMA recourse in the unlikely event that a glare nuisance arose. Specifically, we refer to the duty in s 17 and the related capacity for QLDC to issue an abatement notice or

for QLDC or any person to seek an enforcement order to mitigate any adverse effect caused by or on behalf of a person (ss 17, pt 12, RMA). Enforcement action would not be precluded by s 319(2), RMA. That is because we find that a condition would be unwarranted because of a lack of sufficient evidence that adverse glare would arise (and in view of the uncertainty and cost of the proposed condition). Our finding on that does not constitute any express recognition on the court's part that adverse glare would arise or be appropriate.

[134] For those reasons, we find that no valid resource management purpose would be served by imposing any glare condition.

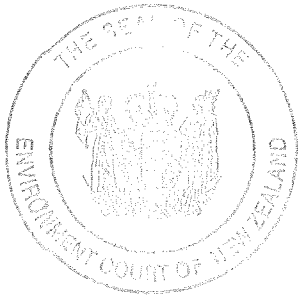
[135] For completeness, we record that the issues raised in the s 42A report concerning Upper Terminal reflectivity with the proposed metal cladding (particularly roofing materials) are overcome by the now agreed related proposed condition on this matter. In light of that agreement, we are also satisfied and find this matter would be effectively addressed by the related proposed condition.

Whether to specify colour controls for hoardings and temporary buildings

[136] QLDC seeks that Skyline's proposed condition 7 as to the external paint finishes of buildings and structures be extended to construction hoardings and temporary buildings for the construction period, within Ben Lomond Reserve. In essence, this would require them to be painted Resene *Karaka Green* or dark grey or green with specified light reflectivity.

[137] QLDC seeks this on the basis of the recommendation of Mr Denney (and Ms Snodgrass's concession in cross-examination that the same landscape justification applied as it does for the permanent buildings and it would be a "good outcome" if this was required).[111]

[138] Skyline's planning witness, Mr Dent opposed QLDC's proposed condition. In cross-examination he explained why he considered such a condition offered insufficient benefit to justify its potentially significant costs (e.g. in the sense that construction buildings and hoardings are typically leased from construction companies). He pointed out that, from wider views, it would be evidently a construction site from the fact that



111 Transcript, p 44.

there would be visible scaffolding, cranes and so forth. While he acknowledged the painting of the hoardings and temporary buildings could be beneficial for those "within the site itself, those people would be fully cognisant in any case of the fact that it is a construction site. However, he acknowledged that hoardings would be in place for the four year construction period (although moving around the construction site) and ultimately conceded that he would not "necessarily be opposed", were the court to impose this addition to the condition.

[139] Skyline submits that what QLDC seeks would not mitigate the effects of the proposal to any significant degree. That is because construction hoardings and temporary buildings would be readily viewed as part of a construction site, regardless of how they are painted. It submits that any "minor improvement" gained by painting the hoardings would be outweighed by the costs incurred in painting them.[112]

[140] We accept Mr Dent's evidence in finding that the wider views of the site are the most relevant when considering the effect of construction on ONL landscape and visual amenity values. That is not to say closer views and experiences are not relevant. Rather, those who experience construction from within the site or in its immediate vicinity will be overwhelmingly aware of the construction site regardless of how hoardings and construction buildings are painted. We also accept Mr Dent's evidence in finding that we should consider the question of the colour of hoardings and construction buildings in the context of construction effects as a whole.

[141] Inevitably, construction activity will have a disruptive effect on the landscape and amenity values (including visual amenity values) associated with Bob's Peak and Ben Lomond Reserve. That disruption will arise from a combination of visual effects, noise and construction activity. For example, the disruption would arise through the movement of cranes, machinery and workers, demolition and scaffolding. However, none of the experts considered that the effects of construction on landscape or amenity values were so significant that development of the proposal ought to be declined.

[142] There would be significant associated visual effects especially in work on the Upper Terminal. Construction hoardings around the Upper Terminal construction site would be viewed in that context as having an associated visual effect. That is similarly the case for temporary construction buildings there, and for hoardings and buildings

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112 Skyline closing submissions, at [7], [8].

associated with excavation and construction activity for the gondola and Lower Terminal.

[143] Whether or not the hoardings and temporary construction buildings were visible, those viewing Bob's Peak and Ben Lomond Reserve (from wide viewing points or in closer proximity) would be very mindful that construction was being undertaken. We find that this would not be materially alleviated by the choice of colour applied to visible hoardings and construction buildings.

[144] We find that the existing and proposed plan provisions (and ss 6(b), 7(c) and (f), RMA) anticipate construction as a temporary, albeit major, intrusion into landscape and amenity values provided that its effects are soundly managed. Inevitably, construction conditions must be practicable, in the sense that an aspect of protecting landscape and amenity values is to ensure construction can be effectively and efficiently undertaken and completed. A further aspect of this is that we ought not to impose conditions on construction that impose costs but do not achieve any material gain in reducing construction effects on landscape and visual amenity values.

[145] Therefore, we accept Mr Dent's evidence in finding that a condition on the colour treatment of construction hoardings and buildings is not warranted.

What conditions should specify for control of construction lighting

[146] The QLDC conditions[113] propose two related changes to Skyline's proposed conditions concerning construction lighting:[114]

(a) the following tracked change to Skyline's proposed condition 3 (which was carried forward from the conditions recommended in QLDC's s 42A report):[115]

> 3. Prior to commencement of construction of the upper terminal/restaurant building extension an external lighting plan <u>including any external lighting required for the construction period</u> shall be submitted to the Manager Resource Consents at Queenstown Lakes District Council for review and certification and shall demonstrate that external lighting is in accordance with

113 QLDC closing submissions, App 1.
114 Exhibit S2 produced through Skyline's planning witness, Mr Dent.
115 Numbered 'i' in the s 42A report.

the Council's *Southern Light Lighting Strategy*.

(b) an additional condition as follows:

> 5. External lighting required for the health and safety of construction workers and to ensure adequate lighting of work sites for construction purposes shall be exempt from condition (4). Such areas shall be identified within the submitted lighting plan.

[147] It can be observed that QLDC's above proposed condition 5 would not allow for any health and safety exemption from its proposed condition 3 requirement for construction lighting to be in accordance with its *Southern Lighting Strategy* ('*Strategy*').

[148] QLDC's proposed change to condition 3 reflects Mr Denney's evidence-in-chief. This included an Annexure recommending tracked changes to Skyline's various recommended conditions (including condition 3). However, while Mr Denney made a general observation that he recommends compliance with the Strategy,[116] he did not explain why this is appropriate for construction lighting *per se*.

[149] In his rebuttal evidence for Skyline, Mr Dent specifically addressed the issue of construction lighting, noting:

> ... the applicant intended to work 24 hours a day. For health and safety reasons adequate visibility by temporary lighting will be required and it is my opinion that providing for excellent visibility is likely to contrast with the key aims of the Southern Lighting Strategy to provide a sustainable and energy efficient network of public lighting that provides a safe night time environment, and which protects and enhances our view of the night sky and surrounding landscape.

[150] In reading a summary statement of his evidence, Mr Denney commented:[117]

> I agree with Sean Dent's (Skyline) evidence that my recommendation for external lighting controls should not hinder provision of adequate lighting in regards to construction worker safety and adequate lighting for construction sites. I recommend however where not necessary, all other areas should minimise the adverse effects of lighting to avoid visual impacts on the landscape and night sky.

116 Mr Denney, evidence-in-chief for QLDC, at [75].
117 Mr Denney, summary statement of evidence for QLDC, at [12].

[151] While somewhat ambiguous, we took that statement to be a concession on Mr Denney's part to Mr Dent's opinion. In any case, QLDC did not put Mr Dent's rebuttal evidence to Mr Denney or cross-examine Mr Dent about Mr Denney's opinion.

[152] QLDC does not explain why it now proposes condition 5. If QLDC intends condition 5 to be in acknowledgement of the concession Mr Denney made in response to Mr Dent's rebuttal evidence, as to the need to recognise construction worker health and safety, it is deficient in this respect.

[153] Skyline opposes QLDC's proposed change to condition 3 and offers the following alternative to QLDC's proposed condition 5:

> 5. External lighting required for the health and safety of construction workers and to ensure adequate lighting of work sites for construction purposes shall be utilised only when construction work is actively occurring. At all other times external lighting for these purposes shall be deactivated ~~exempt from condition (4). Such areas shall be identified within the submitted lighting plan~~.

[154] Relying on Mr Dent's evidence, Skyline submits that it would be impossible for construction lighting to comply with the Strategy. It also submits that there are unlikely to be users of the reserve during night time hours that might be affected by construction lighting. It observes that construction lighting is likely to change frequently depending on the specific requirements and progress of contractors on a daily basis. Hence, it seeks that condition 3 be as it originally proposed and that condition 5 be revised to provide more flexibility.

[155] We accept Mr Dent's opinion on these matters and prefer it to Mr Denney's insofar as there continues to be any differences between those experts. We also accept Skyline's submission that there would likely be relatively few users of Ben Lomond reserve affected by construction lighting. In any case, we find that considerations of construction health and safety outweigh any competing values associated with protecting landscape values associated with the night sky. While night time construction lighting will, to some extent, adversely affect landscape and visual amenity values, we find this would not be materially different from other aspects of construction, as a temporary activity. Hence, our findings from [261] (concerning the existing and proposed plan provisions and ss 6(b) and 7(c) and (f), RMA) apply.

[156] We did not receive evidence that there was any material risk that night time construction lighting could cause sleep disturbance or other nuisance issues for those living in the vicinity. However, we are mindful that construction will occur on highly visible and elevated sites and that there are a few residents living in relatively close proximity to the Lower Terminal. Also, bearing in mind the anticipated four year construction period, we are anxious to ensure effective management of night time construction lighting so as to avoid any risk of such nuisance effects. This would seem readily able to be addressed by the wording of condition 5.

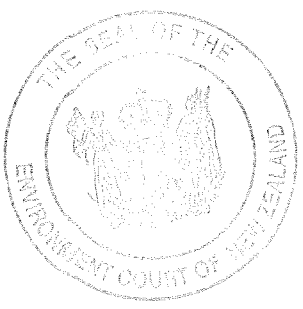
[157] However, we find problems with the wording of conditions offered by both QLDC and Skyline. Specifically, for the reasons we have given:

(a) regarding proposed condition 3:
    (i) we find it would not be appropriate to require that construction lighting be in accordance with the Strategy;
    (ii) we see potential merit in having a condition to require an external lighting plan to address construction lighting;
(b) regarding the different versions of proposed condition 5:
    (i) we find QLDC's version deficient in that, in tandem with QLDC's proposed condition 3, it would require construction lighting to be in accordance with the Strategy;
    (ii) we find Skyline's version deficient in that it would not provide clear exemption from condition 4 and would allow too much licence to construction activity (in the absence of a mechanism such as a construction lighting plan).

[158] In the circumstances, we consider the most appropriate approach is to go so far as to express those findings and to direct QLDC and Skyline to confer with a view to offering to the court (preferably by joint memorandum) further submissions on the most appropriate expression of condition 5. Whilst the evidence before the court is limited, we envisage that these matters ought to be able to be addressed through further discussion between QLDC and Skyline.

Overall findings concerning Topic B

[159] We reserve any determination of the potential cumulative effects associated with any adjacent carparking building including its interface with Brecon Street



(accepting QLDC's[118] and ZJV's submissions[119] and Skyline's acceptance of the need to leave these matters reserved).[120] Subject to that, for the reasons we have given, we find:

(a) the bulk, location and design of the Upper and Lower Terminals and the gondola modifications are appropriate, in terms of their effects on landscape and visual amenity values;

(b) the QLDC conditions properly addresses our related findings in this Interim Decision and accord with s 108 and other RMA requirements, subject to the following:

  (i) proposed condition 1 will need to be completed once all plans are confirmed;

  (ii) proposed conditions 3 and 5 are inappropriate for the reasons we give at [157] and we reserve our ability to revisit the question of appropriate conditions for the matters in conditions 3 – 5 subject to the directions we give at [287];

  (iii) proposed condition 6 is unwarranted and inappropriate for the reasons we give at [134];

  (iv) proposed condition 7 is appropriate except for the last sentence (as to hoardings and temporary buildings) which is unwarranted and inappropriate for the reasons we give at [143]-[145]; and

(c) given the landscape mitigation plan and the effectiveness of conditions, the Upper and Lower Terminal and gondola upgrade:

  (i) would not be contrary to relevant objectives and policies of the existing and proposed plans in regard to landscape and visual amenity effects; and

  (ii) would be appropriate development for the purposes of s 6(a), RMA. Specifically, accepting Ms Sinclair's evidence, we find the ONL would be protected from inappropriate use and development;[121]

  (iii) would properly maintain amenity values and the quality of the environment (ss 7(c), (f)); and

  (iv) would not offend any other RMA requirements.

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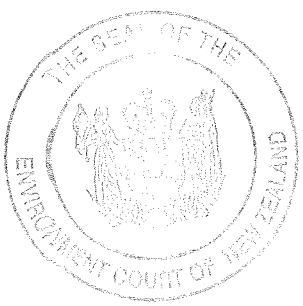
118 Closing submissions for QLDC, dated 30 June 2017, at [22].

119 Closing submissions for ZJV, at [6].

120 Closing submissions for Skyline, at [12].

121 Ms Sinclair, evidence-in-chief for QLDC, at [481].



[160] At [287], we make directions for Skyline to file and serve an updated iteration of its proposed conditions taking account of our findings in this Interim Decision.

Should there be a condition as to relocation of the helipad ('Issue C')?

[161] This issue concerns a helipad that sits between the Upper Terminal and the Treehouse where customers for ZJV's zipline are given a safety briefing before they commence their zipline tours. The helipad was established under a resource consent that was confirmed by *ZJV (NZ)* subject to a five year term and various other conditions.[122] The decision reveals that the helipad is some 30m from the Upper Terminal.[123] Almost all ZJV customers use the gondola and, therefore, walk past the helipad on their way to the Treehouse.

[162] ZJV is concerned that the helipad could be used for construction purposes, given the close proximity of the Upper Terminal and the proposed upgrade to the helipad.[124] It refers to comments by Skyline's planner, Mr Dent, in his rebuttal evidence, to the effect that the helipad may need to be relocated (acknowledging that he did not there make clear whether this would be for construction or other reasons). It also notes his answers in questioning by the court that the likely relocation area would be around the fire pond on the north-eastern boundary of Skyline's lease area.[125]

[163] Also, by way of context, ZJV refers to the Environment Court's observation in *ZJV (NZ)* that human activity in the relevant vicinity "can be frenetic". It points out that Ms Sinclair agreed with a proposition put to her by Dr Somerville that "there is a good deal of congestion as far as traffic is concerned"[126] and an acknowledgement answer by Mr McLeod (ZJV's rebuttal witness on construction matters) that Ziptrek customers would be moving through a construction site on their way from the Upper Terminal to the Treehouse. For context, we note Mr McLeod went on to explain that construction management arrangements were still being worked through and there would be protective hoardings in place.

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122 *ZJV (NZ),* [A], p 2.

123 *ZJV (NZ),* [1].

124 ZJV closing submissions, at [48], [50].

125 ZJV closing submissions, at [53], referring to Mr Dent rebuttal for Skyline at [6.11] and the Transcript, p 89, l 32-34, p 90, l 1-5.

126 ZJV closing submissions, at [49]; Transcript, p 243, l 10-13.

[164] ZJV also submits that, as a matter of law, the helipad cannot be used for both helicopter landing and construction as this would put it in breach of conditions of consent as confirmed by the *ZJV (NZ)* decision (noting, for instance, that decision's conditions 11, 15 and 16). It further submits that the RMP would need to be reviewed if the helipad were used for construction[127] and that relocation of the helipad would require both a resource consent and approval by the Director of Civil Aviation ('DCA') (under the Civil Aviation Rules, pt 157).[128] After describing various aspects of the DCA approval process, ZJV notes an observation made by the court in the *ZJV (NZ)* decision criticising Skyline for not having applied for DCA approval much earlier than it did.[129] It submits that any use for construction of the helipad is a s 5 RMA health and safety issue, and that ZJV has a concern "for the health and safety of its customers and other users of the reserve should Skyline use the helipad for construction purposes".

[165] To address these concerns, ZJV seeks a condition as follows:[130]

> The consent holder will seek the relevant approvals to relocate the helipad before the area it occupies can be used for construction purposes and will give notice of any intended relocation to the Director General of Civil Aviation.

[166] Skyline opposes this, submitting the condition would not serve any relevant purpose, as there is no confirmed proposal to relocate the helipad or to use this area for construction.[131]

[167] We find, on the evidence, the proposed condition would not serve any valid resource management purpose and reject it for the following reasons:

(a) the helipad is governed by the consent issued by the *ZJV (NZ)* decision and that consent would not be superseded or altered by any consent we may issue. Nor would there be scope in this case to authorise any relocation of the helipad (i.e. we agree with ZJV's submission on this that a further application would be required for this, should Skyline seek to do so);

(b) we find that any health and safety issues associated with construction of

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127 ZJV closing submissions, at [51], [52].
128 ZJV closing submissions, at [54].
129 ZJV closing submissions, at [59].
130 ZJV closing submissions, at [50], [60], [61].
131 ZJV closing submissions, at [33].

> the proposal would be amply covered by proposed condition 38 of the QLDC conditions (which we find appropriate in relevant respects) together with the HSWA.

Should there be a condition as to management and other uses of the reserve ('Issue D')?

[168] By way of context for this issue, several adventure tourism activities occur on Bob's Peak and Ben Lomond Reserve. These include Ziptrek, paragliding, mountain biking, hiking and other tourism and recreational pursuits. Bearing in mind the fact that the proposal will increase the intensity of usage of this environment, ZJV and Mr Walker seek raise concern that there is an associated need for an appropriate management response.

[169] ZJV points out that the RMP, as a planning tool for management of the reserve, is well overdue for review and QLDC has no timeframe for doing so.[132] It is concerned that, given that position, the RMP will not properly manage risks to users of the reserve and other adverse effects raised by ZJV.[133]

[170] As to remedy, ZJV does not offer any related condition, but submits that any resource consent granted:

> ... needs to include prescriptive conditions involving Skyline because it provides access for significant numbers of the public to the reserve.

[171] On these matters, QLDC points out that its proposed conditions for this Interim Decision include all the amendments that ZJV's planning witness, Mr Brown, suggested and that were accepted by Mr Dent and Ms Sinclair. That included a new 50m setback from the Ziptrek Treehouse operations for all rock breaking activities.[134]

[172] Skyline notes that it has proposed a number of conditions related to matters concerning effects on other reserve users (including those of concern to ZJV). These include, for example, its proposed conditions 31 on 'maintenance of the vehicular access along the Skyline Access Road for Ziptrek', 13(b) on operational noise, 19(a) on

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132 ZJV closing submissions, at [62]-[65].
133 ZJV closing submissions, at [66].
134 QLDC's closing submissions, at [38].

rock breaking, 19(b) on other construction and earthworks activity and 21 on construction noise.

[173] ZJV does not elaborate on what it means by 'prescriptive conditions' and why, on any proper evidential basis, the QLDC conditions are not satisfactory or complete. We do not accept ZJV's submission that Skyline should be given some form of lead role for the management of activities in the reserve pending review of the RMP. While the gondola carries most adventure tourists to their activities in the reserve, it does not follow that Skyline should perform such a role. The proper agency for reserve management is QLDC, under the RA. While it is desirable that the RMP review is undertaken in a timely way, supervision of that is not for us. Insofar as the management of the reserve under the RA is relevant to us, we find on the evidence (including Mr Brown's) that the QLDC conditions are in all relevant respects sufficient and appropriate. We find the QLDC conditions take fair account of what ZJV's planning witness, Mr Brown, recommended (and we observe that ZJV makes no reference to Mr Brown's recommendations in its closing submissions).

[174] We accept QLDC's and Skyline's closing submissions in finding there is no valid resource management purpose to be served by requiring any additional so called 'prescriptive conditions'.

What conditions should be specified to mitigate for construction business disruption for ZJV ('Issue E')?

[175] By way of context, for seven years ZJV has operated an eco-adventure tourism venture on Bob's Peak, known as 'Ziptrek Ecotours'. This is a zipline (or flying fox) that takes guests through the trees on harnesses clipped to wire ropes suspended high in the trees. The venture combines adventure with an environmental sustainability ethos and message to customers. The company holds various Qualmark certificates, has won a number of tourism and adventure tourism awards, and is active in several environmental and social projects in the community. It employs in the vicinity of 30-40 staff (depending on the season) and presently has in the order of 30,000 customers per annum. Ziptrek tours commence at its top 'Treehouse', approximately 100m to the west of the Upper Terminal. This Treehouse is where guests are welcomed, and given safety briefings before commencing their tour.[135]

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135 Mr Yeo, evidence for ZJV, at [3.1]-[3.6].

[176] The court's site visit provided helpful context for understanding the evidence on this issue. A ZJV guide accompanied the court onto the Treehouse platform where instruction takes place. As the name suggests, this is an open roofed wooden structure. It is a matter of a few steps off the access way, perhaps a minute's walk from the Upper Terminal area and the helipad. The guide explained the process of briefing that takes place within this structure. This includes an instruction of each group, before a guide takes each individual to the launching platform and takes each individual through the final stages before launch.

[177] ZJV seeks the following changes to the QLDC conditions:[136]

(a) a new condition to either:[137]
    (i) ensure Ziptrek (and other commercial operators) are able to use the access road to transport guests during times when the gondola is not operating; or
    (ii) require Skyline to compensate for loss of business during the period that the Ziptrek operations "are required to close".
(b) a change to the proposed Traffic Management Plan ('TMP') condition (now condition 36) to the effect that the TMP must specifically provide for and/or directly address as a minimum "a joint management approach to the access road by all road users, including a requirement that construction will not impede, hinder or disrupt Ziptrek's authorised use of the access road"; and
(c) a new condition to require Skyline to meet Ziptrek's reasonable financial loss for business disruption if construction activities were to impede Ziptrek from utilizing the access road for transporting its customers.

[178] ZJV submits that the evidence discloses that it will face significant financial loss as a result of the construction phase of the proposal. It says that the "most direct loss" will be "as a result of the gondola shutting its services for periods of time". For that submission, it relies on the evidence of its executive director, Mr Yeo.[138]

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136 ZJV closing submissions, at [78]-[81].
137 ZJV closing submissions, at [76].
138 Skyline closing submissions, at [67].

[179] Mr Yeo told us that ZJV conservatively estimated losses in the order of $1.5M as a result of the approximately 4 year construction phase (including a two-month shut down of the gondola). He explained that calculation of expected financial losses was done "internally" (which we understand to mean by ZJV personnel/consultants). He said ZJV's calculations considered loss of business in three defined periods – Skyline's 'shutdown period' (i.e. when the gondola is not operating), the general construction period, and post construction.[139] For the 'shut down period', based on three years of revenue data, it calculated direct revenue loss in the range of $260,000-$300,000 (assuming a May to June shutdown) or $600,000 (if the shutdown extended into April or June). That estimate did not include anything for staff costs and retention or loss of reputation.[140] For the 'general construction period', anticipating morning shut downs over 12 months, Mr Yeo said ZJV calculated revenue losses (for shut down of morning Ziptrek tours) of around $300,000.[141]

[180] For 'post construction', Mr Yeo commented that ZJV seeks "reasonable opportunity" to undertake its business, indicating a preference for provision of directional signage and non-obscured sight lines (including planting of low species of plants in place of Douglas Fir trees that are being removed from the northern horizon).[142]

[181] Mr Yeo also acknowledged that "there could and should be some uplift in business" once the proposed gondola upgrade is completed and operational. However, he considers that "the amenity, economic and brand reputation" effects on Ziptrek would be significant.[143]

[182] Regarding the access road, Mr Yeo told us that, under its lease agreement with QLDC, ZJV has "shared access with Skyline" over the access road. He stated:

> The Right of Way is an important means of access and egress not only for commercial vehicles but particularly emergency vehicles. Ziptrek also has a right to walk over that land with its guests as required and to use it for maintenance and safety management.

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139 Mr Yeo evidence for ZJV, at [5.3].
140 Mr Yeo evidence for ZJV, at [5.5]-[5.6].
141 Mr Yeo evidence for ZJV, at [5.10].
142 Mr Yeo evidence for ZJV, at [5.11], [5.12].
143 Mr Yeo evidence for ZJV, at [5.1].

[183] In slight contrast to that evidence, ZJV's closing submission was that the lease gives ZJV "a right to use the road for maintenance and emergency purposes".[144]

[184] Mr Yeo explained that the access road is used by all of ZJV's customers, around 30% of whom (depending on the season) are children, elderly and/or disabled. He explained ZJV's concerns about how the proposal to make changes to the alignment and height (he understood, a 3m height increase) of the access road in the locality of the Treehouse could impact on day to day Ziptrek operations. He explained that ZJV seeks "close and practical negotiations on the position of this driveway, management, runoff, planting, batter and retaining and the access for pedestrians and cars" (noting ZJV has "an obligation to maintain safe operating access for emergency and operational requirements"). He said ZJV requires "full, unimpeded access ... during operation for vehicles, turnaround and pedestrian access" and a "walkable and presentable standard" and a "flat and safe gathering place off the road".[145]

[185] On the other aspects of construction interference, ZJV raises concerns about the interference that construction noise could have on its customer safety briefing on their nearby Treehouse platform. Mr Yeo explained that this takes approximately 15 minutes, needs to take place immediately prior to the activity and requires the full attention and concentration of customers.[146] He also explained how ZJV relies on its guides being able to continuously communicate with each other via radio. This is strictly enforced, such that zipline procedures must wait until each communication is made and heard.[147] We accept all that to be so.

[186] Mr Yeo expressed concern that this safety protocol (hence ZJV's operations) could be significantly impeded while noise pollution (blasting, rock work, piles, heavy machinery) is present. Were the evidence to demonstrate that construction noise or activities would cause such disruption to the safe operation of the Zipline, we accept that this would constitute an adverse effect that would warrant an appropriate response.

[187] ZJV submits that we should have regard to these claimed business disruption impacts as an adverse effect (under s 104) and that they were matters relevant to consideration of whether the proposal would promote sustainable management, in

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144 ZJV closing submissions, at [40].
145 Mr Yeo evidence for ZJV, at [5.13]-[5.16].
146 Mr Yeo evidence for ZJV, at [4.5]-[4.6].
147 Mr Yeo evidence for ZJV, at [4.9].

terms of s 5, RMA.[148]

[188] ZJV cites a series of decisions we refer to as *Alexandra Flood Action*[149] and *Tram Lease Limited v Auckland Transport*[150] in support of its submission that the Environment Court "has approved compensation conditions in order to remedy adverse socio-economic impacts of developments".

[189] ZJV submits that, in *Alexandra Flood Action,* the court "found that the residents of Alexandra were entitled to either some compensation or further flood avoidance measures as an outcome of sustainable management". For that submission, it refers to the following partial quote from one of the interim decisions:[151]

> There is some doubt whether we have the power to impose a compensation provision on Contact although our analysis of the meaning of "remedying" in section 5(2) of the Act suggests those doubts are misplaced. In any event we can create an incentive for Contact to volunteer one by providing for differential terms (35 or 15 years) depending on whether it is volunteered or not ...We should add that we regard this type of condition as appropriate for the circumstances of Alexandra because human life is not at great risk and nor are any important ecological values. Both those sets of values (especially the latter) are difficult to quantify.

[190] It acknowledges the factual differences, but submits that the court's quoted comments provide support for compensation to be required under s 5 where that would be appropriate. It also submits that the comments support the proposition that the economic impact of an expected four year construction period is something that can be addressed in a consent condition.

[191] On these matters, Skyline says that ZJV's customers would not be impeded from accessing the Treehouse over the entire four year construction period. It points out that they would be able to use the gondola at all times save for the anticipated two month shut down (and on rare occasions when there could be a delay to the morning opening). It points out that ZJV's planning witness, Mr Brown, did not propose the condition ZJV now seeks. It points out that there are no obligations on Skyline (whether

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148 Skyline closing submissions, at [68].

149 *Alexandra Flood Action Society Inc v Otago Regional Council* (EC) C102/05, 20 July 2005 (interim decision); *Alexandra District Flood Action Society Inc v Otago Regional Council* (No. 2) (EC) C034/07, 29 March 2007 (second interim decision) and *Alexandra District Flood Action Society Inc v Otago Regional Council* (EC) C067/07, 24 May 2007 (final decision).

150 *Tram Lease Limited v Auckland Transport* [2015] NZEnvC 191.

151 *Alexandra Flood Action* (EC) C102/05, at [207].

by contract, lease or resource consent) to ensure the gondola's continued operation for either ZJV's staff or customers or other users of the reserve. Nor is there any basis for ZJV to have any legitimate expectation of this. Rather, it submits that any financial loss ZJV may suffer is as a consequence of its own business choice to rely on its customers using transport provided by another party and without any security of ensuring continued operation of this transport.[152]

[192] As for the access road, Skyline points out that this is vested in QLDC and it understands that the reserve lease between QLDC and ZJV (and ZJV's resource consent) only allows it to use it for maintenance and emergency purposes (as per ZJV's closing submissions). It reasons, therefore, that ZJV would need to secure a lease variation (and change to its resource consent) to allow for the greater usage it seeks. It would be beyond jurisdiction to seek to obtain such an expansion of ZJV's property rights through a condition of the consent that Skyline seeks.[153]

[193] As we understand the various *Alexandra Flood Action* decisions and *Tram Lease*, they do not support ZJV's case.

[194] The interim decision in *Alexandra Flood Action* quoted by ZJV was plainly not determinative of the compensation question. It explicitly acknowledged that there are "various other consequences of such a regime which will need to be worked through" (such as whether the compensation figures were reasonable) and that the court would seek submissions from the parties.[154] The final decision in *Alexandra Flood Action* followed the filing of a joint memorandum of counsel on behalf of the consent holder, Contact Energy Limited, the Otago Regional Council and the Alexandra District Flood Action Society Incorporated.[155] The court recorded that Contact "chose to accept liability for any future flooding via the compensation package". On that basis, it approved the finally determined consent conditions. Therefore, we do not accept that the *Alexandra Flood Action* cases are authority for what ZJV claims, i.e. that compensation is required under s 5 where that would be appropriate. Further, these decisions concerned a very different context, namely flooding concerns for the landowners and businesses arising from silt build up. Given the very different factual context, nor do we accept ZJV's submission that the *Alexandra Flood Action* cases

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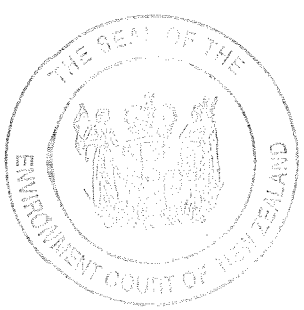
152 Skyline closing submissions, at [30], [31].
153 Skyline closing submissions, at [30].
154 *Alexandra Flood Action* (EC) C102/05, at [207], [208].
155 *Alexandra Flood Action* (EC) C067/07, at [17].

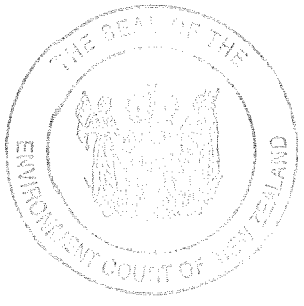


provide any support for its case on conditions for the construction period impacts it claims it will suffer.

[195] The position is similar in regard to the *Tram Lease* decision. It concerned designation requirements by Auckland Transport for its central Auckland 'City Rail Link' project. ZJV refers to one of the designation conditions confirmed by the decision (cond. 61) requiring Auckland Transport to prepare what was termed a 'Social Impact and Business Disruption Delivery Work Plan' ('DWP'). This condition runs to some 8 sub-conditions over three pages. These cover consultative preparation of the DWP (61.1, 61.2, 61.3, 61.5), required content of the DWP (61.4), implementation of the DWP, peer review and monitoring (61.6-61.8). Nowhere does the condition specify that compensation is to be paid. In any case, the decision dealt with only one substantive unresolved issue, namely finalisation of wording of sub-condition 61.5 concerning a certain property, where the relevant parties in that dispute had different wording preferences. The remainder of the four pages of the decision addressed why the court approved consent order outcomes sought by relevant parties on the remaining appeals. *Tram Lease* is not, therefore, in any sense a reasoned decision on the relevant legal principles for the consideration of compensation conditions.

[196] On the law, we observe that s 108(10), RMA prohibits 'financial contribution' conditions unless its stated prerequisites are met (neither of which are in this case) and ZJV did not provide to us any authority for its proposition that a condition to require compensation could be made outside the parameters of s 108(9) and (10), RMA. However, we do not need to make any definitive finding in this decision on whether or not, in appropriate cases, a condition could be imposed with the effect of obliging a consent holder to pay compensation. That is because, for the reasons we have given, we find the evidence to be overwhelmingly against the additional relief sought by ZJV (with one exception, as to signage).

[197] We start with the evidence concerning ZJV's estimated business disruption losses through disruption to access to the gondola. The gondola is Skyline's property and Skyline is not subject to any legal obligation to ensure continuity of its use by ZJV's customers (other than the contractual obligations Skyline would have to a ticket holder, depending on the terms and conditions pertaining to that). In circumstances where ZJV has elected to rely on Skyline's gondola to ferry most of its customers to and from the Zipline, it ought to fairly carry all the business consequences (positive and negative) of that election.



[198] As such, even if it eventuates that ZJV loses revenue in the order of the sums claimed, from the shutting down of the gondola at any time, we find that on *Newbury* principles those losses would not be fairly and reasonably related to the proposal. Rather, they would be a consequence of ZJV's choice of business model. As Mr Yeo himself acknowledged, his business also stands to benefit from an uplift once the upgraded gondola is commissioned and operational (assuming consent is forthcoming).

[199] Therefore, we reject this aspect of ZJV's requested relief.

[200] On the matter of the access road, we accept the evidence that it is not a public road and entitlements to use it are by lease with QLDC and in accordance with terms and conditions that have been agreed between parties to that lease (in this case, ZJV). The QLDC condition 36 specifies as a minimum requirement for the TMP:

> Maintenance of vehicular access along the Skyline Access Road for Ziptrek.

[201] As that minimum requirement is offered in the QLDC conditions, and not opposed by Skyline, we see no obstacle to it being included in the relevant condition. On the evidence (and it is agreed by Skyline) we find it would not serve a valid resource management purpose to go further in response to ZJV's requested relief. Specifically, we find that ZJV's desire for much broader rights to be conferred go beyond the true effects of the proposal (particularly construction effects). In any case, as Skyline has pointed out, conditions of a consent granted to Skyline cannot confer any lawful obligation on QLDC to confer access rights to ZJV.

[202] On the matter of ZJV's concerns about how earthworks could affect usage of the access road (including in terms of any changes in location and height) the QLDC conditions (accepted by Skyline) specify the following:

> 35. Prior to commencing works on site the consent holder shall submit an updated earthworks plan to detail an amended pedestrian and vehicle access to the Ziptrek top tree house. The updated earthworks plan shall be developed in consultation with Ziptrek and shall meet all relevant standards for pedestrian and vehicle access. The amended earthworks plan shall be accompanied by evidence of Ziptrek's approval.

[203] On the evidence, we find this proposed condition appropriately and sufficiently

covers ZJV's expressed concerns.

[204] We have one concern about the wording of proposed condition 35, namely that the last sentence could result in an impasse if ZJV (or 'Ziptrek') unreasonably withholds approval. As such, our preliminary view is that this sentence is more appropriately worded as follows (or to similar effect):

> The amended earthworks plan shall be accompanied by evidence of Ziptrek's approval, provided that this obligation ceases to apply if QLDC is satisfied that the consent holder has used reasonable endeavours, but has not been able to secure [Ziptrek's] approval and the [Manager, Consents] is satisfied that the access otherwise satisfies this condition.

[205] We have made directions for QLDC, Skyline and ZJV to make further submissions on this aspect of wording.

[206] On the matter of construction noise, we find particularly significant that the noise experts reached full agreement on appropriate conditions, such that ZJV elected not to call Mr Peakall. Further, when questioned by the court, ZJV's planning expert Mr Brown said (partial quote):[156]

> ... I had looked at the evidence of the acoustic witnesses and with the conditions that were all promoted in relation to ... the actual construction of the road, i.e. the digging and grading and so on, the separation distances required there while Ziptrek's operating, I was satisfied about those and the other witnesses, the planners are satisfied as well. Then the operation of the road during construction, trucks going back and forth, the acoustic witnesses all seem to think that it would be an annoyance but it wouldn't actually impede the oper – the actual conduct of the briefing.

[207] Returning to the matter of signage, having inspected the site we accept Mr Yeo's evidence that a directional sign placed at the exit to the Upper Terminal would assist Ziptrek customers. The anticipated increase in usage of the Ziptrek, and other adventure tourism facilities in the reserve, following the upgrade makes the value of effective signage stronger. There would be merit in having it in place in time for construction. On our site visit, we observed small directional signs to the locations of other adventure tourism activities in the reserve. We envisage a similar sign for the Ziptrek's Treehouse. We direct the relevant parties to confer and propose a suitable condition. However, on the evidence we find it unreasonable to require "non-obstructed

156 Transcript, p 187, l 6-15.

sight lines" as sought by Ms Yeo. The Ziptrek operation already operates in a significantly obscured location.

[208] Therefore, subject to our noted comments (and the directions we give at [287]) we find that the QLDC conditions (together with a signage condition) would meet relevant RMA requirements and are appropriate and sufficient.

Are the proposed noise and vibration measures appropriate ('Issue F')?

[209] In view of our determinations on Issue E, and given the extent of consensus reached by relevant experts on the suitability of the proposed operational and construction noise measures, we can deal with this issue briefly.

[210] Skyline, ZJV and QLDC each filed evidence from noise experts (Dr Trevathan for Skyline, Dr Chiles for QLDC, Mr Peakall for ZJV). Those experts were excused attendance in view of the consensus that they had reached.

[211] The experts were agreed on the appropriateness of the ultimately proposed operational noise mitigation measures. The proposals for both operational and construction noise are also endorsed by the planning witnesses, Mr Dent (for Skyline) and Ms Sinclair (for QLDC), and ZJV's planning expert (Mr Brown) does not raise any concerns.

[212] We accept that consensus in the expert evidence in finding the proposed operational and construction noise (and vibration) mitigation measures (including in the QLDC conditions) meet relevant RMA requirements and are appropriate. As such, we find there would be no need to revisit any aspect of the QLDC conditions in our final decision. Rather, on these matters, our findings in this Interim Decision will be the basis for that final decision.

Are various settlements reached appropriately addressed ('Issue G')?

[213] We were not informed of any submitter having withdrawn any written approval to the application prior to the hearing and hence have not considered effects on those persons (s 104(3)(a)(ii), (4)). For those various submitters whose withdrawal was conditional or who reached settlements not involving withdrawal, we find the issues they raised to be appropriately addressed, insofar as relevant, in the QLDC conditions.

Findings on various matters raised in written submissions

Ally Mondillo (on behalf of concerned locals as per attached sheet) (#1)

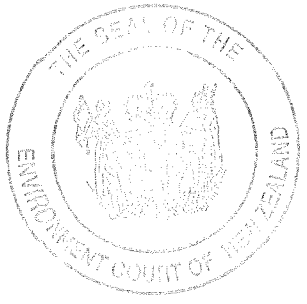
[214] Although the submission records a wish to be heard, none of the submitters appeared or attended to say they wanted to be heard. Nevertheless, we have given careful consideration to their written submission.

[215] Attached to the submission are tables recording the signatures, names, email addresses and phone contacts of listed residents of Lomond Crescent, Thompson Street and Glasgow Street. In addition, the submission attaches an email from Janice and Gordon and Jason and Anneke Kawau (dated 29 September 2017) recording their "full agreement" with the submission. The submission also attaches an email reply from Ms Mondillo confirming she will provide the email to QLDC in view of the Kawaus being away and unable to "sign the residents' petition". The RMA allows for a submission to be made by a 'person' defined as including, inter alia, a body of persons, whether corporate or unincorporate. Therefore, we treat the submission as being made by Ms Mondillo and the associated signatories and the Kawaus ('Mondillo and others').

[216] Primarily, the submission is directed to matters concerning effects on public roads (including damage, detritus and hazards to road users associated with construction traffic). The court has received and considered expert evidence on these matters during the hearing. However, as noted at [236], matters concerning carparking and effects on the road network are not determined by this Interim Decision.

[217] The submission also raises concern about noise caused by heavy vehicles. On this it seeks a condition to confine heavy truck movements to 8.00am to 6.00pm Monday to Friday, with no exceptions.

[218] On this matter, this Interim Decision makes the findings set out at [228]. That is on the basis of the court's findings on expert evidence as set out at [229] and the agreement reached between QLDC and Skyline as to appropriate related consent conditions. The court is satisfied, on the evidence, that the proposed consent conditions appropriately address the submitters' concerns.



Mark Rose (#3)

[219] Mr Rose, who did not seek to be heard, opposes the application. His submission raises concerns about the present inadequacy of carparking and, in view of the growth Queenstown is experiencing, the importance of a sound management approach to transportation and carparking matters. These matters have been addressed extensively by expert witnesses but this Interim Decision defers determinations on them for the reasons we have given. His submission expresses a view that Skyline is not a good corporate citizen, pays their staff poorly and pays less rent than others do for their use of the reserve. These are not relevant resource management matters for our consideration, but the views are noted.

Kiwi Birdlife Park (#4)

[220] We refer to our findings at [266]-[273].

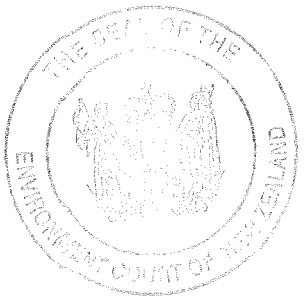
CCR Ltd – Lessee Queenstown Lakeview Holiday Park (#5)

[221] While we have considered this submission, as noted, that is on the basis that the submitter has given written approval and in terms of the direction in s104(3), RMA.

Queenstown Preschool and Nursery (#7)

[222] Queenstown Preschool and Nursery ('QPN') is a not-for-profit community-based childcare centre at 45 Brecon Street, close to the Lower Terminal entrance to the gondola. Its only entrance and exit is via Brecon Street. It is licensed for 70 children, and a significant proportion of the children who currently attend are babies. It already experiences considerable difficulties with parents not being able to find a carpark for dropping off or picking up children. As such, it is particularly concerned that the proposal as notified reduced staff carparking by 20 spaces and did not make any provision for visitor carparking. In its submission, it also raised concern about helicopter noise causing disturbance to childrens' sleep (almost half of their enrolled children having sleeps each day in a facility that is not soundproofed or double glazed).

[223] While QPN acknowledged the proposal to confine loud noises to daytime hours, it noted this did not sit well with its children's needs to sleep during the day.[157]



[157] Queenstown Preschool and Nursery submission (#7), in s 42A report.

[224] By way of relief, QPN's submission seeks that any consent issued to Skyline including conditions to require:

(a) off-street carparking for Skyline's upgraded facility (including for staff and a specified number of visitors) and additional bus parking;
(b) Skyline to notify QPN of days and times that helicopters will be flying and of other noises (e.g. blasting) that may be detrimental to the children and to closely coordinate with QPN on the timing and minimisation of loud noise disruption; and
(c) all efforts to be made to ensure Brecon Street is kept clear at all times to allow emergency vehicles and full access to the pre-school.

[225] Although Ms MacLean attended the hearing for QPN, she elected to not make representations. That was in the context we have earlier set out, namely that the matters of carparking and traffic management are deferred. Related to this, Mr Todd informed the court as follows when delivering Skyline's opening submissions:[158]

> In considering the issue it is noted that you know the likely location(s) of both potential carparks, the fact that they will be serviced from Brecon Street and the fact that it is likely they will at least alleviate the adverse effects on current parking demand at least in respect of the concerns which have been raised by the preschool and nursery, that ... Ms Maclean was representing them.

[226] QPN can take comfort from that assurance on behalf of Skyline. While the matters of carparking and traffic management are deferred at this stage, QPN can be assured that the court will address these matters in due course.

[227] On the matter of construction noise, the QLDC conditions include a number of conditions that were developed with assistance and support of the noise experts. In particular, we are assisted by Dr Chiles' evidence for QLDC on these matters. Specifically he states:[159]

> The applicant has proposed a noise limit of 50 dB $L_{Aeq(15\ min)}$ at the preschool and nursery buildings when they are occupied. This is a stringent daytime noise limit for construction activity, and it should minimise any sleep disturbance in this environment. ...

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158 Transcript, p 18 l 13-17. We have quoted this instead of [57] of Skyline's opening submissions as Mr Todd elaborated on those written submissions orally as recorded on the Transcript.
159 Dr Chiles for QLDC, at [29], [30].

> The submission also seeks notification of helicopter activity in advance. I agree this is an appropriate noise management measure that should be addressed through the CNVMP, along with notification of blasting and other noisy activities.

[228] We accept Dr Chiles' evidence and find that the related matters raised by QPN's submission would be sufficiently and appropriately addressed provided that the conditions properly deliver what Dr Chiles has recommended.

[229] Having reviewed the QLDC conditions, we consider that to be the case with one rider. That is that proposed condition 18 on the Construction Noise and Vibration Management Plan ('CNVMP') does not appear to make any specific reference to Skyline having to give advance notification to QPN of helicopter activity, blasting or other noisy activities.

[230] While we did not hear from Ms Maclean, we find Dr Chiles' evidence sufficient in satisfying us that these concerns raised by QPN's submission ought to be addressed in a practical way.

[231] Therefore, on this matter we have made directions for Skyline to confer with QPN and QLDC and report on whether a mutually acceptable approach to this matter is achieved. If need be, we will invite further submissions from QPN and QLDC before making any final determination of the form of this condition.

S Kolff (#10)

[232] S Kolff explains that he lives at the old Queenstown motorpark and works at the Holiday Park. The submitter is concerned that allowing work to be undertaken 24 hours per day would cause sleep disturbance. He seeks a prohibition on work between 5 p.m. and 8.30 a.m. and on weekends.

[233] Again, we are assisted on this by Dr Chiles' evidence. He considers that the construction noise criteria he recommends would appropriately provide for the submitter's concerns. Dr Chiles is a highly experienced acoustic expert, and his opinion is well informed by applicable New Zealand standards and guidelines that, on the basis of his recommendations, are also built into the QLDC conditions. Therefore, we find that the matters raised by this submission would be sufficiently and appropriately addressed by the QLDC conditions.

Louise Evans (#11) and Georgina Evans (#13)

[234] Georgina and Louise Evans raise similar concerns as to the effects of the proposal on them at 17 Man Street. This is on the corner with Brecon Street.

[235] One concern is as to the lack of provision for carparking in the notified application (and removal of staff caparking). They are concerned that this would put further pressure on an already congested environment. They seek that a carpark be built for customers.

[236] As noted for others raising similar concerns, the matters of carparking and traffic management (including in Brecon Street) is deferred but will in due course be addressed.

[237] They also raise concern about construction noise and sleep disturbance. In regard to these concerns, Dr Chiles for QLDC comments:

> ... 17 Man Street ... is over 250 metres from the lower terminal and I consider that sound from general construction activity in compliance with the criteria should be acceptable even if occurring at night.
>
> This is one of the few residential properties that could be significantly affected by trucks accessing the site from Brecon Street at night. However, condition 24 in Appendix J to the evidence of Mr Dent limits night truck movements and thereby avoids this potential effect.

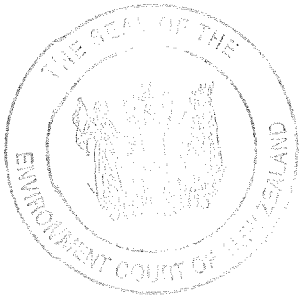
[238] We accept Dr Chiles' evidence on these matters and find that the QLDC conditions would sufficiently and appropriately address the noise effects for the submitters.

Ministry of Education (#12)

[239] As noted in Schedule 1, the Ministry of Education was excused appearance in view of settlement reached with Skyline. Dr Chiles explains how he considered the submitter's concerns in formulating his recommendations and we are satisfied that they are sufficiently and appropriately addressed by the QLDC conditions.

Kelvin Peninsula Community Assoc (#14)

[240] This submitter also raises concern about the lack of provision in the notified



proposal for carparking. It seeks this be provided for both workers and customers "in adequate numbers".

[241] As noted for others raising similar concerns, the matters of carparking and traffic management is deferred but will in due course be addressed.

Frost Foundation Limited (#16)

[242] The submitter acts for the owners of the Queenstown Medical Centre ('QMC') building in Isles Street and for the interests of business partners who occupy the building. As with several other submitters, it objects to the lack of provision for carparking. It seeks, by way of relief, that there be a change to all street parking in the wider vicinity of the QMC building to a mixture of 60 and 90 minute carparks.

[243] We do not have jurisdiction to regulate street carparking allocations. That is a matter for QLDC. However, as noted for others raising similar concerns, the matters of carparking and traffic management is deferred but will in due course be addressed.

Robins Road Ltd (#17)

[244] The submission indicates the submitter has interests in Brecon Street.

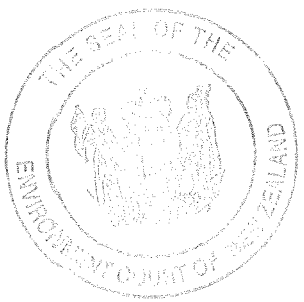
[245] It records that the submitter wished to be heard. However no one representing the submitter put in an appearance or asked to speak to the submission. In any case, the written submission is very clear in the matters of concern and relief sought.

[246] As with several other submissions, the focus of this submission in opposition is as to the lack of adequate (or any) provision for on-site carparking. By way of relief, the submission seeks a dedicated on-site parking facility (building) at the base of the gondola.

[247] As noted for others raising similar concerns, the matters of carparking and traffic management is deferred, but will in due course be addressed.

Kāti Huirapa Rūnaka ki Puketeraki (#18) and Te Rūnanga o Ōtākou (#19)

[248] We address these submissions together, they raise similar issues and seek similar relief. The submitters did not seek to be heard and state that they are neither in



support or opposition to the consent application.

[249] Submission #18 explains that the takiwā of Kāti Huirapa Rūnaka ki Puketeraki ('KHRP') centres on Karitane and extends from the Waihemo River (Shag River) to Purehurehu (north of Heywards Point). It says KHRP share an area of interest in the inland lakes and mountains with Kāi Tahu Rūnanga within Otago, and with those Paptipu Rūnanga located beyond the boundaries of the Otago Region.

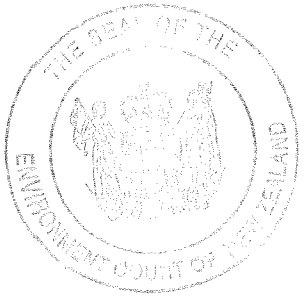
[250] Submission #19 explains that the takiwā of Te Rūnanga o Ōtakou ('TRO') centres on Muaūpoko/Otago Peninsula and extends from Purehurehu to Te Mata-Au (Clutha River) and inland, sharing an interest in lakes and mountains to the West Coast with rūnaka to the north and south.

[251] Relevant to our obligation to have particular regard to the exercise of katiakitanga (s 7(a), RMA), the submissions explain that the respective submitter's kāitiaki responsibilities include protecting the natural world. The submissions further explain the submitters' wish to ensure that wāhi tapu and wāhi taonga are appropriately protected and inform and acknowledge the cultural history of this rohe (area).

[252] The submissions explain that the site is within an area known to Māori as Te Taumata-o-Hakitekura. That name is associated with Hakitekura, the daughter of a Kāti Mamoe Rangatira, Tūwiriroa. The submissions explain:

> One day ... she was in her eyrie (eagles' nest) on Te Taumata-o-Hakitekura (Ben Lomond) behind the gondola area. She spied some girls trying to outswim each other down at the Whakatipu-wai-Māori (Lake Wakatipu) Lakeside. Some were more successful in their attempts at swimming the Lake than others, but no one had managed to swim right across the bracingly cold waters. So Hakitekura made a plan. She went to her father and asked for a kauati (fire stick) and a dry bunch of raupō. He obliged and she bound these very tightly in harakeke (flax) to keep them dry. Next morning very early, Hakitekura managed, through great strength of mind and body, to swim across the entire lake. She lit a fire on the other side on the point that has since been named Te-Ahi-a-Hakitekura. As well as warming her after her chilly endurance test, the fires she ignited served as a beacon for her retrieval.

[253] The submissions inform us that there are no recorded Māori archaeological sites within the boundary of the proposal.



[254] The information the submissions provide on these matters pertains to our related responsibilities under pt 2, RMA.

[255] The submissions each seek that an Accidental Discovery Protocol ('ADP') condition be included in any consent to manage any discovery of artefacts or archaeological material. The submissions attach a suitable form of condition.

[256] On the basis of the information provided in the submission, and ss 6(e), 7(a) and s 5, RMA, we find it both necessary and appropriate that any consent include an ADP condition as proposed as condition 59 of the QLDC conditions.

Lee Exell – Lomond Lodge (#20)

[257] The submission opposes the application and the submitter did not seek to be heard. It explains that the submitter has a motel at 33 Man Street and expresses concern about a range of construction effects and associated detriment to the submitter's motel business. For example, those include proposed extended hours, heaving vehicle movements, noise, dust, and other detriments of construction traffic, and helicopter noise. It seeks that the construction plan be reviewed such that construction activity be confined to 'normal hours'. It raises the prospect that it may have to close its motel during some stages of construction, and seeks associated compensation. It also records concern about carparking.

[258] On the various concerns about construction impact, Dr Chiles comments:

> Like 17 Man Street, this location is over 250 metres from the lower terminal and I consider that sound from general construction activity in compliance with the criteria should be acceptable even if occurring at night.

[259] We are satisfied, on the evidence of Dr Chiles and the other experts, that construction noise and other construction impacts (including from heavy vehicle movements and helicopter operations) will be appropriately mitigated through the QLDC conditions, including in relation to the concerns raised by the submitter.

[260] As noted for others raising similar concerns, the matters of carparking is deferred but will in due course be addressed.

Evaluation under objectives and policies and Part 2

Objectives and policies

[261] Ms Sinclair presented a thorough evaluation of the proposal with reference to relevant existing and proposed plan objectives and policies and relevant aspects of pt 2, RMA.[160] This drew from the s 42A report as well as her evaluation of related expert evidence before the court. Her opinion was also soundly based on the evidence of related expert witnesses; in particular Mr Denney, Mr Jolly, Dr Turner (traffic and transport planning), Dr Chiles and Mr Wardill.

[262] While her overall opinion was that the proposal would be contrary to objectives and policies of the existing plan, this was by reason of specific issues, primarily (although not entirely) related to the matters of carparking, traffic, stormwater (and debris flow) matters reserved by this decision. In particular, she concluded that the proposal, as it currently stands, would be contrary to:[161]

(a) in Chapter 4 – District Wide Issues: 4.4.3 Objective 1 – Provision of Reserves (as to avoiding, remedying or mitigating the adverse effects on public open space and recreational areas from development of visitor facilities);
(b) in Chapter 14 – Transport: Objectives 1 (efficiency), 2 (safety and accessibility) (environmental effects of transportation), 5 (parking and loading) of;
(c) in Chapter 7 – Residential: Objectives and policies pertaining to the Queenstown Residential and Visitor Accommodation Areas section 1, on matters in relation to the adverse effects associated with carparking and the roading network; and
(d) in Chapter 22 Earthworks: Objective 1 as to avoiding, remedying or mitigating the adverse effects of earthworks on communities and the natural environment.

[263] We understand Ms Sinclair's opinion on those objectives also extends to related policies.

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160 Ms Sinclair evidence-in-chief for QLDC, at [295]-[402].
161 Ms Sinclair evidence-in-chief for QLDC, at [397].

[264] Ms Sinclair explained why she considers the proposal is not contrary to other relevant objectives and policies of the existing plan.[162] Her opinion on those matters is materially consistent with the view she expressed in her report under s 87F, RMA.

[265] We understand that, in forming her opinion, Ms Sinclair would have assumed all aspects of Mr Denney's recommendations on landscape and visual amenity mitigation would be taken up and reflected in conditions. For the reasons we have explained, we have accepted most of his recommendations, but take a different view of the value of conditions on glare colour treatment of construction hoardings and temporary construction buildings and aspects of construction lighting (at [134], [144] and [157]). However, because we find the environmental effects of those dimensions of the proposal would be acceptable, having examined the relevant objectives and policies, we find that Ms Sinclair's evaluation remains applicable. We accept her evidence in finding the proposal is not contrary to the existing plan's objectives and policies on the issues addressed by this Interim Decision.

[266] In regard to the proposed district plan, Ms Sinclair updated the opinion she expressed in that report. Based on the evidence of Mr Wardill, she now considers the proposal would not be contrary to the objectives and policies in Chapter 28 Natural Hazards. She explained that she remains of the opinion that the proposal would be contrary to objective 36.2.1 (and related policies) in Chapter 36 Noise, despite the fact that Skyline has obtained the affected party approval of Kiwi Birdlife Park[163] ('KBP'). On that, she differs from Mr Dent who treated this approval as rendering the proposal not contrary to this objective (and related policies).

[267] The objective and related policies are relevantly as follows:

> 36.2.1 … Control the adverse effects of noise emissions to a reasonable level and manage the potential for conflict arising from adverse noise effects between land use activities.
>
> 36.2.1.1 Manage subdivision, land use and development activities in a manner that avoids, remedies or mitigates the adverse effects of unreasonable noise.
>
> 36.2.1.2 Avoid, remedy or mitigate adverse noise reverse sensitivity effects.

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162 Ms Sinclair evidence-in-chief for QLDC at [397] and preceding paragraphs.

163 Kiwi Birdlife Park (submission #[4]).

[268] By memorandum of counsel, KBP confirmed that it gives approval to the application provided that Skyline volunteers the conditions attached to the memorandum and KBP remains a party to the proceedings (so it can be informed of any material amendments to those conditions). It also states that KBP is "accepting of the effects of the proposal on the basis of the conditions proposed by Skyline" and that these conditions "resolve all of its concerns and it consents to the granting of the consent on that basis".[164]

[269] In his evidence-in-chief, Mr Dent confirmed that all of KBP's conditions are accepted by Skyline and he included them in his then recommended consent conditions. He expressed his understanding that KBP's submission had, therefore been resolved and that "all potential adverse effects on them may be disregarded".

[270] Mr Dent was not strictly correct on the law on that last matter. The fact that KBP's approval is conditional means that the s 104(3)(a) RMA prohibition on having regard to effects on this submitter does not apply. Therefore, we must and have had regard to KBP's submission. We note that KBP expresses concerns about construction and operational noise and the potential stressor and welfare harm this could give rise to for kiwi (and associated implications for its capacity to continue to host kiwi). It also expresses concern about construction dust, damage to trees and disturbance to other wildlife in the vicinity of their facility. It acknowledges that Skyline was then endeavouring to resolve these concerns and comments that they "would like to support Skyline's development but welfare of our animals and our visitor experience are of highest priority to us".[165]

[271] We are satisfied that the conditions are properly reflected in the QLDC conditions. Having considered the various concerns expressed in KBP's submission and the resolution reached on those, we find that, insofar as KBP is concerned:

(a) adverse effects of noise emissions would be effectively controlled to a reasonable level;
(b) the potential for conflict as between the proposal and KBP's facility, arising from adverse noise effects, would be properly managed (both in relation to unreasonable noise and reverse sensitivity matters); and

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164 Memorandum of counsel for Kiwi Birdlife Park Limited, dated 29 March 2017.
165 Kiwi Birdlife Park submission #4 as included in s 42A report.

(c) therefore, the proposal would not be contrary to objective 36.2.1 (and the related policies) of the proposed district plan.

[272] In other respects, Ms Sinclair considers that the proposal would not be contrary to the objectives and policies of the proposed plan. Subject to the confined points of difference we have stated, we accept Ms Sinclair's evidence on these matters.

[273] In view of our evidential findings, we also find that, insofar as Issues A-G are concerned, the proposal would not be contrary to the objectives and policies of either the existing or proposed plan. However, we emphasis that this does not constitute a finding that the proposal would satisfy this threshold of s 104D(1)(b), RMA. That is particularly given that we have yet to see how Skyline proposes to address the outstanding issues concerning carparking and traffic (on which, as Ms Sinclair's evidence demonstrates, there are a number of important objectives and policies to consider.

Findings as to pt 2 matters and the effects of the proposal

[274] For the reasons we have given:

(a) we find that there is nothing in respect to Issues A-G that would render the proposal incapable of or inappropriate to be granted consent, subject to the conditions we have found appropriate (and assuming matters pertaining to conditions that we have made the subject of directions are properly addressed); however

(b) we do not determine whether the proposal would promote the RMA's sustainable management purpose, as that is part of the Ultimate Question.

Other matters

Operative and proposed RPS

[275] We have had regard to the operative and proposed RPS. No party argued that they relevantly bear on any of the issues addressed by this Interim Decision and we are satisfied that is the case (in the case of the operative RPS, because it is already given effect by the existing district plan; in the case of the proposed RPS because it is only in the early stages of review).

Other matters raised by submissions

[276] Most of the matters under this heading were raised by Mr Walker.

Extent of detail in Skyline's consent application concerning landscape and visual amenity

[277] Mr Walker commented that Skyline has been deficient in its application AEE and public consultation by failing to give proper information as to the height of structures and scaffolding.[166] We find that is a fair criticism. However, Mr Denney's thorough work would appear to have been impetus for the significant further work by Skyline and its experts. The end result is we find that in regard to landscape, streetscape and visual amenity affects, the ultimate proposal meets relevant RMA requirements despite the deficiencies of the original proposal and the associated AEE information (leaving aside carpark and transport matters). Insofar as Mr Walker raises a concern about procedural prejudice, we are satisfied that he has been put on fair notice by the notified proposal such as to be in a position to present his case before us. Similarly, we find no evidence that the notified proposal gave rise to any issues of procedural prejudice for anyone else. On the contrary, there is a wide cross-section of submissions filed by individuals, community interest groups and others and those submissions demonstrate a sufficiently proper understanding of the proposal. Further, we find the various refinements to the proposal are comfortably within the scope of the originally notified application.

Precedent concerns

[278] Mr Walker raised concern that approving the application would set an adverse precedent that could prompt other applications that undermine the integrity of the plan.[167] As we find the proposal is not contrary to relevant objectives and policies on any of Issues A-G, we find it would not set an adverse precedent for any such issue.

Consideration of alternatives and matters of reserve management

[279] Mr Walker argued that Skyline was legally required, under the RMA, to "supply an alternative" and has failed to do so.[168] He also argued that we should pay particular

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166 Mr Walker evidence, [20], [21].
167 Mr Walker evidence, [3], [4].
168 Mr Walker evidence, [18], [19].

regard to the fact that the proposal would occur within QLDC managed leasehold land (to which we understand Mr Walker to refer to Ben Lomond Reserve). He proposed that Skyline be required to pay an increased rental ("a minimal 10%").[169]

[280] We do not accept Mr Walker's submission that Skyline was under any legal obligation (whether under the RMA or otherwise) to "supply an alternative" proposal. Rather, Skyline was entitled to make the consent application it has made for its chosen proposal. Insofar as Skyline's application was required to include an assessment of alternatives, we are satisfied that it has done so. In particular, it is clearly the position that there is limited scope for alternatives in a context in which the proposal is for an upgrade to an existing gondola and facility. For instance, the alternative alluded to by Mr Walker of an entirely different gondola route can be readily dismissed on the evidence as impracticable. Where there is practicable scope for alternatives concerns matters such as the design and scale of redevelopment and associated landscape treatment. We are satisfied on the evidence that through the process that has led to the final proposal before us, alternative designs and approaches to the proposal have been satisfactorily tested. Any weakness in initial testing of alternatives prior to the notification of the proposal have been overcome.

[281] We have considered the fact that the proposal would occur within Ben Lomond Reserve and find the concerns raised by Mr Walker about the reserve go beyond relevant RMA considerations. In particular, they also encompass a wider concern for how QLDC, as the statutory agency responsible for the reserve in conjunction with the Department of Conservation, ought to manage the use of public reserve land. Insofar as Mr Walker and other submitters seek that we increase the rental payable by Skyline under its reserve concession arrangements, we simply record that we find no valid resource management justification for doing so (on the evidence before us) even if we were to have jurisdiction to do so (and we find we do not).

Concerns about process and QLDC and Skyline conduct

[282] We have noted Mr Walker's concerns about various behavioural matters, primarily directed at Skyline but to some extent also QLDC. These include allegations of misleading behaviour towards the court, 'nonfeasance of justice', 'misfeasance of justice', 'malfeasance of justice' and 'misconduct in office'.

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169 Mr Walker evidence, [5], [6].

[283] Given that those remarks pertain in part to fairness of process and were expressed in an email sent to the court after the adjourned hearing, it is proper that we record the following exchange between Mr Walker and the court prior to the hearing adjournment:

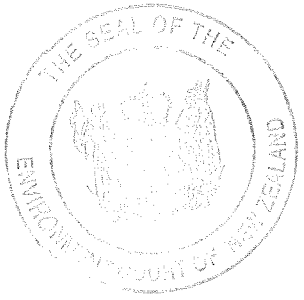
> A. ... I just would like it on record that some part of this process be open to full public submission and participation because as I repeat the direct referral is, the word "Environment Court" is very daunting to a great amount of other, thank you Sir.
>
> Q. Mr Walker you've been a good example of a member of the public who coped with the scariness of the Environment Court and do it very ably so I would encourage you to spread the word about being able to participate in this venue as a people's Court and a direct referral, of course, is the same as two step in the sense of the capacity of the individual to make a submission which the Court listens to. You don't need to come with the trappings of a suit necessarily and lawyers and experts to make your point well to the Court. The Court listens to it.
>
> A. I just took the opportunity Sir, thank you.

[284] We wish to reiterate those observations. Whilst not having assistance from counsel or experts, we found Mr Walker presented an able case. In particular, as the transcript shows, he was assiduous in testing various matters with a range of witnesses, daunting though that is for a lay person. Also, he delivered evidence that was both clear and on point. As this decision records, many of his substantive concerns were also the subject of expert evidence and relevant to the issues we must decide.

[285] We also understand that, inherently, a process in which evidence and issues must be robustly tested is challenging and at times intimidating to a lay person. Even so, we must record that we find these various belated observations by Mr Walker about QLDC and Skyline both unfair and unjustified.

Disputed interpretations of ZJV's resource consent

[286] ZJV and Skyline each made closing submissions concerning suggestions made during the hearing, on behalf of Skyline, that ZJV was responsible for undergrounding the powerline and in breach of its resource consent for failing to do so. ZJV submitted that we can be put this to one side as QLDC has investigated this allegation and written to ZJV confirming its position that ZJV is complying with its consent. We agree with ZJV on that. This is not the proper forum for any findings on this matter. We observe



that the only RMA purpose it serves is to emphasize that, in a setting where cooperation between resource users of a reserve would assist its proper management, there seems a sad demonstration of bad blood. We encourage both parties to work more constructively with each other, but that is as far as we can go on that theme.

Process from here and directions

[287] It is directed as follows:

(a) Skyline is to confer with QLDC as to the reframing of proposed conditions 3-5 of the QLDC conditions with a view to specifying an appropriate construction lighting management plan regime and to otherwise better reflect the findings in this Interim Decision;

(b) Skyline is to confer with QLDC and QPN as to whether condition 18 should be suitably modified to provide for notification to QPN of helicopter activity, blasting and other noisy activity;

(c) Skyline is to confer with QLDC and ZJV as to whether condition 35 of the QLDC conditions should be refined in regard to its specified requirement that the earthworks plan be accompanied by evidence of "Ziptrek's approval" to avoid any potential for an impasse through a failure to secure approval (and as to whether 'Ziptrek' ought to refer instead to ZJV);

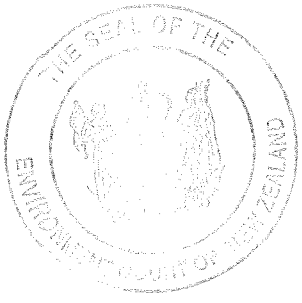
(d) Skyline is to confer with QLDC and ZJV as to:

  (i) whether conditions 63 and 64, as to the requirement to achieve a joint Fire Risk and Evacuation Management Plan, should be refined to avoid any potential for impasse through failure to agree a hold out risk;

  (ii) a suitably worded further condition in regard to QLDC's programmed conifer clearance programme and the relative timing of occupation of the Upper Terminal.

(e) Skyline is to confer with QLDC and ZJV as to an appropriate condition to require the placement of a small but effective sign in the vicinity of the main doors to the reserve from the Upper Terminal to direct ZJV customers towards the Treehouse and to be in place prior to commencement of construction of the Upper Terminal;

(f) Skyline is to file and serve a memorandum of counsel providing an updated set of proposed conditions, showing tracking against the QLDC conditions ('Skyline updated conditions'), by **Friday 1 September 2017**;



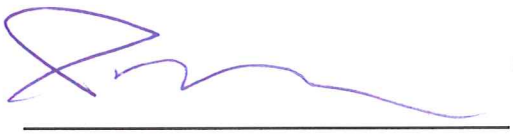
(g) QLDC, ZJV and any other party who wishes to raise any issue or concern about any of the Skyline updated conditions must file a memorandum to that effect, showing tracking against those updated conditions, by **Friday 15 September 2017**;

(h) Skyline is to file and serve a memorandum of counsel providing a status report update by **Monday 2 October 2017**; and

(i) leave is reserved for any party to seek alternative or amended directions by memorandum filed and served by **Wednesday 30 August 2017**.

[288] On 6 June 2017,[170] Skyline reported that it was progressing a resource consent application for a carparking building and anticipated lodging it with QLDC by 31 July 2017. It reported that it was also progressing its investigation of stormwater discharge and disposal matters and anticipated it would lodge a related resource consent application with Otago Regional Council by 30 September 2017, by which date it would also file a status report with the court. In the circumstances, we will withhold from making directions on any further procedural steps until that date. Depending on what Skyline then reports, the parties should anticipate that these directions will be by teleconference convened in early October 2017.

For the court:



J J M Hassan
Environment Judge

170 Memorandum of counsel for Skyline, 6 June 2017.

Schedule 1

Submitters who made a written submission but did not seek to be heard

QLDC sub no.	Submitter	Support: (S) Oppose: (O) Neither S or O: (N)
1	Ally Mondillo and others	O[171]
2	Brecon Street Partnership Ltd	S[172]
3	Mark Rose	O
4	Kiwi Birdlife Park	O[173]
5	CCR Ltd – Lessee Queenstown Lakeview Holiday Park	O[174]
7	Queenstown Preschool and Nursery	O[175]
8	Queenstown Holiday Park and Motels	O
10	S Kolff	O
11	Louise Evans	O
12	Ministry of Education	Seeks changes[176]
13	Georgina Evans	O
14	Kelvin Peninsula Community Association	O[177]
16	Frost Foundation Limited	O[178]
17	Robins Road Ltd	O[179]
18	Kāti Huirapa Rūnaka ki Puketeraki	N
19	Te Rūnanga o Ōtākou	N
20	Lee Exell – Lomond Lodge	O

171 Written submission specified wish to be heard but submitters did not put in an appearance.
172 Submitter represented by counsel, Mr Bartlett QC, at pre-hearing teleconference.
173 See [220].
174 See [221].
175 See [222].
176 See [239].
177 Submission did not indicate whether or not submitter wished to be heard, and submitter did not put in an appearance.
178 Submission indicated wish to be heard, submitter did not put in an appearance.
179 Submission indicated wish to be heard, submitter did not put in an appearance.

Submitters and parties who were heard and the evidence called

QLDC No	Party[180]	Heard[181]	Witness(es) (role or expertise)
	Skyline	Y	Ms Snodgrass (landscape architect), Mr McKenzie (traffic & transport planning), Dr Trevathan* (noise), Mr McLeod (rebuttal surveying and construction), Mr Faulkner (geotechnical engineering and stormwater), Mr Colegrave (economics), Mr Dent (planning)
	QLDC	Y	Mr Denney (landscape architect), Mr Jolly (urban design), Dr Turner (traffic and transport planning), Dr Chiles* (noise), Mr Wardill (geotechnical engineering), Ms Sinclair (planning)
9	Otago Regional Council	Y	Mr Henderson (ORC planning officer), Dr Massey (debris flow risk, stormwater)
15	ZJV (NZ) Ltd	Y	Mr Yeo (ZJV executive director, client position), Mr Peakall* (noise), Mr Still (fire risk), Mr Brown (planning)
6	Mr B Walker	Y	Mr Walker
12	Ministry of Education	N[182] SR	Mr Whyte*, planner as to client's position on application
7	Queenstown Preschool & Nursery[183]	Y SR	N

180 'S' denotes submitter.

181 'Y' denotes 'yes', N' denotes 'no', 'SR' denotes settlement reached with applicant, * denotes by consent written evidence received and witness did not attend hearing.

182 Ministry of Education excused appearance at pre-hearing teleconference in view of settlement reached with applicant.

183 Ms Maclean attended hearing but, by arrangement with applicant in view of settlement reached, did not present submissions or give evidence.