

BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of the Publicly Notified
Plan Change 50

AND

IN THE MATTER of Submissions by Adam
& Kirsten Zaki and Carl
& Lorraine Holt

APPLICATION TO FILE LATE SUBMISSION
Section 37 Resource Management Act 1991

MAY IT PLEASE THE COMMISSIONERS:

1. This is an application under s37 Resource Management Act 1991 to file late submissions on Plan Change 50.
2. This application includes detailed reasons and submissions in support of the application.
3. The submitters are Adam and Kirsten Zaki (jointly) and Carl and Lorraine Holt (jointly). The Submitters own apartments next door to each other at 40A and 40B Man Street, Queenstown. Counsel acts for both submitters. The Submitters are filing separate but identical submissions. The Submitters intend upon running a joint case and are not seeking to file further submissions.
4. The Submitters do not oppose the Plan Change as a whole. Their submission focuses upon the Beach Street Block. Specifically the rules and methods for land owned by interests associated with the Crowne Plaza Hotel and the residential properties on Man Street. They do not seek to be heard on the wider policy framework, except to the extent that it may relate to their site specific issues¹.
5. At the outset, the submitters acknowledge their submission is late and given the Hearing is well progressed, this application is unusual. However, for reasons set out below, it is submitted that the tests under s37A can be met and the Submitters' involvement is unlikely to inconvenience or compromise the decision-making process.

Legal Tests

6. Sections 37 and 37A are (relevantly) as set out below:

37 Power of Waiver and Extension of Time Limits

- (1) A Consent Authority or Local Authority may, in any particular case
—
 - (a) extend a time period specified in this Act or in regulations whether or not the time period has expired; or

¹ No changes to the objectives and policies are sought, only consequential amendments that may be required to give effect to the site-specific relief sought.

- (b) a failure to comply with a requirement under this Act, regulations or plan for the time or method of service of documents.

37A Requirements for waivers and extensions

- (1) A consent authority or local authority must extend a time limit or waive compliance with a time limit, method of service, or the service of a document in accordance with s37 unless it is taken into account –

- (a) the interests of any person who, in its opinion, may be directly affected by the extension or waiver; and
- (b) the interests of the community in achieving adequate assessment of effects of a proposal, policy statement, or plan; and
- (c) its duty under s21 to avoid unreasonable delay.

- (2) A time period may be extended under s37 for –

- (a) A time not exceeding twice the maximum time period specified in this Act; or
- (b) A time exceeding twice the maximum time period specified in this Act if the Applicant or requiring authority requests or agrees.

...

- (6) A consent authority or a local authority must ensure that every person who, in its opinion is directly affected by the extension of a time limit or the waiver of compliance for the time limit, a method of service, or the service of a document is notified of the extension or waiver.

- 7. Clause 2 of the First Schedule to the Act confirms that s37 applies to plan changes.
- 8. In *Metro Water Limited v Auckland Regional Council* [2005] NZRMA 298 the Environment Court examined s37 in the context of its power to grant waivers and directions under s281. This case was about extending the

timeframe to file appeals to a plan change decision. The Court pointed out obiter that s37A provides a framework within which local authorities can make their decisions and therefore an analysis under s281 would not be necessary if the case had been considered after the Resource Management Amendment Act 20032.

9. Nonetheless it is submitted s281 authorities provide useful guidance to frame decision-making. *Omaha Park Limited v Rodney District Council* A46/2008 summarises the types of considerations relevant for an application under s281. These include:
 - a. The length of delay;
 - b. The reasons for the delay;
 - c. The scheme of the Act relating to public participation;
 - d. What has happened in the proceeding in the meantime;
 - e. What effect introducing new parties might have on progressing the appeal.
10. It is noted however that the test in s281 that there be no "undue prejudice" is not the same as the test in s37A(1)(a), albeit that any prejudice to a party will clearly be material. However because the consent authority is fettered by the usual obligation for its decisions to be reasoned and reasonable³ it may be difficult for it to grant an application if there is undue prejudice.
11. It is submitted the *Omaha Park* considerations are a helpful framework for consideration of s37 applications, given the requirement to consider the interests of any person who is affected and the duty to avoid unreasonable delay; see s37A(1)(a) and (c).
12. The exception is s37A(1)(b), which frames public participation within the need to achieve an adequate assessment of the effects of a plan change, rather than the broad scheme of the Act encouraging public participation (see paragraph 9c).

² Section 37A was first enacted in the 2003 amending Act.

³ Or more accurately, so unreasonable that the only proper inference that can be drawn is that the power was misused, *Hawkins v Minister of Justice* [1991] 2 NZLR 530 and not just wrong, *Waitakere City Council v Lovelock* [1997] 2 NZLR 385.

Applicant's Consent

13. Public notice was given on 15 September 2013 and submissions closed on 10 October 2014, (20 working days). Further submissions following public notice on 15 October 2014 closed on 30 October 2014 (10 working days)⁴.
14. Therefore, the time period sought to be extended exceeds twice the maximum specified in the Act and the applicant must consent to the application.
15. PC50 is a Council initiated plan change, so consent has been sought from Council. Council's position is that its consent is not required because as a Council initiated plan change has no applicant. Presumably this is because Council is promoting PC50 in its regulatory capacity under ss 73 and 74. Attached is a copy of an email from Council confirming that position.
16. When speaking to Mr Speedy (the author of the attached email) he advised Counsel that if the above is incorrect then Council consents to the application as far as is necessary to enable consideration by the Commissioners. It does not take a position on the merits and will abide the decision of the Commissioners.

Reasons for Late Submission

17. The Submitters are based out of the country and are only in Queenstown from time to time.
18. The Zakis instruct that they did not receive notice of the plan change at all.
19. The Holts advise that when they were leaving Queenstown they received notice in the post but it was on the day they were flying out. They instruct it was not clear on the face of that notice what the significance of the proposed changes were. The amendments relating to height and noise for the Beach Street Block are technical and difficult for a lay person to understand.
20. After learning of the significance of PC50 from Colin Walker (Mrs Walker's son who gave evidence at the Hearing on her behalf) the Submitters

⁴ Clause 5(3)(b) requires submissions to be at least 20 days after public notification. Clause 7(1)(c) provides ten working days for further submissions following notification.

sought planning advice. They had understood that they had no ability to make a submission. This Counsel was instructed on or about 3 December 2014 and advised this application could be made. A submission was prepared and approved on the weekend of 6 December 2014. Council was contacted promptly and its position under s37A confirmed. Therefore, the submitters have taken immediate steps to action this application.

Interests of Affected Persons

21. It is submitted there are two parties that will be directly affected by the extension of time to file this submission under s37A(1)(a). These are IHG Queenstown Limited and Carter Queenstown Limited (jointly the "Crowne Plaza Interests") and the residents of Man Street on the Beach Street block; being 32 to 36 Man Street.
22. The Submitters' position is very similar to that of Mrs Margaret Walker who resides at 36 Man Street. The relief sought by Mrs Walker requests the Beach Street Block not be rezoned, or if it is, there are controls on height and traffic. The heart of her concerns appear to be the effect rezoning the Beach Street Block will have upon her amenity. The Submitters have particularised their submissions more thoroughly and deal with additional matters such as noise, site coverage and set backs. However their primary relief is that the Beach Street Block not be rezoned and their concerns are amenity-focussed. No other Man Street residents have submitted.
23. The Crowne Plaza Interests submitted on the Beach Street Block, supporting the extension of the Queenstown Town Centre Zone. They then filed a further submission generally opposing Mrs Walker's submission. Their interests are affected insofar as they will now have two parties seeking relief inconsistent with what they are seeking.
24. It is submitted the Crowne Plaza Interests will not be prejudiced because the issues raised by the submitters are not new. Like Mrs Walker the Submitters are concerned about the relationship between the residential land on Man Street and the enabling of the development of the Crowne Plaza Hotel by rezoning it as Queenstown Town Centre Zone.

25. The Submitters and their properties would still need to be considered when addressing Mrs Walker's submission and the Plan Change itself.

Interests of the Community

26. The Submitters' submission assists the Commissioners to have an adequate assessment of the Plan Change because of their submission's attention to the zoning and/or structuring of rules to ensure the residential amenity of Man Street is maintained with an appropriate consenting pathway in place.
27. Mrs Walker's ability to fund her involvement in this process longer term is unknown and it is understood she has not obtained professional legal or planning advice to date. The submitters may consider entering into a funding arrangement with Mrs Walker should this application be declined. However, it is submitted it is preferable, given no prejudice arises to any other party, that the submitters be in control of their own submission.

Undue Delay

28. The submitters do not seek that the Hearing be reconvened and rely upon Mrs Walker's evidence. It is understood that caucusing is being undertaken. The Submitters seek the opportunity to be heard upon matters arising out of the caucusing at any future Hearings. Counsel as a courtesy acknowledges that this would not be an opportunity to present their case through the "back door".
29. It is submitted granting this application will not lead to any unreasonable delay under s21.
30. Overall, it is submitted that it is more efficient to have the submitters involved in this process to try and resolve concerns they have as part of this process.

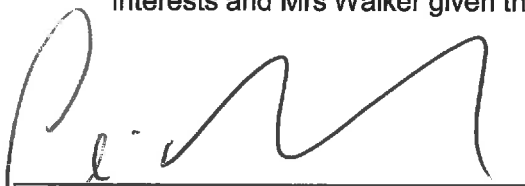
Orders

31. Therefore the Submitters seek orders:
 - a. Waiving the time to file submissions on PC50;
 - b. An extension of the time file submissions on PC50 to the date this application is approved;

- c. Leave for Mrs Walker and the Crowne Plaza Interests to file a further submission.

Service

32. There is no requirement under ss37 or 37A to serve this application. However this application has been served upon the Crowne Plaza interests and Mrs Walker given the direct effect upon them.

A handwritten signature in black ink, appearing to read 'C.P. Thomsen', written over a horizontal line.

C.P. Thomsen
Counsel for the Submitters

9 December 2014

Chris Thomsen

From: Paul Speedy <Paul.Speedy@qldc.govt.nz>
Sent: Friday, 5 December 2014 2:38 p.m.
To: Chris Thomsen
Cc: Julia Chalmers
Subject: RE: PC50 - Holt and Zaki

Categories: IDM

Hi Chris,

As discussed we do not believe the s37A(2)(b) requirement applies in a Council-initiated plan change situation, our view is that the Commissioners have been appointed to consider the plan change as the local authority so any requests for late submissions to be heard should be directed to them and not the Council officer.

If you can finalise the submission, then send to Julia (copied in). She will forward directly to the panel.

Kind regards
Paul

From: Chris Thomsen [mailto:cthomsen@webbfarry.co.nz]
Sent: Thursday, 4 December 2014 11:52 AM
To: Paul Speedy
Subject: PC50 - Holt and Zaki
Importance: High

Dear Paul

Further to my message on your cell phone, I act for Carl and Lorraine Holt and Adam and Kirsten Zaki. The Holts and the Zakis own apartments at 40A and 40B Man Street. They live next door to Peg Walker.

Peg Walker has submitted on PC50. The Holts and Zakis have not.

The Holt & Zaki and Peg Walker interests are aligned, as they are all concerned about the changes to the zoning of land owned by interests associated with the Crowne Plaza Hotel.

The Holts and Zakis wish to apply for a waiver and extension to file and serve a late submission. Because of the time that has passed since submissions have closed, the agreement of the Council (as applicant) to the extension is required before any application can be made to the Commissioners (s37A(2)(b)).

It is accepted that given the hearing is well progressed, this is an uncommon request, however my clients' position is that there is no prejudice arising to any party as a result of granting their application in the circumstances because:

- 1 The Zakis and Holts do not oppose the Plan Change as a whole. Their submission focuses upon the Crowne Plaza land and, specifically, the rules relating to height and other discreet matters on that site. They do not oppose or seek to be heard on the wider Policy framework except to the extent it relates to their site specific issues.

- 2 Their position is similar to that of Peg Walker and the issues they raise are not new.
- 3 While their concerns are site-specific (i.e. the Crowne Plaza site), they represent a community interest for those around Man St. In particular the structuring of rules that ensure the amenity from Man St is maintained with appropriate height, set back limits and noise standards, along with an appropriate consenting pathway for exceedances of any of these (site or zone) standards.
- 4 They do not seek that the hearing be reconvened and rely upon Peg Walker's evidence.
- 5 They seek the opportunity to comment upon any matters out of caucusing but will rely upon Colin Walker to represent their interests at that caucusing given it is unlikely any application will be determined before 8 December. They may wish to be heard at any future hearings.
- 6 Both the Holts and Zakis are based overseas and are only in Queenstown from time to time. Therefore they were not aware of the implications of the Plan Change for their property until after the submission period had closed.
- 7 They had previously understood that they had no ability to make a submission. I have been instructed in the last 48 hours or so and have advised them that this application can be made provided Council's consent is obtained. They have immediately taken steps to action that recommendation, so there has been no undue delay.
- 8 Should this matter be appealed they may be able to seek a right of audience under s274(d). It is more efficient to have them involved to try and resolve any concerns they have during this phase of the process.

Attached is a draft submission. Should our application be granted an identical submission is likely to be filed for the Zakis. This draft is intended to assist you to make a decision on this request and given the tight timeframes we are operating under my clients reserve their ability to amend the draft. QLDC would be provided with the final version of the submission before any application is made.

In the circumstances I would be grateful if you could give this matter your soonest attention and advise on your position.

Regards

Chris Thomsen
Associate
Head of Resource Management

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