

**BEFORE THE HEARING COMMISSIONERS
AT QUEENSTOWN**

IN THE MATTER of the Resource Management
Act 1991

AND

IN THE MATTER of Proposed Plan Change 50 to
the Queenstown Lakes District
Plan

BETWEEN **BRECON STREET
PARTNERSHIP LIMITED**

Submitter No 50/10

AND **QUEENSTOWN LAKES
DISTRICT COUNCIL**

Applicant

**SYNOPSIS OF SUBMISSIONS OF COUNSEL
FOR BRECON STREET PARTNERSHIP LTD**

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**SYNOPSIS OF SUBMISSIONS OF COUNSEL
FOR BRECON STREET PARTNERSHIP LTD**

1. Brecon Street Partnership Ltd owns the land at 34 Brecon Street. The site is zoned Residential under the operative plan, with a commercial overlay.
2. The Draft Plan Change 50 that QLDC put out for limited consultation did not include 34 Brecon Street for rezoning. My client became concerned that the expanded development opportunities provided for in the draft Plan Change were more aligned to QLDC's property interests than to the features or locations of other persons' land. That was consistent with the limited scope of the briefs to Council's experts. Given that the intention of the Plan Change was to expand the town centre area as a whole rather than simply to provide for a Council property development on its own land, the contributors to the section 32 analysis should have been required to give careful consideration to the specific location of the extended zone boundaries.
3. Following discussions between Council and my client and their respective advisers there was further investigation, much of it undertaken at my client's cost. Council advisers then agreed that 34 Brecon Street should be included in PC50. Having confirmed to me that such inclusion was the proper section 32 outcome, QLDC through its solicitors boldly advanced in open correspondence the crude proposition that the principled position that had been agreed to by the independent experts would be reversed by Council employees and lawyers unless my client committed to not objecting to certain details of PC50, in particular not leaving it open to the Commissioners to determine the height rules for 34 Brecon Street.
4. My client did not yield to this inappropriate pressure and following public notification of PC50 lodged a submission "on the Plan Change" as follows:

- (1) **Point 1:** Supporting PC50 in part but questioning the manner in which the increased building heights were not based on environmental considerations, but reflected Council's commercial land ownership interests.

Relief sought

- A. Provide for up to 7 habitable storeys at 34 Brecon Street with similar increases between that site and the 26 metre height zone on the Council land.
- B. Provide for (not necessarily require) relocation of Cemetery Road.
- C. Any necessary consequential amendments.

- (2) **Point 2:** This concerns the structure plan and the desirability to relocate Cemetery Road.

Relief sought

- D. Amend structure plan to provide for changed road layout consistent with B.

- (3) **Point 3:** This repeated concerns to the height issue.

Relief sought

- E. Provide for buildings at 34 Brecon Street up to 19 metres as a controlled activity.
- F. Provide that any building height above 19 metres would require maximum building coverage of 70%.

- G. Provide for 17 metre setback from cemetery boundary for parts of building above 15 metres.
- H. Provide for minimum 3.5 metre floor to ceiling height at ground.

5. Ian Munro's evidence summarises the current situation as follows:

"In terms of the above statutory and District Plan context, I see the alternatives of most relevance to be:

(a) Potential realignment of Cemetery Road:

- (i) I agree with and recommend the approach proposed by Mr Kyle to add text to Rule 10.5.2.1(xiii), and make no further comment.*

(b) Ground Floor Stud Height:

- (i) 4.5m floor-to-floor minimum (Council preference);*
- (ii) 3.5m floor-to-ceiling or similar (my preference).*

(c) Habitable Roof Space Allowance:

- (i) 2m non habitable space (Council preference);*
- (ii) 2m habitable space with roof plant permitted to exceed this by up to 3m provided the plant was no more than 40m² area and at least 10m back from any road boundary (BSPL) (these dimensions have been taken from PC50, Rule 10.6.5.2(i)(a)) (my preference).*

(d) Maximum Building Height at 34 Brecon St:

- (i) 12m controlled activity (plus 2m roof bonus) (Council preference excluding Dr Read);*
- (ii) 12m controlled activity but 8m in vicinity of Queenstown Cemetery (uncertain whether roof bonus is additional but presumed not to be) (Dr Read's preference);*
- (iii) 15m controlled activity at cemetery boundary and up to 19m set back a minimum 17m from cemetery boundary controlled activity, and up to 22.5m set back a minimum 17m from the cemetery boundary as*

a restricted discretionary activity (with roof bonus additional to this). Site coverage above 19m in height limited to 70% maximum (my preference)."

Preliminary issue – Jurisdiction

6. QLDC through its Counsel submits that the Brecon Street Partnership submission seeking a change in the height rules for its land is not "on the Plan Change" which provided the proposed rules. Unexpectedly, Counsel cites in support a series of authorities involving cases where submissions were made by landowners whose land was not included within the area of the Plan Change or variation as notified. As a result of the efforts I have described, 34 Brecon Street was "in" the plan change as notified. My client had no need to seek an extension of the zone to accommodate its land.

7. The *Naturally Fresh* case involved an inquiry as to the appropriate location of the zone boundary for the then proposed Jack's Point zone. The Environment Court had accepted my submission that in any proposal to create a new zone, the areal extent of the zone, and the precise location of the zone boundaries were key s32 issues. In holding that the Environment Court rationale in that case was too liberal, the Court in *Clearwater* stopped short of suggesting that a zone boundary could never be changed through the submission process. I submit that in a situation where a proposed zone boundary did not follow an obvious topographical feature, or inappropriately bisected a site without regard to cadastral boundaries, the proposal must be open to challenge. In *Palmerston North City Council v Motor Machinists Ltd* the High Court determined that as the land subject to the submissions was not part of the Plan Change as proposed by Council that was the end of the matter.

8. In relation to 34 Brecon Street, the quoted line of authority is not relevant given Council's inclusion of the subject land. Each part of the relief described in the plan sought directly and specifically addresses a proposed rule.

9. The present residential zoning provides for an 8 metre height limit at 34 Brecon Street. PC50 changes that and proposes a series of differential height levels across the Lakeview zone. Those height limits as provided for in the Proposed Rules are one of the key issues of this Panel to determine. There is no authority for the proposition that a submission on a proposed height rule is not “on the plan change”.

Process issues

10. The speed with which PC50 has progressed from public notification through to submission, further submission and to a hearing demonstrates just what can be achieved when Council as consent authority chooses to give priority to something. In this case the “something” is a proposed Council property development. The private sector which I predominantly represent is gratified to know that Council understands the significance of timing in relation to property development and accepts that the haste is well intended.
11. The downside however is obvious. In an era where Councils as first instance hearing authorities are adopting the well proven case management techniques from the Environment Court and Commissions of Enquiry, there has been no case management at all for PC50 other than target hearing and decision dates. If ever a case cried out for pre-circulation of expert evidence, written statements of issues and caucusing of expert witnesses, this is such a case.
12. The decision not to adopt proper case management means that in respect of 34 Brecon Street (at least), the case is being put to you in reverse, namely:
 - Council legal submissions (last week).
 - Council expert opinions on my client’s proposal (last week).

- Primary evidence relating to visual effects at 34 Brecon Street and at the cemetery relevant to the formation of expert opinions (this week).

Evidence of Clinton Bird

13. While Mr Bird has had access to all Council generated material and to the submission lodged by my client, he has not seen the written or photographic evidence of David Gibbs or Ian Munro. His brief was prepared and his professional opinion formed before completion of the Fearon Hay updates.
14. Paragraph 6.7 of Mr Bird's evidence describes the varying height controls in the Lakeview zone (ranging from 4.5 metres to 26 metres). He concludes at 6.10 that:

"In my opinion, the analysis underlying the Height Limit Plan and its prescriptions are both sound and appropriate to the character and context of the Lakeview site."

15. In Parts 8.9 to 8.14 of his evidence Mr Bird gives his assessment of photo montages 1, 2, 3, 6, 7 and 8.
16. At 10.20 Mr Bird says this:

"I disagree that the maximum building height on the site at 34 Brecon Street should be increased from three to seven habitable storeys. In my opinion, this would have adverse shading and visual effects on the adjoining historic Queenstown Cemetery, which is an important public space."

17. There is no reference to the evidence upon which the opinion is based. The opinion is not informed by any photo montage prepared for the purpose of analysis. There is no quantification as to the claimed "adverse shading and visual effects" on the cemetery. The exercise of expert judgment is not about simply listing kinds of effects in a generic way – these effects have to be quantified and then analysed as to their

significance. Mr Bird stops well short of saying that the effects are of such a scale that the 12 metre restriction on height must be applied.

18. The conclusion of Mr Bird's paragraph 10.21 that 12 metres is 50% higher than 8 metres is mathematically correct (100%) – but his “count your blessings” approach is not a meaningful urban design analysis.
19. Mr Bird goes on to cite (in part) the 2009 Queenstown Height Study which postulated adverse effects of:
 - (a) **Domination and shadowing of the cemetery** without any quantification. It talked of potentially blocking views, but without any analysis of the difference in effect between a 12 metre and a 19 metre structure or addressing the related issue of site coverage.
 - (b) **Visually dominating views for Queenstown recreation grounds, Queenstown Primary School playing fields and parts of the Town Centre.** There is no evidence that Mr Bird did any work at all to analyse if those concerns had any basis. My client has done the work (as have Feron Hay following a recent request on behalf of my client). Mr Gibbs addresses that, and presents a strong challenge to the suggestion of visual domination.
 - (c) **Potentially obscuring vistas up Brecon Street and Camp Street to the gondola and Ben Lomond** – This also is without foundation and is addressed in Mr Gibbs' evidence.
20. It is not satisfactory for an expert witness of Mr Bird's standing to invite the Panel to come to conclusions that are highly prejudicial to my client's interests unsupported by a basic analysis of the propositions being advanced. Recycling generalised statements from a previous study is not corroboration.

Marion Read

21. In her paragraph 6.17 and 6.18, Ms Read gives her view as to the possible effect of developments up to 12 metres in the vicinity of the cemetery. It is not clear what assumptions she makes as to site coverage, space between buildings or building design.
22. She talks of preventing “a sense of dominance caused by 12 metre buildings”. Without providing any detail of her expertise to evaluate the response of others, it is left for this Specialist Panel to ask itself if it has ever experienced a sense of dominance when walking past a three or four storey building in a commercial area.
23. Appendix 5 of her evidence which is a “stitched panorama” of the view from the northern portion of the cemetery. From that photograph you are asked to agree that:

“It can be seen from this image that a 24 metre high building on the 34 Brecon Street site would obscure a significant part of the view of the Remarkables, although some view of the Remarkables would remain.”
24. Ms Read does not refer to any plan objectives and policies in support of her position – because there are none. There is no breach of any viewshaft because no viewshafts have been created. Ms Read has done no analysis at all before coming to her conclusion.
25. Commissioners will be well used to both experts and lay persons using the expressions “dominant” and “dominance”.
26. Frequently, the no distinction is made between the concept of structures being “dominant” within a particular scene (the Pyramids, or the classic Sydney Harbour Bridge/Opera House image) which may well be positive or neutral in their environmental effect, and the claimed psychological

impact on individuals being confronted with a building that is bigger than them (with a presumption that that is something negative).

27. Ms Read's evidence is anecdotal and impressionistic – not reflecting any research undertaken by her or on her behalf. You are asked to prefer the analysis of Mr Gibbs and Mr Munro.

Conclusion

28. Within the time available my client has taken useful steps to obtain for your consideration some relevant primary evidence upon which you can evaluate the conflicting expert opinions.
29. With regard to the cemetery, a detailed study has been made. Perhaps one conducted over a longer period could have produced more information, but I suggest to you that there is a remarkable consistency in respect of the interviews reported. There is no evidence of anyone visiting the site to pause and reflect in solitude while taking in the view. Generally people stop there on their way to or from another place that has a better view. Speculation about “feelings of dominance” is just that – speculation and that should not influence your decision.
30. My client has undertaken photo-montage work from which we can assess the evidence and come to conclusions as to visual impacts. Council staff and advisers came to their firmly-held conclusions without undertaking any such work and before they had seen the work now produced on behalf of my client.
31. I ask you to also consider the tone of the evidence put forward by my client's expert advisers. They do not hesitate to ungrudgingly express their agreement with aspects of the work of their professional colleagues presented on behalf of Council. They present to you a conviction which stops pleasantly short of the staunchness which characterises much of the Council material.

32. The 34 Brecon Street height issue is not a matter of particular complexity. This hearing remains a basic rule-making exercise following which resource consent applications will inevitably be required. All it takes is a little confidence – firstly in your own rule-making ability and secondly in the ability of subsequent decision-makers (possibly yourselves) to intelligently apply those rules.

R E Bartlett QC

24 November 2014