Before the Queenstown Lakes District Council Hearings Panel

In the Matter	of the Resource Management Act 1991 (**RMA**)
And	
In the Matter	of the Proposed District Plan Stage 2 - Hearing Stream 15 – Visitor Accommodation

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Supplementary Legal Submissions on behalf of Coherent Hotels Limited – Response to Query from Hearings Panel

Dated 27 September 2018

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MAY IT PLEASE THE PANEL:

Introduction

1. I appeared on behalf of Coherent Hotels Limited (**Coherent**) in relation to submissions lodged on the Queenstown Lakes Proposed District Plan – Stage 2 (**Proposed Plan**)[1] on 25 September 2018, along with Coherent's planning consultant Mr Grala.

2. Consequent on exchanges with the Hearings Panel regarding Coherent's submissions and evidence, the Panel requested supplementary submissions addressing a matter arising.

Context

3. The context is:

    a. Coherent owns a number of properties in Fernhill comprising 139 Fernhill Road, 10, 12, 14 and 16 Richards Park Lane, and 18 and 20 Aspen Grove. These properties are collectively referred to in these submissions as the **Site**.

    b. All properties making up the Site, with the exception of 18 Aspen Grove (which is zoned Low Density Residential (**LDR**)), are zoned Medium Density Residential (**MDR**).

    c. It is anticipated that those parts of the Site currently vacant or containing single dwellings will be developed for either an extension to the Aspen Hotel or as a new, standalone, hotel in the future.

    d. The reporting planner recommended that a Building Restriction Area (**BRA**) of 4.5m be applied to a portion of the southern Site boundary, where it adjoins 18 Richards Park Lane and 22 Aspen Grove.

    e. The BRA would only apply on this Site to buildings for visitor

[1] Submitter reference 2524.

accommodation.

f. Locating any building (or part of a building) for visitor accommodation within the BRA (i.e. in this case within 4.5m of that portion of the southern Site boundary) would infringe the rule, requiring resource consent as a non-complying activity.

g. Coherent opposes the imposition of a BRA.

h. The Panel raised various questions relating to notification, with particular reference to whether the "boundary activity" definition would apply.

Issue for comment

4. My understanding is that these supplementary submissions are to consider a hypothetical visitor accommodation development on the Site which has a building or part of a building within 4.5 m of the boundary with 18 Richards Park Lane and 22 Aspen Grove. Issues upon which the Panel sought comment are:

   a. Would the hypothetical development likely be notified to affected persons owning/residing in neighbouring properties?

   b. Related to the above, would the hypothetical development be classed as a boundary activity?

5. Before progressing further, for completeness I would sound a note of caution that there should be no pre-determination on the part of the Panel in a plan review context that notification of a VA development on the Site should occur. That is properly something which would be assessed in accordance with the notification provisions in force at that time by reference to the particular development being advanced.

Notification

6. As the Panel will be aware, notification of applications is addressed in sections 95 – 95 G of the RMA. The notification sections of the RMA have been much

amended over time, with the latest version coming into force as from 18 October 2017. The 2017 notification methodology incorporates a 4 step analysis both for public notification[2] and for limited notification.[3]

7. I don't propose to consider a full-blown detailed hypothetical development. There is no real merit in attempting to do so because there is a myriad of potential design solutions for the Site. I limit my consideration to a "large" visitor accommodation development which:

   a. extends within 4.5 m of the boundary with 18 Richards Park Lane and 22 Aspen Grove, but not closer than 1.5 m to that boundary;

   b. is a restricted discretionary activity, irrespective of spanning both the LDR and MDR zone;

   c. complies with bulk and location controls within the MDR and LDR zones which relate to building height, building coverage, height in relation to boundary, boundary setback and building length.

Rules precluding notification

8. The starting point is that there are rules in the notified PDP applying to Visitor Accommodation which preclude notification.[4]

9. Rule 7.6 (LDR chapter) and rule 8.5 (MDR chapter) provide that Visitor Accommodation in the Low Density Visitor Accommodation subzones and in the Medium Density Visitor Accommodation subzones shall be non-notified.

10. These rules then influence the notification assessment. With reference to section 95 A, public notification of Visitor Accommodation is precluded by a rule.[5] Note for the rule to apply in a manner which prevents the hypothetical development being notified, <u>each activity for which resource consent is sought</u> must be subject to a rule precluding notification. Assuming this

[2] section 95A
[3] section 95B
[4] Rules specifying activities for which consent applications must be precluded from being notified can be imposed pursuant to section 77 D of the RMA.
[5] section 95 A (5) (a)

applied, then Step 4 of section 95A[6] requires determination of whether special circumstances exist in relation to the application which warrant public notification. If such special circumstances exist then public notification is required, otherwise the decision-maker must move on to determine whether to give limited notification.

11. Turning to section 95 B, limited notification of Visitor Accommodation is precluded by a rule.[7] Again this is only in the context of each activity for which resource consent is sought being subject to a rule precluding notification. Similar to the public notification rules, the next step in the assessment is whether special circumstances exist in relation to the application that warrant notification to any other persons not already determined to be eligible for limited notification.[8]

Initial Conclusion – Rules precluding notification

12. Thus, assuming each activity for which resource consent is sought is subject to Rule 7.6 and 8.5, then public or limited notification would only occur dependent on a determination of special circumstances. That would be the position irrespective of whether a BRA was applied.

13. However, the underlined words above identify a consequential issue.

"Each activity" for which resource consent is sought

14. Clearly our hypothetical VA application will require a range of resource consents. These might include earthworks consents for example, in addition to consent for the activity of charging people money in return for offering accommodation.

15. The notification provisions of the RMA have "extended" the definition of residential activity in a manner which encompasses all subsidiary/associated matters for consent. Refer to the definition below:

[6] section 95A (9)
[7] section 95 B (6) (a)
[8] section 95 B (10)

(6) In subsection (5), **residential activity** means an activity that requires resource consent under a regional or district plan and that is associated with the construction, alteration, or use of 1 or more dwellinghouses on land that, under a district plan, is intended to be used solely or principally for residential purposes.

16. The implication of the above is that an activity requiring resource consent associated with the construction, alteration or use of dwelling houses for residential purposes becomes defined as residential activity.

17. In contrast, Visitor Accommodation is not defined in this way. Visitor Accommodation is not defined in the notification provisions of the RMA. Turning to the definition in the notified Stage 2 PDP, the activity does not extend to associated construction matters. Refer to the definition below:

Visitor Accommodation	Means the use of land or buildings (excluding the use of a residential unit or residential flat) ~~for short term, fee paying, living accommodation~~ to provide accommodation for paying guests where the length of stay for any ~~visitor/~~guest is less than ~~3 months~~90 days; and i. Includes such accommodation as camping grounds, motor parks, hotels, motels, ~~boarding houses, guest houses~~, backpackers' accommodation, bunkhouses, tourist houses, lodges, timeshares, and managed apartments ~~homestays, and the commercial letting of a residential unit~~; and ii. ~~May~~ Includes ~~some centralised~~ services or facilities that are directly
	associated with, and ancillary to, the visitor accommodation, such as food preparation, dining and sanitary facilities, conference, bar, ~~and~~ recreational facilities and others of a similar nature if such facilities are associated with the visitor accommodation activity. The primary role of these facilities is to service the overnight guests of the accommodation however they can be used by persons not staying overnight on the site. iii. Includes onsite staff accommodation. iv. Excludes Residential Visitor Accommodation and Homestays.

18. Accordingly, as a result of Rule 7.6 and Rule 8.5 applying only to "Visitor Accommodation", the RMA provisions precluding notification won't apply to the hypothetical VA development (assuming that construction related consents are required) - because "each activity" is not subject to a Plan rule precluding limited notification.

19. In my submission, as identified above the rules precluding notification will not

apply to all aspects of the hypothetical VA development.

Boundary Activity

20. There was also discussion with the Panel regarding notification in the context of a "boundary activity". Section 95A provides that public notification is precluded for restricted discretionary boundary activities.[9] Section 95B requires determination as to whether an owner of an allotment with an infringed boundary in the case of a boundary activity should be limited notified – but only if limited notification is not precluded by Step 2.[10]

21. In effect, in the case of a boundary activity public notification won't occur, but there is in essence a qualified presumption that limited notification to a neighbour will occur.

22. To my mind specific provisions which apply to a boundary activity would not be relevant in the context of our hypothetical VA development because the meaning of boundary activity is defined:[11]

> (1) An activity is a **boundary activity** if—
> (a) the activity requires a resource consent because of the application of 1 or more boundary rules, but no other district rules, to the activity; and
> (b) no infringed boundary is a public boundary.

23. The hypothetical VA application (which complies with the 1.5m yard and height in relation to boundary control) will not require consent because of the application of a boundary rule even if a BRA were in place, because in my view (with reference to the definition of boundary rule) the BRA is not such a rule. A BRA simply prevents locating a building where it is applied, rather than directly relating to the distance between a structure and a boundary of an allotment. Therefore, it would not be defined as a boundary activity.

24. Even if I were wrong in my view that the BRA is not a boundary rule, inevitably the VA application would require a resource consent because of the

[9] section 95 A (5) (b) (iii)
[10] section 95 B (7) (a)
[11] section 87 AAB

application of other district rules which were not boundary rules in any event.

25. In my submission, irrespective of whether or not a BRA was in place, the hypothetical VA will not be defined as a boundary activity. Specific notification provisions arising in the context of a "boundary activity" are not applicable.

Conclusion

26. Consequent on my assessment above, in my view:

    a. The rules in the notified PDP precluding notification with respect to Visitor Accommodation only apply to the commercial activity itself, and therefore will not preclude notification of consents required for the purposes of construction;

    b. Notification provisions in the RMA which specifically apply to a boundary activity (as defined) will not be relevant in the context of an application for resource consent for a new build VA activity (because a range of consents will be required);

    c. Any VA development on the Site will be subject to assessment in accordance with the notification provisions in the RMA. Whether public or limited notification is determined to be appropriate will be dependent on the effects of the proposal, which cannot sensibly be considered in a hypothetical way.

27. Coherent maintains its opposition to the BRA proposed, for the reasons set out in its primary submission and put before the Panel through legal submissions and evidence.

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Jeremy Brabant
Counsel for Coherent Hotels Limited 27 September 2018